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ATTORNEYS FOR THE  
OWNER LESSORS/PARTICIPANTS

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**IN RE:**

**MIRANT CORPORATION, et al,  
  
DEBTORS.**

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**Chapter 11 Case**

**Case No. 03-46590 (DML)  
Jointly Administered**

**Hearing Date and Time:  
October 15, 2003 at 10:30 AM**

**THE OWNER LESSORS/PARTICIPANTS'  
MOTION REQUESTING ADEQUATE PROTECTION IN  
CONNECTION WITH THE DEBTORS' MOTION FOR FINAL  
RELIEF PURSUANT TO SECTION 364 OF THE BANKRUPTCY  
CODE (A) AUTHORIZING THE DEBTORS TO OBTAIN SECURED  
DEBTOR-IN-POSSESSION FINANCING; (B) APPROVING AGREEMENTS  
RELATING TO THE FOREGOING; AND (C) GRANTING RELATED RELIEF**

TO THE HONORABLE D. MICHAEL LYNN, UNITED STATES BANKRUPTCY JUDGE:

COME NOW the Owner Lessors/Participants<sup>1</sup> and submit their Motion Requesting Adequate Protection in connection with the "Debtors' Motion for Final Relief Pursuant to

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<sup>1</sup> The Owner Lessors/Participants are comprised of the following: (1) SEMA OP4 LLC, SEMA OP5 LLC, SEMA OP6 LLC, SEMA OP7 LLC, Morgantown OL3 LLC, Morgantown OL4 LLC, Dickerson OL2 LLC, and Dickerson OL3 LLC, all of which are special purpose entities affiliated with Bank One, N.A.; SEMA OP1 LLC, SEMA OP2 LLC, SEMA OP3 LLC, Morgantown OL1 LLC, Morgantown OL2 LLC, and Dickerson OL1 LLC, all of which are special purpose entities affiliated with Verizon Capital Corporation; and (3) SEMA OP8 LLC, SEMA

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Section 364 of the Bankruptcy Code (A) Authorizing the Debtors to Obtain Secured Debtor-In-Possession Financing; (B) Approving Agreements Relating to the Foregoing; and (C) Granting Related Relief,” filed on September 5, 2003. In support thereof, the Owner Lessors/Participants respectfully state as follows:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. §§ 157 and 1334, the Standing Order of Reference of the United States District Court for the Northern District of Texas, and 11 U.S.C. §§ 361, 363, 364 and 365. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue of these chapter 11 cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

**II. FACTUAL BACKGROUND**

2. As outlined in the Owner Lessors/Participants’ “Limited Objection to the Debtors’ Motion for Final Relief Pursuant to Section 364 of the Bankruptcy Code (A) Authorizing the Debtors to Obtain Secured Debtor-In-Possession Financing; (B) Approving Agreements Relating to the Foregoing; and (C) Granting Related Relief,” filed on October 1, 2003, and incorporated herein, if the DIP Financing Motion is approved, the DIP Facility would cause the Debtors to violate certain covenants within the leases (including the Participation Agreements, the Facility Lease Agreements, the Facility Site Lease and Easement Agreements,

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OP9 LLC, Morgantown OL5 LLC, Morgantown OL6 LLC, Morgantown OL7 LLC, and Dickerson OL4 LLC, all of which are special purpose entities affiliated with UnionBanCal Corporation.

and the Facility Site Sublease Agreements) between MirMa and the Owner Lessors/Participants (collectively the “Power Plant Leases”).<sup>2</sup>

3. More specifically, violations of the Power Plant Leases would prejudice the Owner Lessors/Participants’ interests in the cash flows of MirMa, as well as the cash flows of the Chalk Point Generating Station and the Potomac Generating Plant (the “Negative Pledge Properties”). It is these cash flows which MirMa uses to make the lease payments owed to the Owner Lessors/Participants, which are in turn used to pay down the debt owed by the Owner Lessors/Participants on the Morgantown Base-Load Units 1 and 2 and Dickerson Base-Load Units 1, 2 and 3 (collectively the “Power Plants”). The rights to these cash flows are therefore property interests of the Owner Lessors/Participants requiring protection under the Fifth Amendment Takings Clause and requiring adequate protection under sections 361 and 363(e) of the Bankruptcy Code.

