

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
FLEMING COMPANIES, INC., <i>et. al.</i>	)	
	)	Case No. 03-10945(MFW)
Debtors.	)	
	)	(Jointly Administered)

**Hearing Date: February 2, 2004 at 2:00 p.m.**  
**Objections Due: January 26, 2004 at 4:00 p.m.**

**MOTION OF WEINGARTEN NOSTAT, INC. FOR ORDER  
CONFIRMING REJECTION OF NON-RESIDENTIAL REAL  
PROPERTY LEASE EFFECTIVE AS OF 11/30/2003, OR,  
ALTERNATIVELY, FOR ORDER COMPELLING DEBTORS  
IMMEDIATELY TO REJECT SUCH LEASE**

Weingarten Nostat, Inc. ("Weingarten"), pursuant to Sections 105 and 365 of Title 11 of the United States Code (the "Bankruptcy Code"), hereby requests that the Court enter an order confirming that a certain non-residential real property lease between the debtors, Fleming Companies, Inc., *et al.* (the "Debtors") and Weingarten has been rejected effective as of November 30, 2003, or, alternatively, that the Court enter an order compelling the Debtors immediately to reject such lease. In support hereof, Weingarten respectfully represents as follows:

**JURISDICTION AND VENUE**

1. Debtors commenced the captioned cases by filing voluntary Chapter 11 petitions on April 1, 2003.
2. The Court has subject matter jurisdiction over this motion under and pursuant to 28 U.S.C. § 1334. This is a core proceeding under and pursuant to 28 U.S.C. § 157(b)(2). Venue of this Motion is proper in this District under and pursuant to 28 U.S.C. § 1409.

### **BACKGROUND FACTS**

3. Weingarten, as owner and landlord, and Fleming Companies, Inc. ("Fleming"), as tenant, are parties to an unexpired lease of non-residential real property dated as of September 26, 1986 (the "Lease") for the premises more fully described in the Lease and located at the Windsor Hills Center, 4503 NW 23rd St., Oklahoma City, Oklahoma 73127 (the "Premises"). The Debtors have designated this location as "OK-075."

4. Fleming is the tenant and sub-landlord of the Premises. Meridian, LLC ("Meridian") is the sub-tenant at the Premises pursuant to a sub-lease with Fleming, which the Debtors have designated as "OK-075a."

5. On November 20, 2003, the Debtors filed their motion (Docket Item 4528) (the "Motion to Reject") seeking authority to reject several unexpired non-residential real property leases, including the Lease, effective as of November 30, 2003. The Debtors noticed a hearing on the Motion to Reject for December 8, 2003, with objections to the Motion to Reject due by December 1, 2003.

6. All the leases included in the Motion to Reject were included in the Debtors' sale of assets to C&S Wholesale Grocers, Inc. and C&S Acquisition LLC. In the Motion to Reject, the Debtors represented as follows regarding the leases they sought to reject:

7. The Sale Order<sup>1</sup> granted the Debtors authorization to assume and assign to Purchaser certain executory contracts and unexpired leases ... associated with the Wholesale Distribution Business .... In accordance with this Court's ... [order] ... entered on July 18, 2003, the Debtors on or about August 4, 2003, filed with the Court and served upon the relevant non-debtor counterparties and their counsel a list of the executory contracts and unexpired leases ... to be assumed and assigned under the APA on the Initial Closing Date (as defined in the APA) to

---

<sup>1</sup> All capitalized terms in paragraph 6 of this motion have the meanings given to them in the Motion to Reject.

Purchaser or applicable third parties (the "Third Party Purchasers").

8. In accordance with Sections 2.5 and 2.6 of the APA, Purchaser ... may upon written notice during the six months following the Initial Closing Date (the "Option Period"), require Debtors to either (a) assume and assign to Purchaser or any Third Party Purchasers, any executory contracts or unexpired leases included on the Initial Assignment List or (b) exclude the assignment of any executory contracts or unexpired leases to Purchaser. Purchaser and applicable Third Party Purchaser(s) have provided notice of their desire to exclude the Rejected Contracts from assets acquired pursuant to the APA.

