

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

FLEMING COMPANIES, INC., *et al.*

Debtors.

Chapter 11

Case No.: 03-10945 (MFW)

(Jointly Administered)  
**Related Doc. No. 817**

**LIMITED OBJECTION OF LESSOR, PASSCO TO DEBTOR'S MOTION FOR AN ORDER: (A) AUTHORIZING SALE OF THE RICHMAR STORES FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS; (B) AUTHORIZING ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SUCH SALE**

Passco Delta Fair, a Delaware limited liability company, Alonzo F. Adkins, the Pearl E. Arnold Trust date April 4, 1997, John F. Comer and Kitty R. Comer, the Berle and Carol Crisp Family Trust dated February 21, 1989, Waltco, LLC, a California limited liability company, the Webb B. Morrow, Jr. Living Trust U/A/D/ 12/7/93, Edward Allyn Schmidt and Dorothy Helen Schmidt, the Scofield Family Revocable Living Trust, dated January 8, 1997, the Wirt Family Trust dated June 4, 1991, Antioch Plaza, a Delaware limited liability company, (collectively "Passco"), lessor under a certain nonresidential real property lease ("Lease") concerning premises ("Premises") located at 2950 Delta Fair Boulevard, Antioch, California, hereby files this limited objection, and respectfully states as follows:

1. On or about June 26, 1985, the Fleming Companies, Inc. entered into an agreement to lease the Premises from Delta Fair – Oxford Limited Partnership ("Delta Fair"). On August 25, 1987, Delta Fair assigned its interest to Berberian Trust Properties ("Berberian"). On March 17, 1999, Berberian assigned its interest to the current Lessor, Passco.

2. On or about April 1, 2003 (the "Petition Date"), Fleming Companies, Inc. and numerous affiliates (collectively, "Fleming" or the "Debtors") filed voluntary petitions for relief

under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.* (the “Bankruptcy Code”).

3. On May 12, 2003, the Debtors filed a Motion for an Order: (A) Authorizing the Sale of the Richmar Stores Free and Clear of Liens, Claims and Interests; (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Such Sale (the “Motion”). The Motion seeks authority to sell up to nine (9) of the Richmar retail stores, including the Premises.

4. Under § 365 (f)(2) of the Bankruptcy Code, “The trustee may assign an executory contract or unexpired lease of the debtor only if –

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.”

5. Even if the Debtor meets the threshold requirement of a sound business judgment, the Debtor must also cure any existing defaults and provide adequate assurance of future performance of the assigned contracts. *In re ANC Rental Corporation, Inc. et al.*, 287 B.R. 714, 724 (D. Del. 2002). In *ANC*, the debtors presented evidence that to the extent the agreements required a bond be posted to secure performance, the assignee has agreed to do so and has the agreement of its bonding company to provide the requisite bonds. *Id.* The debtors provided further that the assignee was much more financially secure than the debtors, making the assignee able to perform the debtors’ obligations due under the agreements. *Id.* In the case at hand, the Debtors have not provided similar evidence of adequate assurance of future performance by the assignee.

6. Lessor does not object to the Court's determination that the Lease may be assumed and assigned pursuant to § 365(a), however, Lessor requests that the Debtors provide adequate assurance of future performance by the assignee, at such time the winning bidder is determined, and that Lessor be entitled to file objections thereto.

7. Regarding the cure amount, the Debtor lists the amount of \$32,799.90 in the Schedule of the Debtors' Acquired Contracts attached to the Notice of Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases. However, the Debtors have confirmed the correct cure amount regarding the Premises in the amount of \$101,788.59. See letter attached herein as Exhibit A.

WHEREFORE, Lessor respectfully requests this Honorable Court to enter an Order 1) reflecting the correct cure amount for the Premises as \$101,788.59, and 2) conditioning the relief requested on a requirement that the Debtors provide adequate assurance of future performance by the assignee.

Dated: May 28, 2003

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- and -

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