### III. RELIEF REQUESTED

4. By this Motion, the Owner Lessors/Participants request this Court order, pursuant to §§ 361 and 363(e) of the Bankruptcy Code, that the Debtors provide adequate protection<sup>3</sup> of the Owner Lessors/Participants’ interests in the cash flows of MirMa and its subsidiaries,

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<sup>2</sup> The Owner Lessors/Participants believe that the Participation Agreements, the Facility Lease Agreements, the Facility Site Lease and Easement Agreements, and the Facility Site Sublease Agreements together constitute the Power Plant Leases for purposes of Section 365(d)(3) of the Bankruptcy Code. *See In re T&H Diner, Inc.*, 108 B.R. 448 (D.N.J. 1989) (construing documents collateral to the lease as being part and parcel of the lease for purposes of 365(d)(3)).

<sup>3</sup> The Owner Lessors/Participants believe that they requested adequate protection as part of their Limited Objection when they stated “the Owner Lessors/Participants’ rights to those cash flows will be damaged, rights that the Owner Lessors/Participants argue are not being adequately protected by the DIP Financing Motion and the DIP Facility.” (Limited Objection ¶ 42). However, to more articulate that claim for adequate protection, the Owner Lessors/Participants submit this motion.

including the Negative Pledge Properties, to comply with the terms of the Power Plant Leases, retroactive to the Petition Date, including, but not limited to:

- A. Payment of all fees and expenses due and to be due under the Power Plant Leases, including any increases in rents due under the terms of said Power Plant Leases; and
- B. Compliance with all provisions of the Power Plant Leases, including all non-monetary obligations required to be performed under Section 365(d)(3) of the Code;

The Owner Lessors/Participants further request that the Debtors demonstrate their ability to comply with any order granting this adequate protection.

#### **IV. ADEQUATE PROTECTION STANDARD AND ANALYSIS**

5. A chapter 11 debtor in possession may use property of its estate in the ordinary course of business without notice and a hearing. *See* 11 U.S.C. § 363(c)(1). However, a debtor does not enjoy the right to unfettered use of that property. *See In re Island Helicopter Corp.*, 63 B.R. 515, 520 (Bankr.E.D.N.Y. 1986). Where a creditor leases property to a debtor, a court must condition the debtor's use on adequate protection being furnished for that creditor's, or lessor's, interest in the property. *See* 11 U.S.C. § 363(e). The Owner Lessors/Participants, as lessors, are entitled to adequate protection to protect their interests during the pendency of the Debtors' cases. *In re MS Freight Distribution, Inc.*, 172 B.R. 976, 980 n.4 (Bankr.W.D.Wash. 1994) ("Section 363(e) by its express terms authorizes an entity whose property is to be leased by the debtor to seek adequate protection"); *In re RB Furniture, Inc.*, 141 B.R. 706, 713 (Bankr.C.D.Cal. 1992) ("Section 363 sets forth the conditions under which a debtor may use property in which others have an interest, including lessors.").

6. The concept of adequate protection is derived from the Fifth Amendment protection of property interests as enunciated by the Supreme Court. *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 2001 U.S. Claims LEXIS 11 (2001) (citing *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940)); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

7. Section 363(e) specifically provides—

Notwithstanding any other provision of this section, at any time, on request of any entity that has an *interest in property* used..., or proposed to be used..., by the trustee,<sup>4</sup> the court, with or without a hearing, shall prohibit or condition such use...as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e) (emphasis added). Thus, Section 363(e) of the Bankruptcy Code mandates adequate protection for *interest* holders. 11 U.S.C § 363(e).

