

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

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In re:) **Case No. 03-10945 (MFW)**
) **(Jointly Administered)**
) **Chapter 11**
FLEMING COMPANIES, INC., et al.,)
) **Objection Deadline: June 20, 2003**
Debtors.) **Hearing Date: June 25, 2003**
)
) **Related Docket No. 1383**
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**DEC INVESTMENTS LLC’S AND SHIELD INVESTMENT COMPANY’S
LIMITED OBJECTION TO DEBTORS’ MOTION FOR ORDER
PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE AUTHORIZING
AND APPROVING PROCEDURES FOR (i) THE ASSUMPTION AND
ASSIGNMENT AND (ii) REJECTION OF EXECUTORY CONTRACTS AND
UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY OF THE DEBTORS**

DEC Investments LLC (“DEC”) and Shield Investment Company (“Shield”), by their undersigned counsel, object on the limited basis set forth herein to the Motion for Order Pursuant to Section 365 of the Bankruptcy Code Authorizing and Approving Procedures for (i) Assumption and Assignment and (ii) Rejection of Executory Contracts and Unexpired Leases of Nonresidential Real Property of the Debtors (the “Motion”). In support of the objection, counsel states as follows:

BACKGROUND

1. On April 1, 2003, the Debtors filed for relief under Chapter 11 of the Bankruptcy Code.
2. On June 9, 2003, the Debtors filed the Motion, seeking, among other things, an order from the Court authorizing and approving certain lease and executory-contract-rejection procedures as noted below:

- a. Paragraph 7(a) provides “[t]he Debtors will serve a Notice to reject any Contract ...upon: (i) the contract counterpart The Debtors will not be required to file a separate motion in connection with such Notice.”
- b. Paragraph 7(b) provides “[i]n the case of the rejection of a lease or sublease, the Notice may include the date of surrender of the subject property to the contract counter party, a representation that the Debtor is current on its post-petition obligations under the lease or sublease and a statement of the intended retroactivity of the rejection of the lease or sublease.”
- c. Paragraph 7(e) provides “[a]bsent an objection being served no later than ten calendar days after the date the Debtors serve the Notice, the Debtors shall be authorized but not required to reject such Contract upon the Court entering an order authorizing the rejection of such Contract. The rejection of such Contract shall be effective as of the date set forth in the Notice or surrender letter to be delivered by the Debtors.”
- d. If a timely objection is served, the Debtor shall schedule a hearing to consider the objection only with respect to the rejection of any Contract as to which an objection is properly served. If such objection is overruled or withdrawn, the rejection of such Contract shall be deemed to have occurred in accordance with subparagraph (e) above.

3. The Debtors executed unexpired leases of nonresidential real property with both DEC and Shield covering properties identified as 5100, 5150, 5200, and 5250 Kansas Avenue, Kansas City, Kansas (the “Leases”).

4. The Leases are subject to the Motion.

ARGUMENT

5. The Motion is a purported procedural motion. But DEC and Shield both assert that, after further review, the Motion is, in fact, a substantive motion.

6. Specifically, the Motion applies a retroactivity provision to the Debtors' lease and executory-contract rejection date. For example, the Motion reads that, if no objection to a proposed notice of rejection is received by the Debtors within the time limits set in the Motion, the "Debtors shall be authorized but not required to reject such Contract upon the Court entering an order authorizing the rejection of such Contract. The rejection of such Contract shall be effective as of the date set forth in the Notice or surrender letter to be delivered by the Debtors." Motion, at 7(e).

7. DEC and Shield object to the above-noted provision because, among other things, the retroactivity of such provision violates 11 U.S.C. § 365(d) (4).

8. Section 365(d) (4) of the Bankruptcy Code requires that the Debtors immediately surrender nonresidential real property upon the Debtors' rejection of the Leases. 11 U.S.C. § 365 (2003).

9. Since the outset of this case, DEC and Shield's counsel has communicated with the Debtors' counsel about its various concerns with the surrender of the leased premises. Further, DEC and Shield's counsel has communicated with the Debtor's counsel about its concerns over the Motion vis-à-vis the Leases.

