

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Fleming Companies, Inc , et al ,

Debtors

Chapter 11

Case No 03-10945(MFW)

(Jointly Administered)

Hearing Date August 4, 2003 at 11 30 a.m.

Objection Deadline July 28, 2003 by 4 00 p.m

NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 7th, 2003, counsel for Barry Road Foods, Inc ("Barry Foods"), filed the attached *Motion of Barry Road Foods, Inc., for (i.) Allowance and Payment of Administrative Claim; (ii.) Compelling the Debtor to Provide Adequate Protection; and (iii.) Compelling the Debtor to Assume or Reject the Lease* (the "Motion"), with the United States Bankruptcy Court for the District of Delaware, 824 N Market Street, 5th Floor, Wilmington, Delaware 19801(the "Bankruptcy Court")

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be in writing, filed with the Clerk of the Bankruptcy Court, 824 N Market Street, 5th Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel on or before 4 00 p m (EST) on July 28, 2003

PLEASE TAKE FURTHER NOTICE that if objections are timely filed, served and received, a hearing with respect to the Motion will be held before the Honorable Mary F Walrath, United States Bankruptcy Court Judge, on August 4, 2003 at 11 30 a m (EST) Only those responses or objections timely received by the Court will be considered at the hearing

FILED

JUL 07 2003

FOX ROTHSCHILD LLP



NEAL J. ELVITSKY, ESQUIRE (No. 2092)

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Attorneys for Barry Road Foods, Inc

Date

7/7/2003

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re)	Chapter 11
Fleming Companies, Inc , et al ,)	Case No 03-10945(MFW)
Debtors)	(Jointly Administered)

**MOTION OF BARRY ROAD FOODS, INC., FOR (i.) ALLOWANCE AND
PAYMENT OF ADMINISTRATIVE CLAIM; (ii.) COMPELLING THE
DEBTOR TO PROVIDE ADEQUATE PROTECTION; AND, (iii.)
COMPELLING THE DEBTOR TO ASSUME OR REJECT THE LEASE**

Movant, Barry Road Foods, Inc ("Barry Foods"), by and through its undersigned counsel, hereby files with this Court a Motion for (i) Allowance and Payment of Administrative Claim, (ii) Compelling the Debtor to Provide Adequate Protection, and, (iii) Compelling the Debtor to Assume or Reject the Lease (the "Motion") In support of this Motion , Barry Foods respectfully represents as follows

Jurisdiction

This Court has jurisdiction over this Motion pursuant to 28 U S C § 1334 This matter is a core proceeding within the meaning of 28 U S C § 157(b)(2)(A), (G) and (O) Venue is proper before this Court under 28 U S C §§ 1408 and 1409

2 The statutory predicates for the relief sought herein are §§ 105, 362, 506 and 553 of Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code")

Background

3 On April 1, 2003, (the "Petition Date"), the Debtor, along with other affiliated entities (collectively, "Debtors"), filed their voluntary petitions for relief under

Chapter 11 of the Bankruptcy Code The Debtors operate and manage their businesses as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code

4 On or about December 27, 1996, Barry Foods and Debtor, Fleming Companies, Inc , entered into an equipment lease for various types of refrigeration equipment for use in Debtors' stores (the "Lease") A copy of the Lease, as well as an itemization of the equipment provided therein, is attached hereto as Exhibit "A"

5 Paragraph 2(a) and (d) of the Lease provides as follows

During the Term, the Equipment shall remain the property of [Barry Foods] [Debtors] shall have a leasehold interest in the Equipment and shall have the right to use the Equipment in the Normal operation of the [Debtors'] business consistent with the Terms of this Lease

Neither [Barry Foods] nor [Debtors] shall pledge, lend, create a security interest in, sublet, sell or part with possession of the Equipment or any part thereof or attempt in any other manner to dispose thereof, without the other party's prior written permission

6 On information and belief, prior to the Petition Date, the Debtors sold to a non-debtor third party some or all of the equipment subject to the Lease The Debtors held no ownership interest in the equipment prior to the Petition Date and therefore had not right to sell the equipment The equipment sold by the Debtors had a market value as of the Petition Date of approximately \$1,200,000 00 ¹

7 To date, Debtors have failed to provide Barry Foods with information concerning the identity of the purchaser of the leased equipment, the purchase price or

¹ On July 3, 2003, Barry Foods filed a Motion for Order Authorizing Discovery Pursuant to Bankruptcy Rule 2004 (the "2004 Examination") The purpose for the 2004 Examination is to determine the dollar amount for which Debtors sold the equipment Furthermore, based on the facts established during the requested 2004 Examination, Barry Foods may proceed with other actions in this Court against the Debtors, or in state court to recover the equipment from the third party purchaser

the equipment location Barry Foods is especially concerned that Debtors sold the equipment for less than the equipment's fair market value

8 At the time Debtors sold the equipment, and at all times since, Debtors have made no attempt to inform or otherwise notify Barry Foods that it intended to sell the equipment under the Lease Furthermore, at no time have the Debtors sought, or received, permission or consent from Barry Foods to sell the equipment provided under the Lease

9 Pursuant to paragraph 2(d) of the Lease, Debtors are prohibited from selling any of the equipment under the Lease without receiving prior consent from Barry Foods Absent Barry Foods' consent, Debtors' actions constitute bad faith

