

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

FLEMING COMPANIES, INC.,  
ET AL.,

Debtor.

Case No. 03-10945 (MFW)  
(Jointly Administered)

Chapter 11

Judge: Honorable Mary F. Walrath

Objection Deadline: 09/25/03 @ 4:00 PM.  
Hearing Date: 10/02/03 @ 2:00 PM

**OBJECTION OF BLAIR ROAD REALTY CO. TO DEBTORS' MOTION FOR  
(A) AUTHORIZING AND SCHEDULING AN AUCTION FOR THE SALE OF  
CERTAIN OF THE DEBTORS' REAL PROPERTY; (B) APPROVING THE  
TERMS AND CONDITIONS OF SUCH AUCTION, INCLUDING BIDDING  
PROCEDURES RELATED THERETO; AND (C) APPROVING ASSIGNMENT  
PROCEDURES FOR AFFECTED UNEXPIRED LEASES  
[DOCKET NO. 3666]**

Blair Road Realty Co. ("Blair"), through its attorneys, Archer & Greiner, A Professional Corporation, respectfully objects to the Debtors' Motion for entry of an Order: (a) Authorizing and Scheduling an Auction for the Sale of Certain of the Debtors' Real Property; (b) Approving the Terms and Conditions of Such Auction, Including Bidding Procedures Related Thereto; and (c) Approving Assignment Procedures for Affected Unexpired Leases (the "Motion"). In support of this objection, Blair states as follows:

**BACKGROUND**

1. On April 1, 2003 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code. The Chapter 11 cases commenced thereby are jointly administered for administrative purposes only. The Debtors

operate their businesses and manage their properties as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 cases. An Official Committee of Unsecured Creditors was appointed on April 14, 2003.

2. On October 1, 1995, Blair leased to Royal Food Distributors, Inc., predecessor of the Debtors, the land and building thereon known as 215 Blair Road, Woodbridge, New Jersey, and also known as Lot 13, Block 974 on the Township of Woodbridge Tax Map, to be used and occupied only for refrigerated warehouse distribution of dairy products and offices and other incidental lawful uses (the "Blair Lease"). The building consists of approximately 190,000 square feet. A copy of the Blair Lease is attached as Exhibit A to the attached Certification of Edward Israelow ("Israelow Cert. Exh. A").

3. On June 20, 1994, the Debtors entered into a Sublease of the leased premises to DiGiorgio Corporation (the "Sublease"). Israelow Cert. Exh. B

4. The rent paid by the Debtors to Blair under the Lease is identical to the rent and other amounts paid to the Debtors by DiGiorgio under the Sublease. Israelow Cert., ¶ 5.

5. The Blair Lease was previously the subject of the Debtors' Motion to Authorize Motion for Order Pursuant to Section 365A of the Bankruptcy Code authorizing the Debtors' to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment filed April 2, 2003. (Docket No. 13). The Blair Lease was subsequently withdrawn from that Motion and made the subject of a Motion for Order Pursuant to Section 365(a) of the Bankruptcy Code authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property (Subleased Locations) (Docket No. 644, filed April 30, 2003). The Motion with regard to the

Subleased Locations was continued from time to time, and the proposed rejection of the Blair Lease never resolved.

6. The Debtors have most recently filed the Motion which proposes to conduct an auction in certain real estate owned by the Debtors, including 13 income producing leases. The Debtors state in paragraph 12 of the Motion that “[c]ertain of the Leases to be sold at the Auction are leases in which the Debtors’ have a subtenant (each a ‘Sandwich Lease’). The Debtors have decided to include only the cash flow positive Sandwich Leases in the Auction in order to maximize the Debtors’ flexibility in rejecting leases.”

7. Blair objects to the proposed inclusion of the Blair Lease in the auction and making the Blair Lease subject to the auction procedures on the bases that (1) the Blair Lease is not cash flow positive; and (2) the Debtors and the Debtors’ subtenant DiGiorgio have committed breaches of the Blair Lease which breaches are not capable of cure, such that the Debtors cannot meet the requirements of Section 365(b).

#### **BLAIR’S OBJECTION**

8. The Debtors have defined a Sandwich Lease as a lease in which the Debtors have a subtenant. The Debtors purpose to include only Sandwich Leases which are cash flow positive. The Blair Lease is subject to a sublease to DiGiorgio which essentially provides for DiGiorgio to pay the same rent under the sublease as is due to Blair under the Blair Lease. Accordingly, the Lease is, at best, cash flow neutral but certainly not cash flow positive. Israelow Cert., ¶ 5.

9. On June 18, 2003, DiGiorgio filed a Limited Response of DiGiorgio Corp. to Debtors’ Motion to Establish Procedures under Section 365 of the Bankruptcy Code (Docket No. 1557). This response was filed in partial opposition to the Debtors’ Motion to Establish Procedures for the Assumption and Rejection of Executory Contracts filed June 9, 2003 (Docket

No. 1383). In its Limited Response, DiGiorgio essentially objected to the inclusion of the Blair Lease in the procedures proposed by the Debtors for assumption and rejection. DiGiorgio stated that “[t]he Debtors’, however, derive no benefit at all from the sub-lease since the rent it receives under the sub-lease is equal to the amount of the prime rent that the Debtors’ pay to the prime landlord [Blair]. It is a ‘pass through’ sublease.”

