

**IN THE 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)  
: :  
: : **Objection Deadline: August 14, 2003**  
: : **at 4:00 p.m.**  
: : **Hearing Date: August 19, 2003 at 11:30 a.m.**

**MOTION OF THE CITY OF BIWABIK FOR RELIEF FROM THE  
AUTOMATIC STAY, OR IN THE ALTERNATIVE TO COMPEL  
REJECTION OF NON-RESIDENTIAL REAL PROPERTY LEASE**

The City of Biwabik, Minnesota, a municipal corporation (the "City"), by and through its undersigned counsel, hereby files this motion for relief from the automatic stay, or in the alternative, to compel rejection of a non-residential lease of real property (the "Motion"). The City seeks the entry of an order modifying the automatic stay pursuant to Title 11 United States Code section 362(d) (the "Bankruptcy Code") to permit the City to terminate its Lease (defined below) with the above captioned debtors and debtors in possession (collectively, the "Debtors"). Alternatively, the City seeks an order compelling the Debtors to immediately reject the Lease pursuant to 11 U.S.C. §365(d)(2). In support of this Motion, the City states as follows:

**Jurisdiction**

1. On April 1, 2003, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors are conducting their affairs and managing their properties as debtors in possession pursuant to 11 U.S.C. §1107(a)
2. No trustee has been appointed in these cases and an Official Committee of Unsecured Creditors was appointed on April 14, 2003.
3. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §1334. This

is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(A), (G) and (O). Venue is proper in this Court pursuant to 28 U.S.C. §§1408 and 1409.

### **Background**

4. The City of Biwabik is located in northern Minnesota approximately 60 miles north of Duluth and 90 miles south of the Canadian border. Biwabik, Minnesota (“Biwabik”) is a small town with a low to moderate income population of approximately 954 people, forty (40%) percent of which are elderly.

5. On or about April 11, 1994, the City entered into that certain Retail Building Lease ( the Lease was originally with Gateway Foods, Inc., subsequently acquired by the Debtors) for an area consisting of approximately 13,067 square feet (the “Leased Premises”) to be used as a supermarket (the “Lease”). A true and correct copy of the Lease is attached hereto as Exhibit “A”.

6. The Lease was subsequently sub-leased to a third party who operated a grocery store on the Leased Premises. On or about June 6, 2003, the sub-tenant ceased operations and the Debtors surrendered the keys and vacated the Leased Premises. Subsequently, the City purchased the assets and fixtures located on the Lease Premises from the Debtors pursuant to the “Pre-Auction” procedure establish in these Chapter 11 proceedings.

7. As of June 6, 2003 the Leased Premises has been vacant and the grocery store on the Leased Premises is no longer in operation. This grocery store was the only grocery store in Biwabik, Minnesota. The only other grocery store accessible to the residents of Biwabik is in the next town, approximately seven miles outside of the city. For may of the city residents, traveling that far to purchase and transport groceries to their homes is a hardship.

8. Upon information and belief, the Debtors have made the rental payment

pursuant to the Lease for the month of July but have not made the requisite payment for August.

9. Upon information and belief, the Debtors have terminated their operations at the Lease Premises and have ceased to comply with their obligations under the Lease. As a result, the residents of Biwabik are suffering immediate and irreparable harm. For these and other reasons, the City seeks relief from the automatic stay to terminate the Lease with the Debtors. The City needs relief in order to enable it to enter into an agreement with a third party to operate a grocery store on the Leased Premises and to provide its citizens with a local grocery store from which to purchase food and other household items necessary for their personal and family daily needs.<sup>1</sup>

#### **Relief Requested**

10. The City seeks relief from the automatic stay to terminate the Lease based on the Debtors' payment default, cessation of operations and the immediate need to reopen a grocery store on the Leased Premises. In the alternative, the City requests that the Court enter an order pursuant to 11 U.S.C. §365(d)(2) compelling the Debtors to reject the Lease.

#### **Basis for Relief**

##### **Stay Relief**

11. Section 362(d)(1) of the Bankruptcy Code provides that on request of a party in interest and, after notice and hearing, the Court shall grant relief from the automatic stay provided under subsection (a) of this section such as terminating, annulling, modifying or conditioning such stay, for cause, including lack of adequate protection of an interest and property of such party in interest.

12. The Bankruptcy Code does not define "cause". The Bankruptcy Court,

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<sup>1</sup> The City is currently negotiating with a third party to open and operate a grocery store on the leased premises and have been informed that such third party is prepared to commence operations on September 1, 2003.

however, must decide in each case whether sufficient cause exists for relief from the automatic stay. *See In re Wilson*, 116 F.3d 87, 90 (3<sup>rd</sup> Cir. 1997)(“Section 362(d)(1) does not define “cause,” leaving courts to consider what constitutes cause based on the totality of the circumstances in each particular case.”).

