

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	)	Regarding D.I. 3836

LIMITED OBJECTION OF RENAISSANCE PLAZA ASSOCIATES, L.P. TO DEBTORS'  
SECOND MOTION TO EXTEND TIME TO ASSUME OR REJECT LEASES

Renaissance Plaza Associates, LP (“RPA”), a party in interest, by and through its undersigned counsel, hereby submits this limited objection to the Debtors’ Second Motion to Extend Time to Assume, Assume and Assign, or Reject Unexpired Leases of Nonresidential Real Property (the “Motion”). In support of its Limited Objection, RPA respectfully states as follows:

**INTRODUCTION**

1. RPA is a Pennsylvania limited partnership with offices located at c/o Kramont Realty Trust, 580 West Germantown Pike, Suite 200, Plymouth Meeting, Pennsylvania 19462, and the owner of the Leased Premises described in paragraph 2, below.

2. On or about November 16, 1994<sup>2</sup> Fleming Foods East, Inc., a Pennsylvania corporation (the “Original Lessee”), executed that certain Build and Lease Agreement (the “Lease ”)<sup>3</sup> with RPA for the lease of commercial space located at Renaissance Plaza, New York

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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 by the Debtors as Contract No. 7038.

Ave. and Atlantic Ave., Atlantic City, New Jersey (the “Leased Premises”). The Lease was guaranteed by Fleming Companies, Inc. (the “Debtor”) pursuant to a separate document executed in connection with the Lease, and later amended on May 23, 1996 pursuant to that certain Amendment to Build and Lease Agreement (the “Amendment” and together with the Lease, herein called the “Lease Agreement”) which names the Debtor as the lessee under the Lease.

3. On or about November 16, 1994, the Original Lessee 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>4</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 Original Lessee.

5. Upon information and belief, sometime after execution of the Lease and before May 1996, Original Lessee merged with Fleming Companies, Inc. as a result of which Debtor became the Lessee under the Lease Agreement.

6. Pursuant to the terms of the Lease Agreement, 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.

7. 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.

8. As of the Petition Date, the Debtor was making the payments due under the Lease Agreement and was current on such obligations due to RPA.

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<sup>4</sup> The Sublease is identified by the Debtors as Contract No. 7039.

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

10. On or about August 12, 2003, RPA submitted an invoice to the Debtor for the pro rata share of real estate taxes in the amount of \$47,619.02 due under the Lease Agreement for the quarter ending September 30, 2003 (the “Third Quarter Taxes”).

11. 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 for the Third Quarter Taxes.

12. The Debtor also failed to make the monthly payment for rent and common area maintenance charges (the “Monthly Rent”) as and when due under the Lease Agreement for the month of October 2003. The Monthly Rent is due on the first of each month, but was not paid to RPA until October 7, 2003.

13. 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”). Renco, as 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.

14. 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”).

15. 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 Agreement as part of the Wholesale Distribution Business assets.

16. 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.

17. 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.

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

19. The Motion seeks to extend the time to assume or reject non-residential leases to March 31, 2004 which would allow the Debtors to make appropriate motions to assume or reject upon the expiration of the Option Period.

20. The Motion 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.

## **BASIS FOR LIMITED OBJECTION**

21. Pre-petition, the Debtors closed the distribution facilities that served the Leased Premises and the Debtors are not currently supplying the retailer at the Leased Premises with products for sale. Accordingly, the Debtors are generating little if any income from the operation of their business at the Leased Premises.

22. Upon a showing of cause by a debtor or trustee, courts may grant extensions of the assumption or rejection time period. See, e.g., *Legacy, Ltd. V. Channel Home Centers* (In re Channel Home Centers), 989 F.2d 682, 688-89 (3d Cir.) cert. denied, 114 S.Ct. 184 (1993); *In re American Healthcare Management*, 900 F.2d 827, 830 (5th Cir. 1990); *In re Victoria Station, Inc.*, 875 F.2d 1380, 1384-85 (9th Cir. 1989).

23. The term “cause” as used in Bankruptcy Code § 365(d)(4) is not defined in the Code. In determining whether cause exists for an extension of the assumption or rejection time period, courts have relied on several factors, including the following:

- a. Whether the case is complex and involves a large number of leases;
- b. Whether the leases are primary among the assets of the debtor; and
- c. Whether the lessor continues to receive post-petition rental payments.

24. While Bankruptcy Code §365(d) grants the Debtors the opportunity to seek and extension of time within which to assume or reject non-residential real property leases, Bankruptcy Code §365(d)(3) requires the Debtors to timely perform all obligations of the debtor until such lease is assumed or rejected. The Debtors have not complied with the requirements of Bankruptcy Code §365 because, as demonstrated herein, the Debtors are not current in their obligations to RPA.

25. RPA is concerned that if the Debtors' Motion is granted, the Debtors will not continue to make payments as required until the Lease Agreement is assumed and assigned or rejected thus increasing the substantial arrears already due to RPA.

26. RPA has also filed a Motion to Compel Post-Petition Payment of Rents and Charges, or in the Alternative for Relief from the Automatic Stay (the "Motion to Compel").

27. Any extension of the Debtors' time periods within which to assume, assign and reject the Lease Agreement should be conditioned upon the immediate payment of the Third Quarter Taxes due to RPA in the amount of \$47,619.02. Further, any extension should also be conditioned upon the Debtors promptly making all other post-petition payments as required under the Lease Agreement until an Order is entered terminating the Debtors' obligations thereunder.

WHEREFORE, RPA respectfully requests that any Order entered on the Debtors' Motion include provisions that require the Debtors to immediately pay to RPA the sum of \$47,619.02 and any other outstanding post-petition payments due to RPA under the Lease Agreement, and to promptly make all other and future payments as required under the Lease Agreement until an Order is entered terminating the Debtors' obligations thereunder, and for all other relief as is appropriate.

Dated: October 9, 2003

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