

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

IN RE:	:	Chapter 11
	:	
FLEMING COMPANIES, INC., <u>et al.</u> ,	:	Case No. 03-10945 (MFW)
	:	(Jointly Administered)
Debtor.	:	Objection Deadline: October 13, 2003
	:	Hearing Date: October 20, 2003 @ 2:00P.M.

**OBJECTION OF MERIDIAN PLAZA ONE, LLC TO DEBTORS'
SECOND MOTION PURSUANT TO SECTION 365(D)(4) OF THE
BANKRUPTCY CODE FOR ENTRY OF AN ORDER EXTENDING
TIME TO ASSUME, ASSUME AND ASSIGN, OR REJECT
UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

MERIDIAN PLAZA ONE, LLC (“Meridian”) respectfully submits this objection to the second motion pursuant to 11 U.S.C. § 365(d)(4) for entry of an order extending the time to assume, assume and assign, or reject unexpired leases of nonresidential real property (the “Motion”) filed by the jointly administered estates of Fleming Companies, Inc. et al. (the “Debtors”) and states the following:

1. Meridian is the owner of property (the “Property”) that Fleming Companies, Inc. (“Fleming”) subleases to Lunardi’s Supermarkets. The lease was previously identified in the Notice Re Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale Motion (the “Cure Notice”) as **contract assignment # 6863** (the “Lease”).

2. 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”).

3. Among the assets of the proposed sale, were certain executory contracts and unexpired leases owned by the Debtors.

4. 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.

5. Pursuant to the terms of the Purchase Agreement, the Purchaser, during the six (6) months (the “Option Period”) following the closing date of August 23, 2003, 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.

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

7. The Motion seeks to extend the time to assume or reject non-residential leases including the Lease to March 31, 2004.

8. 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.

9. Meridian submits that Fleming is not current in its post-petition obligations with respect to the Lease.

10. Pursuant to the Lease, Fleming is required to maintain the Property in good condition. There are significant repairs required at the Property, which is supported by a

Property Condition & Seismic Assessments report dated August 16, 2002 prepared for Meridian by ESEC, Earthquake & Structural Engineering Consultants. Meridian received a bid from Devcon Construction, Inc., a well-regarded general contractor in Northern California, regarding the costs of the repairs. The total repair costs attributable to Fleming is approximately \$265,430.04, plus the 3% overhead and profit amount.¹ Fleming has not paid these post-petition obligations.

11. In addition, pursuant to the Lease, Fleming is required to pay Bonus Rent,² which is defined as 1.5% of the gross sales for the period of November 1st through October 31st of each year. The Bonus Rent for November 1, 2002 through October 31, 2003 will be due on November 1, 2003. The Bonus Rent for November 1, 2001 through October 31, 2002 was \$179,351.00. It is anticipated that the Bonus Rent due on November 1, 2003 will exceed the Bonus Rent paid last year, and thus, shall be in excess of \$180,000.00.

12. 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).

13. In determining whether cause exists for an extension of the assumption or rejection time period, courts have relied on several factors, including the following:

¹ The documentation supporting the repair costs was attached to Meridian's objection to the Cure Notice and to Meridian's proof of claim, and is incorporated herein by reference.

² The documentation supporting the Bonus Rent was attached to Meridian's objection to the Cure Notice and to Meridian's proof of claim, and is incorporated herein by reference.

- 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.

14. While 11 U.S.C. § 365(d) grants the Debtors the opportunity to seek an extension of time within which to assume or reject non-residential real property leases, Section 365(d)(3) requires the Debtors to timely perform all obligations until the Lease is assumed or rejected. The Debtors have not complied with the requirements of Section 365 because, as set forth above, Fleming is not current under the Lease obligations, and will owe significant Bonus Rent as of November 1, 2003. Meridian is concerned about the substantial unpaid obligations and the prospect of the significant increase of unpaid obligations on November 1, 2003.

WHEREFORE, Meridian respectfully requests that the Court deny the Debtors' Motion, or alternatively, require Fleming to pay the unpaid obligations under the Lease due through November 1, 2003, including the Bonus Rent, as a condition of granting the Motion.

FOX ROTHSCILD LLP

By: /s/ L. Jason Cornell

L. Jason Cornell, Esquire
Delaware Bar No. 3821
Magdalena Schardt, Esquire
919 N. Market Street, Suite 1300
Wilmington, DE 19801-3046
302/654-7444; 302/656-8920 (fax)
jcornell@foxrothschild.com
mschardt@foxrothschild.com

Attorneys for Meridian Plaza One, LLC

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