8. Property interests are created and defined by state law; unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. *Butner v. United States*, 440 U.S. 48, 55 (1979); accord, *Nobelman v. American Sav. Bank*, 508 U.S. 324, 329 (1993). Furthermore, the debtor-in-possession's property is subject to others' equities in it. *In re Buttes Resources Co.*, 89 B.R. 613, 617 (S.D.Tex. 1988) (citing *In re Monongahela Rye Liquors*, 141 F.2d 864, 869 (3d Cir. 1944)).

9. Here, the Owner Lessors/Participants clearly have property rights in the cash flows from MirMa and its subsidiaries, including the Negative Pledge Properties, property rights

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<sup>4</sup> Although the text of 363(e) refers to trustee, the rights and obligations of the trustee apply with equal force to debtors in possession. 11 U.S.C. § 1107(a).

that entitle the Owner Lessors/Participants to adequate protection. Thus, the right of the Debtors to use the Power Plants and Negative Pledge Properties is subject to the Debtors' obligation to provide the Owner Lessors/Participants with adequate protection of their property interests in not only the Power Plants, but also in the cash flows from MirMa and its subsidiaries and the Negative Pledge Properties.

10. Section 361 of the Bankruptcy Code provides that a debtor in possession may provide adequate protection of an entity's interest in property by: (i) making cash payments to such entity for the diminution in value of such property; (ii) granting such entity an additional or replacement lien; or (iii) granting such entity other relief which will result in the realization of the indubitable equivalent of such entity's interest in such property. 11 U.S.C. § 361. Significantly, however, § 361 prohibits the grant of an administrative expense under § 503(b)(1) as the sole source of adequate protection. Therefore, the Debtors must demonstrate that the required adequate protection will actually be forthcoming and not just promised. *See* 11 U.S.C. § 363(o)(1) (the debtor bears the burden of proving that the creditor's interests are adequately protected).

11. With respect to a lease of non-residential real property, adequate protection is generally defined by compliance with the payments and terms specified under the lease. *In re Ernst Home Center, Inc.*, 209 B.R. 955, 965-66 (Bankr.W.D.Wash. 1997) (lessors of realty have a right to receive timely payments under 365(d)(3), with that right ringing hollow if the debtor had no right to adequate protection). However, adequate protection also requires that the debtor-lessee comply with all non-monetary obligations under the lease. *RB Furniture*, 141 B.R. at 714

(Bankr.C.D.Cal. 1992) (The court, analyzing the requirements of Section 365(d)(3), ordered that in addition to escrowing rents payable to the lessor, the debtor was also required to “perform all other obligations under the Lease as adequate protection for its continued use of the Property” until the debtor either assumed or rejected the lease).

12. In order for the Owner Lessors/Participants’ interests to be adequately protected, the Debtors must not only continue to make the lease payments due under the Power Plant Leases, they must also comply with the non-monetary terms of the Power Plant Leases.

13. The Debtors’ obligations under the Power Plant Leases are governed by Section 365(d)(3) of the Bankruptcy Code. Section 365(d)(3) requires the Debtors to “timely perform all the obligations of the debtor...arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected.” 11 U.S.C. § 365(d)(3).<sup>5</sup> Thus, pursuant to (A) the plain language of 365(d)(3), (B) the legislative history of 365(d)(3), and (C) caselaw interpreting 365(d)(3), the Debtors must perform all obligations owing to the Owner Lessors/Participants under the Power Plant Leases, including the non-monetary obligations to not encumber the assets of MirMa and its subsidiaries and the Negative Pledge Properties.

**A. The Plan Language of Section 365(d)(3) Requires Performance of “All” Obligations, Including Non-Monetary Obligations**

14. When interpreting the meaning of a statute, courts must first focus on the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142

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<sup>5</sup> Although the text of 365(d)(3) refers to trustee, the rights and obligations of the trustee apply with equal force to debtors in possession. 11 U.S.C. § 1107(a).

