

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In Re:	)	Chapter 11
	)	
Fleming Companies, Inc. et al. <sup>1</sup> ,	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
Debtors	)	Hearing Requested: October 20, 2003 2:00 p.m.
	)	Response Date Requested: October 14, 2003

**MOTION OF RENAISSANCE PLAZA ASSOCIATES, LP TO COMPEL PAYMENT OF  
POST-PETITION RENTS AND OTHER OBLIGATIONS, OR IN THE ALTERNATIVE,  
FOR RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C § 362(d)**

Renaissance Plaza Associates, LP (“RPA”), a party in interest, by and through its undersigned counsel, hereby submits this Motion to Compel Payment of Post-Petition Rents and other Obligations, or in the Alternative, for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d) (the “Motion”). In support of its Motion, RPA respectfully states as follows:

**INTRODUCTION**

1. RPA is a Pennsylvania limited partnership with offices located at c/o Montgomery Realty Company, 625 Ridge Pike, Building E, Suite 201, Conshohocken, Pennsylvania 19428, and the owner of the Leased Premises described in paragraph 2, below.

2. On or about May 24, 1994<sup>2</sup> Fleming Foods East, Inc., a Pennsylvania corporation (the “Tenant” or the “Debtor”), one of the Debtors in this case, executed that certain Build and Lease Agreement (the “Lease ”)<sup>3</sup> with RPA for the lease of commercial space located at Renaissance

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<sup>1</sup> The Debtors are the following entities: Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark International, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar 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.

<sup>2</sup> The first page of the Lease contains language that it is entered into on November 16, 1994, however the signature pages and other documents acknowledge that the Lease was originally signed on May 25, 1994.

<sup>3</sup> The Lease is identified as Contract No. 7038.

Plaza, New York Ave. and Atlantic Ave., Atlantic City, New Jersey (the “Leased Premises”).

The Lease was later amended on May 23, 1996.

3. On or about May 25, 1994<sup>4</sup>, the Debtor entered into that certain Sublease Agreement (the “Sublease”) with Renco Supermarket, L.P. (“Renco”), a New Jersey Limited Partnership with offices located at 44 Tanner Street, Haddonfield, New Jersey 08033<sup>5</sup>.

4. On or about May 25, 1994, RPA entered into that certain Sublease Non-Disturbance and Attornment Agreement (the “Renco Agreement”) with Renco and the Debtor.

5. Pursuant to the terms of the Lease, the Debtor is obligated, *inter alia*, to make payments to RPA on a monthly basis for rent and common area maintenance charges and on a quarterly basis for a pro rata portion of real estate taxes.

6. On April 1, 2003 (the “Petition Date”), the Debtors filed their voluntary petitions for relief (the “Chapter 11 Cases”) chapter 11 of title 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, et seq. (the “Bankruptcy Code”). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

7. As of the Petition Date, the Debtor was current it its obligations to RPA.

8. Subsequent to the Petition Date, the Tenant continued to make payments for monthly rent and common area maintenance through September 2003. The Debtor also paid its pro rata share of the real estate taxes for the quarter ending June 30, 2003.

9. On or about August 12, 2003, RPA submitted an invoice to the Debtor for its pro rata share of real estate taxes for the quarter ending September 30, 2003 (the “Third Quarter Taxes”).

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<sup>4</sup> The first page of the Lease contains language that it is entered into on November 16, 1994, however the signature pages and other documents acknowledge that the Lease was originally signed on May 24, 1994.

<sup>5</sup> The Sublease is identified as Contract No. 7039.

10. The invoice specified that payment was due with twenty (20) days of receipt or September 1, 2003. To date, no payment has been received by RPA on the invoice.

11. The Debtor has also failed to make its monthly payment for rent and common area maintenance charges for the month of October 2003. The total arrears as of October 2, 2003 are \$102,029.90 (the "Arrears"), including the amounts due for the Third Quarter Taxes.

12. As part of the Debtors' pre-petition distribution business, certain of the Debtors supplied a full line of grocery products to grocery stores, supercenters and specialty retailers through regional distribution centers (the "Wholesale Distribution Business"). The retailer operating from the Leased Premises was serviced out of the Debtors' Northeast distribution center until that distribution center closed in or about April 2003, after which the Debtors have failed to service the retailer and other of their former customers in the Northeastern United States.

13. As part of the post-petition administration of the Debtors cases, the Debtors moved to sell substantially all of the Wholesale Distribution Business assets pursuant to an asset purchase agreement (the "Purchase Agreement") between certain of the Debtors and C&S Wholesale Grocers, Inc. and C&S Acquisition LLC (the "Purchaser").

14. Among the assets of the Wholesale Distribution Business, were certain executory contracts and unexpired leases related to the Wholesale Distribution Business. RPA believes that the Debtors consider the Lease as part of the Wholesale Distribution Business assets.

