

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
Fleming Companies, Inc., et al.,) Case No. 03-10945 (MFW)
) (Jointly Administered
Debtors.)
) **Hearing Date: 10/20/03 @ 2:00 p.m.**
) **Objections Due: 10/14/03 @ 4:00 p.m.**
) (10/13/03 was federal holiday)

RE: D.I. No. 3918

**LIMITED OBJECTION OF THE BENENSON CAPITAL COMPANY
AND THE LAROB CAPITAL COMPANY IN RESPONSE TO DEBTORS'
MOTION FOR AN ORDER PURSUANT TO SECTION 365(C) OF
THE BANKRUPTCY CODE APPROVING THE STIPULATION
REGARDING THE UNEXPIRED REAL PROPERTY LEASE AND
SUBLEASE FOR 4576 WILLOW ROAD, PLEASANTON,
CALIFORNIA (LEASE NO. CA-237) AND THE REJECTION OF SAME**

The Benenson Capital Company ("Benenson") and The Larob Capital Company ("Larob"), by their undersigned counsel, in support of their limited objection to *Debtors' Motion for an Order Pursuant to Section 365(c) of the Bankruptcy Code Approving the Stipulation Regarding the Unexpired Real Property Lease and Sublease for 4576 Willow Road, Pleasanton, California (Lease No. CA-237) and the Rejection of Same* (the "Motion"), respectfully state:

a. The Stipulation Will Result in Injury to the Landlord, a Non-Party.

1. Benenson and Larob are collectively the "Landlord" and debtor Fleming Companies, Inc. is the "Tenant" of the property at 4576 Willow Road, Pleasanton, California (the "Property"), pursuant to a lease between the Landlord and the Tenant, dated October 15, 1985 (the "Prime Lease"). A copy of the Prime Lease is annexed to the Debtors' Motion as Exhibit B.

2. The Tenant in turn subleases the Property to Quaker Sales and Distribution, Inc. (the "Subtenant"), pursuant to a sublease agreement between the Tenant and Subtenant, dated

November 12, 1992 (the "Sublease"). A copy of the Sublease is annexed to the Debtors' Motion as Exhibit C.

3. In their Motion, the Debtors seek approval of a Stipulation between the Tenant and Subtenant. A copy of the Stipulation is annexed to the Debtors' Motion as Exhibit A. The Landlord is not a party to the Stipulation.

4. Pursuant to the Stipulation, the Subtenant would buy its way out of the Sublease by paying a fee to the Tenant. The basic fee to be paid by the Subtenant is \$1,750,000. In addition, the Subtenant agrees to reimburse the Tenant for amounts that the Tenant may have to pay to the Landlord by reason of the Tenant's rejection of the Prime Lease, up to a maximum of \$100,000, or by reason of the Tenant's pre-petition defaults under the Prime Lease, up to a maximum of \$30,000. In return for the Subtenant's payments as aforesaid, the Tenant agrees that it will reject and terminate the Sublease.

5. The Tenant and the Subtenant further agree in the Stipulation that the Tenant will cause the Prime Lease to be rejected as of December 31, 2003, contemporaneous with the Tenant's rejection and termination of the Sublease. As previously indicated, the Landlord is not a party to the Stipulation, nor is the Landlord to receive any part of the consideration to be paid by the Subtenant to the Tenant under the Stipulation. Nevertheless, as a result of the Stipulation, the Landlord's Prime Lease is to be rejected.

6. The Landlord does not seek by this limited objection to prevent the Tenant from obtaining this Court's approval of the Stipulation. Rather, the Landlord objects to the proposed relief to the extent that the Order sought by the Tenant may in any manner prejudice claims which the Landlord has or will have against the Tenant or against the Subtenant by reason of the consummation or approval of the Stipulation or by reason of breaches of the Prime Lease or

Sublease. To avoid any such inference, the Landlord seeks a provision in the Order to be issued by the Court acknowledging that the Order is without prejudice to any such claims.

b. By entering into the Stipulation, the Tenant and Subtenant are taking action which will constitute a breach of the Prime Lease.

7. To put the Debtors' current Motion in context, it is relevant to note that the Stipulation between the Tenant and Subtenant comes on the heels of an earlier motion in which the Debtors sought approval for a very different treatment of the Prime Lease and Sublease.

8. On or about September 12, 2003, the Debtors filed a *Motion for Order: (a) Authorizing and Scheduling an Auction for the Sale of Certain of the Debtors' Real Property; (b) Approving the Terms and Conditions of Such Auction, Including Bidding Procedures Related Thereto; and (c) Approving Assignment Procedures for Affected Unexpired Leases* (the "Sale Motion"). In the Sale Motion, the Debtors sought permission to sell the Prime Lease, not reject it, pursuant to an auction process. The Prime Lease was included in a group of so-called "Sandwich Leases," that is, situations in which the Debtors were both tenants under a prime lease and sublandlords under a sublease. The Debtors indicated in the Sale Motion that each of the Sandwich Leases, including the Prime Lease, provides positive cash flow to the Debtors. In other words, with respect to the Prime Lease, the Debtors earn more rent under the Sublease than they are obligated pay to the Landlord under the Prime Lease. Had the Sale Motion gone forward as filed, one would anticipate that the Prime Lease would have been assumed and assigned to the highest bidder at auction, and the Debtors would thereby have derived value from the Prime Lease for their creditors.

