

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: FLEMING COMPANIES, INC., <i>et al.</i> ,	:	Chapter 11
	:	
Debtors.	:	Case No.: 03-10945 (MFW)
	:	
	:	Jointly Administered
	:	
	:	Hearing Date: October 20, 2003
	:	Hearing Time: 2:00 p.m.

**LIMITED OBJECTION OF CAM-I, LLC AS SUCCESSOR IN INTEREST TO EVPM
LIMITED PARTNERSHIP TO DEBTORS' MOTION FOR ORDER PURSUANT TO
SECTION 365(c) OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS
TO REJECT CERTAIN UNEXPIRED LEASES AND SUBLEASES OF NON
RESIDENTIAL REAL PROPERTY [DI 3815]**

CAM-I, LLC as successor in interest to EVPM Limited Partnership [hereinafter CAM-I] by and through it's undersigned counsel, Fox Rothschild LLP, hereby serves notice of it's limited objection to the Debtors' Motion for Order Pursuant to Section 365(c) of The Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases and Subleases of Non-Residential Real Property [hereinafter the Motion]. In support of the objection CAM-I states as follows:

1. On September 25, 2003, the Debtor¹, along with other affiliated

¹ The Debtors include the following: Fleming Company, 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.

entities, moved this Court for an Order seeking to reject certain non-residential leases. [DI 3815]. In addition to rejection, Debtors seek to have the effective date of the rejection made retroactive to September 30, 2003.

BACKGROUND

2. According to Exhibit A of the Motion, Debtors seek to reject, among others, the lease described as AZ-025.

3. CAM-I is the owner of record of non-residential property [hereinafter the Property] and lessor under a September 1, 1994 Build and Lease Agreement, described in the Motion as AZ-025, with Debtors' affiliate.

4. Under the Lease, the Debtor has certain obligations [hereinafter the Lease Obligations] including the payment of Rent, Common Area Maintenance [CAM] charges, Real Estate Taxes and Sales Taxes. Pursuant to the lease those obligations are due as follows:

<u>Desc.</u>	<u>Lease Provision</u>	<u>Due Date</u>	<u>Amount</u>
Rent	Paragraph 6	1 st of month	\$27,250.00
Fuel Rent	Paragraph 5	1 st of month	\$ 1,666.67
Landscape	Paragraph 2	1 st of month	Proportional Share
Mgmt Fees	Paragraph 2	1 st of month	Proportional Share
Sales Taxes	Paragraph 2	variable	
Sweeping	Paragraph 2	1 st of month	Proportional Share
Water	Paragraph 2	1 st of month	Proportional Share

5. The Debtors failed to payments for the Lease Obligations in the manner required under the Lease. Specifically the Debtor is presently delinquent as follows:

Description	Amount	Date Due
October 03 Rent	\$ 27,250.00	10/1/2003

October 03 Landscape	\$ 450.00	10/1/2003
October 03 Management Fee (store)	\$ 847.62	10/1/2003
October 03 Sweeping Fee	\$ 198.25	10/1/2003
October 03 Fuel Facility Rent	\$ 1,666.67	10/1/2003
October 03 Management Fee (fuel)	\$ 53.50	10/1/2003
Sales Tax 2%	\$ 609.32	10/1/2003
October 03 Total	\$ 31,075.36	10/1/2003

NATURE OF OBJECTION

6. By the Motion Debtors seeks entry of an Order (i) rejecting certain leases; and (ii), retroactively rejecting the Lease back to September 30, 2003.

7. CAM-I takes no position with respect to the reasonableness of the Debtors' exercise of business judgment in rejecting the leases.

8. CAM-I, however, objects to the Debtors' request that the Court order relief retroactively. At present, the Debtor is delinquent for October rents, CAM, sales tax and potentially its pro-rata real estate property taxes. CAM-I objects to the entry of a retroactive Order to the extent such Order relieves the Debtor of satisfying its current Lease Obligations.

