

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

**In re:** )  
 )  
**LADY BALTIMORE FOODS, INC.,** ) **Case No. 02-43428**  
 )  
 **Debtor.** )  
\_\_\_\_\_ )

**In re:** )  
 )  
**LADY BALTIMORE OF** ) **Case No. 02-43429**  
**MISSOURI, INC.,** )  
 )  
 **Debtor.** )  
\_\_\_\_\_ )

**MEMORANDUM AND ORDER**

Debtors request this Court enter an order authorizing them to assume a lease with Fisher Holdings, Inc., and a listing agreement with, and retention of, R.B. Murray & Company and B.A. Karbank & Co., L.L.P. as realtors.<sup>1</sup> Although the parties agree that the realtors have earned a \$125,000 commission for the sale of Debtors' Springfield real estate, they disagree how that commission should be classified. The Court has jurisdiction to hear this matter,<sup>2</sup> and it is a core proceeding.<sup>3</sup>

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<sup>1</sup>Doc. No. 321. The Court previously entered an order resolving other issues contained in this motion.

<sup>2</sup>28 U.S.C. §§ 157 and 1334(b).

<sup>3</sup>28 U.S.C. § 157(b).

## I. STATEMENT OF FACTS

Based upon the Stipulation of Uncontroverted Facts<sup>4</sup> filed by the parties, and the information contained in the exhibits presented to the Court, the Court makes the following findings of fact:

1. On January 8, 2002, Lady Baltimore Foods, Inc. and R.B. Murray & Company and B.A. Karbank & Company, LLP (hereinafter “Realtor”), entered into an Exclusive Right to Sell Agreement for Use of Commercial or Industrial Property (the “Listing Agreement”) for Lady Baltimore’s Springfield, Missouri distribution facility and real estate.<sup>5</sup>
2. The Listing Agreement provided that Lady Baltimore would pay Realtor five percent of the sales price “due and payable at the consummation of the sale transaction.”
3. On September 20, 2002, as a result of Realtor’s efforts, Lady Baltimore of Missouri, Inc. entered into a two-year lease agreement (the “Lease”) with Fisher Holdings, Inc. (“Fisher”), beginning October 1, 2002.
4. The Lease contained an option to purchase, which allowed Fisher to exercise its right to purchase the property for a sum certain by notifying Lady Baltimore, in writing, of its intent to purchase within the first nine months of the lease term.
5. The Lease allowed Fisher to determine the date of closing, so long as Fisher give Lady Baltimore thirty days’ written notice of the closing date and the closing occurred no later

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<sup>4</sup>Doc. No. 388.

<sup>5</sup>Although the Lease Agreement, Addendum to Lease Agreement, and the Listing Agreement are all signed by Lady Baltimore Foods, Inc., the actual Commercial and Industrial Real Estate Sale Contract is signed by Lady Baltimore of Missouri, Inc. The Court is frankly unsure against which of the two jointly administered estates the Realtor claim is asserted, and will thus use the generic term “Debtors” or “Lady Baltimore.”

than the last day of the lease term. The Lease also allowed either party to terminate the lease, within certain time parameters, if the purchase option was not exercised.

6. Lady Baltimore agreed, by signing the Lease, that it would pay Realtor five percent of each lease payment, and “[i]f the Premises are purchased by Tenant [Fisher] during the Term, Landlord [Lady Baltimore] will pay such REALTOR(S) a sales commission of five percent (5%). Less any lease commission previously paid by Landlord to brokers.” (Emphasis in original).
7. On December 31, 2002, Lady Baltimore filed for bankruptcy under Chapter 11 of the Bankruptcy Code.
8. Between October 1, 2002 and December 31, 2002, no rent was paid or required to be paid by Fisher to Lady Baltimore under the Lease. Rent was determined by a formula based on storage fees generated, and apparently none were generated over the benchmark allowed by the Lease.<sup>6</sup>
9. Since lease commissions were based on rents paid, and no rents were paid or due pre-petition, Realtor was entitled to no pre-petition lease commissions.
10. On June 30, 2003, the last day of Fisher’s ninth month of tenancy, Fisher notified Lady Baltimore in writing of its intent to exercise the purchase option.
11. On October 31, 2003, in order to effectuate the sale in this pending bankruptcy, Lady Baltimore filed a Motion for Order Authorizing Debtor to (1) Assume Commercial and

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<sup>6</sup>The Court has extrapolated this fact from the parties’ Stipulation, because it indicates all appropriate rentals have been paid by Fisher, and all rents received were received post-petition.