9. The Rejected Contracts all relate to the Wholesale Distribution Business ....

16. The Debtors are entitled to a November 30, 2003, effective date of rejection as to all non-residential real property leases listed in Exhibit A attached hereto, because the Debtors are current on their obligations pursuant to Section 365(d)(3) of the Bankruptcy Code, the Debtors have or will have surrendered the locations to the landlords on or before November 30, 2003, and ***the Debtors will not withdraw any of the locations from Exhibit A.***<sup>2</sup>

See Motion to Reject at ¶¶ 7- 9, and 16.

7. Because Weingarten did not oppose the relief sought by the Debtors by the Motion to Reject, it did not file an objection thereto.

8. By their letter addressed to Weingarten dated November 24, 2003, a true and correct copy of which is attached hereto as Exhibit B, the Debtors stated:

The Debtors have filed or intend to file a motion ... to reject the Lease ... under 11 U. S. C. § 365. The motion will request that the Bankruptcy Court order the rejection of the Lease effective November 30, 2003. Upon entry of the Bankruptcy Court's order approving the motion, the Debtors shall be deemed to have rejected the Lease as of November 30, 2003.

In anticipation of the Bankruptcy Court's approval of the motion for rejection of the Lease as of November 30, 2003, the

---

<sup>2</sup> The Lease was included on the Exhibit A to the Motion to Reject. A true and correct copy of such Exhibit A is attached hereto as Exhibit A.

Debtors hereby disclaim any further right, title or "interest" (including the right of possession) in the Premises or the Lease as of November 30, 2003. In addition, to the extent the Debtors have any personal property at the Premises, the Debtors hereby abandon such personal property. Enclosed please find all of the keys to the Premises that the Debtors have in their possession ....

\* \* \*

Thus you may wish to take immediate action to put such utilities, security and insurance under your account immediately so as to avoid any lapse in coverage or service.

9. In reliance on the Motion to Reject and the Debtors' November 24th letter, Weingarten immediately began taking steps both to protect its interest in the Premises and to mitigate its damages. In such regard, Weingarten began negotiations with Meridian for a new lease of the Premises. Such negotiations eventually resulted in the production, and execution by Meridian, of an Occupancy Agreement dated as of December 1, 2003 (the "Agreement"), which provides for Meridian to lease the Premises for one year commencing December 1, 2003. The parties also discussed the possible execution of a customary commercial lease for the Premises. A true and correct copy of the Agreement is attached hereto as Exhibit C.

10. In accordance with their negotiations and the Agreement, Meridian has paid rent for the Premises for December 2003 to Weingarten. However, due to the uncertainty involved in this matter, as set forth below, Meridian has to this time refused to pay rent for January 2004.

11. At the December 8, 2003, hearing, the Debtors presented the Court with a revised order (Docket Item 4908) (the "Order") with respect to the Motion to Reject, which, without any notice to Weingarten, and contrary to the representations made by the Debtors in paragraph 16 of the Motion to Reject, was altered from the form attached to the Motion to Reject upon its filing with the Court. In sum, as to Weingarten, the Lease was unilaterally removed from the schedule of leases attached to the Order. In this regard, the Order provides:

The Motion is granted, provided however, that with respect to the Debtor's nonresidential real property lease with Dana B. Geyer for real property located at 331 South Main Place, Rice Lake, Wisconsin (Lease ID: WI-054CS), the Motion is continued until the hearing to be held on December 23, 2003. Additionally, the Motion as to lease numbers PA-844, PA-844a, PA-067, PA-067a, OK-075, OK-075a, OK-150 and OK-150a is continued until the hearing to be held on December 23, 2003.

A true and correct copy of the Order is attached hereto as Exhibit D.

12. Notwithstanding its unilateral (and improper) removal of the Lease from the Order, the Debtors thereafter still treated the Lease as rejected effective November 30, 2003. By letter dated December 11, 2003, a true and correct copy of which is attached hereto as Exhibit E, the Debtors stated as follows:

Please be advised that I am in receipt of the CAM Reconciliation for the period of 7/03-9/30/03 regarding the above location. As you should be aware, this location was rejected effective 11/30/03 by the bankruptcy court.

13. Moreover, no rent or other amounts due under the Lease have been paid by the Debtors to Weingarten for December 2003 or January 2004.

14. On December 19, 2003, the Debtors filed a Notice of Agenda for the December 23, 2003, hearing. In the Agenda the Debtors represented that the status of the Motion to Reject (item 9) was: *"All of the objections have been resolved or continued to the January 5, 2004 omnibus hearing."* No reference is made anywhere in the Agenda to Weingarten, the Lease or OK-075. As set forth above, Weingarten did not file an objection to the Motion to Reject.

