



Entered on Docket  
August 27, 2008

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re )

T-REX PARTNERS, LLC, )

Debtor. )

Case No. BK-S-08-16729-MKN

Chapter 11

Date: August 20, 2008

Time: 9:30 a.m.

**MEMORANDUM DECISION ON DEBTOR’S MOTION  
TO EXTEND TIME FOR NON-PERFORMANCE AND CREDITOR  
DICKINSON, LLC’S MOTION TO COMPEL ASSUMPTION OR REJECTION AND  
TIMELY PAYMENT OF RENT, AND MOTION FOR RELIEF FROM STAY**

These matters were heard on August 20, 2008. The appearances of counsel were noted on the record. After presentation of oral arguments, the matters were taken under submission based on the written materials submitted by the parties and the representations of counsel at the hearing.

**BACKGROUND<sup>1</sup>**

T-Rex Partners, LLC (“Debtor”) filed a voluntary petition for Chapter 11 reorganization on June 24, 2008. (Dkt# 1) The face of the petition indicates that the Debtor’s principal place of business is in Orange County, California. The Resolution Authorizing Bankruptcy attached to

<sup>1</sup> In this Memorandum Decision, all references to “Section” shall be to the provisions of the Bankruptcy Code, 11 U.S.C. section 101, et seq., unless otherwise indicated. Likewise, all references to “Rule” shall be to the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

1 the petition indicates that the Debtor is a Nevada limited liability company. According to its  
2 Schedule "G", Debtor is a tenant under an unexpired ground lease for a shopping center located  
3 in Dickinson, North Dakota ("Ground Lease"), where the lessor is identified as Dickinson, LLC.  
4 Schedule "G" also lists a variety of tenants for spaces at the shopping center. According to  
5 Schedule "D", Debtor's interest in the shopping center is encumbered by various parties to  
6 secure claims totaling approximately \$742,000. One of the scheduled secured creditors is  
7 identified as Grizzley Investors, LLC, with an undisputed claim in the amount of \$217,000.

8 On June 24, 2008, Debtor filed the Omnibus Declaration of Aaron Reis ("Reis  
9 Declaration") in Support of First-Day Filings. (Dkt# 7) In the Reis Declaration, the controlling  
10 member of the Debtor attests that the Debtor is the lessee under a 55-year ground lease in North  
11 Dakota upon which an 89,000 square foot shopping center is located. The declarant also attests  
12 that Dickinson, LLC,<sup>2</sup> the lessor under the Ground Lease, commenced an eviction proceeding in  
13 North Dakota ("Eviction Action") that was the immediate cause of the bankruptcy case being  
14 filed. The Eviction Action is disclosed in Item 4 of the Debtor's Statement of Financial Affairs.

15 On July 18, 2008, the Debtor filed a Motion to Extend Time for Non-Performance  
16 ("Extension Motion") seeking a 60-day delay on its obligation to pay rent under the Ground  
17 Lease. (Dkt# 24) Dickinson filed written opposition (Dkt# 42) on August 4, 2008 ("Dickinson  
18 Opposition") to which the Debtor filed a reply ("Debtor's Reply") on August 11, 2008. (Dkt#  
19 56)

20 On July 24, 2008, Dickinson filed a separate Motion (1) to Compel Assumption or  
21 Rejection of Alleged Unexpired Lease Pursuant to 11 U.S.C. §365(d)(2), (2) to Compel Timely  
22 Payment of Rent and Related Obligations Pursuant to 11 U.S.C. §365(d)(3), and (3) to Terminate  
23 the Automatic Stay and Grant Relief from Stay of the Order Pursuant to Federal Rule of  
24 Bankruptcy Procedure 4001(a)(3). (Dkt# 29) This separate motion ("Motion to Compel") seeks  
25 to force the Debtor to timely perform its obligations under the Ground Lease, including the

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27 <sup>2</sup> Dickinson, LLC, is a Michigan limited liability company.