ARGUMENT - *Section 365*

9. Section 365(d)(3)² of the Bankruptcy Code obligates a debtor-in-possession to timely perform its obligations pursuant to an unexpired lease for non-residential real property. 11 U.S.C. § 365(d)(3). Section (d)(3) provides:

² 11 U.S.C. § 365(d)(3) is applicable to the Debtor through § 1107 of the Bankruptcy Code, which requires that a debtor-in-possession perform all the duties and obligations of a trustee, except as specified in section 1106 of the Bankruptcy Code. 11 U.S.C. § 1107.

The Trustee *shall timely perform all* of the obligations of the debtor, except those specified in 365(b)(2), arising from and after the order for relief under any unexpired leases of nonresidential real property, *until such lease is assumed or rejected*

(Emphasis added). The purpose of this subsection is to relieve the burden placed on non-residential property lessors during the period between the petition date and the assumption or rejection of the lease. *In Re: Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989 (6th Cir. 2000).

10. The express intent of § 365(d)(3) is to compel Debtor to perform Lease obligations in accordance with the terms of the lease. This provision of the Code, designed to protect lessors such as CAM-I, “requires payment of the full lease rent whether the space has greater or lesser market rental value, or whether the trustee is making full or no use of the premises.” *In Re: P.J. Clarke’s Restaurant Corp.*, 265 B.R. 392, 397 (S.D.N.Y. 2001).

11. Pursuant to *In Re Montgomery Ward*, 3d Cir., 268 F.3d 205 (2002), CAM-I is entitled to payments of the Lease Obligations as due and proscribed by the controlling contract and according to the terms of that contract. *Id.* at 211.

12. Section 365’s mandatory language combined with the *Montgomery Ward* Court’s commandment that such obligation are due as per the controlling contract compel the conclusion that the Debtor is not entitled, under the facts of this Motion, to retroactive rejection of the CAM-I lease. The Bankruptcy Code and case law within this Circuit are clear: until a lease is finally rejected the Debtor must timely perform all

obligations due under the controlling contract. Timely performance, as described by the *Montgomery Ward* court is when the obligation arises under the contract. Under the CAM-I Lease the time for “timely performance” was October 1. Debtors’ request for retroactive relief is inconsistent with Congressional intent set out in Section 365 and the Third Circuit’s interpretation of that intent.

ARGUMENT – *Nunc Pro Tunc*

13. What the Debtors seek is an order *nunc pro tunc*. Such discretionary orders should only be granted under extraordinary circumstances. *In re: Arkansas Co.*, 3d Cir., 798 F.2d 645, 650 (1986); *In re GC Companies, Inc.*, D. Del., 274 BR 663, 671-72 (2002). Such is hardly the case here. Given the clear and mandatory language of §365(d)(3) CAM-I asserts that the Debtor must establish to the Court’s satisfaction that extraordinary circumstances warrant the entry of a *nunc pro tunc* order. *Arkansas, supra* at 648. Debtors make no such showing. Indeed, Debtor makes no circumstantial showing other than to assert that the estate may save \$780,485 monthly. This alone does not rise to the level of exceptional circumstances upon which the Court should balance the underlying equities. *In re Thinking Machines Corp.*, 1st Cir., 67 F. 3d 1021, 1034 (1995). There is no suggestion that the delay in effecting rejection was the fault of the lessors/creditors. *See e.g., In re Jamesway Corp.*, S.D.N.Y., 179 B.R. 33, 39 (1995). There is no suggestion or evidence that the lessor(s) locked the Debtors out the premises. *See eg., In re O’Neil Theatres, Inc.*, Bankr. E.D. La., 257 BR 806 (2000). There is no evidence that the Debtor effectively rejected lease pre-petition. *In re Amber Stores, Inc.*, Bankr. N.D.

Tex., 257 BR 806 (1996).