RELIEF REQUESTED

Barry Foods is Entitled to Allowance and Payment of Administrative Expense Claim

10 Section 503(b) of the Bankruptcy Code provides that the actual and necessary costs and expenses of preserving a debtor's estate shall be allowed as an administrative expense claim

11 These estates benefited from Debtors' bad faith liquidation of Barry Foods' equipment and Barry Foods should accordingly receive the proceeds of the equipment sale

12 While section 365(d)(10) of the Bankruptcy Code only requires payment of obligations arising after the first 60 days of the case, the section provides that the Court may order otherwise "after notice and a hearing based on the equities of the case

" 11 U.S.C. § 365(d)(10) A lease which was not terminated prepetition is an

unexpired lease on the petition date, and the lessor is entitled to administrative lease payments from the date of the filing of the petition until the date the Court approves the rejection of the lease *In re Trans World Airlines, Inc* , 145 F 3d 124, 136 (3rd Cir 1998)

13 Based on the foregoing, the Court should allow Barry Foods an administrative expense claim for all proceeds arising from the sale of the equipment and other obligations (including, without limitation, late charges, attorneys' fees, interest and other costs) arising under the Lease, from the Petition Date, pursuant to sections 503 and 365 of the Bankruptcy Code

Barry Foods is Entitled to Adequate Protection

14 Pursuant to Bankruptcy Code section 363(e) and Bankruptcy Rule 4001(a), Debtors' use of the proceeds from the sale of the equipment should be conditioned on Barry Foods' interests and claims remaining adequately protected

15 This Court, along with courts in other districts, recognizes that the doctrine of adequate protection exists to protect a creditor's interests in property against the depreciation in value of the property through its continued use by the Debtor *In re Monroe Park*, 17 B R. 934 (D Del 1982), *see also In re Swedeland Dev Group, Inc* , 16 F 3d at 552

16 The Bankruptcy Code does not expressly define "adequate protection" Instead, section 361 of the Code sets forth the following three non-exclusive methods on how a secured interest in property may be protected (i) by periodic cash payments, (ii) by granting additional or replacement liens, or (iii) by granting other relief resulting in the indubitable equivalent of such entities interest in the property The purpose of

adequate protection is to "compensate a creditor for any decrease in the value of its security interest in collateral during the pendency" of a case *In re Megan-Racine Assoc* 202 B.R. 660, 663 (Bankr. N.D. N.Y. 1996)

7 Since the Petition Date, Debtors have used the proceeds from the sale of equipment, despite Debtors' unauthorized sale of the equipment to a third party

18 Given Debtors' bad faith in selling the equipment, Barry Foods should receive the "indubitable equivalent" in the form of payment of the market value of the equipment, plus costs, expenses and interest arising from the sale

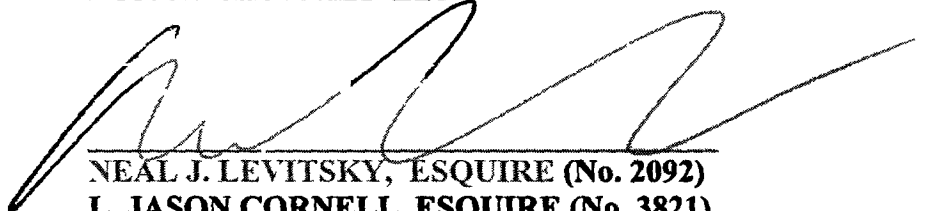
**Barry Foods is Entitled to an Order from the Court
Requiring the Debtor to Assume or Reject the Lease**

19 Pursuant to 365(d)(2) of the Bankruptcy Code, a party to an unexpired lease agreement with a debtor may request from a court that the debtor be required to determine, within a specified period of time, whether to assume or reject such an agreement

20. As stated previously, Debtors' Lease with Barry Foods does not expire until December 26, 2007. Debtors continues to benefit from the use of the proceeds from the unauthorized sale. As the Lease remains unexpired, Debtors should be compelled to assume or reject the Lease

WHEREFORE, Barry Foods respectfully requests the Court enter an order (a) granting Barry Foods allowance and payment of an administrative expense claim for the market value of the equipment sold by the Debtors, (b) directing the Debtors to provide Barry Foods with adequate protection of Barry Food's interest in the equipment subject to the Lease, and, (c) compelling the Debtors to assume or reject the Lease

FOX ROTHSCHILD LLP



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(302) 622-4206

Attorneys for Barry Road Foods, Inc

Date 7/7/2003

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re)	Chapter 11
Fleming Companies, Inc , et al.,		Case No 03-10945(MFW)
)	
Debtors		(Jointly Administered)
)	Hearing Date August 4, 2003 at 11 30 a.m.
		Objection Deadline July 28, 2003 by 4:00 p m

ORDER

WHEREFORE, upon consideration of the *Motion of Barry Road Foods, Inc., for (i.) Allowance and Payment of Administrative Claim; (ii.) Compelling the Debtor to Provide Adequate Protection, and (iii.) Compelling the Debtor to Assume or Reject the Lease* (the "Motion")

IT IS HEREBY ORDERED that Barry Road Foods, Inc , shall be allowed an administrative claim in the amount of \$1,200,000 00, and,

IT IS FURTHER ORDERED that Debtors must provide adequate protection in a manner conforming with the ruling of this Court, and,