10. Blair and DiGiorgio agree that neither the Blair Lease nor the sublease provide any economic benefit to the Debtors and are certainly not cash flow positive. Accordingly, the Blair Lease is not properly the subject of the Motion.

11. During the occupancy of the leased premises, either the Debtors or DiGiorgio have committed certain defaults under the Blair Lease, which defaults cannot be cured. These defaults were outlined in correspondence from Blair to the Debtors dated August 5, 2003, a copy of which correspondence is attached as Exhibit D to the Israelow Certification. These specific defaults are as follows:

a. DiGiorgio has apparently permitted the property to be occupied by a company known as Lilly Trucking. Blair believes that the use of the premises by this entity causes potential environmental contamination and increases in the fire hazards to which the leased premises are subject.

b. DiGiorgio has permitted another entity known as Food Town to occupy a portion of the premises offices.

c. The leased premises were listed in the New Jersey Department of Environmental Protection Environmental Data Base as a closed State Hazardous Waste Site, which was never disclosed to Blair by either Fleming or DiGiorgio. Apparently, a No Further

Action letter was issued in December 1996 from the New Jersey Department of Environmental Protection.

d. In the 1980's a regulated underground storage tank adjacent to the building was installed with a capacity of 500 to 1,000 gallons. Federal and state regulations require that such tanks installed before December 22, 1988, must have a leak detection system installed by December 1993 and spill-overfill/corrosion protection by December 1998. Blair has been provided no proof of compliance with these regulations as a result of the actions undertaken by the Debtors.

e. Blair has been advised that a total of 11 underground storage tanks were removed from the leased premises. Neither the Debtors nor DiGiorgio provided Blair with the closure documentation which is required to be submitted to the New Jersey Department of Environmental Protection nor has Blair been provided with copies of reports indicating that the tanks were closed in accordance with applicable regulations which specify the closure requirements for underground storage tanks containing hazardous substances. N.J.A.C. 7:14B-9.2 and 9.5. These regulations include the development and implementation of a closure plan including a site investigation requiring soil sampling at specified intervals for all tanks and piping.

f. Blair is advised that the operations at the leased premises result in the generation of hazardous waste. Blair has not been provided waste manifest with respect to removal of hazardous waste.

12. Section 365(b)(1) provides that if there has been a default on an executory contract, the contract cannot be assumed unless at the time of the assumption the debtor cures or provides adequate assurance that the debtor will promptly cure such default. If the court finds

that a breach cannot be cured, then assumption and assignment is not permitted. *In re Vencor, Inc.*, 2003 W.L. 21026737 (Bankr. D. Del. 2003).

13. The breaches of the Blair Lease which have been identified are not breaches which are susceptible to reversal or cure. The occupancy of the premises by unrelated entities and the use of the premises outside the use clause of the Blair lease are historical facts which cannot be reversed. Breaches of this nature prevent the assumption and assignment of an executory contract. *In re Deppe*, 110 B.R. 898, 904 (Bankr. D. Minn. 1990).

14. The Bankruptcy Court may retain some discretion in determining that lease provisions may be refused enforcement in the bankruptcy context, but this depends upon a finding of no economic detriment to the landlord and, correspondingly, the deprivation of the bankruptcy estate from realizing the intrinsic value of the contract. *In re Lee West Enterprises, Inc.*, 179 B.R. 204, 207-208 (Bankr. C.D. Cal. 1995), citing *In re Joshua Slocum*, 922 F.2d 1081, 1092 (3<sup>rd</sup> Cir. 1990). The conduct of the Debtors and DiGiorgio with respect to the leased premises presents not only material defaults under the Lease, but also the potential for significant economic detriment to Blair. The failure to comply with the applicable environmental laws and regulations with respect to tank removal presents significant future problems relating to the premises. Correspondingly, as indicated in the Israelow Certification and in the DiGiorgio pleading previously filed, the Blair Lease has no economic benefit to the Debtors.

WHEREFORE, Blair Road Realty Co. respectfully requests that the subject Lease be removed from the Motion and that the Debtors be directed to promptly reject such lease.

Dated: September 23, 2003

ARCHER & GREINER  
A Professional Corporation  
Attorneys for Blair Road Realty Co.

By s/John V. Fiorella  
John V. Fiorella (ID #4329)  
1300 Market Street, Suite 700  
Wilmington, DE 19801  
Telephone: 302.777.4350  
Facsimile: 302.777.4352

and

HELLRING LINDEMAN GOLDSTEIN &  
SIEGAL LLP  
John A. Adler (8147)  
One Gateway Center  
Newark, New Jersey 07102  
Of Counsel for Blair Road Realty Co.