10. Specifically, the parties have discussed numerous issues that need to be addressed before the Debtors may surrender the properties subject to the Leases under 11 U.S.C. § 365(d)(4), including, without limitation, the following: (1) The properties subject to the Leases comprise Fleming Foods' Midwest Distribution Center and include refrigerated warehouse space

operated with at least one warehouse operated at a temperature of negative 22 degrees Fahrenheit as of the Petition Date; (2) To protect the integrity of the building structures, temperatures at the properties must be raised no more than 10 degrees per week until the temperatures reach ambient levels of 65 degrees Fahrenheit (the Court recently approved a Stipulation in conjunction with the DoveBid auction, which endorsed this temperature restoration plan); (3) Hazardous substances, including ammonia, reside on the properties. The parties have agreed that the Debtor may leave the ammonia so long as it can be stored in the existing on-site refrigeration-storage vessels in compliance with all applicable governmental laws, ordinances, and regulations. If ammonia exists that cannot be legally stored in such vessels in compliance with all applicable laws, ordinances, and regulations, the Debtors have agreed to remove the ammonia from the properties; (4) Certain restorations may be required for a surrender of the properties, including, without limitation, (i) restoring access to the Shield property at 5200 and 5250 Kansas Avenue from a public street or road (specifically, the Debtors removed all public access to these premises during their tenancy—now the premises may only be accessed via the adjacent land owned by a third party, Shadrall, or over the DEC premises); (ii) securing and separating the leased premises from any property owned by third parties (specifically, the Shield warehouse is connect by concrete walkways with the Shadrall facility with no way to secure the building vis-à-vis the Shadrall facility); and (iii) unless alternative arrangements are made with both DEC and Shield, otherwise returning the property to its pre-leased condition in compliance with all laws, regulations, codes, and ordinances.

11. In the Motion, and in contravention of 11 U.S.C. § 365(d) (4), the Debtors appear to be proposing either a “written-surrender date” before rejecting the Leases or a rejection of the

Leases without surrender. The “written-surrender date” is both artificial and may not constitute actual surrender.

12. DEC and Shield both assert that, to comply with 11 U.S.C. § 365 (d)(4), the Debtors must do the following things to the leases premises to “actually” surrender them before rejecting the Leases: (1) To protect the integrity of the building structures, the Debtors must raise the building temperatures no more than 10 degrees per week until the temperatures reach 65 degrees fahrenheit (such action being previously agreed to in that certain Stipulation filed between the parties); (2) The Debtors must remove all inventory from the leased premises; (3) The Debtors must remove or cause to be removed all goods sold to third parties at the Debtors’ earlier auction from the leased premises and restore and/or repair the leased premises in connection with any removal of such goods; (4) The Debtors must remove ammonia and other hazardous substances, as described in paragraph 10, from the leased premises; (5) The Debtors must restore access from the Shield property to a public street or road; (6) The Debtors must secure the leased premises; (7) The Debtors must separate the Shield property from the leased premises and make other restorations; (8) The Debtors must ensure that the leased premises are protected from fire by a fully-functional fire-suppression system; and (9) The Debtors must ensure that the leased premises, immediately before surrender, complies with all laws, regulations, codes, and ordinances.

13. Because the Debtors removed public-street and rail access during their tenancy and physically attached certain of the leased premises to adjacent property, owned by either Shadrall to the west or DEC to the east, Shield’s premises are landlocked. In fact, one can access the leased premises owned by Shield at 5200 and 5250 Kansas Avenue only through adjacent property, which is not owned by Shield.

14. Currently, the Debtors have possessory rights to such adjacent property.

15. Shield has no possessory rights to such adjacent property.

16. For those reasons, the Debtors are in the best position to address the access issues outlined in paragraph 12(5) above.

17. Because the Debtors have so-attached the leased premises to the adjacent property, such that both properties operate as one fully-integrated building, the Debtors must appropriately secure and separate the leased premises owned by DEC and Shield from the adjacent property owned by a third party--Shadrall, as identified in paragraphs 12(6), 12(7), and 12(8).

18. Moreover, because the Debtors have so-attached the leased premises to the adjacent property, such that both properties operate as one fully-integrated building, neither building complies with the fire code, which could make the building uninsurable.

