UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
FLEMING COMPANIES, INC., *et al.*,	:	**Case Nos. 03-10945 (MFW)**
	:	**(Jointly Administered)**
Debtors.	:	
	:	**Objection Date: June 18, 2003, at 4:00 p.m.**
	:	**Hearing Date: June 25, 2003 at 2:00 p.m.**

OBJECTION OF HAWKINS COMPANIES, AGENT FOR THOMAS CENTRE, LLC TO DEBTOR'S MOTION PURSUANT TO SECTION 365(d)(4) OF THE BANKRUPTCY CODE FOR ENTRY OF AN ORDER EXTENDING TIME TO ASSUME, ASSUME AND ASSIGN, OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY

TO THE HONORABLE MARY F. WALRATH,
UNITED STATES BANKRUPTCY JUDGE:

1. Hawkins Companies (hereinafter referred to as "Hawkins") is the agent for Thomas Centre, LLC, the owner of a shopping center located in Phoenix, Arizona, as that term is used in 11 U.S.C. § 365(b)(3). See *In Re: Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990). Fleming Companies, Inc. is a party to a lease (hereinafter referred to as "Lease") with Thomas Centre, LLC for a leasehold identified by Debtors as Store No. AZ-140 CS, which is impacted by the relief requested in Debtors' Motion.

2. It is acknowledged that the Debtors remain parties to a large number of unexpired leases, many of which may ultimately be found to be valuable assets of Debtor's Chapter 11 estate either because the Lease will continue to be used by Debtors as part of its business or transferred to a proposed assignee for value. However, for the reasons enumerated immediately *infra*, the lease between Debtor and Hawkins is not such a lease.

3. The Lease indicates that the leasehold at issue was intended to be operated as a retail supermarket which was to be the only anchor tenant at the shopping center. Debtors are not operating their business at this leasehold, and have auctioned the FF&E located at the leasehold pursuant to the "Dovebid" auction previously approved by this Honorable Court. The FF&E was bought by the Hawkins Companies or one of its designees.

4. Upon information and belief, based upon Debtors' recent actions and pronouncements by their counsel in open court, Debtors have already begun their analysis of the status of their leases and their various businesses and have already reached a decision to withdraw from the retail supermarket business and to substantially lessen their wholesale business in the State of Arizona. It is therefore unlikely that Debtors will choose to assume the lease for the purpose of continuing their business operations at the leasehold.

5. Upon information and belief, the economic terms of the lease are substantially above the market rate, and it will be virtually impossible to assume and assign the lease to a third party for value.

6. Recognizing that there was a substantial likelihood that Debtors would not be in a position to operate at the leasehold, in order to aid the many smaller in line tenants at the shopping center, and in an attempt to mitigate the probable contractual damages that it will suffer if Fleming Companies, Inc. breaches the lease, Hawkins Companies has been searching for a potential replacement tenant since approximately September 2002. The search for a substitute anchor tenant has not gone well, and the best possibility on the horizon is a potential tenant who would be willing to enter into a new lease for approximately one-third less than the amount Fleming Companies, Inc. is obligated to pay under the Lease. Upon information and belief,

neither Debtors nor their real estate consultants are likely to be any more successful in obtaining an assignee.

7. Although Debtors have paid rent and related charges owing and due under the lease, and allege in their motion that they will continue to do so, Hawkins and the other tenants at their shopping center are being substantially damaged as a result of no anchor tenant being open for business. It is elementary that an anchor tenant substantially increases foot traffic at a shopping center, increasing the sales made by other in line tenants. Without the benefit of an anchor tenant, many in line tenants have had difficulty paying the rent owing and due under their leases, in some instances causing Hawkins to have to forebear its rights to collect the full amount of the rent.