L.Ed.2d 881 (1999). “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)) (internal citations omitted); *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (“[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”).

15. Here, the plain language of 365(d)(3) calls for the debtor-in-possession to perform all obligations under its leases from the entry of the order of relief until the lease is assumed or rejected. The statute does not say that the Debtors must only perform in odd months only; it does not state that the Debtors may select which obligations it wishes to perform; it does not say that only affirmative obligations must be performed; nor does it say that only “monetary” obligations need be performed. Section 365(d)(3) states unequivocally that all obligations must be performed. *See Cukierman v. Uecker (In re Cukierman)*, 242 B.R. 486 (9th Cir.BAP 1999), *rev’d on other grounds*, 265 F.3d 846 (9th Cir. 2001) (citations omitted) (“Section 365(d)(3) requires the trustee to “perform *all* obligations” under the lease. By its own language, the Section is not limited to the obligation to pay rent.”); *SCS Company v. Peter J. Schmitt, Co. (In re Peter J. Schmitt)*, 1995 WL 1772010, at \*2 (D.Del. 1995) (“[i]t does not appear that the bankruptcy court has the equitable discretion under § 365(d)(3) to disallow an obligation of the

debtor arising under an unexpired lease after the order for relief until the lease is assumed or rejected”).

16. Moreover, Congress carved out certain exceptions in 365(d)(3), namely those in 365(b)(2), but chose not to include any additional exceptions. A canon of construction states that once drafters start excluding certain obligations, those obligations not excluded are included. As Congress chose not to exclude non-monetary obligations from the language of 365(d)(3), the only logical conclusion is that non-monetary obligations are included within the purview of 365(d)(3). *See In re MS Freight Distribution, Inc.*, 172 B.R. 976, 978-979 (Bankr.W.D.Wash. 1994) (“There are only three exceptions to the requirement that the trustee perform all obligations under the lease, those exceptions set forth in [§ ]365(b)(2), which are not applicable here. This Court therefore concludes that ‘all obligations’ means just that.”). Therefore, under the plain language of Section 365(d)(3), the Debtors are required to timely perform all lease obligations, including non-monetary obligations, until the leases are assumed or rejected.

**B. The Legislative History of Section 365(d)(3) Leads to the Conclusion That “All” Obligations Includes Non-Monetary Obligations**

17. Although the Court need not look to legislative history to determine that “all” includes non-monetary defaults as well as monetary defaults, the legislative history also supports this conclusion. While most courts cite only to the solitary floor statement made by Senator Orrin Hatch<sup>6</sup> when analyzing Section 365(d)(3)’s legislative history, the “contemporaneous

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<sup>6</sup> Senator Hatch’s statement reads in pertinent part:

This bill would lessen the problems [of landlords] by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely

remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).<sup>7</sup> In fact, courts are to consult reports, debates and hearings of Congress for legislative history of a law’s enactment, *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285-86 (1987), in addition to various bills submitted to Congress prior to final enactment. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737-38 (1985).

18. In proposing House Bill 2377, a predecessor to House Bill 5174, the bill passed into law in the Bankruptcy Amendments and Federal Judgeship Act of 1984, commentator David B. Simpson proposed that the text of 2377 be amended so that debtors would be excused from performing provisions of leases that “do not involve the payment of rent and other occupancy charges....” Hearing Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, 98th Cong. 37, 46 (1984) [hereinafter “Subcommittee Hearings”]. That proposed change was not made. In addition, commentator George A. Hahn and a statement from the National Bankruptcy Conference noted that the requirement in House Bills 2377 and 5187, another predecessor to House Bill 5174, that the trustee perform “all” obligations of a tenant extended beyond merely rent to “all other obligations provided by the lease no matter how onerous.” Subcommittee Hearings at 17, 19. Though House Bills 2377 and 5187 were not enacted into law, the above comments indicate that the term “all” in 365(d)(3) was intended to

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performance requirement will ensure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee’s assumption or rejection of the lease.