14. The Debtors offer no explanation why the Motion could not be made and heard prior to September 30.³ In the absence of such an explanation, this Court should refrain from exercising its extraordinary equitable powers. 11 U.S.C. § 105(a); *In re GST Telecom*, D. Del., 2001 WL 686971 (June 8, 2001).

15. CAM-I, however, is half-pregnant and in the untenable position of having “Debtors’ possession” without have the concomitant legal right to use the property for economic gain. More daunting is that CAM-I is financially liable for events occurring between the effective date of the rejection and the date of the Order without the ability to mitigate against that risk.⁴

16. Until this Court signs the Order rejecting the lease, the leasehold interest remains property of the estate. 11 U.S.C. § 541; *In re American Int'l Airways*, 44 B.R. 143, 145 (Bankr. E.D.Pa.1984). The Debtor does not have authority to remove such property from the estate absent Court order. *Thinking Machines, supra*, at 1022. Likewise the property is subject to the automatic stay under 11 U.S.C. § 362. Even though Debtors have turned over the keys to the property, in practical terms CAM-I has nothing more than an act of legal bagatelle mired in uncertainty that, in this day, is no more evidence of ownership than is the ancient common law tradition of passing a clump of dirt between buyer and seller upon the transfer of property.

³ Nothing prevented the Debtors from seeking an expedited hearing. *Local Rule of Bankruptcy Practice and Procedure of the United States District Court for the District of Delaware* 9006-1(c).

17. Finally, the majority of courts that have considered the issues rejected the application, such as Debtors make here, for retroactive lease rejection. *Thinking Machines, supra*; *In re Arizona Appetito's Stores, Inc.*, 9th Cir., 893 F.2d 216 (1990); *In re O'Neil Theatres, Inc., supra*; *In re Jamesway Corp.*, 179 B.R. 33 (S.D.N.Y. 1995); *In re Federated Dept. Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991); *In re Valley Steel Products Co.*, 147 B.R. 168 (Bankr. E.D.Mo.1992); *In re Garfinckels, Inc.*, 118 B.R. 154 (Bankr. D.C.1990); *In re Worths Stores Corp.*, 130 B.R. 531 (Bankr. E.D.Mo.1991); *In re 1 Potato 2, Inc.*, 182 B.R. 540 (Bankr. D.Minn.1995); *In re Compuadd Corp.*, 166 B.R. 862 (Bankr. W.D.Tex.1994); *In re Appliance Store, Inc.*, 148 B.R. 234 (Bankr. W.D.Pa.1992); *Maroon v. Four Star Pizza, Inc. (In re Four Star Pizza, Inc.)*, 135 B.R. 498 (Bankr. W.D.Pa.1992). Even those courts that have awarded such relief did so in the face of self-described extraordinary circumstances or facts. *E.g., Amber Stores, supra*, at 827 (1996).

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⁴ A retroactive rejection opens the lessor up to incalculable landowner uncertainty and liability.

WHEREFORE, CAM-I respectfully requests that this Court deny the Debtors' request for retroactive application of Lease AX-032(b), as described in the Motion, and enter an order, substantially in the form attached hereto as **Exhibit B** (i) requiring the Debtors to pay and maintain all obligations due up to and including the date that the rejection order is signed' (ii) directing the Debtors to pay such administrative expense claims in full within ten (10) days from the date of entry of the Order, (iii) granting such other further relief as the Court deems just and proper.

FOX ROTHSCHILD, LLP

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Attorney For CAM-I, LLC as successor in interest to
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DATED: October 13, 2003

Certificate of Service

I, Bernard George Conaway, Esquire, hereby certify that on October 13, 2003, a copy of the **LIMITED OBJECTION OF CAM-I, LLC AS SUCCESSOR IN INTEREST TO EVPM LIMITED PARTNERSHIP TO DEBTORS' MOTION FOR ORDER AUTHORIZING THE DEBTORS TO REJECT CERTAIN UNEXPIRED LEASES AND SUBLEASES OF NON RESIDENTIAL REAL PROPERTY [DI 3815]** was served upon the following counsel as indicated:

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