13. In this context, the court should consider: (i) whether any great prejudice to either the bankrupt estate or the debtor will result; (ii) whether the hardship to the non-bankrupt party by continuance of the stay considerably outweighs the hardship to the debtor; and (iii) the probability of the movant prevailing on the merits. *See In re Rexene*, 141 B.R. 574, 576 (Bankr. D.Del. 1992).

14. The City has demonstrated sufficient cause to grant relief from the automatic stay. As stated above, the grocery store that operated on the Leased Premises was the only grocery store in Biwabik. The residents of Biwabik are now forced to incur the added expense and for many, the burden, of traveling outside of the city to purchase the daily necessities of life for themselves and their families.

15. Pursuant to the proposed asset purchase agreement with C&S Wholesale Grocers, Inc. and C&S Acquisition LLC, the Debtors have six months to provide notice of any leases which will be assumed and assigned pursuant to the asset purchase agreement. A delay of six months will place the residents of Biwabik (many of which are elderly) in the middle of the harsh winter months that are common to northern Minnesota without an easily accessible grocery store. The City has been negotiating with a third party to operate a grocery store on the Leased Premises and have been informed that this third party would be ready to commence operations on September 1, 2003. If the City is not permitted to terminate the Lease, this opportunity may be lost to the detriment of the residents.

16. The prejudice to the Debtors in granting the relief requested is extremely minimal. The Lease is for a relatively small location serving a small rural population. The Debtors have already surrendered the keys to the Leased Premises, ceased operations and are no longer receiving any income from operations at this location. Additionally, the Debtors' will be relieved of the burden of making postpetition rental payments for a location which is no longer being operated. Therefore, it is quite clear that the Debtors will suffer little, if any, prejudice and, in fact, will benefit from eliminating the continuing obligation to pay postpetition rent.

17. As to the final factor, as a result of the Debtors cessation of operations and failure to pay rent, the Debtors have failed to comply with their obligations under the Lease and the remedy for such defaults is termination. Thus, the City believes that it has a reasonable chance of prevailing on the merits.

#### Rejection of the Lease

18. In the alternative, the City requests that the Debtors be compelled to immediately reject the Lease.

19. Section 365(d)(2) of the Bankruptcy Code provides in pertinent part that "the court, on request of any party to such contract or lease, may order the trustee [debtor in possession] to determine within a specified period of time whether to assume or reject such contract or lease". "Congress intended this provision to 'prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status *vis-à-vis* the estate'". *In re University Medical Center*, 973 F.2d 1065, 1079 (3d Cir. 1992)(citing S. Rep. No. 989, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 59 (1978), reprinted in 1978 U.S.C.C.A.N. 5787,5845). Accordingly, under section 365(d)(2), a debtor "is allowed a reasonable time to decide whether to assume or reject." *Theatre Holding Corp. v. Mauro*, 681 F.2d, 105 (2d Cir. 1982).

20. When deciding what is to be deemed as a reasonable period for determining whether to assume or reject a lease, the courts consider the following factors; “the nature of interests at stake, the balance of hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is . . . in derogation of Congress’ scheme[.]” *In re Beker Industries Corp.*, 64 B.R. 890, 896 (Bankr. S.D.N.Y. 1986); *see also In re Charrington Worldwide Enterprises Inc.*, 98 B.R. 65, 70 (Bankr. M.D. Fla. 1989).

21. The City respectfully submits that based on the equities, this Court should order the Debtors to immediately reject the Lease. As stated above, the Debtors have vacated the Leased Premises, ceased operations and defaulted on the August rental payment. The operation of a grocery store on the Leased Premises is vital to the residents of Biwabik and in the public interest. The Debtors have not indicated whether and when they are going to assume and assign the Lease or when another grocery store will open to meet the critical daily needs of this small rural community.

22. The interest at stake for the City is the operation of a grocery store for its residents while the interest at stake for the Debtors has been essentially mooted through their surrender and vacancy of the Leased Premises. Additionally, as explained above, a balancing of the harms and the good to be achieved clearly weighs in favor of the City.

#### **No Filing of Brief**

23. Because this Motion presents no novel issues of law, and the statutory and case law authorities relied upon by the City are set forth herein, the City is not filing a brief in support of this Motion. The City, however, reserves the right to file a brief in reply to any objection to this Motion or as otherwise deemed necessary by the City in accordance with the applicable rules of the Court.

**No Previous Request**

24. No previous request for the relief sought in this Motion has been made to this or any other Court.

WHEREFORE, the City respectfully requests the Court enter an Order: (i) modifying the automatic stay to allow the City to effectively terminate the Lease with the Debtors; or (ii) in the alternative, compelling the Debtors to immediately reject the Lease; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: August 5, 2003  
Wilmington, Delaware

BLANK ROME LLP



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