IT IS FURTHER ORDERED that Debtors must assume or reject the equipment lease referenced in the aforementioned Motion within sixty (60) days from the date of this order, and,

The Court shall grant such other relief as is just and appropriate

SO ORDERED this day of _____, 2003

United States Bankruptcy Judge

CERTIFICATE OF SERVICE

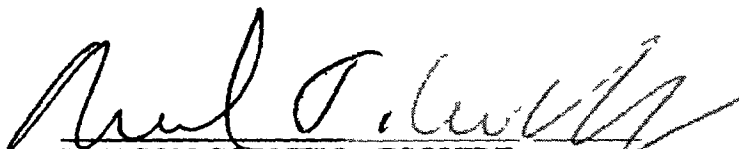

The undersigned hereby certifies that one (1) copy of the attached pleading was served upon the following individuals this 7th day of July, 2003, by First Class mail, postage prepaid

Laura Davis Jones, Esquire
Christopher James Lhulier, Esquire
Pachulski Stang Ziehl Young
Jones & Weintraub P C
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Dennis Dunne, Esquire
Milbank Tweed Hadley & McCloy
One Chase Manhattan Plaza
New York, NY 10005-1413


L JASON CORNELL, ESQUIRE


EQUIPMENT LEASE

THIS EQUIPMENT LEASE ("Lease") is made, entered into as of the 27th day of December, 1996, (the "Effective Date"), by and between BARRY ROAD FOODS, INC , a Missouri corporation ("Lessor"), and FLEMING COMPANIES, INC , an Oklahoma corporation ("Lessee")

RECITALS

A Lessor owns certain equipment described on Schedule A, attached hereto and incorporated herein by this reference (collectively, the "Equipment")

B Lessee desires to lease the Equipment from Lessor for use in connection with Lessee's business

NOW, THEREFORE, in consideration of the foregoing and for the mutual premises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Lessor and Lessee hereby agree as follows

1 Lease of Equipment Subject to the terms and conditions set forth in this Lease, Lessor hereby leases to Lessee the Equipment This Lease shall commence on the Effective Date and shall continue until December 26, 2007, unless earlier terminated pursuant to the terms hereof (the "Term")

2 Ownership of Equipment

(a) During the Term, the Equipment shall remain the property of Lessor Lessee shall have a leasehold interest in the Equipment and shall have the right to use the Equipment in the normal operation of Lessee's business consistent with the terms of this Lease

(b) At the expiration of the Term of this Lease and if all of the other conditions set forth in Section 10 of this Lease have been satisfied, Lessee shall have the option to purchase the Equipment for the fair market value of the Equipment not to exceed \$25,000

(c) Lessor and Lessee shall each keep the Equipment at all times free and clear from all claims, levies, liens, encumbrances and process Each party shall give the other party immediate notice of any such attachment or other judicial process affecting the Equipment

(d) Neither Lessor nor Lessee shall pledge, lend, create a security interest in, sublet, sell or part with possession of the Equipment or any part thereof or attempt in any other manner to dispose thereof, without the other party's prior written permission

(e) Each party shall at any time or times hereafter, whenever requested by the other party, execute and deliver to such other party all agreements, instruments and documents, in form and substance satisfactory to the requesting party, necessary to fully consummate all of the transactions contemplated herein and necessary for the protection of such other party's interest in the Equipment

3 Warranty

(a) Unless caused by Lessee's improper care or misuse, if for any reason the Equipment does not operate properly during a period of thirty (30) days following the Effective Date, Lessor shall repair or replace the Equipment, as soon as possible, at Lessor's cost. Lessor does not make any other warranty or representation, express or implied, of merchantability or otherwise

(b) Lessor hereby assigns to Lessee rights under any manufacturer's warranty with respect to any of the Equipment

4 Operation and Maintenance Lessee shall be responsible for the costs of maintenance of the Equipment during the term of this Lease. Lessee is given the right to make alterations, additions or improvements to the Equipment, so long as the value of the Equipment is not reduced

5 Taxes and License Fees During the Term, Lessee shall pay promptly all taxes, fees, and assessments, levied on the Equipment, including, but not limited to, all license and registration fees, sales, use, property, gross receipts, excise, ad valorem, or other taxes or charges, now or hereafter imposed by a governmental body, upon or with respect to, any of the Equipment

6 Risk of Loss and Damage or Destruction to the Equipment Lessee shall bear all risk of loss, damage, theft, or destruction, partial or complete, to any or all of the Equipment, from and after delivery of the Equipment to Lessee

7 Insurance Lessee, at its expense, agrees to obtain and maintain insurance on the Equipment against loss or damage by fire, theft, explosion and other hazards and risks ordinarily subject to extended coverage insurance, such insurance shall be in such amounts and issued by companies as may be satisfactory to Lessee

8 Rental Lessee agrees to pay Lessor during the Term, as rent for the Equipment, monthly installments as follows

(a) monthly lease payments in the amount of \$15,909.09 shall be due and payable on the date hereof and continuing thereafter on the third day of each month, beginning on the third day of February, 1997, for the next fifty-nine months,

(b) thereafter, monthly lease payments in the amount of \$20,075 75 shall be due and payable on the third day of each month for the next twelve months, and

(c) thereafter, monthly lease payments in the amount of \$19,659 09 shall be due and payable on the third day of each month for the next sixty months

Rental payments shall be subject to the rights of set off as provided in that certain Agreement dated November 19, 1996 between Lessor and Lessee. Rent shall be payable at the office of Lessor or to its duly appointed agent or at such other place as Lessor may from time to time designate to Lessee in writing.

