

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

In re:

FLEMING COMPANIES, INC., et al.

Debtors.

Chapter 11

Case No. 03-10945 (MFW)  
(Jointly Administered)

**Related Docket Item # 3142, 4537**

**Hearing: 12/08/03 @ 9:30 a.m.**

**Objections Due: 12/01/03 @ 12:00 noon.**

**SUPPLEMENTAL OBJECTIONS OF INVERSIONES RAMIRO TO MOTION  
OF DEBTORS AND DEBTORS IN POSSESSION TO ASSUME  
AND ASSIGN LEASE TO SYCAMORE PARTNERS LLC AND “CURE AMOUNTS”**

Inversiones Ramiro, S.A., (“Inversiones Ramiro”) by and through undersigned counsel, objects to the Motion to Assume and Assign Lease to Sycamore Partners LLP, a Third Party Purchaser, under the Sale Order entered August 15, 2003, and hereby supplements its previously filed objections to the “Cure Amounts” and objections to Debtor’s assumption and assignment of certain non-residential leases. In support of its objections, Inversiones Ramiro states as follows:

1. Objector is Inversiones Ramiro, the landlord under a lease dated July 31, 1973, for the premises located at the Riverside Plaza Shopping Center, 6419 Riverside Blvd., Sacramento, California (the “Lease”) also referred to as Fleming Lease CA-001 and identified as Contract Assignment No. 6721 on page 5 of the “Assignment List,” attachment no. 1 to the “Assignment Notice” filed on November 20, 2003, as docket no. 4537. The initial term of the Lease was for twenty years and contains 6 five-year options. The Lease is currently in its second option term, which expires May 31, 2004.

2. The Lease premises are now vacant. On or about November 1, 2003, the Debtors' wholesale customer and subtenant Nugget Market abandoned the Lease premises without notice to Inversiones Ramiro, completing their long-planned move to their new location 2.7 miles away. The Debtor now proposes to assume and assign the Lease to Sycamore Partners LLC, a real estate investment company that does not operate grocery stores or any other retail businesses.

3. On July 25, 2003, Inversiones Ramiro timely filed its Objection of Inversiones Ramiro S.A. to the "Cure Amounts" and Proposed Assignment (D.I. 2699).

4. On August 11, 2003, Inversiones Ramiro timely filed its Objection of Inversiones Ramiro to Motion Of Debtors and Debtors in Possession to Assume And Assign Certain Nonresidential Real Property Leases Pursuant to Section 365 of the Bankruptcy (D.I. 2937).

5. On October 13, 2003, Inversiones Ramiro timely filed its Objection Of Inversiones Ramiro To The Debtors Second Motion Pursuant To § 365(d)(4) Of The Bankruptcy Code For Entry Of An Order Extending Time To Assume, Assign, Or Reject Certain Nonresidential Real Property Leases on the basis that, among other grounds, the Debtors have failed to comply with their post-petition rent obligations to Inversiones Ramiro and further delay would prejudice Inversiones Ramiro (D. I. 4025).

6. At the October 20, 2003, hearing on the Debtor's Second Motion for Entry of An Order Extending Time to Assume, Assume and Assign, or Reject Unexpired Leases, the Court ruled that if there were any further failures to pay post-petition obligations the Lease would be deemed rejected (the "Deemed Rejection Order"). On October 21, 2003, the Court ordered that the Debtors had until November 30, 2003 to notify Inversiones Ramiro of their decision to assume and assign or reject their lease

otherwise the Inversiones Ramiro lease will be deemed rejected as of November 30, 2003.<sup>1</sup>

7. The Debtors notified Inversiones Ramiro of their intention to assume and assign the Lease to Sycamore Partners LLC; however, Debtors have continued to fail to comply with their post-petition obligations under the Lease. A post-petition obligation remains unpaid in the amount of \$11,649.68 as follows:

CAM charges due for period ending September 30, 2003 .....	\$9,063.88
One-month <sup>2</sup> post-petition rent due .....	\$2,585.80
<b>Total .....</b>	<b>\$11,649.68</b>

8. Since the Debtors' have failed to comply with their post-petition obligations under the Lease, the Court should find that the Lease is deemed rejected as of November 30, 2003 pursuant to the Deemed Rejection Order.

9. The Debtors, by authorizing and allowing the Lease premises to go dark and become vacant, are also in default of an implied covenant of continuous operation and the implied covenant of good faith and fair dealing.

10. As set forth in Inversiones Ramiro's assignment objection (D.I. 2937), Debtors also have utterly failed to provide assurance of future performance under the Lease and that the Debtors can satisfy the four requirements of section 365(b)(3). In fact, the Lease premises are now dark and unoccupied, reducing the percentage rent to zero and adversely affecting other tenants.