130 Cong. Rec. s8891, 8895 (daily ed. June 29, 1984), reprinted in 1984 U.S.C.C.A.N. 576.

include all obligations of the tenant and not just non-monetary obligations such as rent. *Florida Power & Light*, 470 U.S. at 737-38. Thus, the legislative history of 365(d)(3) supports the plain language analysis demonstrating that Congress intended the Debtors to perform all of their obligations under the Power Plant Leases, including all non-monetary obligations.

**C. Case Law Interpreting Section 365(d)(3) Indicates That Non-Monetary Obligations Are Included Within “All the Obligations of the Debtors”**

19. While there are numerous cases interpreting Section 365(d)(3) to include monetary obligations, *In re Dieckhaus Stationers of King of Prussia, Inc.*, 73 B.R. 969 (Bankr.E.D.Pa. 1987) (rents); *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879 (Bankr.E.D.N.Y. 1986) (utility charges); *In re Pacific Sea Farms*, 134 B.R. 11 (Bankr.D.Haw. 1991) (attorneys’ fees); *In re Ames Department Store, Inc.*, 150 B.R. 107 (Bankr.S.D.N.Y. 1993) (taxes), few cases interpret 365(d)(3) to either include or exclude non-monetary obligations.

20. Three courts have interpreted Section 365(d)(3) to include non-monetary obligations. *In re United Trucking Services, Inc.*, 851 F.2d 159 (6th Cir. 1988); *In re Atlantic Container Corp.*, 133 B.R. 980 (Bankr.N.D.Ill. 1991); *In re T&H Diner, Inc.*, 108 B.R. 448 (D.N.J. 1989).<sup>8</sup> In *In re T&H Diner, Inc.*, the court enforced a lease provision requiring the debtor to maintain insurance. 108 B.R. at 443-45. In *In re Atlantic Container Corp.* and *In re United Trucking Services, Inc.*, the courts enforced lease provisions requiring the debtors to

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<sup>7</sup> Moreover, the weight of Senator Hatch’s comments should be diminished because the bills he proposed, Senate Bill 2297, *see* 128 Cong. Rec. S26982 (Oct. 1, 1982), and Senate Bill 549, *see* 129 Cong. Rec. S2646 (Feb. 22, 1983), were not enacted into law.

<sup>8</sup> *See also In re Litho Specialties, Inc.*, No. 3-92-4304 (Bankr.D.Minn. Oct. 16, 1992) (attached hereto as Exhibit A) (although dealing with 365(d)(10), which also requires that the debtor-in-possession “perform all the obligations of the debtor,” the Bankruptcy Court ordered the debtor to comply with all of its non-monetary

repair and maintain the leased property. 133 B.R. at 991-92; 851 F.2d at 162. These cases reinforce the plain language interpretation and legislative history of Section 365(d)(3) which require the conclusion that the debtor must perform all of its lease obligations.

21. Supporting the interpretation of 365(d)(3) to include non-monetary obligations is the policy stated by the Ninth Circuit's opinion in *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846 (9th Cir. 2001), and the Ninth Circuit BAP's opinion in *Coleman Oil Company Inc., v. Circle K Corp. (In re Circle K Corp.)*, 190 B.R. 370 (BAP 9th Cir. 1996). In *Cukierman*, the Ninth Circuit stated that "[i]nterpreting § 365(d)(3) as a bright-line rule, encompassing all obligations contained in a bargained-for agreement, ensures prompt performance of lease obligations.... The simplicity of this rule prevents delays and disputes caused by uncertainty over whether the provision applies to any given lease obligation." 265 F.3d at 851. The Ninth Circuit BAP echoed this policy in *Circle K* when it stated that "[t]he purpose behind § 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize. This is accomplished by forcing the debtor to abide by the contract provisions during pendency of the bankruptcy and cure any prepetition defaults upon assumption while prohibiting the creditor from enforcing any prepetition default remedies." 190 B.R. at 376 (citations omitted).<sup>9</sup>

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obligations under the leases, in particular, maintaining insurance policies on the leased equipment and affording the lender and its representatives their rights to inspect).