1 payment of post-bankruptcy rent, to make an immediate decision on whether to assume or reject  
2 the Ground Lease, and to obtain relief from stay in the event the Debtor does not comply. The  
3 Motion to Compel is accompanied by the Declaration of Gary L. Vandenburg (“Vandenburg  
4 Declaration”) that was filed on the same date. (Dkt# 32) Debtor filed a written opposition  
5 (“Debtor’s Opposition”) on August 11, 2008 (Dkt# 54) and Dickinson filed a reply (“Dickinson  
6 Reply”) on August 14, 2008. (Dkt# 60). The latter reply is accompanied by an additional  
7 declaration from Mr. Vandenburg (“Second Vandenburg Declaration”) as well as a Declaration  
8 of Matthew C. Zirzow, Esq. (“Zirzow Declaration”). (Dkt #s 61 and 62)

9 Oral arguments were presented at the hearing on August 20, 2008. In addition to counsel  
10 for the Debtor and Dickinson, counsel for Grizzley Investors, LLC, was permitted, without  
11 objection, to present oral argument in support of Debtor’s position. Thereafter, the matters were  
12 taken under submission. Because both matters are interrelated and include overlapping  
13 arguments, both are addressed in this single Memorandum Decision.

#### 14 APPLICABLE LEGAL STANDARDS

15 The treatment of executory contracts and unexpired leases is governed by Section 365.  
16 Subject to bankruptcy court approval, a debtor-in-possession may assume or reject an executory  
17 contract or unexpired lease of the debtor. See 11 U.S.C. § 365(a).<sup>3</sup> If an unexpired lease of  
18 nonresidential real property is not assumed by the debtor-in-possession within 120 days after  
19 commencement of the bankruptcy case, the lease is deemed rejected and the subject property  
20 must be surrendered. See 11 U.S.C. § 365(d)(4).<sup>4</sup>

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22 <sup>3</sup> While Section 365 refers to the rights and obligations of a bankruptcy trustee, a  
23 Chapter 11 debtor-in-possession has the same rights and obligations, with exceptions not  
24 applicable to this case, under Section 1107(a).

25 <sup>4</sup> Section 365(d)(4) requires unexpired leases of nonresidential real property to be  
26 assumed or rejected by the earlier of 120 days after the petition date or the date a bankruptcy  
27 plan is confirmed. See 11 U.S.C. § 365(d)(4)(A)(i and ii). Within the 120-day period, a 90-day  
28 extension of the 120-day period may be obtained from the court on cause shown. See 11 U.S.C.  
§ 365(d)(4)(B)(i). Subsequent extensions may be granted only with the consent of the lessor.

1 With respect to an unexpired lease of nonresidential real property, Section 365 also  
2 directs that the debtor-in-possession “shall timely perform all of the obligations of the debtor”  
3 after the case is filed “until such lease is assumed or rejected.” See 11 U.S.C. §  
4 365(d)(3)(Emphasis added.). For cause shown, however, the bankruptcy court “may extend...the  
5 time for performance of any such obligation that arises within 60 days after the [petition] date...,  
6 but the time for performance shall not be extended beyond such 60 day period.” Id. (Emphasis  
7 added.) The debtor has the burden of demonstrating cause for an extension of the performance  
8 obligation under Section 365(d)(3). See, e.g., In re Pac-West Telecomm, Inc., 377 B.R. 119, 126  
9 (Bkrcty.D.Del. 2007)(denying request for extension where debtors alleged that they were too  
10 busy during first 60 days of bankruptcy case).

11 Immediately upon the commencement of a bankruptcy case, the automatic stay arises  
12 under Section 362(a) that “operates as a stay, applicable to all entities, of...the commencement or  
13 continuation...of a judicial...proceeding against the debtor that was or could have been  
14 commenced before the [petition date]....to recover a claim against the debtor that arose before the  
15 commencement of the [bankruptcy] case...” See 11 U.S.C. § 362(a)(1). Upon a showing of  
16 “cause”, the automatic stay may be terminated, annulled, modified or conditioned as ordered by  
17 the bankruptcy court. See 11 U.S.C. § 362(d)(1). Relief also may be granted if the debtor has no  
18 equity in the property and the property is not necessary to an effective reorganization of the  
19 debtor. See 11 U.S.C. § 362(d)(2). The party requesting relief from the automatic stay has the  
20 burden of proof on any issues regarding the debtor’s equity in any property that is the subject of  
21 the request, while the debtor or opponent has the burden of proof on all other issues. See 11  
22 U.S.C. § 362(g)(2).

