

**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
_____)	
		RE: D.I. No. 522

**SUPPLEMENT TO MOTION OF PHOENIX FOODCO INVESTORS, LLC
AND SLC FOODCO INVESTORS, LLC FOR ORDER UNDER
11 U.S.C. §§ 105, 365(d)(3) AND 503(b) DIRECTING DEBTORS
TO PAY UNPAID ADMINISTRATIVE LEASE OBLIGATIONS**

Phoenix Foodco Investors, LLC (the “Phoenix Landlord”) and SLC Foodco Investors, LLC (the “SLC Landlord” and, together with Phoenix Landlord, the “Landlords”), hereby supplement their pending motion for an order under 11 U.S.C. §§ 105, 365(d)(3) and 503(b) directing the above-captioned debtors and debtors-in-possession (the “Debtors”) to pay unpaid administrative lease obligations (the “Motion”),¹ and state as follows:

Preliminary Statement

1. In the Motion, the Landlords seek immediate payment of estimated real estate taxes and other amounts due under the Leases. As a result of the Motion, the Debtors have paid the estimated amounts due and owing under the SLC Lease, but not under the Phoenix Lease.

2. In the meantime, the parties have agreed to an effective rejection of the Leases on September 30, 2003, pursuant to a proposed order approving a stipulation that is presently pending before the Court. In connection with the rejection of the Leases, the Landlords informally advised the Debtors of all outstanding administrative expense claims under the Leases and the Landlords’ intention to supplement the Motion to address such administrative claims.

¹ All capitalized terms not defined herein are ascribed the meanings given to such terms in the Motion.

Supplement

3. By this Supplement to the Motion, the Landlords seek an order from this Court directing the Debtors to pay administrative expense obligations due under the Leases in the following amounts: \$24,340 to the SLC Landlord and \$465,093 to the Phoenix Landlord.

4. The SLC Landlord has an administrative expense claim for late charges under the SLC Lease incurred as a result of Fleming's late payment of rent during April and May 2003 in the amount of \$1,913.

5. The SLC Landlord has an administrative expense claim for real estate taxes incurred during the Debtors' use of the SLC Lease for the postpetition, prerejection period (April 1 to September 30, 2003) in the amount of \$22,427.²

6. The Phoenix Landlord has an administrative expense claim for late charges under the Phoenix Lease incurred as a result of Fleming's late payment of rent during April and May 2003 in the amount of \$1,059.

7. The Phoenix Landlord has an administrative expense claim for real estate taxes incurred during the Debtors' use of the Phoenix Lease for the postpetition, prerejection period (April 1 to September 30, 2003) in the amount of \$408,616.

8. The Phoenix Landlord has an administrative expense claim for unpaid sales tax on rent payments that were incurred during the Debtors' use of the Phoenix Lease for the postpetition, prejection period. The Phoenix Landlord also has an administrative claim for the unpaid sales tax on the rent payment made in March 2003 because those taxes were obligated to

² The total amount of the real estate taxes due for the postpetition, prerejection period is \$112,012, but Fleming made five monthly estimated tax payments of \$17,917, for a total of \$89,585. The \$22,427 number referenced above is the net remaining balance due.

be paid under the Phoenix Lease after the Petition Date.³ So the taxes due on the rent payments made between March and September 2003 equal \$55,418.

9. Section 365(d)(3) of the Code provides that the "trustee shall timely perform all the obligations of the debtor . . . 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"

10. Under section 365(d)(3), the Debtors are required to pay their postpetition lease obligations in full as they become due. See In re Pacific-Atlantic Trading Co., 27 F.3d 401, 404-05 (9th Cir. 1994); In re Barrister of Del., Ltd., 49 B.R. 446, 447 (Bankr. D. Del. 1985).

11. Despite the plain language of section 365(d)(3), the Debtors have failed to pay to the Landlords the amounts obligated to be paid under the Leases, including the late charges under both Leases and the sales tax on the rent payments made under the Phoenix Lease (through August 2003). The Debtors are obligated to pay these amounts promptly. See Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 211 (3^d Cir. 2001); In re Valley Media, Inc., 290 B.R. 73, 76 (Bankr. D. Del. 2003).

12. Section 503(b)(1)(A) states that administrative expenses are the "actual, necessary costs and expenses of preserving the estate." The amounts incurred during the postpetition, prerejection period, including the real estate taxes relating to the SLC Lease and the Phoenix Lease and the sales tax on the rent payments made under the Phoenix Lease, are actual, necessary costs and expenses of preserving the estates. See Valley Media, 290 B.R. at 76. There

³ Under the Phoenix Lease, the taxes are due before they become delinquent, which is on the 20th of the following month that the rent payment was made – so the tax on the March rent payment was due April 20. The Phoenix Landlord only learned recently that Fleming had never paid any of the sales tax since the inception of the Phoenix Lease. Nevertheless, the Phoenix Landlord is not asserting an administrative expense claim for the unpaid sales tax that were obligated to be paid before the Petition Date.

is no reason why such administrative expenses should not be paid promptly since the Leases are being rejected.

WHEREFORE, the Landlords respectfully requests that the Court enter an order (i) directing the Debtors to pay \$24,340 to the SLC Landlord and \$465,093 to the Phoenix Landlord within three business days and (ii) grant to the Landlords such other and further relief as is just.

Dated: Wilmington, Delaware
 September 22, 2003

ZUCKERMAN SPAEDER LLP

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