<sup>9</sup> The cure provisions of 11 U.S.C. § 365(b) are also illustrative of the requirement that the debtor-in-possession must perform all of its lease obligations, including its non-monetary obligations. If the Debtors were allowed to breach the non-monetary obligations under the Power Plant Leases, MirMa would be required to cure those defaults prior to assumption. See *In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029, 1033 (9th Cir. 1997) (debtors are not relieved from the obligation to cure non-monetary defaults as a prerequisite to the assumption of a lease); *In re New Breed Realty Enterprises, Inc.*, 278 B.R. 314, 317, 321 (Bankr.E.D.N.Y. 2002) (same). Thus,

22. Moreover, bolstering the rejection of the three cases interpreting 365(d)(3) to exclude non-monetary obligations<sup>10</sup> is the opinion in *In re Exchange Resources, Inc.*, where the court stated the following:

The courts that reject such a straightforward application of the statute often do so with an undercurrent of horror over the potential damage to the process of reorganization.... These courts do generally give lip service to the main mandate of § 365(d)(3): the reorganizing debtor's clear duty to live up to its monetary and nonmonetary covenants under an unexpired lease, pending its acceptance or rejection, and timely so. Their analysis falls short, however... If the debtor does not default in a substantive lease covenant, its landlord has no cause to complain, and no basis for the commencement of proceedings under § 365(d)(3). This makes the accrual of such obligations wholly avoidable--by a simple compliance with § 365(d)(3). The imposition of such obligations, then, is a strong incentive for such compliance.

215 B.R. 366, 370 (Bankr.D.Minn. 1997). Thus, the opinions in *United Trucking Services, Atlantic Container, T&H Diner, Cukierman, Circle K, and Exchange Resources* reinforce both the plain language interpretation and legislative history analysis that Section 365(d)(3) applies to all obligations of the debtor, including non-monetary obligations.

## V. CONCLUSION

23. Section 365(d)(3) requires a debtor-in-possession to perform "all" obligations under its leases of non-residential property. Therefore, the Debtors must perform all obligations under the Power Plant Leases with the Owner Lessors/Participants, including not encumbering

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if the debtor must cure the default, by implication, the debtor should have been performing the obligation that led to the default.

<sup>10</sup> See *In re Ernst Home Ctr., Inc.*, 209 B.R. 955 (Bankr.W.D.Wash. 1997); *In re R.H. Macy & Co., Inc.*, 152 B.R. 869 (Bankr.S.D.N.Y. 1993); *In re Food City, Inc.*, 95 B.R. 451 (Bankr.W.D.Tex. 1988). However, these cases are distinguishable in that the non-monetary obligations found to be non-enforceable were "going dark" clauses, which required the debtors to remain open for business. 209 B.R. at 961; 170 B.R. at 72-77; 95 B.R. at 454-46. The *Macy* court opined that enforcing an obligation that forces the debtor to maintain operations would be inconsistent with the duty to maximize estate assets, which might require the debtor to shut down certain operations.

assets of MirMa and its subsidiaries and the Negative Pledge Properties. Based on Sections 361, 363 and 365 of the Bankruptcy Code and the *RB Furniture* opinion, the Owner Lessors/Participants request that this Court enter an order requiring the Debtors to provide the Owner Lessors/Participants with adequate protection as detailed above.

WHEREFORE, the Owner Lessors/Participants request that this Court enter an order requiring the Debtors to provide adequate protection to the Owner Lessors/Participants under §§ 361 and 363(e) of the Bankruptcy Code, including: (a) requiring the Debtors to comply with all of the terms of the Power Plant Leases, including all non-monetary obligations; and (b) granting such further relief as this Court deems just and proper.

