

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 at 2:00 p.m.
	)	Objections Due: 10/13/03

**REPLY OF QUAKER SALES & DISTRIBUTION, INC. TO LIMITED OBJECTION OF  
THE BENSONSON CAPITAL COMPANY AND THE LAROB CAPITAL COMPANY IN  
RESPONSE TO DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTION  
365(c) THE BANKRUPTCY CODE APPROVING THE STIPULATION REGARDING  
THE UNEXPIRED REAL PROPERTY LEASE AND SUBLEASE FOR 4576 WILLOW  
ROAD, PLEASANTON, CALIFORNIA  
AND THE REJECTION OF SAME**

Quaker Sales & Distribution, Inc. ("Quaker"), by its attorneys, submits this Reply to the Limited Objection of the Benenson Capital Company and the Larob Capital Company (collectively, "Landlord") 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 "Limited Objection").

**I. BACKGROUND**

Landlord owns the property at 4576 Willow Road, Pleasanton, California (the "Property"). Fleming Companies, Inc. ("Fleming") is the tenant at the Property pursuant to a lease dated October 15, 1985 (the "Prime Lease"). A copy of the Prime Lease is attached to the Debtors' Motion as Exhibit B. Fleming in turn entered into a Sublease for the Property with Golden Grain, Inc. on November 12, 1992 (the "Sublease"). Golden Grain subsequently assigned its rights under the Sublease to Quaker. A copy of the Sublease is attached to the Debtors' Motion as Exhibit B. Both the Prime Lease and the Sublease expire by their terms on October 15, 2005.

The Debtors have filed a motion to approve a Stipulation between them and Quaker pursuant to which Quaker will pay the Debtors at least \$1,750,000 and Fleming will reject and terminate the Sublease effective December 31, 2003. In addition, Fleming will reject the Prime Lease as of that date.

In its Objection, Landlord does not contest the Debtors' business judgment to enter into the Stipulation. Nor does Landlord offer to pay more money to the Debtors' estate as an alternative to the Court's approving the Stipulation. Instead, Landlord simply requests that the Court require the Debtors to include a provision in the Order granting the Motion and approving the Stipulation providing that such approval is without prejudice to any claims Landlord may have against the Debtors or Quaker. See Objection at ¶6. In doing so, Landlord, "for purposes of notice to parties in interest" (Objection at ¶12), outlines the claims it may assert against Quaker should the Court approve the Stipulation.

Quaker does not oppose including the additional language to the Order requested by Landlord. However, for purposes of notice to Landlord, Quaker asserts that Landlord has no claims against Quaker and any attempt to assert such claims by Landlord would be utterly without legal or factual merit.

## **II. LANDLORD HAS NO CLAIMS AGAINST QUAKER.**

Landlord contends that if Quaker goes through with the Stipulation and Fleming rejects the Prime Lease, Landlord can sue Quaker to collect the remaining rent owed by Fleming under the Prime Lease. See Objection at ¶16. In making this argument, Landlord relies on two provisions of the Prime Lease and two provisions of the Sublease.

First, Landlord points to Paragraph 23.1 of the Prime Lease, which states that any sublease shall be subject to the provisions of the Prime Lease. Objection at ¶12. Of course, this boilerplate

provision alone gives no rights to Landlord against Quaker for any unpaid rent because Quaker never signed the Prime Lease and never assumed its terms.

Second, Landlord refers to Paragraph 23.2 of the Prime Lease, which states that after a Fleming default, Landlord can collect rent from any subtenant. Objection at ¶13. Once again, this standard lease provision gives Landlord no rights against Quaker because there is no privity of contract between them. Moreover, although this provision allows Landlord to collect rent from a subtenant upon Fleming's default, it does not state that the subtenant is obligated to pay the rent to Landlord.<sup>1</sup>

Third and most importantly, Landlord cites an actual document signed by Quaker – the Sublease – specifically Paragraph 5.1 of that document, which states that Quaker's occupancy of the Property "shall be subject to all the terms, conditions, and provisions of the Lease . . . ." Objection at ¶14. It is this provision, according to Landlord, that binds Quaker to perform under the Prime Lease should Fleming default under it, including paying rent to Landlord. The only problem for Landlord is the applicable law of California (as in most states) is to the contrary.

The assumption must be clearly expressed. In order for a subtenant to become liable to the landlord, the assumption must be express. The mere mention in a sublease that "this sublease is subject to the terms and provisions of the master lease," or other similar language is not sufficient to constitute an express assumption by the subtenant. Clauses of this type are merely statements of the general rule and do not create any privity of contract between the landlord and the subtenant, and they do not incorporate the provisions of the master lease into the sublease. Miller & Starr, California Real Estate Treatise, § 19.68 (citing Reed v. South Shore Foods, Inc., 229 Cal. App. 2d

---

<sup>1</sup> Landlord misstates this provision of the Prime Lease by claiming that it means that "any subtenant assume the obligation to pay the rent stipulated in the Prime Lease in the event that the Tenant defaults, . . . ." Objection at ¶16.

705, 712, 40 Cal. Rptr. 575 (3d Dist. 1964); Johnson v. Couch, 189 Cal. App. 2d 687, 691-692, 11 Cal. Rptr. 645 (3d Dist. 1961); Pedro v. Potter, 197 Cal. 751, 758-759, 242 P. 926, 42 A.L.R. 1165 (1926).