## 23 DISCUSSION

24 The Ground Lease was the subject of the Eviction Action that was stayed upon the  
25 commencement of the bankruptcy case. The Debtor has requested a 60-day extension of the

26 \_\_\_\_\_  
27 See 11 U.S.C. § 365(d)(4)(B)(ii).

1 Debtor's obligation under Section 365(d)(3) to pay postpetition rent. The parties do not dispute  
2 that the Debtor has not paid postpetition rent for the partial month of June<sup>5</sup> as well as the month  
3 of July. The parties agree, however, that the Debtor has paid rent for the month of August. At  
4 the hearing, Debtor's counsel represented that he is holding \$20,000 in his trust account that  
5 would be sufficient to pay the partial month of June and the entire month of July. Counsel  
6 suggested that the Debtor's performance is improving and that it will be able to generate enough  
7 proceeds from operation of the shopping center to get current on all obligations under the  
8 Ground Lease in the near future.<sup>6</sup>

9 In addition to the foregoing rent, Dickinson asserts that the Debtor also is delinquent in  
10 real estate taxes due prepetition in the amount of \$20,522.98, see Motion to Compel at 3:5-7 and  
11 Vandenburg Declaration at ¶ 6, also owes postpetition attorney's fees and costs totaling  
12 \$9,197.39. See Dickinson Reply at 2:22 and Zirzow Declaration at ¶ 3 and Exhibit "1" thereto.  
13 The real estate taxes apparently accrued prepetition, however, and there is no information or  
14 evidentiary basis on which to pro rate the taxes as part of the Debtor's postpetition obligation.  
15 Absent such information or evidence, the Court cannot conclude that those prepetition taxes are  
16 an obligation encompassed by Section 365(d)(3).

17 Dickinson's claim to attorney's fees is based on Section 17.02(a) of the Ground Lease

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19 <sup>5</sup> A partial month of rent under a lease is commonly referred to as a "stub month" with  
20 the amount determined by deriving the percentage of the full month after the bankruptcy petition  
21 is filed, multiplied by the monthly rent. Dickinson argues, see Dickinson Opposition at 4:19 &  
22 n.1, that the majority of courts include the stub month in the debtor-in-possession's rent  
23 obligation under Section 365(d)(3). Id., citing In re Picturesque, LLC, 2006 WL 3820891  
24 (Bkrcty.D.Az. December 22, 2006)(Hollowell, J.). The Debtor argues that the stub month  
should not be included but does not explain why. See Debtor's Opposition at 4:3-5. Here, the  
Court will adopt the proration approach taken by Judge Hollowell and includes the June stub rent  
in the Debtor's obligation under Section 365(d)(3).

25 <sup>6</sup> The bankruptcy petition indicates that the Debtor's business involves single asset real  
26 estate under Section 101(51B) and that it is a small business under Section 101(51D). As a  
27 result, significant deadlines are imposed including the requirement under Section 362(d)(3) for  
the debtor to file a proposed plan of reorganization or to commence monthly payments to its  
secured creditors within the first 90 days.

1 which provides that “If either party commences an action against the other to enforce any of the  
2 terms hereof or because of the breach by either party of any of the terms hereof, the losing party  
3 shall pay to the prevailing party reasonable attorney’s fees and expenses and a right to such  
4 attorney’s fees and expenses shall be deemed to have accrued upon the commencement of such  
5 action and shall be enforceable whether or not such action is prosecuted to judgment.”<sup>7</sup> Under  
6 this language, it appears that the parties contemplated the commencement of a lawsuit to enforce  
7 the Ground Lease rather than the prosecution of a motion in a bankruptcy proceeding. Although  
8 Dickinson refers to Section 17.08 in support of its request for attorney’s fees, see Motion to  
9 Compel at 6:18-20, it cites no authority and provides no analysis as to why the specific language  
10 would support inclusion of attorney’s fees under Section 365(d)(3)<sup>8</sup>, nor any evidence that the  
11 parties to the Ground Lease intended such fees to be allowed in a proceeding other than a formal  
12 lawsuit.