Industrial Lease Agreement Pursuant to 11 U.S.C. § 365, (2) Enter into Commercial and Industrial Real Estate Sale Contract, (3) Sell Real Property to Fisher Holdings, Inc., Free and Clear of Liens and Interests Pursuant to 11 U.S.C. § 363(f), (4) Assume Listing Agreement Pursuant to 11 U.S.C. § 365 and Approve Retention of R.B. Murray & Company and B.A. Karbank and Company, LLP, as Realtors, and (5) Allow Tenant's Offset of Monthly Rental Payments to Debtor for Certain Building Repairs ("Motion to Assume").

12. Between the date Lady Baltimore filed its bankruptcy petition and the date it filed the Motion to Assume, the Lease was carried out as written, except that no lease commissions were ever paid to Realtor. This is true even though \$109,067.20 in rents were paid to Lady Baltimore by Fisher post-petition, and the Lease provided that Realtor would receive 5% (or \$5,453.35) of rents paid as a lease commission.
13. On December 1, 2003, pursuant to an agreement of the parties, this Court granted so much of the Motion that sought an order allowing Debtor to enter into the Commercial and Industrial Real Estate Sale Contract and sell the property, but required the 5% commission (\$125,000) claimed by Realtor to be set aside and not distributed or used, awaiting disposition of this matter.
14. The sale was closed January 27, 2004.
15. The \$2.5 million sale price was fair, and Realtor performed adequately.

Other facts will be discussed below, when necessary.

## II. CONCLUSIONS OF LAW

The parties agree that Realtor fairly earned a \$125,000 commission for the sale of the Springfield real estate, but disagree how that claim should be classified. The Unsecured Creditors Committee (“Committee”) claims Realtor earned its commission at the time the Lease was executed, pre-petition, and thus its claim is entitled to a general, unsecured status. Realtor claims its right to a commission did not accrue until Fisher exercised its option to purchase the real estate and the sale was closed, which occurred post-bankruptcy, and thus the commission should be treated as a post-petition administrative claim and paid in full under 11 U.S.C. § 503(b)(1)(A).<sup>7</sup> The classification is potentially dispositive, because it is presently unknown what dividend unsecured creditors will receive in any liquidating plan. If Realtor’s claim is treated as an administrative claim, it will likely receive 100% of its claim, rather than having to share pro rata with unsecured creditors.

Two questions must be answered before deciding the status of the commission. First, the Court must determine whether the Listing Agreement was still an executory contract when the bankruptcy was filed. If so, the Court must then determine whether Lady Baltimore should be allowed to assume the executory contract, or if the business judgment standard would dictate that it reject the contract.

### **A. The Listing Agreement was still executory in nature after Lady Baltimore filed its bankruptcy.**

The first issue before the Court is whether the Listing Agreement was executory at the time Lady Baltimore filed for bankruptcy protection. Whether a contract is executory within the meaning of the

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<sup>7</sup>All future statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

Bankruptcy Code is a question of federal law.<sup>8</sup> An executory contract is one where “performance remains due to some extent on both sides.”<sup>9</sup> The crucial factor that establishes the executory nature of the contract is the existence of the unperformed mutual obligations at the time of the filing of the bankruptcy petition.<sup>10</sup>

The Committee contends that Realtor had already fully performed its obligations under the contract at the time the bankruptcy was filed, and thus the estate had already obtained whatever benefit it would gain from the contract. In other words, the Committee argues that Realtor had located a buyer pre-petition, and had earned its entire commission at the time it procured the lease between Debtor and Fisher in September 2002, because the lease included an option to buy. The Realtor, on the other hand, contends its commission was not earned until the sale was consummated, which occurred post-petition.

