

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

In re:)	Chapter 11
)	
Fleming Companies, Inc., <i>et al.</i> ,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Objection Deadline: April 14, 2003 @ 4:00 p.m.
)	Hearing Date: April 21, 2003 @ 12:30 p.m.

**LIMITED OBJECTION OF M&J WILKOW, LTD. TO MOTION FOR ORDER
UNDER SECTION 365(A) OF THE BANKRUPTCY CODE AUTHORIZING
THE DEBTORS TO REJECT CERTAIN UNEXPIRED LEASES OF
NONRESIDENTIAL REAL PROPERTY AND AVIATION EQUIPMENT [DKT. NO. 13]**

M&J Wilkow, Ltd. ("*M&J*"), by its counsel, files its Limited Objection to the Motion for Order Under Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment (the "*Objection*"). In support of its Objection, M&J states as follows:

BACKGROUND

1. Pursuant to an Assignment and Assumption Agreement, dated October 28, 1999, executed by Fleming Companies, Inc. and Rainbow Food Group, Inc. (the "*Debtors*"), Fleming Companies, Inc. transferred, assigned and conveyed and Rainbow Food Group, Inc. assumed and agreed to perform all of the obligations under a certain lease dated January 22, 1990 ("*Lease*"). The Debtors are assignees to the lessee under the Lease. The Lease is for real property commonly known as 1643 County Road B-2, St. Paul, Minnesota (the "*Leased Premises*").

2. On April 1, 2003 (the "*Petition Date*"), the Debtors filed their voluntary petitions under chapter 11 of title 11 of the United States Code (the "*Code*").

3. Since the Petition Date, the Debtors have continued to occupy the Leased Premises. Pursuant to the Lease, on the first day of each month, the Debtors are obligated to pay (a) minimum monthly rent of \$52,081.38, plus approximately \$10,274.11 for common area

maintenance and other expenses, and (b) real estate taxes and other expenses in the amount of \$94,162.93.

4. On April 4, 2003, the Debtors filed and served their Motion for Order Under Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment (the "Motion"). The deadline to file an objection to the Motion is April 14, 2003 and a hearing on the Motion is scheduled for April 21, 2003.

5. Pursuant to the Motion, the Debtors request that the Court authorize the rejection of certain executory contracts effective as of the Petition Date.

OBJECTION

6. M&J objects to the Motion to the extent it seeks to reject the Lease retroactively, effective as of the Petition Date, and avoid liability for payment of administrative expense claims for unpaid postpetition rent and other Lease obligations due for April 2003.

7. The majority of courts hold that court approval is a condition precedent for an effective rejection of a lease under Section 365(a) of the Code, and that rejection is effective when the bankruptcy court enters an order authorizing rejection. *See In re New Valley Corporation*, 2000 Lexis 12663, *44 (D. N.J. 2000); *In re Thinking Machines Corp. v. Mellon Financial Servs. Corp.*, (In re Thinking Machines Corp.), 67 F.3d 1021, 1025 (1st Cir. 1995). Although courts have authorized the rejection of executory contracts *nunc pro tunc* to the petition date, they have done so only when the balance of equities favors the debtor, such as when the debtor never occupied, or was no longer in possession of the property when rejection of the lease was sought. *See In re At Home Corporation*, 2003 LEXIS 5210 (N.D. Cal. 2003)(debtor never occupied building prior to petition date); *In re O'Neil Theatres, Inc.*, 257 B.R. 806 (E.D. La. 2000)(debtor surrendered leased premises prior to petition date); *In re*

Amber's Stores, Inc., 193 B.R. 819 (Bankr. N.D. Tex. 1996)(debtor had moved out and turned over keys to lessor pre-petition). Unlike the debtors in the foregoing cases, the Debtors in this case are still in possession of, and continue to operate their business out of, the Leased Premises. As a result, the balance of equities favors M&J and the effective date for rejection of the Lease should be the later of (i) the date the rejection order is entered or (ii) the date the Leased Premises are vacated and surrendered to M&J.

8. By seeking rejection of the Lease *nunc pro tunc* as of the Petition Date while remaining in possession of the Leased Premises, the Debtors are attempting to render ineffective the protections afforded to M&J under Section 365(d)(3) of the Code, and to avoid fulfilling their obligations under that Section.

9. Authorizing rejection of the Lease *nunc pro tunc* to the Petition Date will confer an inequitable benefit on the Debtors at M&J's expense. M&J cannot resume control of, or relet, the Leased Premises.¹ In the meantime, the Debtors are using the Leased Premises while attempting to avoid their obligations under Section 365(d)(3) of the Code to pay the rent and other expenses due and payable under the Lease. In effect, M&J is being required to subsidize the Debtors' use and occupancy of the Leased Premises during the postpetition period while receiving nothing in return. Thus, M&J should be afforded administrative status for obligations in the month of April 2003.

10. The Court of Appeals for the Third Circuit has unambiguously held that a debtor must fulfill all of its rental obligations under Section 365(d)(3) of the Code until such Lease is assumed or rejected. *See Centerpoint Properties v. Montgomery Ward Holding Corp.* (In re

¹ *See In re Federated Department Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991) (rejection of the Lease *nunc pro tunc* to the Petition Date puts the lessor in an unfairly awkward position: even though the debtor in possession may already have left the premises and may no longer be paying rent, the lessor would be ill-advised to relet the property because the court may not approve the rejection (citations omitted)).

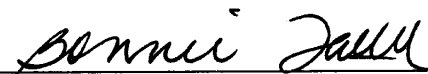
Montgomery Ward Holding Corp.), 268 F.3d 205 (3rd Cir. 2001). Courts in this District agree that Section 365(d)(3) of the Code requires debtors to pay rent obligations (including, without limitation, taxes billed postpetition) in full and *without* proration as they come due in the pre-rejection period. *In re Valley Media, Inc.*, 290 B.R. 73 (Bankr. D. Del. 2003)(Walsh, J.). Thus, the Debtors should be directed to immediately pay the rent, real estate taxes, other obligations that became due on or after the Petition Date.

WHEREFORE, M&J Wilkow, Ltd., respectfully requests that the Court enter an order:

- (a) Denying the Motion to the extent it seeks rejection of the Lease retroactive to the Petition Date;
- (b) Ordering the Debtors to pay rent, real estate taxes and other obligations under the Lease that have come due from the Petition Date to the date that is the later of (i) the date an order is entered rejecting the Lease or (ii) the date the Debtors vacate and surrender the Leased Premises to M&J; and
- (c) Granting such further relief as the Court deems just and proper.

Dated: April 14, 2003
Wilmington, Delaware

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