

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re	)	Chapter 11
FLEMING COMPANIES, INC., <i>et al.</i> ,	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
Debtors.	)	Hearing Date: 10/02/03 @ 2:00 p.m.
	)	Objection Deadline: 10/9/03 (as to PRIM)

**OBJECTION BY PRIM FLEMING WAREHOUSE, LLC TO DEBTORS'  
MOTION FOR AN ORDER PURSUANT TO SECTION 365(a) OF THE  
BANKRUPTCY CODE AUTHORIZING DEBTORS TO ASSUME AND ASSIGN  
THE MIAMI FOODCO SUBLEASE AND TO REJECT THE PRIM LEASE  
[RE: DN 3711]**

1. PRIM Fleming Warehouse, LLC (“PRIM”), by and through its undersigned counsel, hereby submits this objection to the *Debtors’ Motion for an Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing Debtors to Assume and Assign the Miami Foodco Sublease and to Reject PRIM Lease Pursuant to an Asset Purchase Agreement between the Debtors and G&S Wholesale Grocers, Inc. and C&S Acquisition LLC* (the “Motion”) as authorized on the record by this Court at the October 2, 2003 hearing on the Motion.<sup>1</sup> While PRIM does not oppose the rejection of the Debtors’ nonresidential real property lease with PRIM, PRIM requests that any order authorizing rejection of the lease include a provision that (a) establishes the effective date of rejection as the later of turnover of the premises to PRIM and the entry of this Court’s order authorizing rejection; and (b) requires, pursuant to section 365(d)(3) of the Bankruptcy Code, immediate payment by the Debtors of post-petition rent and additional

rent for the full month of October 2003, less any amounts that may be paid by Associated Grocers of Florida, Inc. for the same.

### **Background**

2. PRIM is party to the unexpired lease of nonresidential real property (the “Lease”) with Fleming Companies, Inc. located at 3400 NW 74<sup>th</sup> Avenue, Miami, Florida (the “Warehouse”).

3. In early July 2003, the Selling Debtors and C&S entered into a Purchase Agreement pursuant to which the Selling Debtors were to sell the Debtors’ wholesale distribution business to C&S. On July 11, 2003, the Selling Debtors filed the Sale Motion with this Court. On August 15, 2003, the Court entered an order approving the Sale Motion.

4. In connection with the Purchase Agreement, on August 4, 2003, the Debtors filed a *Notice Re Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion* seeking to assume and assign the Warehouse to Associated Grocers of Florida, Inc. (“Associated Grocers”), the designee of C&S. Shortly thereafter, the Debtors filed a *Supplemental Notice Re: Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion* [Docket No. 2719]. In response, PRIM filed a timely cure objection (Docket No. 2289) and commenced negotiations with Debtors’ counsel concerning the amount demanded in the cure objection. In connection with such negotiations, the Debtors forwarded certain financial information concerning Associated Grocers’ ability to provide adequate assurance of future performance under the Lease.

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have their meanings given to them in the Motion.

However, on the eve of the hearing with regard to the cure objection, Debtors' counsel informed PRIM's counsel that the Lease was incorrectly listed on the Initial Assignment List. As a result of the Debtors' mistake, PRIM's counsel verbally informed Debtors' counsel that it reserved the right to seek attorneys' fees, in a cure objection or otherwise, for services rendered and expenses incurred by PRIM's counsel in connection with the Debtors' error.

5. On August 21, 2003, the Debtors filed a *Notice of Assumption and Assignment of Certain Executory Contracts and Unexpired Leases to Associated Grocers of Florida, Inc.* [Docket No. 3295], to assume and assign the Miami Foodco Sublease to Associated Grocers. On September 17, 2003, the Debtors filed the instant Motion, seeking to reject the Lease effective to September 30, 2003 and to assume and assign the Miami Foodco Sublease. Foodco filed a timely objection to the Motion on September 25, 2003. Because the hearing was set for October 2, 2003, only two days into October, and further because PRIM was in separate and unrelated negotiations with Associated Grocers for a potential long term lease agreement or purchase of the Warehouse, PRIM elected not to object to the Motion. At the October 2, 2003 hearing, this Court took the matter under advisement and informed PRIM's local counsel that PRIM could submit an objection on or before Thursday, October 9, 2003.

6. As of the date of this letter brief, the Debtors have not surrendered the Warehouse to PRIM. In addition, certain racking systems remain inside the Warehouse.