9 Termination and Breach In the event Lessee fails to perform any of its obligations contained herein in the manner and at the time or times required hereunder, including but not limited to, the payment in full of any lease payments, then, if such default has not been cured ten (10) days after Lessee's receipt of written notice from Lessor specifying the default, or, if such default cannot reasonably be cured in ten (10) days, if cure of such default has not been commenced and is being pursued with reasonable diligence in such ten (10) day period, Lessee shall be deemed to be in default under this Lease, and Lessor shall have the right to terminate this Lease and Lessee's right to possession thereof, and Lessee shall have the right to retake and retain the Equipment.

10 Purchase Option Upon the expiration of the Term of this Lease, if all rents theretofore due and payable have been paid in full and if Lessee is not otherwise in default under any other provision of this Lease, Lessee shall have the right and privilege, at its option, to purchase the Equipment for the fair market value of the Equipment at such time, provided however, that in no event shall such amount exceed \$25,000. Upon the exercise of this option, Lessor will duly execute and deliver to Lessee all documents necessary and proper to effect retransfer of ownership of the Equipment to Lessee, free and clear of all encumbrances, security interests, and liens, upon payment by Lessee in cash of the full amount of the option price and thereupon this Lease shall terminate and no further rents shall become due in respect of the Equipment purchased by Lessee. If Lessee shall not exercise such option to purchase, the Equipment shall be removed from its location and returned to Lessor or, at Lessor's option, left at said location or otherwise disposed of by Lessee.

11 Waivers and Notices Any term or condition of this Lease may be waived at any time by the party entitled to the benefit thereof by a written instrument. No delay or failure on the part of any party in exercising any rights thereunder, will constitute a waiver of such rights or of any other rights hereunder. All notices, consents, instructions, approvals and other communications provided for herein shall be validly given, made or served if in writing and delivered personally or sent by certified or registered first class mail, return receipt requested, postage prepaid, addressed as follows:

(a) If to Lessor

Barry Road Foods, Inc
c/o Nick Holaves
7701 John Anders
Kansas City, Missouri 64152

(b) If to Lessee

Fleming Companies, Inc
5150 Kansas Avenue
Kansas City, Missouri 66106
Attention Les Dalecio

with a copy to

Fleming Companies, Inc.
6301 Waterford
Oklahoma City, Oklahoma 73112
Attention David Almond

or to such other address as either party may have furnished to the other in writing in accordance herewith, except that notices of change of address shall only be effective upon receipt. All notices shall be deemed received on the date of delivery or, if mailed, three business days after the date appearing on the return receipt therefor.

12 Severability If any provision contained in this Lease shall be inoperative for any reason whatsoever, the validity and effect of all other provisions shall not be affected thereby


13 Binding Effect This Lease shall be construed in accordance with the laws of the State of Missouri, and shall be binding upon and inure to the benefit of the parties hereto, their successors; legal representatives and assigns. Lessor shall not assign its interests hereunder without the prior written consent of Lessee

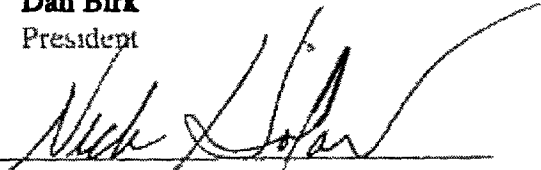
14 Headings The headings in this Lease are inserted for convenience only and are not to be considered in construction of the provisions hereof

IN WITNESS WHEREOF, Lessor and Lessee have executed this Lease as of the date first above written