To support its position, the Committee relies upon both the language of the Listing Agreement, and on Missouri<sup>11</sup> case law surrounding a realtor’s right to collect a commission on the sale of real estate. The Agreement states that “[w]hen and if [the Realtor] produces a prospect ready, willing and able to purchase the property . . . and the prospect indicates such intention in writing, [Lady Baltimore] agrees to pay [the

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<sup>8</sup>*In re Munple, Ltd*, 868 F.2d 1129 (9<sup>th</sup> Cir. 1989).

<sup>9</sup>*See* 3 Collier on Bankruptcy ¶ 365.02[1] (1999).

<sup>10</sup>*RAF Financial Corp. v. Resurgens Communications Group, Inc.*, 1990 WL 145603 (D. Colo. 1990), citing *In re California Steel Co.*, 24 B.R. 185, 187 (Bankr. N.D. Ill. 1982); *Collingswood Grain Inc. v. Coast Trading Co. (In re Coast Trading Co. Inc.)*, 744 F.2d 686, 692 (9<sup>th</sup> Cir. 1984) and *Carlson v. Farmer's Home Administration (In re Newcomb)*, 744 F.2d 621, 624 (8<sup>th</sup> Cir. 1984).

<sup>11</sup>Property interests are created and defined by state law, the Realtor’s interest in receiving a commission is a state law property right, and both parties have stipulated that Missouri law is the applicable state law.

Realtor] a commission of five percent of the sale price.” That language does support the proposition that the date the purchaser of the property is secured is the date the Realtor is entitled to the commission. Similarly, Missouri law provides that the critical date for determining when a realtor is entitled to a commission is the date the buyer is procured, not the date of the closing on the real estate.<sup>12</sup>

Furthermore, numerous bankruptcy courts have held that when a realtor finds a buyer pre-petition, but the closing does not occur until after the bankruptcy petition is filed, the listing agreement is not executory in nature, because the realtor has fully performed its obligations under the listing contract. For that reason, when a buyer is procured pre-petition, many courts have found that the realtor has a pre-petition, unsecured contingent claim for the commission, contingent on the sale closing,<sup>13</sup> and not a post-petition administrative claim.

Alternatively, Realtor argues that under Missouri law, its “commission is earned at the time of the sale.” In support of this argument, the Realtor cites, *inter alia*, *In re John Chezik Imports, Inc.*<sup>14</sup> Realtor fails to cite an important part of *Chezik Imports*, however, where the bankruptcy court noted that “[u]nder

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<sup>12</sup>See *Moore v. Prindable*, 815 S.W.2d 25, 27 (Mo. Ct. App. 1991); *Real Estate Enterprises v. Collins*, 256 S.W. 2d 286, 289 (Mo. Ct. App. 1953).

<sup>13</sup>See, e.g., *Coldwell Banker and Co. v. Goodwin Bevers Co., Inc. (In re Goodwin Bevers Co., Inc.)*, 575 F.2d 805 (10<sup>th</sup> Cir. 1978) (rejecting claim by realtor that because completion of the transaction occurred after bankruptcy, the listing agreement was an executory contract under California law and was not a provable claim at the time of bankruptcy); *In re W/B Associates*, 227 B.R. 635 (Bankr. W.D. Penn. 1998) (holding that listing agreement was not executory where realtor found purchaser pre-petition, and all that remained to be done post-petition was the closing of the purchase and payment of the commission); and *In re Munple, Ltd.*, 868 F.2d 1129 (9<sup>th</sup> Cir. 1989) (holding that when a commission is due upon the procurement of a buyer, the listing agreement is not made executory by a provision conditioning payment on closing the sale).

<sup>14</sup>195 B.R. 417 (Bankr. E.D. Mo. 1996).

Missouri law, generally, a broker earns a commission from the seller when he produces a buyer ready, willing, and able to buy on the terms specified by the seller, whether or not the sale is completed.<sup>15</sup> The court went on to note that “[t]he parties may vary the seller's duty to pay the broker's commission by express agreement within their listing contract,” and found that “under the terms of the Employment Agreement, the parties agreed to substitute the terms of their agreement as to the payment of commission for the general provisions under Missouri common law.”<sup>16</sup>

Therefore, although the Realtor is correct in stating that the closing of the purchase in *Chezik Imports* governed whether the realtor was entitled to a commission under the facts of that case, the Realtor ignores the fact that the court only made this finding after ruling that the parties altered the common law rule by the express terms of the listing agreement. The ultimate holding in *Chezik Imports* is clearly distinguishable from this case, because, unlike the listing agreement in *Chezik Imports*, the Listing Agreement herein contains language that essentially mirrors Missouri common law, rather than significantly altering it.