## Objection

### A. **Rejection Is Effective upon the Date That the Bankruptcy Court Enters Its Order Granting Relief**

7. The rejection of a lease in bankruptcy may occur in one of two ways: (1) expiration of the initial 60-day period after the bankruptcy filing without the debtor seeking to assume the lease or extend the time to assume or reject; or (2) order of the Bankruptcy Court. *See* 11 U.S.C. § 365(d)(4); *Thinking Machines Corp. v. Mellon Financial Services Corp. #1 (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1<sup>st</sup> Cir. 1995). Until either of these alternatives occurs, the automatic stay precludes PRIM from exercising control or taking any action with respect to the Warehouse. *See* 11 U.S.C. § 362. As a result, PRIM cannot re-let the space, or take any binding action with respect to the space, until the Court enters an order rejecting the Lease. This circumstance is no fault of PRIM, and equitable considerations dictate that PRIM receive prompt payment for this period as required by section 365 of the Bankruptcy Code.

8. Debtors offer no authority to support their request for retroactive relief. This is not surprising because the Bankruptcy Code and the relevant case law provide that rejection of a lease is generally not effective until it is so ordered by the Bankruptcy Court. In *Thinking Machines*, the First Circuit held that rejection of a lease of nonresidential real property is ineffective until entry of a bankruptcy court order approving such rejection. *See id.* at 1022. In reaching its conclusion, the Court found that bankruptcy court approval was properly a condition precedent to rejection because (i) the structure of the Bankruptcy Code and the essential role of judicial oversight in the chapter 11 process indicated Congressional intent that such prior approval be required; (ii) enactment of the Bankruptcy Code in 1978 indicated Congressional intent to overhaul

prior bankruptcy practice and to make court approval of lease rejections obligatory for the first time; and (iii) a court order is an especially important element of the judicial proceeding and to disregard the role of a court would “trivialize judicial oversight of the rejection process.” *Id.* at 1025-26.

9. Additional case law supports the *Thinking Machine* rationale that rejection of a lease is generally not effective until it is so ordered by the Bankruptcy Court. *See In re Federated Department Stores, Inc.*, 131 B.R. 808, 815 (S.D. Ohio 1991) (reversing bankruptcy court’s approval of retroactive rejection as requested by debtor); *In re Arizona Appetito’s Stores, Inc.*, 893 F.2d 216 (9<sup>th</sup> Cir. 1990); *In re Worth’s Stores, Corp.*, 130 B.R. 531 (Bankr. E.D. Mo. 1991) (prohibiting retroactive rejection notwithstanding that the debtor had vacated the premises and notified landlord of same); *Paul Harris Stores, Inc. v. Mabel L. Salter Realty Trust (In re Paul Harris Stores, Inc.)*, 148 B.R. 307 (S.D. Ind. 1992); *Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.)*, 27 F.3d 401 (9<sup>th</sup> Cir. 1994) (section 365(d)(3) expresses the intent of Congress to secure for lessors the full amount of rent due during the 60-day period while the trustee determines whether to accept or reject the lease, regardless of any benefit to the estate); *In re Swiss Hot Dog Co.*, 72 B.R. 569, 571 (D. Colo. 1987); *In re 1 Potato 2, Inc.*, 182 B.R. 540, 542 (Bankr. D. Minn. 1995) (absent a compelling equitable reason to the contrary, a debtor is not entitled to a retroactive rejection date).

10. PRIM is entitled to performance under the Lease until it receives turnover of the Warehouse. Absent some affirmative conduct by PRIM delaying the rejection or turnover of the Warehouse, the Debtors must compensate PRIM for their post-petition control over the Warehouse. *See Amber’s Stores, Inc.*, 193 B.R. 819, 825 (Bankr. N.D.

Tex. 1996); *see also*; *Paul Harris Stores*, 148 B.R. 307 (S.D. Ind. 1992); *In re Federated Dep't Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991); *Allegheny Center Assocs. v. Appliance Store, Inc. (In re Appliance Store, Inc.)*, 148 B.R. 226 (Bankr. W.D. Pa. 1992); *In re Revco D.S. Inc.*, 109 B.R. 264, 267-68 (Bankr. N.D. Ohio 1989). Therefore, the effective date for the rejection of the Lease should be no earlier than the date the Court enters its order authorizing rejection.

