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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:	: Case No. 08-10152 (jmp)
	: Chapter 11
	:
	: Hearing Date: 0814/08
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QUEBECOR WORLD (USA) INC.	:
	:
Debtor.	:
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MEMORANDUM OF NATIONAL CITY COMMERCIAL CAPITAL COMPANY, LLC IN  
SUPPORT OF ITS MOTION FOR AN ORDER COMPELLING ASSUMPTION OR  
REJECTION OF LEASES OR ALTERNATIVELY FOR RELIEF FROM THE  
AUTOMATIC STAY AND FOR AN ADMINISTRATIVE CLAIM

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On the Brief

## PRELIMINARY STATEMENT

This brief is submitted on behalf of National City Commercial Capital Company, LLC (“Movant”), in support of its motion for an Order compelling the debtor to assume or reject the equipment Leases at issue or, in the alternative for relief from the stay and an administrative claim. This motion is made because debtor has ceased making monthly payments due to movant.

## FACTUAL SUMMARY

National City is the owner of a certain equipment leased to Debtor.

More specifically, on or about February 2, 2004, the Debtor, through its Vice President, as Lessee, entered into two Master Lease Agreements (Lease Numbers 96989000 and 104319000) with Information Leasing Corporation, now known as National City, as Lessor. A true and accurate copy of the two Master Lease Agreements are attached to the Affidavit of Lisa Marie Moore as EXHIBIT A.

Pursuant to the Master Lease Agreements, title to the equipment at all times remains with National City.

The Debtor has defaulted under the terms of the Master Lease Agreements as follows:

### Master Lease Agreement 96989000

Monthly Payment	\$ 9,495.00
Payments due for 5/1/08 & 6/1/08	\$ 18,990.00
Stipulated Loss Value	\$104,445.00
Residual	\$ 5,000.00
Late Charges	\$ 3,798.00

### Master Lease Agreement 104319000

Monthly Payment	\$ 10,778.00
Payments due for 2/1/08, 3/1/08, 4/1/08, 5/1/08 & 6/1/08	\$ 53,890.00
Partial Payment due 11/1/07	\$ 6,578.00
Stipulated Loss Value	\$129,336.00
Residual	\$ 5,000.00
Late Charges	\$ 5,389.00
Origination Fee	\$ 100.00

The Movant has demanded payment from the Debtor and it has refused and continues to refuse to make payments on its indebtedness.

## **GROUNDNS FOR RELIEF**

Pursuant to 11 U.S.C. Section 362, Movant is stayed from the commencement or continuation of any court action or other proceeding against the Debtor to collect its rent or to recover the subject property. The Movant has been unable to determine whether or not the Trustee or the attorney for the Debtor In Possession will voluntarily abandon the property owned by Movant. As long as the Trustee or the attorney for the Debtor In Possession does not seek permission of this Court to accept or reject said Lease Agreements, the Movant is being and will continue to be irreparably harmed since the Debtor is believed to be using the leased equipment and thus, they are depreciating in value, yet the Debtor is not making the required monthly payments.

The Trustee or the attorney for the Debtor in Possession should be required to accept the Lease Agreements, cure the default and pay the Movant the rental for the use of the leased equipment described herein, plus counsel fees, taxes and late charges, or to reject the Agreements and surrender the possession of the leased equipment to the Movant, or Movant should immediately be granted relief from the automatic stay.

Pursuant to Section 365(d)(5) of the United States Bankruptcy Code, the Debtor is obligated to pay Movant the rental value set forth in Lease Agreements beginning no later than 60 days after filing the petition. The Debtor filed the instant petition on or about January 21, 2008. Thus, the Debtor is clearly in default of its unambiguous obligation pursuant to 363(d)(5). It has been more than sixty days since filing and the Debtor has failed to make the monthly rental payments.

The legislature intended, in Section 365(d)(5) to shift the burden of taking action from the lessor to the Debtor. The Debtor's conduct constitutes bad faith and cause for relief from the stay.

The Movant has retained counsel in an effort to obtain the indebtedness owed by the Debtor. The Lease provides that Movant shall be entitled to attorneys' fees incurred in the event of Debtor's default.

No request for the relief sought herein has previously been made to this or any other Court.

## LEGAL ARGUMENT

### A. The Debtor Should Be Compelled To Assume Or Reject The Lease

While a debtor ordinarily may assume or reject an unexpired lease of property at any time before the confirmation of a Chapter 11 Plan, upon request by a party to such lease a bankruptcy court may order the debtor to assume or reject within a specified time period. 11 U.S.C. §365(d)(2). A failure to perform obligations under a lease may be sufficient grounds for compelling assumption or rejection. *In re O-Jay Foods, Inc.*, 110 B.R. 95, 97-98 (Bkrcty. D. Minn. 1989).

Section 365(d)(5) provides, in relevant part: "the trustee shall timely perform all of the obligations of the debtor...first arising from or after 60 days after the Order for relief in a case under Chapter 11 of this title under an unexpired lease of personal property...until such lease is assumed or rejected..." 11 U.S.C. §365(d)(5). Section 365(d)(5) was enacted by Congress to protect commercial lessors such as Movant whom, in effect, are being forced to extend post-petition credit to Debtor. *See In re Leisure Time Sports, Inc.*, 189 B.R. 511, 513 (Bkrcty. S.D. Cal. 1995) (section 365(d)(5) constitutes a "clear Congressional mandate that commercial lessors be given special protection."); *In re Ernst Home Center, Inc.*, 209 B.R. 955, 965 (Bkrcty. W.D. Wash. 1997).

This Court has exercised the broad authority given under section 365(d)(5) by compelling debtors to pay post-petition obligations. *See e.g. In re Edison Brothers Stores, Inc.*, 207 B.R. 801, 805 (Bkrcty. D. Del. 1997) ("[D]ebtor must timely perform under §365(d)(5) and may only retain the equipment by assuming the lease agreement and complying with §365(b)(1)").

The Lease Agreements in this case are indisputably "true leases" with no nominal purchase options. The 60 day period has since passed and debtor has failed to make the required payments or pursue an assumption or rejection. Movant calls upon the Court to direct debtor to make the required payments and assume or reject the Lease Agreements as soon as possible.

Additionally, Movant seeks an administrative claim for the first 59 days of bankruptcy for the debtor. 11 U.S.C. Section 503(b)(1)(A). Too, Movant is entitled to all monies not paid after the 60 day period as to Lease Agreements. In the event that these payments are not promptly made, Movant is entitled to have the Lease Agreements deemed rejected and to recover its equipment.

B. "Cause for Relief from Stay"(Bad Faith)(Section 362(d)(1)

"The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief but is not the only cause." H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 343 (1977); S. Rep. No. 95-589, 95th Cong., 2nd Sess. 52 (1978), US Code Cong. and Admin. News 1978, p. 4787. Another ground for relief is, inter alia, bad faith on behalf of the Debtor. In Re Rye, 54 B.R. 180 (Bkrcty. D.S.C. 1985); In Re Unioil 54 B.R. 192, 194 (Bkrcty. C.D. 1985). In the instant case the Debtor's use of Movant's valuable equipment without any payment whatsoever and in direct violation of the congressional mandate of Section 365(d)(5), constitutes bad faith on behalf of the Debtor, to the detriment of Movant, justifying an order for relief from the automatic stay.

CONCLUSION

For foregoing reasons National City Commercial Capital Company, LLC respectfully requests that this Honorable Court grant full and immediate relief accordingly.

Respectfully submitted,

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By: \_\_\_\_\_/s/ Frank Peretore, Esq.  
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Dated: 07/15/08