

**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)
: :
: Jointly Administered
Debtors. :
: :
: **Hearing Date: October 20, 2003 at 2:00**
: **p.m.(ET)**
: **Objection Deadline: October 13, 2003**
: **by 4:00 p.m.(ET)**

**MOTION OF DANA B. GEYER, TRUSTEE, E.B. GEYER TESTAMENTARY TRUST,
FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

The E.B. Geyer Testamentary Trust “A” and Dana B. Geyer as Trustee, by and through their undersigned counsel, Swartz Campbell LLC [hereinafter Geyer] by and through it’s undersigned counsel, hereby moves (the “Motion”) this Court pursuant to section 365(d)(3) of title 11 of the United States Code (the “Bankruptcy Code”), for an order (i) allowing its administrative expense claim as set forth herein under the Lease (as defined below), (ii) directing the Debtors and Debtors In Possession (the “Debtors”) to pay this administrative expense claim in full within ten (10) days from the date of entry of an order approving the Motion, and (iii) directing the Debtors to pay all future administrative expense claims arising from the Lease as they arise until the Lease is rejected or assumed pursuant to section 365 of the Bankruptcy Code. In support of the Motion, Geyer respectfully states as follows:

JURISDICTION & VENUE

1. On April 1, 2003, the Debtor , along with other affiliated entities filed

their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

2. The Debtor and its related entities (collectively, “Debtors”) are operating their businesses and managing their affairs as Debtors-in-Possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The statutory basis for the relief sought herein is 11 U.S.C. §§ 365(d)(3). Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

4. No trustee or examiner has been appointed in this Chapter 11 case.

5. Notice of this Motion has been given to (a) the United States Trustee, (b) counsel to the Committee, (c) counsel to the Debtors, and (d) the other parties on the general service list being maintained in these cases. Geyer submits that no other or further notice is required.

BACKGROUND

6. Geyer is the owner of record of non-residential property located at 331 South Main Place, Rice Lake WI [hereinafter the Property] and lessor under a Shopping Center Lease of November 18, 1977 [the Lease] with Fleming Companies as lessee, as successor to Gateway Foods Inc as a result of a 2/24/96 merger. A copy of said lease and connected documents is attached hereto as **Exhibit A**.

7. Under the Lease, the Debtor has certain obligations [the Lease Obligations], including the payment of Maintenance Expenses and Real Estate Taxes. Pursuant to the lease those obligations are due as follows as the Debtors have failed to make payments for the Lease Obligations in the manner required under the Lease:

<u>Description.</u>	<u>Lease Provision</u>	<u>Amount</u>
Maintenance	Paragraph 7.1	\$To be calculated
RE Taxes	Paragraph 17.1	\$39,574.93 ¹

8. The Debtors have not rejected the Lease or surrendered the Property to Geyer and, each month beginning April 1,2003, have paid 1/12 of their annual rent obligation under Article 17 Of the Lease.

RELIEF REQUESTED

9. By this Motion, Geyer seeks entry of an Order granting it an administrative expense claim in the amount of \$39,574.93 plus interest and penalties for Real Estate Taxes plus an amount to be calculated for maintenance expenses as the post-petition Lease Obligations owed by the Debtors, payable within 10 days of the Court's order , pursuant to section 365(d)(3) of the Bankruptcy Code. Geyer also seeks an Order requiring the Debtors to continue to timely pay their obligations consistent with the terms of the Lease and pursuant to section 365(d)(3) until the Lease is rejected or assumed.

BASIS FOR RELIEF REQUESTED

10. Section 365(d)(3)¹ of the Bankruptcy Code obligates a debtor-in-possession to timely perform its obligations pursuant to an unexpired lease for nonresidential real property. 11 U.S.C. § 365(d)(3). The purpose of this subsection is to relieve the burden

¹Attached hereto as **Exhibit B** is a copy of the notice of Real Estate Tax Due which has been sent to Debtor which establishes the principal amount. Movant also seeks interest and penalties which continue to accrue.

placed on non-residential property lessors during the period between the petition date and the assumption or rejection of the lease. *In Re: Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989 (6th Cir. 2000).

11. The express intent of § 365(d)(3) is to compel Debtor to perform Lease obligations in accordance with the terms of the lease. This provision of the Code, designed to protect lessors such as Geyer “requires payment of the full lease rent whether the space has greater or lesser market rental value, or whether the trustee is making full or no use of the premises.” *In Re: P.J. Clarke’s Restaurant Corp.*, 265 B.R. 392, 397 (S.D.N.Y. 2001)²

12. Pursuant to *In Re Montgomery Ward*, 3d Cir., 268 F.3d 205 (2002), Geyer is entitled to payments of lease expense obligations due as set forth by the controlling contract and according to the terms of that contract. *Id.* at 211. Pursuant to Paragraph 17.1 of the Lease, “Lessee agrees to pay when due all real estate taxes”. **Exhibit B** establishes that Real Estate Tax is due in the amount of \$39,574.93 to which interest and penalties are accruing.

13. With respect to the Maintenance Expenses, Paragraph 7.1 imposes on Lessee “as its expense to keep both the interior and exterior, including structural repairs of the demised premises in good repair and in a clean and wholesome condition”. Movant believes that Debtors have not complied with this obligation, which lack of compliance has occurred post petition, and therefore seek this Court’s designation of that obligation as an unliquidated administrative expense, subject to calculation.

²11 U.S.C. § 365(d)(3) is applicable to the Debtor through § 1107 of the Bankruptcy Code, which requires that a debtor-in-possession perform all the duties and obligations of a trustee, except as specified in section 1106 of the Bankruptcy Code. 11 U.S.C. § 1107..

14. Accordingly, as a lessor of non-residential real property Geyer is entitled to an administrative expense payment for the Debtors' post-petition obligations under the Lease *without regard* to the benefit requirement of § 503 of the Bankruptcy Code. See *In re Brewer*, 233 B.R. 825, 829 (Bankr. E.D. Ark. 1999). Additionally, Geyer is entitled to have the Debtors continue to timely pay future Rent until the Lease is properly rejected or assumed.

NO PRIOR REQUEST

15. Geyer has not made a prior request for the relief sought in this Motion to this or any other court.

WHEREFORE, Geyer respectfully requests that this Court enter an order, substantially in the form attached hereto as **Exhibit C** (i) allowing it administrative expense claims as set forth herein under the Lease, (ii) directing the Debtors to pay the liquidated portion of the administrative expense claims in full within ten (10) days from the date of entry of the Order, (iii) directing the Debtors to pay all future administrative expense claims arising from the Lease as they arise until the Lease is rejected or assumed pursuant to section 365 of the Bankruptcy Code, and (iv) granting such other further relief as the Court deems just and proper.

SWARTZ CAMPBELL LLC

By: s/ Richard P. S. Hannum
Richard P.S. Hannum (#665)
919 Market Street
17th Floor PO Box 330
Wilmington DE 19899
Tel: 610-692-9500x133
Fax: 610-692-4936
rhannum@swartzcampbell.com
Counsel for Landlord & Trustee

DATED: September 19, 2003