13 Dickinson’s request to compel the Debtor to immediately assume or reject the Ground  
14 Lease, rather than await Chapter 11 plan confirmation, is based on Section 365(d)(2). Dickinson  
15 relies on the language in Section 365(d)(2) that “...the court, on the request of any party to such  
16 contract or lease, may order the trustee to determine within a specified period of time whether to  
17 assume or reject such contract or lease.” See Motion to Compel at 3:20 to 4:3. A careful  
18 reading of that provision, however, indicates that Dickinson has ignored the remaining language  
19 in Section 365(d)(2) that limits its applicability to executory contracts and unexpired leases of  
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22 <sup>7</sup> In its written argument, Dickinson relies solely on this provision of the Ground Lease  
23 in support of its request for attorney’s fees. See Dickinson Reply at 2:22. At oral argument,  
24 Dickinson’s counsel also asserted that such fees are appropriate under the indemnity and hold  
25 harmless provisions contained in Section 17.01 of the Ground Lease. Because the latter  
arguments were raised for the first time at the hearing, they will not be considered here. Upon  
proper notice, however, the argument may be raised a later date.

26 <sup>8</sup> In Pac-West Telecomm, supra, there appears to have been at least some similar  
27 attorney’s fee language in the parties’ nonresidential real property leases, 377 B.R. at 126, but  
the landlord’s entitlement to such fees was not resolved.

1 residential real property.<sup>9</sup> Moreover, the cases cited by Dickinson, see id. at 3:27 to 4:3, either  
2 preceded the enactment of the current version of Section 365(d)(2) or did not involve leases of  
3 nonresidential real property. See Theatre Holding Corporation v. Mauro, 681 F.2d 102 (2<sup>nd</sup> Cir.  
4 1982)<sup>10</sup>; In re Dunes Casino Hotel, 63 B.R. 939 (D.N.J. 1986)<sup>11</sup>; In re Rebel Rents, Inc., 291 B.R.  
5 520 (Bkrcty.C.D.Cal. 2003)<sup>12</sup>; and In re Enron Corp., 279 B.R. 695 (Bkrcty.S.D.N.Y. 2002)<sup>13</sup>.  
6 Absent a showing to the contrary, the Court is not inclined to extend Section 365(d)(2) to  
7 nonresidential leases of real property when the Bankruptcy Code provides specific treatment for  
8 such leases under Section 365(d)(3) and Section 365(d)(4).

9 Perhaps because Section 365(d)(2) includes no provision to reduce the amount of time for  
10 a debtor-in-possession to make a determination to assume or reject an unexpired lease of  
11 nonresidential real property, Section 365(d)(3) requires immediate performance of the rent  
12 obligations for such leases after the bankruptcy case is commenced. While Section 365(d)(2)  
13 does not apply to Chapter 7 proceedings (where no reorganization is contemplated), Section  
14 365(d)(3) clearly affords more protective treatment to nonresidential lessors whose premises  
15 \_\_\_\_\_

16 <sup>9</sup> In quoting the language of Section 365(d)(2) in its brief, see Motion to Compel at 3:21-  
17 24, Dickinson did not place emphasis on the following portion: “In a case under chapter...11...of  
18 this title, the trustee may assume or reject an executory contract of unexpired lease of **residential**  
19 real property or of personal property of the debtor at any time before the confirmation of the  
20 plan...”

21 <sup>10</sup> At the time Theatre Holding was decided, Section 365(d)(2) was not limited to  
22 residential real property leases and personal real property leases; rather, those limitations were  
23 implemented by the passage of the 1984 amendments to the Bankruptcy Code. See 3-365  
24 Collier on Bankruptcy (15<sup>th</sup> Ed. Revised) ¶ 365.LH at [2][a].

25 <sup>11</sup> Dunes Casino Hotel involved an executory contract to purchase real property rather  
26 than an unexpired lease of nonresidential real property. 63 B.R. at 943-44.

27 <sup>12</sup> Rebel Rents involved unexpired leases of construction vehicles and trucks rather than  
28 nonresidential real property leases. 291 B.R. at 523-24.

<sup>13</sup> The Enron Corporation decision cited by Dickinson involved executory contracts for  
reservation of pipeline capacity for natural gas rather than nonresidential real property leases.  
279 B.R. at 699-700.