LESSOR


BARRY ROAD FOODS, INC

By 
Dan Birk
President

By 
Nick Holaves
Vice President

LESSEE

FLEMING COMPANIES, INC

By 
Printed Name J. L. Wadsworth
Title Director of Food Service

SCHEDULE A

Schedule of Equipment

**SCHEDULE A TO
EQUIPMENT LEASE**

<u>Quantity</u>	<u>Fixture</u>		<u>Serial #</u>
(1)	LVH1200-1 Unit Cooler	Climate Control	
(2)	LVH-2700-1 Unit Cooler	Climate Control	
(1)	LSH-120-1 Unit cooler	Climate Control	
(1)	LSC-100-1 Unit Cooler	Climate Control	
(2)	SM-1080-A Unit cooler	Bohn	
(6)	SM2080-A Unit Cooler	Bohn	
(2)	ADT-1040 Unit cooler	Bohn	
(1)	MPG3900 Unit Cooler	Bohn	
(2)	MCD-463A Remote Condenser	Friedrich	
(1)	MCD581A Remote Condenser	Friedrich	
(1)	FRI05AHX Reach-in	Friedrich	89LW031
(1)	FRI04AHX Reach-in	Friedrich	89LW032
(1)	WSWK12RMX Island Frozen	Friedrich	89EW350
(1)	WSWK12RMX Island Frozen	Friedrich	89EW351
(1)	WSWK7RMX Frozen End Cap	Friedrich	89LW028
(1)	FRI05AHX Reach-in Frozen	Friedrich	89EW324
(1)	FRI05AHX Reach-in Frozen	Friedrich	89EW325
(1)	FRI05AHX Reach-in Frozen	Friedrich	89EW326
(1)	FRI05AHX Reach-in Frozen	Friedrich	89EW327
(1)	FRI05AHX Reach-in Frozen	Friedrich	89EW329
(1)	FRI05AHX Reach-in Frozen	Friedrich	89EW330
(1)	WSWK12RMX Island Frozen	Friedrich	89EW346
(1)	WSWK12RMX Island Frozen	Friedrich	89LW023
(1)	WSWK12RMX Island Frozen	Friedrich	89LW024
(1)	WSWK7RMX Island Frozen	Friedrich	89LW025
(1)	WSWK7RMX Island Frozen	Friedrich	89LW026
(1)	WSWK12RMX Island Frozen	Friedrich	89LW027
(1)	WSWK12RMX Island Frozen	Friedrich	89EW347
(1)	WSWK12RMX Island Frozen	Friedrich	89EW348
(1)	WSWK12RMX Island Frozen	Friedrich	89EW349
(1)	DMD512AX Dairy Case	Friedrich	89EW321
(1)	DMD512AX Dairy Case	Friedrich	89EW322
(1)	DMD512AX Dairy Case	Friedrich	89EW323
(1)	WSWK7RMX Frozen End Case	Friedrich	89LW019
(1)	WSWK8RMX Frozen End Case	Friedrich	89LW020
(1)	WSWK12RMX Island Frozen	Friedrich	89LW021
(1)	WSWK12RMX Island Frozen	Friedrich	89EW331
(1)	WSWK12RMX Island Frozen	Friedrich	89LW022
(1)	WSWK12RMX Island Frozen	Friedrich	89EW345
(1)	DMD512AX Dairy Case	Friedrich	89KW734
(1)	DMD512AX Dairy Case	Friedrich	89KW735
(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW012
(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW013
(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW014
(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW015

(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW016
(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW017
(1)	SRID12X Roll-in Dairy Case	Friedrich	89LW018
(1)	DMD512AX Dairy Case	Friedrich	89LW018
(1)	DMMD512AX Deli Meat	Friedrich	89KW730
(1)	DMMD512AX Deli Meat	Friedrich	89LW008
(1)	FMD512RAX Frozen Multi-Deck	Friedrich	89LW09
(1)	FMD512RAX Frozen Multi-Deck	Friedrich	89LW010
(1)	DMD512AX Dairy Case	Friedrich	89DW037
(1)	DMD512AX Dairy Case	Friedrich	89KW731
(1)	DMD512AX Dairy Case	Friedrich	89LW011
(1)	DMD512AX Dairy Case	Friedrich	89KW732
(1)	DMD512AX Dairy Case	Friedrich	89KW733
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW160
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89LW005
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW030
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW031
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW032
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89LW006
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW155
(1)	DMMD512AX Deli Meat 5-Deck	Friedrich	89LW007
(1)	ASHV12X Produce Case	Friedrich	89KW754
(1)	ASHV12X Produce Case	Friedrich	89KW755
(1)	ASHV12X Produce Case	Friedrich	89KW756
(1)	ASHV12X Produce Case	Friedrich	89KW757
(1)	DMD512AX Dairy Case	Friedrich	89DW036
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW156
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW157
(1)	BSM12LX 1-Deck Fresh Meat	Friedrich	89DW158
(1)	ASHV12X Produce Case	Friedrich	89LW265
(1)	ASHV12X Produce Case	Friedrich	89LW266
(1)	ASHV12X Produce Case	Friedrich	89LW267
(1)	ASHV12X Produce Case	Friedrich	89LW268
(1)	ASHV12X Produce Case	Friedrich	89LW269
(1)	ASHV12X Produce Case	Friedrich	89LW270
(1)	ASHV12X Produce Case	Friedrich	89LW271
(1)	ASHV12X Produce Case	Friedrich	89LW272
(1)	#74 Pizza Case	Friedrich	
(1)	Unit Cooler	Larkin	AMT6-561
(1)	Self-serve Wall Case	Schmidt	D-584-30
(1)	RFR118 Equipment Screen	Gold Dpt	
(1)	FMR3 Bone Dust Remover	Hobart	702956
(1)	Pressure Washer	City Wide	3535014
(1)	Large Bun Pan Cart		
(1)	Small Bun Pan Cart		
(6)	20 Space Bun Pan Racks		
(1)	50' Heavy Duty Hose		
(1)	Hose Reel		
(4)	Hand Truck		
(1)	Ladder		