19. As noted above, the Debtors have possession rights to such adjacent property, and Shield has no possessory or other rights in or to such adjacent property.

20. For those reasons, the Debtors are in the best position to complete the requirements set forth in paragraph 12(6), (7), and (8) and otherwise return the leased premises to its pre-leased conditions in compliance with laws, regulations, codes, and ordinances.

21. DEC and Shield both assert that the Court allow the Debtors to reject the Leases only upon "actual surrender," which is outlined above in paragraph 12, and not "written surrender," which is suggested and requested in the Motion, to the lessors.

22. Section 365(d) (3) of the Bankruptcy Code requires the Debtors to timely perform all their obligations under unexpired leases and executory contracts. 11 U.S.C. § 365 (2003).

23. DEC and Shield both assert that the Debtors' obligation to timely perform under the Leases, as required by 11 U.S.C. § 365(d) (3), continues until the Debtors actually surrender the leased premises as noted in paragraph 12.

24. As can be seen, nothing in the Motion guarantees that the Debtors will "actually surrender" the premises before the proposed effective date of the rejection, which violates Section 365(d) (4) of the Bankruptcy Code.

25. In essence, the Motion operates to shift the burden imposed by 11 U.S.C. § 365(d) (4) from the Debtors to DEC and Shield, which violates 11 U.S.C. § 365(d) (4).

26. Moreover, paragraph 7(e) of the Motion provides that "the Debtors shall be authorized but not required to reject such Contract upon the Court entering an order authorizing the rejection of such Contract."

27. With this optional language, a scenario could exist in which DEC and Shield received notice of rejection but the Debtors never submit an Order to the Court actually rejecting the Lease. In which case, DEC and Shield would be "in limbo" as to the status of their leases with the Debtors. This limbo could prejudice both DEC and Shield as well as the bankruptcy estate (e.g., by not allowing DEC and Shield to mitigate their rejection damages). Moreover, since the Debtors seek retroactivity on rejection notices pursuant to the Motion, any delays between the Notices sent under the Motion and the submission of an order of rejection would prejudice the landlords. DEC and Shield suggest that if the Debtors exercise their business judgment and determine a particular lease should be rejected, give notice of such rejection, and the landlord does not object to such rejection, the Debtors should not then have the sole discretion to delay submission of an order of rejection or elect to not reject such leases after such time. Moreover, Debtors should not be permitted to short-circuit their obligations to surrender

under the Bankruptcy Code. The rejection orders should be promptly submitted, and the orders should provide that rejection be effective upon actual surrender.

28. For the reasons noted above, the entry of an Order by the Court approving the Motion would prejudice the substantive rights of both DEC and Shield with the Leases.

RELIEF REQUESTED

29. For those reasons, DEC and Shield respectfully request that the Court deny the Motion as to DEC and Shield; or, in the alternative, grant the Motion as modified to address the concerns herein to require that (a) the Debtors be required to promptly submit rejection orders where notices of rejection are issued; (b) those orders provide that the rejection is effective upon the “actual surrender” of the leased premises; and (c) “actual surrender” of the DEC and Shield leased premises requires those actions, as detailed in paragraph 12, before the Leases are rejected.

WHEREFORE, DEC and Shield both respectfully request that the Court enter an order denying the Motion or, in the alternative, granting the relief requested herein paragraph 28 above; and awarding it such other and further relief that the Court deems just and proper.

Dated: June 20, 2003
Wilmington, Delaware

Respectfully submitted,

BUCHANAN INGERSOLL

/s/ Selinda A. Melnik
Selinda A. Melnik (No. 4032)
1201 N. Market Street, Suite 1501
Wilmington, Delaware 19801
Phone: (302) 428-5500
Fax: (302) 428-3996

and

Scott Welman, MO # 38191
Mark T. Benedict, MO # 44621
Marcus A. Helt, MO # 50374
HUSCH & EPPENBERGER, LLC
1200 Main Street, Suite 1700
Kansas City, Missouri 64105
Phone: (816) 421-4800
Fax: (816) 421-0596

Counsel for Dec Investments LLC and
Shield Investment Company