

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

In re:  FLEMING COMPANIES, INC., <i>et al.</i> ,  Debtors.	Chapter 11  Case No. 03-10945 (MFW) (Jointly Administered)  Objection Deadline: February 10, 2004 at 4:00 p.m. Hearing Date: February 17, 2004 at 3:00 p.m.
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**MOTION OF SOUTHPARK VILLAGE, L.L.C.  
FOR ALLOWANCE AND IMMEDIATE  
PAYMENT OF AN ADMINISTRATIVE CLAIM**

Southpark Village, L.L.C. (“Landlord”), by and through its undersigned counsel, hereby moves the Court for an Order of allowance and directing immediate payment of an administrative claim, and in support thereof states as follows:

**I. INTRODUCTION**

1. On April 1, 2003 (the “Petition Date”), each of the above-captioned Debtors (collectively, the “Debtors”) filed voluntary petitions in this Court for relief under chapter 11 of title 11 of the Code. The Debtors continue to operate their businesses and manage their properties as Debtors-in-possession pursuant to sections 1107(a) and 1108 of the Code.

2. As a part of the Debtor’s distribution business, Debtors supply a full line of grocery products to grocery stores and specialty retailers.

## **II. THE SOUTHPARK VILLAGE LEASE**

3. On or about September 10, 1984, one of the Debtors, Fleming Companies, Inc. (“Fleming”) and Landlord’s predecessor executed a written lease of premises located in the Southpark Village Shopping Center, Lafayette, Louisiana (the “Lease”), which lease was amended as of January 16, 2001 (the “Amendment”). Attached as Exhibit “A” is a copy of the Lease. Attached as Exhibit “B” is a copy of the Amendment. The Lease and the Amendment are governed by Louisiana law.

4. On or about October 17, 2003, the Debtors filed a motion pursuant to 11 U.S.C. § 365 to reject the Lease effective October 31, 2003, which motion was granted by order dated November 4, 2003.

5. In Article II of the Amendment, Fleming agreed to pay from and after December 13, 2000 the sum of \$20,861.34 per month, and an additional \$10,378.51 per month (“Deferred Rent”), which would become due and payable in the event of and upon Fleming’s failure to exercise its option to renew the Lease by August 31, 2004.

6. Therefore, Fleming had the alternative obligations, under Louisiana Civil Code article 1808 to either pay the Deferred Rent or renew the Lease.

7. On October 17, 2003 — if not before — Fleming announced that the Lease would be rejected.

8. Such announcement and rejection constituted an election to not renew the Lease, thereby triggering Fleming’s obligation to pay the Deferred Rent, which was demanded by

Landlord and billed to Tenant by Landlord post-petition and pre-rejection. Attached as Exhibit “C.”

is a copy of Landlord’s demand dated October 22, 2003. Attached as Exhibit “D” is a copy of Landlord’s billing dated October 31, 2003.

9. Under *In re Montgomery Ward Holding, Inc.*, 268 F.3d 205 (3<sup>rd</sup> Cir. 2001), since the obligation to pay the Deferred Rent matured and came due post-petition and pre-rejection, all of the same constitutes an administrative expense.

10. The amount of Deferred Rent that came due post-petition and pre-rejection, for the period December 13, 2000 - October 31, 2003 totals \$358,895.57, all of which is claimed as an administrative expense.

11. Alternatively, that portion of the Deferred Rent that accrued for the period April 1, 2003 - October 31, 2003, totaling \$71,649.57 is claimed as an administrative expense.

**III. LANDLORD IS ENTITLED TO ALLOWANCE AND IMMEDIATE PAYMENT OF AN ADMINISTRATIVE CLAIM IN THE AMOUNT OF \$358,895.57, OR ALTERNATIVELY \$71,649.57, PLUS INTEREST AND ATTORNEY’S FEES.**

12. Landlord is entitled to allowance and immediate payment of an administrative claim in the amount of \$358,895.57, which became due and payable post-petition and pre-rejection, or alternatively \$71,649.57.

13. Section 503(b)(1)(A) of the Bankruptcy Code provides for priority treatment of “actual, necessary costs and expenses of preserving the estate.” Where a debtor continues to receive the benefits from the other party to an executory contract or unexpired lease, “the debtor-in-possession is obligated to pay for the reasonable value of the services.” *NLRB v. Bildisco &*

*Bildisco*, 465 U.S. 513, 531 (1984). In order for an administrative claim to be allowed, the transaction must be between the creditor and the debtor, and the estate must receive a benefit from the transaction. *In re MUMA Services, Inc.*, 279 B.R. 478, 489 (Bankr. D. Del. 2002), citing *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527, 532-33 (3d Cir. 1999).

