

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

<p>In re:</p> <p>FLEMING COMPANIES, INC., <u>et al.</u>,</p> <p style="text-align: center;">Debtors.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p style="text-align: right;">Chapter 11</p> <p style="text-align: right;">Case No. 03-10945 (MFW) (Jointly Administered)</p> <p style="text-align: right;">Objection Deadline: October 13, 2003 Hearing Date: October 20, 2003 @ 2:00 P.M.</p>
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OBJECTION OF BRIGANTINE TOWN CENTER ASSOCIATES, LP TO THE 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

Brigantine Town Center Associates, LP (“BTCA”), by and through its undersigned counsel, hereby objects to the 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 (the “Motion”) and, in support thereof, respectfully represents as follows:

1. BTCA, as successor-in-interest to Brigantine Harbour Limited Partnership, owns the Brigantine Town Center in Brigantine, New Jersey (the “Shopping Center”). BTCA leases a supermarket located in the Shopping Center to the Debtors pursuant to a Build and Lease Agreement dated March 7, 1989 (the “Lease”) which, in turn, the Debtors sublease to Brigantine Supermarket, Inc. (the “Subtenant”). A true copy of the Lease is attached hereto as Exhibit “A.”

2. The Lease provides, in relevant part, as follows:

7.1 TAXES AND ASSESSMENTS. As additional rental, the LESSEE agrees to pay to the LESSOR, on demand, the amount of all taxes and assessments levied and assessed against the premises . . . (emphasis supplied).

3. On August 15, 2003, this Court entered an Order authorizing the Debtors to sell substantially all of the Wholesale Distribution Business assets to C&S Wholesale Grocers, Inc. and C&S Acquisition LLC or their designees (collectively, “Purchaser”) pursuant to an Asset Purchase Agreement (“APA”) and granting related relief. The APA provides, inter alia, that during the six (6) month period following the closing date of August 23, 2003 (the “Option Period”), the Purchaser may provide written notice to the Debtors requiring them either to assume and assign to the Purchaser, or exclude the assignment of, any executory contract or unexpired lease. The Option Period expires on or about February 23, 2004.

4. The Debtors have not yet sought to assume or reject the Lease. Despite the expiration of the Option Period on February 23, 2004, the Debtors seek in the Motion to extend the time to assume or reject the Lease pursuant to Section 365(d)(4) of the Bankruptcy Code (the “Section 365(d)(4) Extension”) until March 31, 2004.

5. In support of the Motion, the Debtors assert that they are current in all of their post-petition rent payments and other contractual obligations with respect to the Lease and intend to perform all of their obligations thereunder as required by Section 365(d)(3) of the Bankruptcy Code. See Motion at ¶ 19. The Debtors further posit that the landlords will not be prejudiced as a result of the requested Section 365(d)(4) Extension. Id.

6. The Debtors’ contentions are completely inaccurate. On September 17, 2003, before the Motion was filed, BTCA’s counsel advised the Debtors’ counsel that the Debtors were delinquent for almost two (2) months in their payment of third (3d) quarter real estate taxes in the amount of \$14,131.41 (the “Tax Payment”). A true copy of the September 17, 2003 letter is attached hereto as Exhibit “B.” BTCA did not receive payment of the Tax Payment in response to the initial July 25, 2003 notice or counsel’s September 17, 2003 letter. Curiously, the Debtors

have failed to discharge their obligations under the Lease despite their likely receipt of reimbursement from the Subtenant for the Tax Payment.

7. Additionally, on October 2, 2003, BTCA's counsel reminded the Debtors that the Tax Payment had not yet been made. To date, BTCA has not received a response to the October 2, 2003 letter, a true copy of which is attached hereto as Exhibit "C."

8. The United States Court of Appeals for the Third Circuit has recognized that a debtor may be granted more than one Section 365(d)(4) Extension for "cause." In re Channel Home Centers, Inc., 989 F.2d 682, 688-89 (3d Cir.), cert. denied, 114 S.Ct. 184 (1993). See also, 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).

9. In determining whether cause does not exist for granting a Section 365(d)(4) Extension, courts consider several factors, including whether the debtor is paying the rent that is reserved under the lease. See in re Wedtech Corporation, 72 B.R. 464, 472 (Bankr. S.D.N.Y. 1987) (citing Theatre Holding Corp. v. Mauro, 681 F. 2d. 102, 105-106 (2d Cir. 1982)). Application of this factor to the case sub judice establishes that cause does not exist to grant another Section 365(d)(4) Extension.

10. In addition, Section 365(d)(3) of the Bankruptcy Code requires the Debtors to timely perform all of their obligations under the Lease until it is assumed or rejected. The Debtors have not complied with the requirements of Section 365(d)(3) as they have failed to remit the Tax Payment in accordance with the Lease.¹

¹ In addition, the Debtors will have to pay fourth (4th) quarter real estate taxes on or about November 1, 2003.

11. Respectfully, the Bankruptcy Code and relevant case law do not permit the Debtors to enjoy the benefits of the Lease while ignoring their obligations thereunder, thereby transforming BTCA into an involuntary provider of post-petition services. Unless the Debtors say what they mean and mean what they say in the Motion, to wit, that they are and will remain current under the Lease until it is assumed or rejected, the Debtors' time to assume or reject the Lease should not be extended.

WHEREFORE, BTCA respectfully requests that this Court enter an Order denying the Motion as it relates to the Lease and granting such other relief as the Court deems just and appropriate under the circumstances.

DATED: October 13, 2003

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.

By: /s/ Ilana Volkov
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FOR THE DISTRICT OF DELAWARE**

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

CERTIFICATION OF SERVICE

I, Ilana Volkov , Esq., hereby certify that on October 13, 2003, I caused to be served a true and correct copy of the foregoing Objection (without Exhibit A), via facsimile, upon all counsel on the attached service list.

Dated: October 13, 2003

/s/ Ilana Volkov

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