Date: October 14, 2003.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

/s/ Kristian W. Gluck

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170 B.R. at 74. Here, no similar policy is implicated as the Debtors are only called upon to not encumber the assets of MirMa and its subsidiaries and the Negative Pledge Properties.

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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served, by United States first class mail, postage prepaid, on October 14, 2003, upon the Official Master Service List as attached hereto and upon the following parties by facsimile:

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Local Counsel for Mirant

/s/ Kristian W. Gluck  
Kristian W. Gluck

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In re:

LITHO SPECIALTIES, INC.,  
Debtor.

ORDER RE: MOTION OF FLEET  
CREDIT CORPORATION FOR RELIEF  
UNDER 11 U.S.C. §365

BKY 3-92-4304

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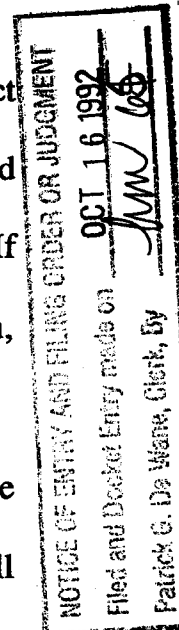
At St. Paul, Minnesota, this 16<sup>th</sup> day of October, 1992.

This Chapter 11 case came on before the Court on October 6, 1992, for hearing on the motion of Fleet Credit Corporation ("Fleet") for certain relief under 11 U.S.C. §365. Fleet appeared by its attorney, Douglas B. Greenswag. Debtor appeared by its attorney, Michael B. LeBaron. Upon the moving and responsive documents and the arguments of counsel, the Court read certain Findings of Fact and Conclusions of Law on the record in disposition of the motion, pursuant to FED. R. CIV. P. 52(a) and FED. R. BANKR. P. 9014. Upon those Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:

1. That, no later than *December 5, 1992*, Debtor shall assume or reject equipment leases nos. 30367-3 (the subject of which is a Harris Half Web press) and 30367-4 and 30367-5 (the subjects of which are two Scitex assemblers) with Fleet. If Debtor fails to timely assume or reject any or all of these leases in an objective fashion, it shall be deemed to have rejected those leases.

2. That Debtor has been obligated to Fleet for rental payments in the full amount contemplated by the leases since the commencement of this case, and shall



be so obligated until it assumes or rejects the leases. Fleet shall be entitled to recover these rents as follows:

- a. For all rent accrued from August 7, 1992 through October 6, 1992, which remains unpaid, Fleet is allowed a claim. This claim shall be calculated by prorating the amount of the monthly rental payment under the leases, for the entire postpetition period through October 6, 1992. This claim shall have the priority of an expense of administration of the Chapter 11 estate, as accorded by 11 U.S.C. §§503(b) and 507(a)(1). To evidence this claim, Fleet and its counsel shall file a proof of claim, and serve a copy of the same upon Debtor's counsel, within 10 days of the date on which this order is entered.
- b. During the period from October 6, 1992, until the date on which it assumes or rejects the leases, Debtor shall make timely regular rental payments to Fleet in the amount required by the leases.
- c. To the extent that the *pro rata* division of Debtor's rent obligations through October 6, 1992, leaves unpaid a portion of a month's rent accrued after that date, Debtor shall pay that amount to Fleet by the next due date for a rental payment under the leases.

3. That Debtor shall comply with all of its non-monetary obligations to Fleet under the lease, pending its assumption or rejection. In particular, Debtor shall maintain all policies of insurance on the leased equipment which it was obligated to furnish pre-petition, and it shall afford Fleet and its authorized representatives any rights of inspection which Fleet had under the lease.

4. That Debtor and Fleet shall place their agreement on adequate protection of Fleet's interests under lease no. 30367-2 (the subject of which is a Heidelberg press) before the Court for approval via one of the procedures under FED. R. BANKR. P. 4001.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Gregory F. Kishel". The signature is written in a cursive style with a large initial "G".

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U.S. BANKRUPTCY JUDGE

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