Although this Court thus agrees that the law provides Realtor was entitled to its commission when it produced a ready, willing and able buyer, the question in this case is when did Realtor produce that buyer under the terms of the agreements of the parties. The Lease required Fisher to notify Lady Baltimore of its intent to purchase, in writing, during the first nine months of the lease, which expired June 30, 2003, and that is the date Fisher exercised the option. Accordingly, until June 30, 2003, six months post-petition, there was no buyer for this real estate. Instead, at the time of filing, Fisher was merely a tenant with an

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<sup>15</sup>*Id.* at 420 (emphasis added).

<sup>16</sup>*Id.*

option to purchase. It was not “ready, willing and able to purchase the property” until June 30, 2003, and certainly had not indicated any intent in writing before that date.

Because the language of the Listing Agreement, along with all relevant case law, indicates that the commission was to be paid upon the procurement of a ready, willing and able buyer, the Court finds the Realtor became entitled to the sales commission on the property when Fisher exercised its option to purchase. Had Fisher decided not to exercise the purchase option, Realtor was still required under the terms of the Listing Agreement to continue to market the real estate. The Listing Agreement provided that either party could terminate the agreement on 45 days’ written notice,<sup>17</sup> and there is no evidence before the Court that the Agreement was ever terminated. Such continued marketing was required under the terms of the contract, and thus Realtor had not fully performed under the Listing Agreement at the time bankruptcy was filed. For that reason, the Court finds the Listing Agreement was an executory contract, still awaiting significant performance by both the Realtor and Lady Baltimore, at the time Lady Baltimore filed its bankruptcy petition.

The Court notes that this finding is also consistent with the language used in the Lease Agreement, to which the Realtor was not a party. Pursuant to the Lease Agreement, Lady Baltimore was obligated to pay the Realtor a 5% sales commission “If the Premises are purchased by [Fisher].” Again, it is clear from this language that the Realtor was not entitled to the 5% sales commission until Fisher took on the role of a purchaser, which clearly occurred post-petition.<sup>18</sup>

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<sup>17</sup>Exhibit 4, Paragraph 8.

<sup>18</sup>If Fisher had paid any rents to Lady Baltimore pre-petition (or any had been owed under the rent formula), Realtor would have been entitled to receive 5% of those rents as its lease commission. Its claim for those pre-petition lease commissions would have been a general unsecured claim, because

**B. The Lease was also an executory contract at the date of filing**

Debtor's October 31, 2003 Motion also sought to assume the Lease Agreement with Fisher Holdings. The Committee apparently objected to assumption of the Lease, although no written objection was originally filed, as the agreed Order allowing the sale to proceed deferred this issue. The Committee has now argued that assumption of the lease is moot, as the lease has been superseded by the sale of the real estate. That was not the case, however, when Debtor moved for the assumption.

Again, the existence of unperformed mutual obligations at the time of the filing of the bankruptcy petition is crucial. Therefore, although the Committee is correct in its assertion that now there may be nothing left to do under the Lease, because the sale has now superseded the Lease, the contract must be examined to determine what obligations were outstanding at the time of the filing of the bankruptcy petition, and at the time of the motion.

The Court finds that as of October 31, 2003, there was still a year remaining on the lease, and thus substantial performance was still required by both parties. Most importantly, it was the Lease that contained the option to purchase, which both Debtor and Fisher Holdings wished to enforce. For the same reasons articulated above, the Court also finds that both as of the date of filing, and as of October 31, 2003 when the Debtor's Motion was filed, the Lease Agreement was an executory contract.

**C. The Court approves Lady Baltimore's request to assume the Lease and Listing Agreement, including retention of R.B. Murray & Company and B.A. Karbank & Co. as realtors.**

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it had completed its performance in earning the rent commissions pre-petition.