1 may be involved in prolonged efforts to reorganize. A debtor-in-possession may be granted  
2 temporary relief from such lease performance for a limit of sixty days from the petition date, but  
3 only upon a finding of cause. More importantly, Section 365(d)(3) specifically provides that  
4 “...the time for performance shall not be extended beyond such 60-day period.” Thus, even if  
5 cause is shown, the debtor-in-possession’s obligations that arise within the initial 60-day period  
6 cannot be postponed to a time after the 60-day period has elapsed.<sup>14</sup>

7 Under Section 365(d)(3), the maximum extension permitted by the statute would be to  
8 August 23, 2008, i.e., the 60<sup>th</sup> day after the filing of the Debtor’s bankruptcy petition. By that  
9 date, the Debtor would be obligated under the Ground Lease to have made the June and July  
10 rental payments, as well as with the payment due on August 1.<sup>15</sup>

11 Debtor asserts that cause exists under Section 365(d)(3) because it unexpectedly  
12 discovered on July 8, 2008 (two weeks after the bankruptcy case was commenced), that its  
13 insurance on the shopping center had lapsed. See Extension Motion at 16-20. As a result, the  
14 Debtor had to expend \$15,000 immediately to obtain insurance coverage, thereby causing it to  
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18 <sup>14</sup> Debtor is correct that a violation of Section 365(d)(3) is not determinative of whether a  
19 debtor should be compelled to assume or reject an unexpired lease. See Debtor’s Reply at 2:1-4.  
20 However, Debtor’s further suggestion that a breach of Section 365(d)(3) simply should be  
21 treated as a factor in determining whether to grant an additional extension of time under Section  
22 365(d)(4), id. 2:2-4 & n.2, citing, In re Southwest Aircraft Services, Inc., 831 F.2d 848, 854 (9<sup>th</sup>  
23 Cir. 1987), goes too far. The focus of the Southwest Aircraft decision was on whether an  
24 extension of time under then-Section 365(d)(4) could be granted after the then-60-day deadline  
25 had elapsed so long as the debtor’s request for the extension was filed prior to passage of the 60-  
26 day deadline. 831 F.2d at 851-52. The debtor in Southwest Aircraft tendered payment of all  
27 amounts in default under Section 365(d)(3) prior to the hearing on the motion to extend time to  
28 assume or reject. Id. at 849. The court did not rule out a full panoply of remedies that might be  
available for the debtor’s violation of Section 365(d)(3), including “forfeiture of the unassumed  
lease, some other penalty, or no penalty at all.” Id. at 853.

<sup>15</sup> The Extension Motion was heard on Wednesday, August 20, 2008, and the maximum  
additional time for performance would have been until Monday, August 24, 2008, i.e., the first  
business day after the 60-day deadline.



1 miss the rent payment that was due on July 11, 2008. Id. at 2:21-28.<sup>16</sup> Predictably, Dickinson  
2 argues that the Debtor should have known that its insurance coverage had lapsed and that it was  
3 obligated to maintain such insurance as a Chapter 11 debtor-in-possession. See Dickinson  
4 Opposition at 5:8-13. The Court agrees that there was nothing unexpected about the Debtor's  
5 insurance obligation and that the Debtor's omission does not establish cause.

6 Debtor further argues that Dickinson should not be afforded relief because: (1) there is a  
7 previously undisclosed, second ground lease that was recorded in Dickinson's favor, see  
8 Debtor's Opposition at 2:7 to 3:11, and (2) Dickinson is not authorized to do business in North  
9 Dakota. Id. at 3:14-20. From these alleged facts<sup>17</sup>, Debtor argues that Dickinson is not entitled  
10 to immediate possession of the shopping center or otherwise should not receive relief. Id. at 5:1-  
11 15. Debtor also claims that the Ground Lease is not a "true lease" that is governed by Section  
12 365 and therefore the Motion to Compel must be denied. See Debtor's Opposition at 5:18 to  
13 15.<sup>18</sup>

14 Assuming that the Debtor's first two concerns are even factually correct, the Court is not  
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16 <sup>16</sup> None of the Debtor's asserted reasons for the lapse in insurance coverage are set forth  
17 in or supported by the Reis Declaration.

18 <sup>17</sup> Several documents are attached as proposed exhibits to Debtor's written opposition,  
19 none of which are authenticated and no additional declaration from the Debtor's controlling  
20 member has been submitted. In response, Dickinson has submitted the Second Vandenburg  
21 Declaration to which is attached as Exhibit "1" an assignment of rights under the Ground Lease  
22 to Dickinson.