(6)	20x72x72 4-Shelf Forks		
(1)	4x9x24" Compensating Hood		
(1)	RFR118 Electric Fryer		
(1)	RFR118 Submerger		
(1)	Portable Grease Filter		
(1)	RGL118 Mobile Glazer		
(1)	RGL118 Drain Tray		
(1)	Henny Penny #500 Pressure Fryer		
(1)	Henny Penny PS145 Pressure Smoker		
(1)	PUB200G Exhaust Fan		
(1)	C30 5-RF Curb		
(1)	AFS150K Supply Fan		
(1)	C26 5 Curb		
(1)	R-102 Fire Suppression System		
(1)	FMR3 Mixer	Hobart	11178005
(1)	Cheese Knife-18"		
(1)	Mixer Table 24' x 24"	Hobart	
(1)	8' x 30" Stainless Table/Shelf		
(1)	5000TE Control Panel	Hobart	31466898
(1)	25' Control Panel Cable	Hobart	
(1)	Post Assembly-ESW	Hobart	
(1)	Digital Data Recorder	Hobart	
(1)	Hand Wrap Station	Hobart	4004804
(1)	SP1500 Load Cell Scale	Hobart	17030550
(1)	SP1500 Load Cell Scale	Hobart	17030638
(2)	Standard Display	Hobart	
(1)	Original Recorded Cassette	Hobart	
(1)	256 Byte Memory Board	Hobart	
(1)	SC Wrapper	Hobart	31006961
(1)	5000TE Printer Controller	Hobart	13415382
(1)	5000TE Load Cell Scale	Hobart	
(1)	SP80 Service Scale	Hobart	17016476
(1)	SP1500 Service Scale	Hobart	17025222
(1)	Standard Display	Hobart	
(1)	256 Byte Memory Board	Hobart	
(1)	1865 Operators Control	Hobart	31379922
(1)	18VPS Thermal Printer	Hobart	31378377
(1)	Load Cell Scale	Hobart	13437898
(1)	HWS Post Assembly	Hobart	
(1)	1865 Interface Kit	Hobart	
(1)	Hand Wrap Station	Hobart	4006075
(1)	6' Scale to Panel Cable	Hobart	
(1)	HWS-2 Control Panel Support	Hobart	
(1)	Large Platter	Hobart	
(1)	30' Hanging Scales	Chatillon	79598
(1)	30' Hanging Scales	Chatillon	79667
(1)	30' Hanging Scales	Chatillon	79659
(1)	30' Hanging Scales	Chatillon	79595
(1)	30' Hanging Scales	Chatillon	105583
(1)	30' Hanging Scales	Chatillon	105579

(1)	KW12244 Cart	Unarco	
(4)	Cart Corrals	Emies	
(4)	24x72x48 4-Shelf Racks	New Age	
(1)	Blue Giant Pallet Truck	Wesco	
(1)	8x30" Poly Top Table	Unarco	
(1)	5x30" Poly Top Table	Unarco	
(1)	VGK8 Service Deli Case	Hussmann	9292-0695
(1)	VGK12 Service Deli Case	Hussmann	9269-0537
(15)	Cross Stack Lugs-White		
(4)	NCR 2126 Scan System		
(4)	Zephyr Checkstands		
(1)	Interior Signage Kit		
(84)	Aluminum Platters		
(1)	Stainless Runner Cart		
(2)	Space Saver Carts		
(1)	45RRTT Crown Lift Truck		W-98387
(1)	(5) Aluminum Dollies (20 x 27)		
(1)	Set "Food 4 Less" Channel Letters		
(1)	Music, Paging and Sound System		
(1)	Interior "Food 4 Less" Sign Kit		
(1)	Bulldog Battery		29088
(1)	Bulldog Charger		F14136
(1)	Lot Chrome Railing (Cart area)		
(19)	18491E Nester Chill Tray		
(5)	UDS Utility Drawers		
(300)	1200-10 Scanner Carts		
(300)	Shnnkiller Reflectors		
(1)	Fox Hydraulic Baler		
(69)	Pr 5/25s 2-Step Racks		
(20)	PR 5/25TD Dividers		
(4)	RPD 2424 Recieving Desks		
(9)	MPST Stock Trucks		
(2)	PT 2542 Wet Produce Trucks		
(2)	USK 156 Lugs		
(18)	CSL-8 Lugs		
(20)	USK 1812 Platter Carts		
(216)	D1826 Aluminum Platters		
(96)	NDD 2418 Green Wire Dividers		
(6)	Portable Display Bins		
(1)	B4OBL Hyster Truck		B135UO66
(4)	Wall Mount Hand Sinks		
(1)	Produce Sinks		
(1)	Deli Sink		
(1)	Bakery Sink		
(1)	Meat Sink		
(1)	Trac 280 Scrubber		
(1)	2500 Whirlamatic		
(1)	Reed Bakery Oven #5-25x56		
(1)	Reed Proofbox #65x37		
(1)	Zephyr Tn-Belt Checkstand		29106