Having determined that the Lease and Listing Agreement were executory contracts at the time Lady Baltimore filed its bankruptcy petition, the Court must now turn its attention to Lady Baltimore's request for authorization to assume the Lease and the Listing Agreement, and to retain Realtors as realtors for the estate under §§ 327(a), 328 and 1107(a). This Motion was filed in October, 2003, and the parties agreed to that part of the Motion that requested the sales contract be executed, and the sale consummated, because all parties in interest, including the Committee, agreed the \$2.5 million sales price was reasonable. Thereafter, the Committee and the Realtor sought to brief and orally argue the issue of the classification of the \$125,000 sales commission.

A debtor may assume the obligations of an executory contract or unexpired lease subject to the bankruptcy court's approval.<sup>19</sup> The debtor's ability to assume or reject any executory contract continues until the confirmation of a Chapter 11 plan, unless, upon request of a party, the Court orders the debtor to either assume or reject the lease within a specified period of time.<sup>20</sup> The court must use the "business judgment" standard in analyzing whether to approve the debtor-in-possession's decision to assume or

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<sup>19</sup>11 U.S.C. § 365(a); *see also In re Valley View Shopping Center, L.P.*, 260 B.R. 10, 24 (Bankr. D. Kan. 2001).

<sup>20</sup>11 U.S.C. § 365(d)(2).

reject an executory contract.<sup>21</sup> The scope of review is narrow,<sup>22</sup> and a presumption of reasonableness attaches to debtor's management decisions.<sup>23</sup>

The Second Circuit explained the Court's role in applying the business judgment standard in the context of approving the assumption or rejection of an executory contract "as [one of] an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession, and not, as it does in other circumstances, as the arbiter of disputes between creditors and the estate."<sup>24</sup> Under the business judgment standard, assumption of an unexpired lease or executory contract is appropriate if the debtor can demonstrate the assumption will benefit the estate.<sup>25</sup>

The Committee asserts that Lady Baltimore's attempt to assume the Lease and Listing Agreement at this point, post-closing of the sale of the property, is of no benefit to the estate, and only results in elevating the Realtor's claim from that of an unsecured, pre-petition claim to that of an administrative

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<sup>21</sup>*In re Valley View Shopping Center, L.P.*, 260 B.R. at 39.

<sup>22</sup>*Matter of GP Exp. Airlines, Inc.*, 200 B.R. 222, 230 (Bankr. D. Neb. 1996) (holding that absent a showing of bad faith or abuse of debtor's discretion, debtor's exercise of business judgment in deciding whether to assume a lease will generally not be disturbed).

<sup>23</sup>*In re Johns-Manville Corp.*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986).

<sup>24</sup>*Orion Pictures Corp. v Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2<sup>nd</sup> Cir. 1993).

<sup>25</sup>*See Westship, Inc. v. Trident Shipworks, Inc.*, 247 B.R. 856 (M.D. Fla. 2000); *In re Gateway Apparel, Inc.*, 210 B.R. 567 (Bankr. E.D. Mo. 1997); *In re Riodizio, Inc.*, 204 B.R. 417 (Bankr. S.D.N.Y. 1997).

expense claim, which claims will likely be paid in full. Debtor and Realtor claim the decision to assume the Lease and Listing Agreement constitutes good business judgment and should be approved by the Court.<sup>26</sup>

The Court finds that as of the date the Motion was filed, the assumption of the Lease and the Listing Agreement, which brought with it the continued contractual relationship with the Realtor, was of some benefit to the estate in this case. The motion to assume the Lease and Listing Agreement were filed prior to the closing of the sale, and in fact accompanied a request by Lady Baltimore to enter into a contract for sale with Fisher. All parties agree that the Realtor was effective in procuring a purchaser for the property and in obtaining a fair price.

Furthermore, when the Motion was filed, there was no guarantee that the sale with Fisher would be closed, or that future services of the Realtor, either in assisting in the closing of the deal with Fisher or in procuring another buyer in the event the sale with Fisher fell through, would not be needed. Clearly, Lady Baltimore and the Realtor had a good working relationship and the Realtor was very familiar with the property. The continued contractual relationship between Lady Baltimore and the Realtor was beneficial to the estate, and this Court cannot find, with the appropriate deference that must be given to debtors-in-possession in such inquiries, that the decision to assume the Listing Agreement was other than through the exercise of good business judgment.