22 <sup>18</sup> On August 18, 2008, Debtor filed a "Motion for Determination that Debtor's Ground  
23 Lease is Not a True Lease Subject to 11 U.S.C. §365 and §502" (Dkt# 66) that is scheduled to be  
24 heard on September 23, 2008. By that motion, the Debtor apparently seeks to determine the  
25 validity of the parties' interests under the Ground Lease or other equitable relief, that otherwise  
26 would require an adversary proceeding under Rule 7001. It does not appear that Dickinson  
27 would relinquish any protections afforded by the adversary process. Cf., Dickinson's Reply at  
28 5:13-15. At a minimum, as a contest matter under Rule 9014, the discovery available pursuant to  
Rule 9014(c) makes it unlikely that the motion would be resolved on the currently scheduled  
hearing date.

1 persuaded that Dickinson is not entitled to relief. The mere presence of a second ground lease or  
2 of any legal disability of Dickinson to conduct business in North Dakota, without more, is  
3 insufficient to excuse Debtor from the requirements of Section 365(d)(3) or to prohibit  
4 Dickinson from seeking relief from this Court. In fact, Dickinson is scheduled by the Debtor as  
5 having an unsecured claim in the amount of \$48,000 that is not contingent, unliquidated, or  
6 disputed. Dickinson has standing in this bankruptcy case.

7 As to whether the Ground Lease is a “true lease”, the Court is somewhat perplexed as to  
8 how the Debtor can assert that Section 365 does not apply in response to the Motion to Compel,  
9 while at the same time seeking relief under Section 365(d)(3) in its Extension Motion. This is  
10 particularly odd since Schedule “G” does not identify the Ground Lease as anything other than  
11 an unexpired lease of nonresidential real property. More importantly, Debtor’s argument is  
12 simply that: an argument. Until it prevails, its obligations as a lessee under an unexpired lease of  
13 nonresidential real property are still subject to the requirements of Section 365(d).

14 Based on this record, the Court cannot find that cause exists under Section 365(d)(3) to  
15 extend the time for the Debtor to perform its obligations under the Ground Lease. For that  
16 reason, Debtor’s request for an extension of time under Section 365(d)(3) must be denied and  
17 Dickinson’s motion to compel immediate payment of post-petition rent must be granted.

18 Dickinson’s alternative request for relief from stay will be denied without prejudice. In  
19 the event that the Debtor fails to perform its lease obligations as required by Section 365(d)(3),  
20 Dickinson may renew its motion for relief from stay.<sup>19</sup> Under those circumstances, the Court  
21 also would entertain a request for an order shortening time for a hearing on a renewed motion.<sup>20</sup>

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22  
23 <sup>19</sup> Nothing in the Court’s decision prevents Grizzley Investors from taking appropriate  
24 steps to protect its interests, if any, as the holder of a claim secured by the Debtor’s interest in  
the Ground Lease.

25 <sup>20</sup> The Court’s inclination would be to allow relief from stay, if at all, for the Eviction  
26 Action to go forward rather than to order immediate possession under Section 365(d)(4). Such  
27 relief would permit the Debtor to raise its available defenses, if any, to Dickinson’s capacity to  
appear in a legal proceeding in North Dakota.

1  
2 **CONCLUSION**

3 For the reasons set forth herein, Debtor's Extension Motion will be denied. Dickinson's  
4 Motion to Compel will be denied insofar as it seeks to compel the Debtor to immediately assume  
5 or reject the Ground Lease under Section 365(d)(2). Dickinson's Motion to Compel will be  
6 granted insofar as it seeks immediate performance by the Debtor under Section 365(d)(3) of the  
7 aforementioned June and July rental obligation under the Ground Lease.

8 Dickinson's Motion to Compel will be denied without prejudice insofar as it seeks relief  
9 from the automatic stay to proceed with the Eviction Action or other nonbankruptcy remedies.

10 Separate orders have been entered concurrently herewith.

11  
12 Copies noticed through ECF to:

13  
14 ROBERT E ATKINSON [r.atkinson@kupperlin.com](mailto:r.atkinson@kupperlin.com)  
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20 and sent to BNC to:

21 All parties on BNC mailing list

22 ###