11. Even those minority cases that have authorized retroactive relief recognize that it is the exception rather than the rule. These cases typically rely on extraordinary circumstances to deviate from the generally recognized rule that the date of the order establishes the effective date of rejection. *See Amber's Stores*, 193 B.R. at 821; *see also In re APS Holding Corp.*, No. 98-197 (PJW) (Bankr. D. Del. Feb. 2, 1998); *In re Homeplace Stores, Inc.*, No. 98-8 (PJW) (Bankr. D. Del. Jan. 5, 1998) (retroactive relief granted where debtors relinquished control to the premises to the landlord on or before the date requested). In *Amber's Stores*, the court acknowledged the general rule that the effective date of a lease rejection is the date of the entry of a court order approving rejection. The court deemed such order a condition precedent to an effective rejection of the lease. *Id.* at 825-26. In summarizing its view that the entry of the order is the proper effective date of lease rejection, the Court stated:

Why should the debtor be penalized by having to wait for an order to be entered rejecting a lease before the lease is considered rejected, when there is an unequivocal action on the debtor's part to reject the lease, the debtor is receiving no benefit from the leased premises, and the debtor has filed a motion with the court to reject? The short answer to this question is because the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure require it.

*Id.* at 826.

12. In *Amber's Stores*, the court granted retroactive relief only because of the unique circumstance presented in that case; the Court found that the overwhelming equities favored the relief requested by the debtor. *See id.* at 827. The debtor in *Amber's Stores* (1) notified its landlord of its intent to vacate and cease operations over a month before filing; and (2) vacated the leased premises and turned over the keys to landlord over a month prior to filing bankruptcy. This is not the circumstance presented to the Court in this case. Although the Motion claims that “[t]he Selling Debtors will have surrendered the Warehouse to PRIM as of September 30, 2003,” the fact remains that the Selling Debtors have yet to surrender the premises and have not returned the keys to PRIM (symbolic of actual surrender). The Debtor does not assert (nor do they exist) any of the unique facts set forth in *Amber's Stores*. The Debtor had not vacated the Warehouse at the time it filed the Motion. Accordingly, there is no equitable reason for the Court in this case to deviate from the majority of cases ruling against retroactive rejection.

13. In addition, it is not altogether a foregone conclusion that the request to reject the Lease will not be withdrawn. This possibility weighs against the informal standard in this District, first announced by former Chief Judge Peter J. Walsh, that retroactive rejection is appropriate only in instances where a debtor has made an unequivocal, definitive representation to the court and the landlord that under no circumstances will it withdraw its request for rejection. As seen from the Debtors' withdrawal of their notice to PRIM that they intended to assume and assign the Lease to Associated Grocers, the Debtors may withdraw this Motion as well. The Debtors have moved to assume and assign the Foodco sublease of the freezer warehouse adjacent to the

Warehouse. Foodco has objected in writing to such relief on the ground that if the Lease is rejected, the Foodco sublease necessarily must be rejected per the terms of the sublease and for solid economic reasons. Furthermore, this Court has conducted an evidentiary hearing on the matter. In the event this Court rules in favor of Foodco and against assumption and assignment of the Foodco sublease, it remains possible for the Debtors to move to assume and assign *both* the Lease and the Foodco sublease.

14. Moreover, even if the Debtor subsequently vacated before entry of the order approving the rejection, PRIM may not re-enter or re-let the Warehouse until entry of the rejection order. PRIM can not access the Warehouse or represent to a prospective tenant that it has control or possession of the Warehouse until entry of a rejection order. For these reasons, and consistent with the majority of cases ruling against retroactive rejection, the rejection of the Lease should not be effective until the *later of* the date the Debtor vacates or surrenders possession to PRIM and entry of the order approving the rejection.

**B. Because the Effective Date of Rejection Will Necessarily Fall After October 1, 2003, PRIM Is Entitled to Full Rent and Additional Rent from the Debtors for October 2003.**

15. Section 365(d)(3) of the Bankruptcy Code provides that “the trustee [or debtor-in-possession] shall timely perform all 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.” The Third Circuit Court of Appeals has ruled that the date of performance of an obligation under an unexpired lease governs whether that obligation must be fully performed for purposes of Section 365(d)(3) of the Bankruptcy Code. See In re Montgomery Ward Holding Corp., 268 F.3d 205 (3d Cir. 2001). In Montgomery Ward,



the Third Circuit considered a lease requiring the debtor (a) to reimburse the landlord for all taxes related to the leased premises upon receipt of an invoice for the same from the landlord; and (b) to provide a deposit for taxes to be billed in the future. See id. at 207. The debtor filed its bankruptcy petition on July 7, 1997. On July 11, 1997, the landlord sent invoices to the debtor for 1996 and 1997 taxes and the deposit due under the lease. The Court found section 365(d)(3) unambiguous, holding that because the obligations arose under the lease when the invoices were sent by the landlord, all of the invoiced amounts were required to be paid under Section 365(d)(3). See id. at 210.