(1)	Zephyr Tr-Belt Checkstand	29107
(1)	Zephyr Tr-Belt Checkstand	29108
(1)	Zephyr Tr-Belt Checkstand	29109
(1)	Zephyr Tr-Belt Checkstand	29110
(2)	Brute 55 Gallon Cans	
(1)	Produce Film Wrapper	
(8)	Scale Hangers with Base	
(4)	#1331 Bun Pan Racks	
(12)	Brass Bakery Shelves	
(12)	Bakery Wire Brackets	
(1)	Cheese Slicer	
(10)	7" x 11" Clip in Frames	
(1)	TI 15 Knight Grocery Safe	
(16)	Orchard Bin Tables-	
(8)	Spillover Tables	
(1)	Produce Irrigation System	
(8)	SSBT Boning Tables	
(14)	7230 Undershelf	
(5)	1272-SS Meat Boat Racks	
(11)	Utility Drawers	
(8)	SSMT 7230 Stainless Prep Tables	
(6)	SSB72 Stainless Tables	
(2)	BNT-SB 7230 Stainless Tables	
(1)	CT-6 Cake Merchandiser	
(2)	Crown Pallet Jacks #2748	
(3)	4-Roll Bag Stands	
(12)	Front Mount Bag Racks	
(1)	24x38x14 Produce Cooler	
(1)	10x12x10 Bakery Cooler	
(1)	Meat Prep/Freezer Combo Cooler	
(1)	15x73x14 Dairy Cooler	
(1)	4246 Meat Grinder	31473309
(1)	Electronic Stretch Wrapper	31467936
(1)	180P Powered Curve	31467936
(1)	RBG Rotary Bin	31444266
(1)	#5614 Meat Saw	27148784
(1)	#5614 Meat Saw	27148787
(1)	A200 Mixer	11419771
(1)	12" Meat Slicer	56892956
(1)	12" Meat Slicer	56890778
(1)	12" Meat Slicer	56893344
(1)	#403 Tenderizer	56891929
(1)	#4246 Mixer Grinder	27116923
(24)	18x26 Yellow Bakery Trays	
(1)	Cake Donut Machine	11442
(20)	Stainless 1/9 Size Pans	
(100)	Standard Bun Pans	
(4)	Stainless 1/3 Size Pans	
(1)	Lot Madix Widespan Shelving Components	

- (5) Electnc Cigarette V dors
- (1) Complete security system
- (3) Meese Trucks
- Misc Deli/Bakery Smallwares
- Misc Office Furniture/Supplies

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

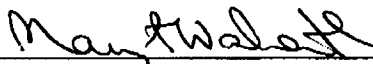
In re:) Chapter 11
)
FLEMING COMPANIES, INC., et) Case No. 03-10945 (MFW)
al.)
Debtors.)
)
)

ORDER

AND NOW, this \ st day of APRIL 2004, upon consideration of
the Motion of Barry Road Foods, Inc., for the allowance and
payment of an administrative claim, it is hereby

ORDERED that the Motion is **DENIED**.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

re Claim # 13573

Docket # 7450
eod 4-1-04

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
FLEMING COMPANIES, INC., et) Case No. 03-10945 (MFW)
al.)
Debtors.)

MEMORANDUM OPINION¹

Before the Court is the Motion of Barry Road Foods, Inc., for the allowance and payment of an administrative claim, adequate protection, and assumption or rejection of its equipment lease ("the Equipment Lease") pursuant to sections 365 and 503 of the Bankruptcy Code. The Debtor opposes the Motion and contends that the Equipment Lease is in fact a disguised security agreement that is not subject to section 365. In the event the Court concludes that it is a lease, however, the Debtor seeks to reject it. For the reasons set forth below, we conclude that the Equipment Lease is a disguised security agreement. Accordingly, we deny the Motion.

I. **FACTUAL BACKGROUND**

In 1990, Fleming Companies, Inc. ("the Debtor"), approached

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

Docket #7449
cd 4-1-04

Barry Road Foods, Inc. ("Barry Road") with an opportunity to own and operate a Food 4 Less store in Kansas City, Missouri. The parties executed several agreements by which Barry Road purchased equipment and inventory for \$2.2 million and sublet the store from the Debtor.

In 1996, the Debtor implemented a new sales program altering the price of inventory sold by the Debtor to Barry Road. Following the introduction of this new sales program, Barry Road expressed dissatisfaction with the Debtor's new program and a desire to sell the store. After the parties discussed several options, the Debtor agreed to purchase the store from Barry Road. As part of this sale, the Debtor (1) purchased the inventory, (2) terminated the sublease of the store, (3) entered into a non-compete agreement with the owners of Barry Road, and (4) entered into the Equipment Lease.

The Equipment Lease commenced on December 27, 1996, and was scheduled to terminate on December 26, 2007. Pursuant to the Equipment Lease, the Debtor leased the equipment necessary to operate the Food 4 Less Store while Barry Road retained ownership of the equipment. The Equipment Lease prohibited the Debtor from pledging, lending, subletting, or selling any of the leased equipment without prior written permission from Barry Road. Upon termination of the Equipment Lease, the Debtor had an option to purchase the equipment for its fair market value, not to exceed

\$25,000.

Several years later, the Debtor decided to sell the Food 4 Less store and possibly convert it into a Festival Foods store. To permit the planned sale and conversion, the Debtor and Barry Road entered into a letter agreement dated September 15, 1998, modifying the Equipment Lease. The modification allowed the Debtor to move, discard, or otherwise dispose of any of the leased equipment without recourse and without obtaining consent from Barry Food. Despite obtaining this modification, the Debtor never sold or converted the Food 4 Less store.

On April 1, 2003, the Debtor filed a voluntary petition under chapter 11 of the Bankruptcy Code. On April 17, 2001, the Debtor subleased a portion of the equipment covered by the Equipment Lease to Madison Foods, Inc., and sold or scrapped the remaining equipment.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 & 157(B)(2)(A), (B), (K), (M) & (O).

III. DISCUSSION

Barry Road contends that it is entitled to an administrative claim arising from the Debtor's post-petition contractual obligations arising under the Equipment Lease and the proceeds

generated by the Debtor from the sale of the equipment covered by the Equipment Lease pursuant to sections 503 and 365 of the Bankruptcy code. The Debtor contends that section 365 is not applicable because the Equipment Lease is not a true lease but rather a disguised security agreement. See In re Integrated Health Services, Inc., 260 B.R. 71, 75 (Bankr. D. Del. 2001) (noting that section 365 is not applicable to disguised security agreements.) Since Barry Road did not perfect any security interest in the equipment, the Debtor contends that Barry Road is not entitled to an administrative claim.