Not only is the law absolutely clear that Quaker can only be bound by the terms of the Prime Lease if it expressly assumes them, but also the Sublease itself states in Paragraph 5.1 that “[u]nless specifically assumed by [Quaker] herein, [Quaker] shall have no responsibility to perform any affirmative obligation of [Fleming] under or pursuant to the Lease.” Quaker never specifically assumed the obligation of Fleming to make rent payments to Landlord after a Fleming default either in the Sublease or in any other document where such a representation might typically be found, such as an attornment agreement between Landlord and Fleming. Indeed, there is no agreement to which Landlord and Quaker are signatories and Landlord does not contend otherwise.

Finally, Landlord notes that Paragraph 5.1 of the Sublease provides that Fleming and Quaker agree that they will not take any action or fail to take any action that may constitute a default under the Prime Lease. Objection at ¶14. Such provision is a covenant running between the two parties to the Sublease – Fleming and Quaker. It is not a covenant running in favor of Landlord nor is Landlord a third-party beneficiary of such covenant. Without privity of contract with Quaker and lacking any third-party beneficiary rights, Landlord cannot assert any rights against Quaker based on this language contained in the Sublease.

### **III. CONCLUSION.**

For the foregoing reasons, the Court should approve the Stipulation between Fleming and Quaker containing the language requested by Landlord because such language is meaningless as Landlord lacks any colorable claim against Quaker as a result of the Stipulation.

Dated: October 17, 2003

Respectfully submitted,

/s/ David L. Finger  
David L. Finger (DE Bar ID #2556)  
Finger & Slanina, P.A.  
One Commerce Center  
1201 Orange Street, Suite 725  
Wilmington, DE 19801-1155  
(302) 884-6766

David M. Neff  
Brian A. Audette  
PIPER RUDNICK LLP  
203 North LaSalle Street  
Suite 1800  
Chicago, Illinois 60601-1293  
(312) 368-4042

and

Daniel Carrigan  
PIPER RUDNICK LLP  
1775 Wiehle Avenue  
Suite 400  
Reston, VA 20190-5159  
(703) 773-4000

Attorneys for Quaker Sales &  
Distribution, Inc.

**CERTIFICATE OF SERVICE**

I, David L. Finger, certify that a copy of the attached REPLY OF QUAKER SALES & DISTRIBUTION, INC. TO LIMITED OBJECTION OF THE BENSONSON CAPITAL COMPANY AND THE LAROB CAPITAL COMPANY IN RESPONSE TO DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTION 365(c) THE BANKRUPTCY CODE APPROVING THE STIPULATION REGARDING THE UNEXPIRED REAL PROPERTY LEASE AND SUBLEASE FOR 4576 WILLOW ROAD, PLEASANTON, CALIFORNIA AND THE REJECTION OF SAME was served on the parties listed on the attached Service List via facsimile on Friday, October 17, 2003.

/s/ David L. Finger

David L. Finger (DE Bar ID #2556)  
Finger & Slanina, P.A.  
One Commerce Center  
1201 Orange Street, Suite 725  
Wilmington, DE 19801-1155  
(302) 884-6766

## SERVICE LIST

Laura Davis Jones, Esquire  
Pachulski, Stang, Ziehl, Young,  
Jones & Weinstraub P.C.  
919 North Market Street, 16<sup>th</sup> Floor  
P. O. Box 8705  
Wilmington, Delaware 19899-8705  
Fax: (302) 652-4400

Richard Wynne, Esquire  
Kirkland & Ellis  
777 South Figueroa Street  
Los Angeles, California 90017  
Fax: (213) 680-8500

Joseph McMahon, Esquire  
Office of the U. S. Trustee  
844 King Street  
Room 2313  
Wilmington, Delaware 19801  
Fax: (302) 573-6497

Dennis F. Dunne, Esquire  
Milbank, Tweed, Hadley & McCloy LLP  
1 Chase Manhattan Plaza  
New York, New York 10005  
Fax: (212) 530-5219

Charles P. Greenman, Esquire  
Jenkins, & Gilchrist Parker Chapin LLP  
The Chrysler Building  
405 Lexington Avenue  
New York, New York 10174  
Fax: (212) 704-6288

Thomas G. Macauley, Esquire  
Zuckerman Spaeder LLP  
919 Market Street  
Suite 1705  
Wilmington, Delaware 19899  
Fax: (302) 427-8242

Scott D. Cousins, Esquire  
Greenberg Traurig LLP  
The Brandywine Building  
1000 West Street, Suite 1540  
Wilmington, Delaware 19801  
Fax: (302) 661-7000

Julie Compton, Esquire  
Office of the United States Trustee  
for the District of Delaware  
844 King Street - Suite 2313  
Wilmington, Delaware 19801  
(302) 573-6497

David M. Fournier, Esquire  
Pepper Hamilton LLP  
1201 Market Street - Suite 1600  
P. O. Box 1709  
Wilmington, Delaware 19899-1709  
Fax: (302) 656-8865

Andrew P. DeNatale, Esquire  
White & Case LLP  
1155 Avenue of the Americas  
New York, New York 10036-2787  
Fax: (212) 354-8113

I. William Cohen, Esquire  
Pepper Hamilton LLP  
100 Renaissance Center - Suite 3600  
Detroit, Michigan 48243-1157  
Fax: (313) 259-7926