14. Section 365(d)(3) provides that “[t]he Trustee shall timely perform all the obligations of the debtor, . . . , arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” Thus, under Section 365(d)(3) of the Bankruptcy Code, the Debtor had an affirmative obligation to stay current with all post-petition Rent Obligations. Lawrence P. King, Collier on Bankruptcy (15<sup>th</sup> ed. rev. 1998), § 365.04[3][f] at p. 365-37.

15. In addition, because the payment of rent under the Lease is “an actual and necessary” cost of doing business under § 503, its payment will be afforded administrative expense priority. *See, e.g., In re Zagata Fabricators, Inc.*, 893 F.2d 624, 627-28 (3d Cir. 1990) (“In a situation in which, as here, a debtor fails to pay rent but continues to occupy the landlord’s premises, the landlord thus may pursue two remedies under the Bankruptcy Code. First, the landlord may claim first priority as a creditor to whom the debtor owes rent as an ‘actual, necessary cost . . . of preserving the estate.’”).

16. Moreover, under cases such as *In re Brenick*, 178 B.R. 305, 307-08 (Bankr. D. Mass. 1995) and *In re Pudgie’s Dev. of N.Y.*, 223 B.R. 421, 427 (Bankr. S.D.N.Y. 1999), *aff’d*, 239 B.R. 688 (S.D.N.Y. 1999), Landlord has or may even have a superpriority claim for these amounts, which must be paid.

17. By electing not to renew the Lease, yet still not paying the Deferred Rent which came due post-petition and pre-rejection, Fleming has breached its alternative obligation as recognized under Louisiana Civil Code article 1808<sup>1</sup>, and has reaped an unfair benefit at Landlord's expense. Landlord has had to incur the amounts claimed while Fleming continued to utilize the leased premises without paying all of its rent obligations in a timely manner. In addition, by announcing its intention and electing, not to renew the Lease, Fleming triggered the resolutive condition provided under Louisiana Civil Code article 1767<sup>2</sup>, thereby making the

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<sup>1</sup> Article 1808 provides:

“An obligation is alternative when an obligor is bound to render only one of two or more items of performance”.

Attached as Exhibit “E” is a copy of the article with official revision comments.

<sup>2</sup> Article 1767 provides:

“A conditional obligation is one dependent on an uncertain event.

If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.

If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutive.”

Deferred Rent then due and payable. *See, Larose v. Barrow*, 499 So.2d 1299 (La. App. 4<sup>th</sup> Cir. 1986); and *Gulf Coast Bank & Trust Co. v. Rick Granger Enterprises*, 800 So.2d 402, 405 (La. App. 3<sup>rd</sup> Cir. 2001) (when obligor announces it will not perform a future obligation, the obligee need not wait until the failure to perform for breach to occur). Accordingly, Fleming should be ordered to pay Landlord all amounts owing post-petition and pre-rejection under the Lease, including collection costs and attorneys' fees occasioned by the Debtors' failure to pay post-petition rent.

18. Here, there is no question that the Lease is between the creditor (Landlord) and Fleming. Thus, the first element of the test for allowance of an administrative claim is satisfied.

19. Second, the estate received a benefit from the Lease throughout these proceedings. Fleming used the premises subject to the Lease, which was necessary in Fleming's business.

20. A landlord is generally entitled to an administrative claim for the fair value of the services provided to and used by the Debtor. *See, e.g., MUMA*, 279 B.R. at 489 ("[T]he rental value fixed in the lease will control, unless there is convincing evidence that such rental rate is unreasonable," quoting *In re F.A. Potts & Co., Inc.*, 137 B.R. 13, 18 (Bankr. E.D. Pa. 1992)). Landlord believes that Fleming will not be able to establish that the amounts owed are outside current market rates for such services, and therefore, unreasonable. Thus, Landlord is entitled to

an administrative claim in the current amount of \$358,895.57, or alternatively \$71,649.57, plus charges and costs of collection.

21. Finally, this Court has broad discretion as to the timing of the payment of administrative expense claims.<sup>3</sup> *In re Continental Airlines, Inc.*, 146 B.R. 520, 531 (Bankr. D. Del. 1992); *see also In re Photo Promotion Associates, Inc.*, 881 F.2d 6, 8-9 (2d Cir. 1989). Landlord submits that this Court should compel Fleming to pay immediately the full amount owed to Landlord for the post-petition Lease payments.

WHEREFORE, Landlord respectfully requests that the Court allow and direct immediate payment of an administrative claim in the amount of \$358,895.57, or alternatively \$71,649.57, plus interest and collection costs.

Dated: January 12, 2004  
Wilmington, Delaware

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<sup>3</sup> Although Landlord has timely filed its administrative expense proof of claim, as reflected by attached Exhibit "G," because the Debtors reaped the benefits of the use of the leased premises, Landlord believes that it is entitled to and seeks payment at this time.

SESSIONS, FISHMAN & NATHAN, L.L.P.

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