

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
) Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC.,) (Jointly Administered)
et al.,) **Objections Due: 07/28/03 @ 4:00 p.m.**
Debtor.) **Hearing Date: 08/04/03 @ 11:30 a.m.**

**OBJECTION OF DUTTON MILL JOINT
VENTURE, L.P. TO DEBTORS' CURE AMOUNT**

Dutton Mill Joint Venture, L.P. ("Dutton Mill"), a party in interest herein, pursuant to 11 U.S.C. § 365(b) and Rule 9014 of the Federal Rules of Bankruptcy Procedure, and for its objection ("Objection") to the "Cure Amount" set forth in Debtors' Notice Re Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion ("Notice") states:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.
2. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2).

BACKGROUND

3. Dutton Mill is the "Landlord" and Fleming Companies, Inc. ("Fleming"), one of the Debtors in this proceeding, is the "Tenant" under a Build and Lease Agreement executed on December 4, 1998 for nonresidential real property located in the Dutton Mill Shopping Village in Malvern, Pennsylvania (called "the Lease"), a copy of which is attached hereto as Exhibit "A".

4. On or about July 11, 2003, Fleming filed a Notice concerning potential assumption and assignment of certain executory and unexpired leases with a Cure Amount Schedule ("Schedule") attached thereto. The Schedule (page 29) listed contract

number 6535 (Dutton Mill Joint Venture, LP) as a contract to which they wished assumption with a cure amount of \$0 (the “Cure Amount”).

5. For the reasons set forth below, Dutton Mill objects to the *Cure Amount* as incorrectly stated, since the amount necessary to cure the defaults under the Lease is significantly higher and certain components of the default cannot be fixed at this time. Dutton Mill is entitled to have paid all amounts owed through the assignment of the Lease pursuant to 11 U.S.C. §365. Notwithstanding any amount that may be fixed for the Cure Amount through July 31, 2003, Dutton Mill reserves all rights to all amounts owed under the Lease through the date of the assumption and assignment of the Lease and will supplement its Objection with evidence to prove up the amounts owed.

Amounts Due Under the Lease

A. Common Area Charges for Lighting

6. Pursuant to Section 2.2 of the Lease, Fleming is obligated to pay Dutton Mill—and has not yet paid--parking and common area maintenance lighting expenses in the shopping center determined as a percentage of Fleming’s proportionate square footage occupied in the Shopping Center divided by the total number of square feet in the entire Shopping Center. The parking and common area maintenance lighting expenses in the shopping center are additional post-petition charges, metered separately from the rest of Dutton Mill’s tenants. At this time, Dutton Mill is still calculating the amount of charges for the month of July, which charges are continuing to accrue post-petition. Dutton reserves the right to claim such damages as they become known.

B. Common Areas Maintenance Charges

7. Pursuant to Section 2.3 of the Lease, Fleming also is obligated to pay Dutton Mill—and has not yet paid—common areas maintenance charges calculated as a percentage of the total shopping center’s estimated annual pro rata charges, but not greater than \$35,000 per year, payable on a monthly basis. At this time, Dutton Mill estimates that Fleming’s common area maintenance charges for the month of July, which are still unpaid and are a post-petition expense, will be \$2,916.67. However, this amount is continuing to accrue post-petition, and Dutton Mill reserves the right to claim such damages as they become known.

C. Real Estate Taxes and Assessments Already Accrued

8. Pursuant to Section 7.1 of the Lease, Fleming is obligated, and has not yet paid, additional post-petition rent for all taxes and assessments, including real estate taxes. At this time, Dutton Mill has not been able to calculate the exact amount of Fleming’s obligation for outstanding taxes, but such amounts will continue to accrue post-petition., and Dutton reserves the right to claim such damages as they become known.

D. Outstanding Insurance Amounts

9. Pursuant to Section 8.1 and 9.3, Fleming is obligated to provide and pay for various policies of insurance on the Leased Premises, including a Blanket Insurance Policy covering the Premises, Rental Abatement Insurance, and Liability Insurance. These amounts of unpaid insurance amounts are additional post-petition rental obligations of Fleming that must be included in the Cure Amount. At this time, such amounts are not yet liquidated but are continuing to accrue post-petition, and Dutton Mill reserves the right to claim such damages as they become known.

E. Rental Charges

10. Although the Cure Notice seeks to fix the amount due through July 31, 2003, Dutton Mill is entitled to all rent obligations under the Lease through the date of the assumption and assignment. These obligations include the monthly rent (\$33,687.50 according to Section 5.1). Dutton Mill reserves all rights to have this obligation paid in full prior to the assumption and assignment of the Lease.

OBJECTION TO RELIEF REQUESTED

11. Based on the Debtors' Notice, it appears that the payment of the common area lighting charges, common area maintenance charges, the real estate taxes, the insurance policy amounts owed by Fleming, and the additional sums of rent through the date of assumption and assignment, will become delinquent if not paid on or about the date of the hearing on the Debtors' Sale Motion.

12. By virtue of an original Cure Notice and a Supplemental Cure Notice served upon Dutton Mill, the Debtors seek to place an unlawful burden on Dutton Mill to immediately calculate all damages associated with the Debtors' breach of its Lease. The Debtors threaten that a failure to respond (on very short notice) to the Cure Notice and Supplemental Cure Notice will result in the forfeiture by Dutton Mill of any right to claim damages as a result of the Debtors' actions except to the extent that the Debtors have admitted a Cure Amount in the Schedules. By reviewing the Schedules, one can clearly see that the Debtors have listed a Cure Amount of \$0 for almost every contract but a few, placing the burden of proof on all of the creditors to "prove up" their damages. This is unfair and hardly in good faith.

Because Fleming has not given Dutton Mill assurances that any of the common area maintenance charges, common area light charges, real estate taxes, or insurance policy payments due now will be paid before they become delinquent, Dutton Mill files this Objection to protect its right to payment under the Lease and 11 U.S.C. § 365(b) in the event the taxes are not paid by Fleming on or before August 4, 2003.

13. The amounts due under the Lease will most likely be offset by the income that Fleming receives from Fleming's subtenant which is occupying the Premises. Therefore, payment by Fleming will not have any adverse impact on Fleming's operations or its estate.

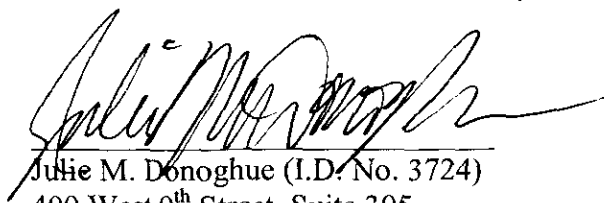
WHEREFORE, Dutton Mill requests that:

(a) The Court enter an Order sustaining Dutton Mill's Objection to the Cure Amount unless Fleming provides evidence that the common area light charges, the common area maintenance charges, the real estate taxes, the insurance premiums, and the rental amounts to cover the time periods for the assumption and assignment of the Lease have been paid; and

(b) The Court grant Dutton Mill such further relief as may be just and equitable.

Dated: July 29, 2003

DAVID I. WALSH & ASSOCIATES, P.A.



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