The parties agree that Missouri law governs whether the Equipment Lease is a true lease.² Under Missouri law, a lease is "a transfer of the right to possession and use of goods for a term in return for consideration, but . . . retention or creation of a security interest is not a lease." Mo. Rev. Stat. §400.2A-103(1)(j). Therefore, to determine what is a lease, we must determine what is a security interest. Id. Missouri has adopted revised section 1-201(37) of the Uniform Commercial Code ("the UCC") which defines security interest as

an interest in personal property or fixtures which secures payment or performance of an obligation. . . . Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee

² The Third Circuit has suggested, but not decided, that state law governs whether an agreement is a true lease. In re Continental Airlines, Inc., 932 F.2d 282, 294 (3d Cir. 1991).

is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(a) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal consideration upon compliance with the lease agreement, or

(d) the lessee has an option to become the owner of the goods for no additional consideration or nominal consideration upon compliance with the lease agreement.

For purposes of subsection (37):

(a) Additional consideration is not nominal if . . .

(ii) when the option to become the owner of the goods is granted to the lessee the price stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised.

Mo. Rev. Stat. § 401.1-201(37).

In determining whether a lease is a true lease, the form or title chosen by the parties is not determinative. See, Ford Motor Credit Co. V. Hoskins (In re Hoskins), 266 B.R. 154, 159 (Bankr. W.D. Mo. 2001). See also, Liona Corp v. PCH Assoc. (In re PCH Assoc.), 804 F.2d 193, 200 (2d Cir. 1986); In re Homeplace Stores, Inc., 228 B.R. 88, 93 (Bankr. D. Del. 1998). Revised section 1-201(37) deleted all references to the parties' intent. Hoskins 266 B.R. at 159.

Although Missouri adopted the revised version of section 1-201(37) in 1992, no Missouri state court has addressed whether an

agreement is a true lease under the revised UCC. Id. The Bankruptcy Court for the Western District of Missouri, however, has construed this section in light of other state court rulings and concluded that an analysis under section 1-201(37) focuses on the "economic realities" of the transaction. Id. (citing Banterra Bank v. Subway Equip. Leasing Corp. (In re Taylor), 209 B.R. 482 (Bankr. S.D. Ill. 1997)).

Under an economic realities test, a lease is a security interest if the Debtor cannot terminate the lease's obligations and one of the enumerated provisions of section 1-201(37) is satisfied. Id. In this case, the parties agree that the Equipment Lease's financial obligations are not subject to termination by the Debtor. (Stipulations of Admitted Facts at p. 2.) Therefore, our analysis will focus on whether the Equipment Lease satisfies one of the enumerated provisions of section 1-201(37).

A. Economic Life of the Equipment

The first enumerated provision of section 1-201(37) considers whether the original term of the lease is equal to or greater than the remaining economic life of the goods. Mo. Rev. Stat. §400.1-201(37)(a). The Debtor contends that the Equipment Lease created a security interest because the lease term covered the equipment's entire economic life. We agree. The Debtors' valuation expert established that the equipment would have little

or no value at the end of the lease term. She testified that it would likely cost more to remove the equipment than it was worth. In fact, Barry Road does not contest this. (Post Hearing Memorandum at p. 6.) Because the uncontradicted evidence establishes that the covered equipment would have no economic value at the end of the lease term, the first element of section 1-201(37) is satisfied. Therefore, we must conclude that the Equipment Lease is not a true lease, but rather a disguised security agreement.

B. Economics of the Transaction

Even if we were to conclude that the Equipment Lease is not a disguised security agreement as a matter of law, we must nonetheless determine whether the specific facts of the case establish that the agreement was a disguised security agreement. Hoskins, 266 B.R. at 161. The facts of this case support our conclusion that the Equipment Lease was a security agreement for the sale of the equipment. When Barry Road agreed to sell the store to the Debtor, the economic realities suggest that Barry Road was also selling the equipment needed to operate that store. At that time, the owners of Barry Road were attempting to exit the grocery store business. Even if the Debtor chose not to exercise its purchase option it is unlikely that Barry Road would have taken the Equipment back. The evidence established that Barry Road did not intend to operate a grocery store in the

future. Supporting this conclusion is the fact that Barry Road did not require the Debtor to sublease the store back to Barry Road if the Debtor elected not to purchase the equipment. Without this provision, Barry Road could not guarantee that it could use the equipment without relocating it to a new location at great cost. Although Dan Birk, President of Barry Road, testified that it now wanted to move back to the store and operate, Barry Road does not have that right. The testimony presented clearly establishes that moving the equipment to a new location would not make economic sense. Accordingly, we conclude that the economic realities at the time the Equipment Lease was executed establish that it was in fact a security agreement.

IV. CONCLUSION

For the foregoing reasons, we conclude that the Equipment Lease is a security interest pursuant to Missouri's Uniform Commercial Code § 1-201(37). Therefore, we deny the Motion of Barry Road Foods, Inc., for the payment of administrative rent. The Debtor's alternative Motion to reject the Equipment Lease is moot.

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

Dated: April \ , 2004