15. On August 15, 2003, the Court entered an Order (the "Sale Order"), approving the Purchase Agreement and authorizing a sale of substantially all of the Wholesale Distribution Business assets and the assumption and assignment of certain executory contracts, license agreements and unexpired leases.

16. Pursuant to the terms of the Purchase Agreement, the Purchaser, during the six (6) months (the “Option Period”) following the closing date, may provide written notice to the Debtors requiring the Debtors to either (a) assume and assign to the Purchaser any executory contract or unexpired lease or (b) exclude the assignment of any executory contract or unexpired lease. The Option Period is now set to expire on or about February 23, 2004.

17. The Debtors have not yet moved to assume or reject the Lease .

18. The Debtors have filed that certain Second Motion to Extend Time to Assume, Assume and Assign, or Reject Unexpired Leases of Nonresidential Real Property (the “Motion to Extend”) seeking to extend the time to assume or reject non-residential leases to March 31, 2004 which would allow the Debtor to make appropriate motions to assume or reject upon the expiration of the Option Period.

19. The Motion to Extend states as follows: “The Debtors believe that they are current in all of their post-petition rent payments and other contractual obligations with respect to the [leases]. The Debtors intend to perform all of their obligations under the [leases] as required by [Bankruptcy Code § 365(d)(3)].” Motion at ¶19.

20. RPA intends to file a Limited Objection to the Motion to Extend based upon the Debtor’s failure to make certain post petition payments as described herein.

21. RPA seeks an order compelling the Debtor to (i) immediately pay the Arrears and (ii) continue making payments required under the terms of the Lease. In the alternative, RPA seeks relief from the automatic stay in order to pursue its remedies under state law.

#### **BASIS FOR RELIEF**

22. Bankruptcy Code § 365(d)(3) provides, in relevant part:

The [debtor] shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), 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.

11 U.S.C. § 365(d)(3).

23. Bankruptcy Code § 365(d)(3) therefore requires the Debtors to timely perform its obligations under the terms of the Lease without requiring that RPA file a Motion under Bankruptcy Code § 503(b)(1) seeking allowance of an administrative claim.

24. As demonstrated herein, the Debtor is not current on its obligations to RPA, having failed to pay monthly rental and common area maintenance obligations for the month of October and the Third Quarter Taxes.

25. Accordingly, RPA seeks an Order (i) compelling the Tenant to immediately pay the Arrears to RPA and (ii) requiring the Tenant to continue making post-petition payments until the Tenant's obligations under the Lease are terminated by assumption, assumption and assignment or rejection, or any other disposition approved by this Court.

26. In the alternative, RPA seeks relief from the automatic stay in order to pursue its state court remedies under the terms of the Lease.

27. Bankruptcy Code § 362(d) provides, in relevant part:

On request of a party in interest and after notice and hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; or

(B) such property is not necessary to an effective reorganization. . .

11 U.S.C. § 362(d).

28. Shortly after the Petition Date, the Debtors closed their distribution facilities that served the Leased Premises and are not currently supplying, and have not since May 2003 supplied, the retailer operating from the Leased Premises; thus, the Debtors' intentions are clear: they do not intend to resume their business operations as it relates to the Leased Premises.

29. The Leased Premises are not necessary to an effective reorganization.

30. The Tenant has failed to make required payments for the October rent and common area maintenance charges and the Third Quarter Taxes.

31. Sufficient cause exists to modify the automatic stay in order to allow RPA to pursue its rights under state law with regard to the Leased Premises.

WHEREFORE, RPA respectfully requests that the Court enter an Order compelling (i) the Debtor to immediately pay the sum of \$102,029.90 to RPA, and (ii) the Debtor to timely make all other payments required by the Lease until such time as the Debtor's obligations are terminated by assumption, assumption and assignment or rejection, or any other disposition approved by this Court, and for all other relief as is appropriate. In the alternative, RPA respectfully requests that this Court enter an Order granting RPA relief from the automatic stay

as it applies to the Lease and the Leased Premises in order to allow RPA to exercise its rights under state law, and for all other relief as is appropriate.

Dated: October 3, 2003

FOX ROTHSCHILD LLP

By: /s/ Michael J. Viscount, Jr.  
Sheldon K. Rennie, Esquire  
Delaware Bar No. 3772  
919 N. Market Street, Suite 1300  
Wilmington, DE 19899-2323  
302/654-7444; 302/656-8920 (fax)  
[srennie@foxrothschild.com](mailto:srennie@foxrothschild.com)

and

Michael J. Viscount, Jr., Esquire  
1301 Atlantic Avenue  
Midtown Building, Suite 400  
Atlantic City, NJ 08401-7212  
(609) 348-1515 (phone)  
(609) 348-6834 (fax)  
E-mail: [mviscount@foxrothschild.com](mailto:mviscount@foxrothschild.com)

Counsel for Renaissance Plaza Associates, LP