9. Apparently, after filing the Sale Motion, the Tenant and the Subtenant formed an alliance, resulting in the Stipulation and the Debtors' withdrawal of the Prime Lease from the Sale Motion. Thus, the Tenant is seeking to reject the Prime Lease rather than putting it up for auction. From the Tenant's point of view, the Stipulation presumably provides the Tenant with a greater cash

recovery than it hoped to achieve by assuming the Prime Lease and assigning it to the highest bidder at auction. From the Subtenant's point of view, the Stipulation presumably enables the Subtenant to buy its way out of a lease that it apparently feels is burdensome. It would therefore appear that the Stipulation is, on its face, beneficial to the Tenant and Subtenant. For the Landlord, on the other hand, the Tenant's alliance with the Subtenant changes the situation drastically for the worse. Thus, rather than having the Prime Lease assumed and assigned, and pre-petition arrears cured, the Landlord will now have its Prime Lease rejected and will suffer a substantial loss of rents.

10. The Landlord does not dispute that the Tenant may, pursuant to Section 365(a) of the Bankruptcy Code, seek an Order of this Court permitting the Tenant to reject the Prime Lease. Nevertheless, in contrast to the Sale Motion's proposed assumption and assignment of the Prime Lease and the Sublease, the Tenant's rejection of the Prime Lease will give rise to claims which the Landlord may file against the Tenant in the Tenant's bankruptcy case.¹

11. In addition, the consummation of the Stipulation may give rise to claims against the Subtenant for the damages that the Landlord will suffer as a result of the rejection of the Prime Lease, and the Landlord's claim against the Subtenant will not be precluded or limited in any manner by Sections 365(g) and 502(b) of the Bankruptcy Code. By this limited objection, the Landlord seeks a provision in the Court's Order reflecting that the Order does not purport to resolve, and is without prejudice to, any claims that the Landlord may now or hereafter have against the Subtenant.

¹ Pursuant to Sections 365(g)(1) and 502(b)(6) of the Bankruptcy Code, the Tenant's rejection damage claims against the Tenant will be limited in certain respects. The rejection claim is not at issue on the Motion, however, and the calculation of the rejection claim is therefore not relevant. Of course, the Landlord's rejection damage claim is separate and apart from any claims the Landlord may have to administrative rent.

12. Although the Landlord's claims against the Subtenant are not presently before this Court, and likely will never be before this Court, for purposes of notice to parties in interest, the Landlord can briefly outline the nature of such claims. In this regard, Section 23.1 of the Prime Lease provides, in part:

Lessee may sublet the Property or any part thereof, without the prior written consent of Lessor, provided that each sublease shall expressly be made subject to the provisions of this Lease and a copy thereof shall be forwarded to Lessor within 10 days after the effective date thereof.

13. Section 23.2 of the Prime Lease contains the following additional language regarding subleases:

If the Property or any part thereof is sublet to, or occupied by, or used by, any person other than Lessee, whether or not in violation hereof, Lessor after default by Lessee under this Lease, may collect Basic Rent and additional rent from the subtenant, user of occupant.

14. In recognition of the foregoing obligations, the Sublease between Tenant and Subtenant provides at section 5.1, in part:

This sublease and [Subtenant's] occupancy of the Leased Premises shall be subject to all the terms, conditions, and provisions of the Lease and this Sublease Agreement shall automatically terminate upon any termination of the Lease. Unless specifically assumed by [Subtenant] herein, [Subtenant] shall have no responsibility to perform any affirmative obligation of [Tenant] under or pursuant to the Lease. [Tenant] and [Subtenant] each agree that they will not take any action or fail to take any action which may constitute a Default under the Lease.

15. The Tenant's proposed rejection of the Prime Lease, pursuant to the Stipulation between the Tenant and the Subtenant, will constitute a breach of the Prime Lease for which the Landlord will have a claim to assert in the Tenant's bankruptcy case. Indeed, although Section 365(a) of the Bankruptcy Code permits a debtor to reject an executory contract or lease, the Bankruptcy Code expressly acknowledges in Section 365(g) that the rejection "constitutes a breach of such contract or lease."

16. Under the terms of the Prime Lease and Sublease, including those quoted above, the Landlord's breach of the Prime Lease, pursuant to the Stipulation, will give rise to claims in favor of the Landlord and against the non-debtor Subtenant. Thus, the Prime Lease requires that any subtenant assume the obligation to pay the rent stipulated in the Prime Lease in the event that the Tenant defaults, and the Subtenant affirmatively assumed that obligation in the Sublease. Accordingly, when the Tenant discontinues its payment of rent under the Prime Lease, the Landlord will have a claim against the Subtenant for the unpaid rent. In addition, by entering into the Stipulation, a key aspect of which is the rejection of the Lease, the Tenant and Subtenant have already violated their express undertaking in the Sublease that "they will not take any action or fail to take any action which may constitute a Default under the Lease."

WHEREFORE, Benenson and Larob respectfully reserve all their rights to assert any and all claims they have or may hereafter have against the Tenant or Subtenant as a result of the transactions contemplated in the Stipulation, or by reason of any breaches of the Prime Lease or Sublease, and respectfully request that the Order include a provision in its Order reflecting that the Order does not purport to resolve, and is without prejudice to, any claims that the Landlord may now or hereafter have against the Tenant or Subtenant .

Dated: Wilmington, Delaware
October 14, 2003

Respectfully submitted,

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