

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
Fleming Companies, Inc., <u>et al.</u> , ¹)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Hearing Date: August 19, 2003 at 11:30 a.m.
)	Objection Date: August 12, 2003

**DEBTORS' MOTION FOR AN ORDER APPROVING STIPULATION REJECTING
THE UNEXPIRED REAL PROPERTY LEASE FOR 5810 WEST PEORIA AVENUE,
GLENDALE, AZ (LEASE NO. AZ-005)**

Richmar Foods, Inc. ("Richmar") and its affiliated debtors (collectively, the "Debtors") hereby move (the "Motion") this Court for an order pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") to approve the Stipulation Regarding Unexpired Real Property Lease for 5810 West Peoria Avenue, Glendale, AZ, dated July 30, 2003, (the "Stipulation"), between Debtor Richmar, and sublandlord, Bashas' Inc. (the "Sublandlord"). In support of the Motion, Richmar respectfully states as follows:

Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 V.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicate for the relief requested herein is Bankruptcy Rule 9019.

¹ The Debtors are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favara Concepts, Ltd.; Fleming Foods Management Co., L.L.C.; Fleming Foods of Texas, L.P.; Fleming International, Ltd.; Fleming Supermarkets of Florida, Inc.; Fleming Transportation Service, Inc.; Food 4 Less Beverage Company, Inc.; Fuelserv, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; Minter-Weisman Co.; Piggly Wiggly Company; Progressive Realty, Inc.; Rainbow Food Group, Inc.; Retail Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

Background

2. On April 1, 2003 (the "Petition Date"), the Debtors filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors continue to manage and operate of their businesses and properties as debtors in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. An Official Committee of Unsecured Creditors has been appointed in these chapter 11 cases (the "Cases"), and no trustee or examiner has been appointed herein.

3. Upon Court approval, the Stipulation Regarding Unexpired Real Porperty Lease for 5810 West Peoria Avenue, Glandale, AZ (Lease No. AZ-005) and Order Thereon (the "Stipulation"), a copy of which is attached hereto as Exhibit A, rejects the lease (the "Lease") for the premises located at 5810 West Peoria Avenue, Glendale, AZ (the "Leased Premises").

4. Pursuant to this Court's Order (A) Authorizing the Employment and Retention of DoveBid, Inc. and AMH Corp. as Auctioneers for the Sale of Residual Assets, (B) Establishing an Expedited Procedure to Sell Residual Assets Pursuant to the Auction Agreement with DoveBid, Inc., and (C) Authorizing, but not Requiring, the Sale of Residual Assets (the "DoveBid Order"), entered on June 4, 2003 [Docket # 1359], the Debtors sold certain residual assets located at the Leased Premises (the "Residual Assets") to the Sublandlord on July 15, 2003.

5. The Debtors have terminated their operations at the Leased Premises, sold the Residual Assets and determined, in the exercise of their business judgment, that the Lease is not necessary for the Debtors' reorganization efforts.

6. The Sublandlord has a covenant in its prime lease for the Leased Premises which requires it to operate a grocery store at the Leased Premises on a continuous basis. Immediate rejection of the Lease permits the Sublandlord to re-enter the Leased Premises, begin operations and avoid potential damages arising from its violation of the foregoing covenant.

7. In consideration for the rejection of the Lease, the Sublandlord agrees to pay the Debtors One Hundred Thousand Dollars (\$100,000.00) immediately upon entry of the order approving the Stipulation.

Relief Requested

8. Richmar respectfully requests that the Court enter an Order approving the Stipulation, authorizing the parties to take all actions necessary to effectuate the Stipulation and any other actions in accordance with the terms thereof.

Basis for Relief

9. The Debtors believe that the Stipulation and all of the actions provided for and/or permitted thereunder are in the best interests of their estates and within the reasonable exercise of the Debtors' business judgment. See generally Committee of Equity Sec. Holders v. Lionel Com., 722 F.2d 1063, 1070-71 (2d Cir. 1983) (applying business judgment rule to decisions to use, sell or lease assets outside of the ordinary course of business); Wes-Flo. Inc. v. Wilson Freight Co., 30 B.R. 971, 975 (Bankr. S.D.N.Y. 1983) (asset sale). A debtor satisfies the "business judgment" test when it decides, in good faith, that the proposed action will benefit the estate. In re Chipwich. Inc., 54 B.R. 427, 430-31 (Bankr. S.D.N.Y. 1985); Commercial Fin. Ltd. v. Hawaii Dimensions. Inc. (In re Hawaii Dimensions. Inc.), 47 B.R. 425, 427 (D. Haw. 1985). The debtor in possession's application of its business judgment is subject to great judicial deference. In re WPRV-TV. Inc., 143 B.R. 315 (D. Puerto Rico 1991), *aff'd in part. rev'd in part.* 983 F.2d 336 (1st Cir. 1993); In re Thrifty Liquors. Inc., 26 B.R. 26 (Bankr. D. Mass. 1982); In re Moore, 110 B.R. 924 (Bankr. C.D. Cal. 1990); In re Walter, 83 RR. 14, 19-20 (9th Cir. B.A.P. 1988) (the court need only find that there is a rational basis for undertaking the proposed action). To minimize litigation and to expedite the administration of a bankruptcy estate, "[c]ompromises are favored in bankruptcy." 9 Collier on Bankruptcy 9019.03[1] (15th ed.). See also Protective Committee for Independent Stockholders of TMT Trailer Ferry. Inc. v. Anderson, 390 U.S. 414, 424 (1968) (bankruptcy court must employ its "informed, independent judgment" to determine whether the settlement is both "fair and equitable") (citations omitted). Courts will generally

approve a settlement if the proposed settlement is in the best interests of the estate. In re Depoister, 36 F.3d 582 (7th Cir. 1994).

10. In this instance, the Debtors have determined that the Lease is no longer needed for their businesses. The Stipulation provides substantial compensation for the Debtors' estates for the rejection of the Lease. The Debtors believe in their business judgment that the transactions facilitated by the Stipulation are fair and reasonable, and in the best interest of their estates and creditors.

Notice

11. Notice of the Motion was provided to: (a) the United States Trustee; (b) counsel to the pre-petition and post-petition lenders; (c) counsel to the Official Committee of Unsecured Creditors; (d) counsel to Sublandlord; and (e) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors submit that no further notice is required for entry of an order granting the Motion.

No Prior Request

12. No prior Motion for the relief requested herein has been made to this or any other Court.

WHEREFORE, Richmar respectfully requests that this Court enter an Order, in the form attached hereto, approving the Stipulation, authorizing Richmar to take all actions necessary to effectuate the Stipulation, and any other actions in accordance with the terms thereof, and granting the Debtors such other relief as is just and proper.

Dated: August 4, 2003

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