8. The express language of Section 365(d)(4) indicates that sixty (60) days is the benchmark for assuming or rejecting leases, unless Debtors can show cause. The legislative history of Section 365 suggests that only in exceptional cases should an extension of time be granted. As was noted by Senator Hatch, in the legislative history (130 Cong.Rec. S 8891, S8894-95, Daily ed. June 29, 1984):

> "In all but the most complicated reorganization cases, sixty (60) days should be sufficient period to make this determination [to assume or reject]. Even in large reorganization cases, the Debtor presumably knows his own business and understands the value of his assets well enough to make such decisions in sixty (60) days. Also, the Debtor is generally well aware in advance that a bankruptcy may be necessary and can plan ahead to decide which leases should be retained. The Debtor should consequently be able to make this determination shortly after the petition is filed and certainly within sixty (60) days in all but the most complicated cases." [Emphasis Added]

9. Many courts have acknowledged that the purpose of the 1984 legislation "was to protect lessors (particularly shopping center operators) from delay and uncertainty by forcing a trustee or a debtor in possession to decide quickly whether to assume unexpired

leases." Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079 (9th Cir. 1989). And see, In Re Channel Home Centers, Inc., 989 F.2d 682, 686 (3rd Cir. 1993); In re Moreggia & Sons, Inc., 852 F.2d 1179 (9th Cir. 1988); Matter of American Healthcare Management, Inc, 900 F.2d 827, 831 (5th Cir. 1990).

10. Debtors reference the decision of the Court of Appeals for the Third Circuit in *In Re Channel Home Centers, Inc.*, *supra*, in support of their Motion. In reviewing that decision one should not overly emphasize the Court's statement that "nothing prevents a Bankruptcy Court from granting an extension because a particular debtor needs additional time to determine whether the assumption or rejection of particular leases is called for by the Plan of Reorganization that it is attempting to develop." *Id.*, at 689. The main focus of the *Channel* opinion concerned whether or not a second extension of the time to assume or reject leases could be granted by a Bankruptcy Court. In approaching this issue the Court stated, at 686:

> We do, however, find guidance in the evident purpose of Section 365(d)(4), which, as both parties seem to agree, is to prevent Trustees from taking too much time in deciding whether to assume unexpired non-residential leases. This purpose is apparent from the statute itself, which unequivocally provides that a lease must be deemed rejected unless the trustee assumes it before the 60-day period expires or obtains an extension. Moreover, the legislative history, while silent on the authority of a Bankruptcy Court to grant a second extension, does support the conclusion that Section 365(d)(4) was intended to prevent undue delay. [Emphasis added.]

11. While one can appreciate that Debtors do not want to make mistakes by misevaluating leases, and assuming leases too early, thereby incurring an administrative burden, or rejecting leases and losing their value for the estate, *Congress has made it clear that the rights of the debtor and its landlords must be balanced*. Had Congress intended that the averments of cause set forth by Debtors would rise to the level of "actual cause", Congress would certainly not have enacted the amendments to Section 365 with the language as it now exists. Indeed, at

paragraph 17 of their Motion, these Debtors even suggest that their "cause" warrants an extension through confirmation. Nevertheless, Congress specifically eliminated the provision that allowed such extensions through confirmation by enactment of the 1984 amendments. To accept Debtors' proffer of "cause" would be to completely obfuscate the meaning of Section 365(b)(4).

12. Upon information and belief, granting Debtors' Motion as to Hawkins' lease would not be in the best interest of Debtors' estate in that it will require the continued payment of rent and related charges in the amount of more than $46,000 per month, with little or no chance that the leasehold will be usable in Debtors' business going forward or assignable for value. In contrast, if Debtors reject the lease, Hawkins expects to be able to mitigate its damage claim of approximately $2.5 Million calculated pursuant to 11 U.S.C. § 502(b)(6) by approximately 50%.

WHEREFORE, Hawkins Companies, agent for Thomas Centre, LLC requests that the relief being requested by Debtors as to its lease located in Phoenix, Arizona, identified as Debtor's Store No. AZ-140 CS be denied, and Hawkins Companies prays for such further relief as is just and necessary under the circumstances.

Dated: June 18, 2003
Wilmington, Delaware

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	:	CHAPTER 11
FLEMING COMPANIES, INC., et al.,	:	
	:	CASE NO. 03-10945 (MFW)
Debtors.	:	
	:	

CERTIFICATE OF SERVICE

I, Jennifer A. L. Kelleher, Esquire, certify that on this 18th day of June, 2003, I caused a true and correct copy of the Objection to Debtor's Motion for Entry of an Order Extending Time to Assume, Assume and Assign, or Reject Unexpired Leases of Nonresidential Real Property, to be served on the attached service list in the manner indicated.

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