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1 A copy of the Deemed Rejection Order is attached as Exhibit A hereto, and **this Supplemental Objection hereby constitutes the required Notice of further default** with regard to the Debtors' Code § 365(d)(3) obligations.

2 Because the Debtors' payments do not indicate which month's obligations are being paid with a given check, it is unclear which month's rent remains in default. However, the defaulted month is one of the postpetition months prior to December.

11. The Debtors have provided no assurances regarding the ultimate occupant of the Lease premises now that the premises have been abandoned by Nugget Market. Debtors have failed to provide any information with respect to the ability of Sycamore Partners LLC, the proposed Third-Party Purchaser, to pay the obligations under the Lease going forward. Sycamore Partners LLC has provided no information regarding their plans for the Lease premises other than verbal representations through their counsel that they seek to prevent a grocery store from occupying the Lease premises and propose to sublease the Lease premises to Dollar Tree Stores, Inc., a discount variety store chain operator.

12. As a result, Inversiones Ramiro is unable to determine to what extent (i) the percentage rent due under such lease will decline substantially; (ii) the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the Debtor; (iii) the use of the Premises will violate the use provisions contained in any other lease, financing agreement, or master agreement relating to Riverside Plaza Shopping Center; or (iv) whether the assumption and assignment will disrupt the tenant mix at the Riverside Plaza Shopping Center.

13. As set forth in Inversiones Ramiro’s Cure Objection (D.I. 2699), Debtors’ proposed cure amount of \$0.00 is incorrect. As of December 1, 2003, Debtors remain indebted to Inversiones Ramiro under the Lease, according to Inversiones Ramiro’s records, in an aggregate amount not less than \$139,965.36 calculated as follows:

CAM charges due for period ending June 30, 2002 .....	\$55,281.30
Interest on CAM charge from 8/01/02 to 12/08/03 .....	\$5,473.03
One Month post-petition rent due .....	\$2,585.80
CAM charges due for period ending September 30, 2003 .....	\$9,063.88
Breach of Continued Operation (2 mos. Loss of Percentage Rent).	\$12,166.00
Post petition attorneys fees through 11/30/03.....	\$54,944.54
Interest on post-petition Lease obligations to 12/08/03 .....	\$450.81
<b>Total .....</b>	<b>\$139,965.36</b>

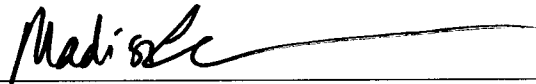
14. Under the Lease, Inversiones Ramiro is entitled to interest on the past due amounts at the rate of 7% per annum. Inversiones Ramiro is also entitled to interest on the past due amounts under California law. Cal. Civ. Code § 3289. This interest must be paid to cure the defaults under the Lease and compensate Inversiones Ramiro for the pecuniary loss it suffered as a result of such defaults. See In re Eagle Bus. MFG., Inc., 148 B.R. 481, 483 (Bankr. S.D. Texas 1992); In re Westview 74th Street Drug Corp., 59 B.R. 747, 757 (Bankr. S.D.N.Y. 1986).

15. Under California law, Inversiones Ramiro is also entitled to damages for Debtors' breach of the implied covenant of continuous operation and implied covenant of good faith and fair dealing. Lippman v. Sears, Roebuck & Co., 44 Cal. 2d 136 (1955); College Block v. Atlantic Richfield Co., 206 Cal. App. 3d 1376 (Cal. App. 2nd Dist. 1988). As an additional pecuniary loss incurred after the Original Cure Notice, Inversiones Ramiro will suffer, in addition to other damages, the loss of percentage rent at an annual rate of approximately \$73,000, or \$6,083 per month for each and every month the Lease premises remain vacant and unoccupied.

16. The Debtors have failed to comply with post-petition Lease obligations, the Lease premises are vacant and unoccupied, and the Debtors have failed to provide assurance of future performance under the Lease and that the Debtors can satisfy the four requirements of section 365(b)(3). The Lease should be deemed rejected by the Debtors and the premises surrendered forthwith to Inversiones Ramiro.

Conclusion

WHEREFORE, for the foregoing reasons, Inversiones Ramiro prays that this Honorable Court enter an order, substantially in the form of the proposed order attached as Exhibit B hereto, (i) denying the request to assume and assign the Lease to Sycamore Partners LLC, (ii) deeming the Lease rejected and surrendered to Inversiones Ramiro as of November 30, 2003, and (iv) granting such other and further relief as is just and proper.



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DATED: December 1, 2003  
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