15. On December 31, 2003, the Debtors filed a Notice of Agenda for the January 5, 2004, hearing. In the Agenda the Debtors represented that the status of the Motion to Reject (item 35) was: *"A general order has been entered regarding this matter. The Morrell Park objection has been resolved. This matter will go forward only as to the objection of Better Food Distributors, Inc. The matter is continued to the January 21, 2004 omnibus hearing with regards*

to *Geyer Trust*." Again, there is no reference anywhere in the Agenda to Weingarten, the Lease or OK-075.

16. After receiving a copy of the Order, on or about December 12, 2003, Weingarten has attempted to contact the Debtors to discuss the issues relating to rejection of the Lease, but, other than confirming that the December 8 hearing on the Motion to Reject was continued to December 23, 2003, and then to the January 5, 2004, the Debtors have not responded to Weingarten's inquiries.

### **ARGUMENT; RELIEF REQUESTED**

17. The Debtors are entitled to reject leases under Section 365(a) of the Bankruptcy Code. Ordinarily, the earliest a rejection can be effective is as of the date the bankruptcy court enters an order granting the debtor's request to reject. However, sometimes the effective date of a rejection can precede the court's approval thereof. *In re Namco Cybertainment, Inc.*, Case No. 98-173 (Judge Walsh Bench Order; April 15, 1998). *Accord In re Worths Stores Corp.*, 130 B. R. 531 (Bankr. E. D. Mo. 1991).

18. By the Motion to Reject the debtors sought to reject leases effective as of November 30, 2003, a date earlier than the earliest date on which the Court could have entered an order granting the Motion to Reject (which would have been the hearing date of December 8, 2003). Thus, the Debtors were invoking the Court's power under *Namco Cybertainment* and similar decisions to order a "retroactive" rejection of the Lease.

19. In this regard, and in compliance with the standards for a retroactive rejection, the Debtors represented in the Motion to Reject (i) that they would (and, by their November 24th letter, in fact, did) take action to surrender the Premises (including the keys) to Weingarten: (ii) the Debtors unequivocally stated their intention to reject the Lease (and did so in their November

24th letter as well); and (iii) the Debtors stated that they would not withdraw their request to reject the Lease.

20. Notwithstanding such representations to the Court, and to Weingarten, and notwithstanding their subsequent actions consistent with a November 30 rejection of the Lease, the Debtors, without notice to Weingarten, unilaterally removed the Lease from the list of leases to be rejected pursuant to the Order.

21. However, in accordance with *Namco Cybertainment* and its progeny, upon filing the Motion to Reject the Debtors lost their right not to follow through with a rejection of the Lease. The *Namco Cybertainment* standards exist in part to protect landlords – so that they can take action in reliance on a debtor's stated intent to reject a lease without undue delay. Weingarten in fact took action in reliance on the Debtors' representations in the Motion to Reject, and on the Debtors' actions relating thereto. Accordingly, the Debtors should be estopped from now taking any position other than that the Lease was rejected effective as of November 30, 2003.

22. Moreover, Weingarten submits, on information and belief, that, under the terms of the APA and the Sale Order, the Debtors have no authority at this time to do anything other than reject the Lease. As set forth in the Motion to Reject, the Purchaser has made its election to exclude the Lease from the sale, which election was set forth in the Motion to Reject. Accordingly, the Debtors are barred by *res judicata* and the law of this case from now taking any action with respect to the Lease other than to reject it.

WHEREFORE, Weingarten respectfully requests that the Court enter an order confirming that the Lease was rejected by the Debtors pursuant to 11 U.S.C. § 365(a) effective as of November 30, 2003, or alternatively, that the Court entered an order compelling the debtors immediately to reject the Lease. Weingarten further requests such other and further relief to which it may be justly entitled.

Dated: January 16, 2004

Respectfully submitted,

STEVENS & LEE, P.C.

/s/ John D. Demmy

JOHN D. DEMMY (ID No. 2802)

300 Delaware Avenue

8<sup>th</sup> Floor, Suite 800

Wilmington, DE 19801

Telephone: (302) 425-3308

Telecopier: (610) 371-8515

Email: jdd@stevenslee.com

*Attorneys for Weingarten Nostat, Inc.*