16. The Montgomery Ward Court followed the performance approach adopted previously by the Sixth Circuit in In re Koenig Sporting Goods, Inc., 203 F.3d 986 (6<sup>th</sup> Cir. 2000). See id. at 211. In Koenig, the debtor filed a voluntary chapter 11 petition on August 18, 1997. On November 25, 1997, the debtor notified its landlord that it was rejecting the lease effective December 2, 1997. Following rejection, the landlord claimed that, because monthly rent was due under the lease in advance on the first day of the month, the debtor was required to pay all of the December 1997 rent as administrative rent under Section 365(d)(3). The Sixth Circuit stated, “[u]nder these circumstances, § 365(d)(3) is unambiguous as to the debtor’s rent obligations and requires payment of the full month’s rent.” Id. at 989. Because the debtor controlled when to file its motion and chose the second day of the month to reject, the Court found that the equities of the matter favored the landlord. Moreover, the court specifically held that the landlord was not receiving a “windfall;” rather, the landlord was receiving “that to which it is entitled under § 365(d)(3) and the debtor is obligated to pay under the lease.” Id. at 990.

17. Several other courts have adopted the “performance” approach since the Koenig decision. See, e.g., Ha-Lo Industries, Inc. v. Centerpoint Properties Trust, 342 F.3d 794 (7<sup>th</sup> Cir. 2003) (citing Montgomery Ward and Koenig in requiring the debtor to pay a full-month’s rent notwithstanding mid-month rejection); In re CCI Wireless, LLC, 279 B.R. 590 (Bankr. D. Colo. 2002) (same); In re Comdisco, Inc., 272 B.R. 671, 674-76 (Bankr. N.D. Ill. 2002) (citing Montgomery Ward and noting that advance rent during the pre-rejection period is “a charge for the consumption of a resource during the administration of the case”).

18. By seeking retroactive rejection, the Debtors are also attempting to avoid the clear dictates of section 365(d)(3), the Third Circuit’s holding in Montgomery Ward, similar authority in other jurisdictions, and the requirement in the Lease that full rent must be paid on the first of each month. The Debtors could have moved earlier to provide ample notice to PRIM and to Foodco but chose to file its Motion September 17, 2003. The Debtors could have moved for shortened notice and/or expedited consideration of the Motion. In failing to do so, this Court did not hear the Motion until the October 2, 2003 omnibus hearing date. This Court should not reward the Debtors with retroactive rejection to September 30, 2003 contrary to well-settled authority for failing to file the Motion earlier.

#### **Notice**

19. This objection has been served upon: (a) counsel for the Debtors; (b) the Office of the United States Trustee; (c) counsel to the Senior Secured Lenders; (d) counsel to the Official Committee of Unsecured Creditors; (e) counsel for David Minkin, Patricia M. Lester, Peter L. and Paul H. Briger, the E. T. Family Partnership, landlords under the Ground Lease for the Miami Foodco Sublease; (f) counsel to Miami Foodco

Investors, LLC, the sublandlord under the Miami Foodco Sublease; and (h) counsel to Associated Grocers. PRIM submits that, in light of the nature of the relief requested, no other or further notice need be given.

**WHEREFORE**, PRIM respectfully requests that this Court enter an order (i) establishing an effective date of rejection as the later of the Debtors' surrender of the Warehouse to PRIM and the date of entry of the Court's order (the "Effective Date"); (ii) requiring immediate payment by the Debtors of post-petition rent and additional rent for the full month of October 2003, less any amounts that may be paid by Associated Grocers for the same; and (iii) granting to PRIM such other and further relief as is just and proper in the circumstances.

Dated: October 9, 2003  
Wilmington, Delaware

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**CERTIFICATE OF SERVICE**

I, Jennifer A. L. Kelleher, Esquire, hereby certify that on this 9th day of October, 2003, I caused a true and correct copy of the foregoing objection to be served on the following list in the manner indicated:

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