

)	Chapter 11
)	
In re)	Case No. 03-10945 (MFW)
)	
Fleming Companies, Inc., et. al.)	(Jointly administered)
)	
Debtors.)	Objection Date: February 4, 2004 @4:00 pm
)	Hearing Date: March 3, 2004 @10:30 am

Landlord Southbridge Plaza Limited Partnership (“Southbridge”), by and through its undersigned counsel and pursuant to 11 U.S.C. §§365(d)(3), 507(a)(1) and 503(b)(1)(A), hereby moves for allowance and payment of its administrative claim. In support of its motion, Southbridge states as follows:

1. Southbridge is the owner of certain improved real property located at 3415 W. Glendale, Phoenix AZ (hereinafter the “Premises”). ABCO Realty Corp (“ABCO”), was a tenant of the Premises. ABCO subleased the property to Fleming Companies, Inc. pursuant to a Sublease dated November 3, 1997. Pursuant to the Lease and Sublease, rent accrued on the first of the month in the amount of \$24,530.00. In addition, the tenant is obligated to pay certain taxes and common area maintenance expenses.

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3. Since the petition date, rent has accrued and is due and owing by the Debtors to Southbridge for the month of April in the amount \$24,530.07. In addition, Sales taxes are due and owing as of April 15, 2003 in the amount of \$38,866.14. Attached hereto collectively as Exhibit A is a copy of the Relevant Lease Provisions, Lease Assignment, Sublease Agreement, and statement of amounts owed.

ARGUMENT

I. Southbridge is Entitled to an Administrative Claim for the Rent and Taxes

4. Section 365(d)(3) requires that "the trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease . . . until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). As the Third Circuit Court of Appeals held in *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001), "§ 365(d)(3) is not ambiguous." *Id.* at 210.

5. Moreover, Section 365(d)(3) "require[s] the trustee to perform the lease in accordance with its terms," and the clear and unambiguous language of § 365(d)(3) mandates that a debtor-tenant's obligation arises when the debtor is required to perform such obligation under the terms of the lease. *Id.* at 209-10.

6. As the Third Circuit correctly noted in *Montgomery Ward*, "[w]e are not alone in holding that an obligation arises under a lease for the purposes of § 365(d)(3) when the legally enforceable duty to perform arises under that lease." *Id.* For example, in *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6th Cir. 2000), the debtor was a party to a lease that required it to pay \$8,500 rent on the first of each month for that month's rent. *Id.* at 987. The debtor filed its voluntary Chapter 11 bankruptcy petition on August 18, 1997. However, the debtor did not give notice that it was rejecting the lease until November 25, 1997, and sought to reject the lease

effective December 2, 1997. The landlord filed a motion in the Bankruptcy Court seeking payment of rent for the full month of December. The debtor disagreed, and argued that it was liable only for pro-rata rent for the two days of December prior to the effective date of its rejection of the lease. *Id.* at 988. The Bankruptcy Court and the Bankruptcy Appellate Panel ("BAP") both ruled that the landlord was entitled to rent for the full month of December, because the debtor was obligated to pay rent on December 1, which was post-petition and pre-rejection. *Id.* The debtor appealed to the Sixth Circuit Court of Appeals.

7. The Sixth Circuit affirmed, holding that:

Under the terms of the lease the debtor was obligated to pay [the landlord] \$8,500 in advance on the first of each month for that month's rent. The specific obligation to pay rent for December 1997 arose on December 1, which was during the post petition, pre rejection period. Under these circumstances, § 365(d)(3) is unambiguous as to the debtor's rent obligation and requires payment of the full month's rent.

Id. at 989.

8. In addition to the Third and Sixth Circuit Court of Appeals, other courts have also held that an obligation arises under a lease for purposes of § 365(d)(3) when the legally enforceable duty to perform arises under that lease. *See, e.g., In re HQ Global Holdings, Inc.* 282 B.R. 169, 173 (Bankr. D. Del. 2002) (Walrath, J.) (In denying the landlords' motions seeking administrative rent for the entire month of March when the debtor's bankruptcy petition was filed on March 13, the court held "the Debtors were obligated to pay the entire March rent in advance on March 1, 2002. The leases do not require payment on a pro-rata basis. The Debtors were therefore legally obligated to pay the March rent before the Petition Date.").

9. Although Southbridge does not have to prove a benefit to the estate to obtain an administrative expense under §365(d)(3), such a benefit was certainly conferred on the estate by the

post-petition use of the Premises. By keeping the Lease in effect post-petition, the debtor was able to maintain its business.

II. Southbridge is Entitled to Its Attorneys' Fees and Costs as Part of Its §365(d)(3) Administrative Claim.

10. Attorneys' fees incurred by a landlord as a result of a debtor's failure to comply timely with its §365(d)(3) obligations should be included as part of the landlord's §365(d)(3) administrative claim.

11. For example, in *Loews Cineplex*, the District Court held that:

Recovery of attorney's fees and interest under Section 365 is appropriate where the lease at issue provides for such recovery as an obligation of the Debtor. See, e.g., *In re Westview 74 Superth Street Drug Corp.*, 59 B.R. 747, 756-57 (Bankr.S.D.N.Y. 1986). Here, because the Lease provides for recovery of attorneys' fees and interest, their receipt deserves the same priority under Section 365(d)(3) as any of the Debtor's other obligations that arise post petition and therefore should be awarded.

Loews Cineplex, 2002 WL 535479, at *9. In the instant case, the Lease clearly provides for attorneys' fees and costs. (Exh. A, p. 5 paragraph 12 of the Sublease Agreement.)

12. Numerous additional cases have held that attorneys' fees are compensable as part of a landlord's §365(d)(3) claim. See e.g., *In re Pacific Sea Farms, Inc.*, 134 B.R. 11, 15 (Bankr. D. Hawaii 1991); *In re MS Freight Distribution, Inc.*, 172 B.R. 976, 979 (Bankr. W.D. Wash. 1994); *In re Revco D.S., Inc.*, 109 B.R. 264 (Bankr. N.D. Ohio 1989); see also *In re Crown Books Corp.*, 269 B.R. 12 (Bankr. D. Del. 2001) (Walrath, J.) (allowing recovery of attorneys' fees under §365(b)(1) as part of cost to cure lease defaults).

13. The express language of §365(d)(3), and the cases cited above compel a finding that the attorneys' fees and costs incurred by Southbridge in obtaining the allowance and payment of

Southbridge's administrative claim and compelling the debtor to pay all of rent and taxes owed should be included as part of Southbridge's administrative claim.

III. Southbridge is Entitled to an Administrative Claim for Rent under § 503(b)(1)(A)

14. Section 503(b)(1)(A) provides that "[a]fter notice and a hearing, there shall be allowed, administrative expenses...including the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. §503(b)(1)(A).

15. Therefore, in addition to its claims for rent and attorneys' fees pursuant to Section 365(d)(3), Southbridge is entitled to an administrative claim for the unpaid rent and taxes. *See In the Matter of Zagata Fabricators, Inc.*, 893 F.2d 624, 627 (3d Cir. 1990) ("There is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an 'actual, necessary' cost to which a landlord, as a creditor, is entitled.").

WHEREFORE, for the reasons set forth above, Southbridge respectfully request that the Court enter an Order awarding Southbridge: (1) an administrative expense claim for the post-petition rent and taxes due and owing in the amount of \$63,396.14; (2) the attorneys' fees and costs incurred by Southbridge in obtaining the allowance and payment of Southbridge's administrative claim; and granting Southbridge such other and further relief as deemed just and proper.

Dated: January 15, 2004

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