

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 p.m.
Objections Due: July 28, 2003 at 4:00 p.m.

**MOTION OF WEINGARTEN REALTY INVESTORS FOR
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE RENT**

Weingarten Realty Investors (“Weingarten”), by its counsel, pursuant to Sections 365(d)(3) and 503(b)(1)(A) of Title 11 of the United States Code (the “Bankruptcy Code”), hereby requests that the Court enter an order compelling the debtors, Fleming Companies, Inc., *et al.* (the “Debtors”), to pay administrative rent due to Weingarten for the month of July 2003 in connection with an unexpired lease of nonresidential real property. In support hereof, Weingarten respectfully represents as follows:

JURISDICTION AND VENUE

1. Debtors commenced the captioned cases by the filing voluntary Chapter 11 petitions on April 1, 2003.
2. The Court has subject matter jurisdiction over this motion under and pursuant to 28 U.S.C. § 1334. This is a core proceeding under and pursuant to 28 U.S.C. § 157(b)(2).
3. Venue of this Motion is proper in this District under and pursuant to 28 U.S.C. § 1409.

BACKGROUND FACTS

4. Weingarten, as lessor, is party to an unexpired non-residential real property lease dated October 31, 2000 (the "Lease") with Fleming Companies, Inc. d/b/a Food-4-Less, as lessee, with respect to the premises located at 2705 50th Street, Lubbock, Texas (the "Leased Premises").

5. The Lease requires payment of minimum rent, common area maintenance, taxes and insurance (collectively, "Monthly Rent"), in equal monthly installments, in advance, on the first day of each month.

6. The Debtors did not make the Monthly Rent payment in the amount of \$28,679.17 (the "July Rent Obligation") that came due under the Lease for the month of July 2003.

7. The Debtors have not rejected the Lease or surrendered the Leased Premises to Weingarten.

ARGUMENT; RELIEF REQUESTED

Weingarten is Entitled to Immediate Payment of the July Rent Obligation

8. Section 365(d)(3) of the Bankruptcy Code provides, in relevant part:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U. S. C. § 365(d)(3).

9. The July Rent Obligation came due after these cases were commenced. The Lease has not yet been rejected by the Debtors. Thus, the July Rent Obligation arose “on or after the Order for Relief,” and, otherwise pursuant to Section 365(d)(3); and must be paid immediately by the Debtors.

Weingarten is Entitled to Payment of the July Rent Obligation as an Expense of Administration of the Cases Under Section 503(b)

10. Alternatively, Weingarten requests allowance of the July Rent Obligation as a Chapter 11 administrative expense of the estate pursuant to Section 503(b). Such obligation arises from the Debtors’ exclusive post-petition possession and control of the Lease and the Leased Premises.

11. If for some reason the Court is not inclined to grant relief to Weingarten under Section 365(d)(3), which Weingarten submits should occur here, the Court should allow Weingarten an administrative claim in the amount of the July Rent Obligation, under Section 503(b), and also should order the Debtors immediately to pay Weingarten’s administrative expense claim.

12. The decision whether to require immediate payment of administrative expenses is within the Court’s discretion. *In re Verco Indus.*, 20 B.R. 664, 665 (B.A.P. 9th Cir. 1982); *In re Kaiser Steel Corp.*, 74 B.R. 885, 891 (Bankr. D. Colo. 1990). Where there are sufficient funds in the estate to pay all administrative expenses in full, immediate payment to an administrative creditor is appropriate. *In re Standard Furniture Co.*, 3 B.R. 527, 532-33 (Bankr. S.D. Cal. 1980). On information and belief, Debtors are not administratively insolvent and, on the contrary, have sufficient funds from the liquidation of their assets on hand to pay all

administrative expenses in full.

13. Weingarten should not be forced to wait an indefinite time for payment for services it has provided to the Debtors and which have benefited the Debtors' estates, especially when other administrative creditors (i.e. estate professionals) are receiving current, on-going, payment for the services they are providing.

WHEREFORE, Weingarten respectfully requests that the Court enter an order approving this Request for Payment of Administrative Expense Claim and for such other and further relief to which it may be justly entitled.

Dated: July 16, 2003

Respectfully submitted,

STEVENS & LEE, P.C.

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