Likewise, when the Motion to Assume the Lease was filed, there was still a year left under the terms of the lease. More importantly, it is that Lease that provided Fisher with the option to purchase,

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<sup>26</sup>The Realtor also contends that § 1108 gives the debtor “the authority to operate the business as it sees fit” and that the Court need not even consider the business judgment standard. The Court finds this argument to be completely without merit, as § 365 clearly requires Court approval of any assumption or rejection of an executory contract, after notice and a hearing.

which all parties agree was in the best interest of the estate. Thus, again, there are no facts before the Court that would suggest Debtor's request to assume that Lease was other than through the exercise of good business judgment. Therefore, the Court finds that the motion to assume the Lease and Listing Agreement should be granted.

The Committee argues that assumption of either of these agreements was made moot by the closing, on January 26, 2004, some three months after the motion was made. The Court disagrees that merely because the parties were unable to more quickly brief, and this Court was unable to more quickly decide, the issues, that that inherent court delay renders the matters moot. If the Court were to allow such delays to alter substantive rulings, it would only encourage parties to delay proceedings.

Under these circumstances, it is unfair to punish Debtor and Realtor because they wanted to do what was best for the creditors—to make sure the sale closed expeditiously. They could have held up the sale (potentially losing the buyer) until this issue was resolved, so as to not risk mootness of the issue. Instead, the parties and the Court allowed the sale to close, which was clearly in the best interest of the estate. The Court thus deems the issues raised by the October 31, 2003 motions reserved, as the facts existed on that date, and denies Committee's mootness claim.

Finally, the Committee seems to suggest that by allowing the assumption of the Lease, that will somehow result in Realtor having its pre-petition lease commission relegated to an administrative priority. This is not true for two reasons. First, the parties' stipulations have led this Court to believe that the Realtor was never entitled to any pre-petition lease commissions, because no rents were paid or payable, pre-petition, under the rent formula. Secondly, the Court has held that any claim that Realtor might have had for pre-petition lease payments would have been a general, unsecured claim.

**D. Lady Baltimore is authorized to hire the Realtor as a professional pursuant to 11 U.S.C. § 327.**

Based upon the Court's ruling that Lady Baltimore should have been allowed to assume the Listing Agreement, the Court finds it was and is appropriate to allow Lady Baltimore to hire the Realtor pursuant to § 327 for the purposes of serving as a professional realtor for the estate in dealing with the sale of Lady Baltimore's Springfield, Missouri distribution facility and real estate. The Court notes that there have been no objections to this portion of the motion filed by Lady Baltimore, beyond those lodged against the assumption of the Lease and Listing Agreement as outlined above, which the Court has overruled.

**III. CONCLUSION**

The Court finds that the Lease and the Listing Agreement were executory contracts at the time the bankruptcy was filed. Substantial performance was required by both Lady Baltimore and Fisher under the terms of the Lease at the time of bankruptcy. As to the Listing Agreement, the Realtor had not produced a ready, willing and able buyer, as that term was defined by the contract, at the time the bankruptcy was filed, but instead had only produced a tenant, Fisher, which might someday wish to purchase the property. Because Fisher did not exercise its option to purchase the property until after Lady Baltimore filed its bankruptcy petition, however, the Listing Agreement was executory at the time the bankruptcy petition was filed, and was subject to assumption or rejection by Lady Baltimore.

The Court finds no basis to hold that Lady Baltimore failed to exercise good business judgment in electing to assume the Lease and Listing Agreement when it so requested in October, 2003, as doing so provided a benefit to the estate. Therefore, the Court approves Lady Baltimore's request to assume both contracts. The Court also finds that Lady Baltimore is allowed to hire and compensate the Realtor,

pursuant to § 327 and under the terms of the Listing Agreement, which caps compensation at 5% of the sales price, for providing services as a realtor to the estate for the sale of Lady Baltimore's Springfield, Missouri distribution facility and real estate.

**IT IS, THEREFORE, BY THIS COURT ORDERED** that Lady Baltimore's Motion for Order Authorizing Debtor to Assume the Lease and Listing Agreement Pursuant to 11 U.S.C. § 365 and to Approve Retention of R.B. Murray & Company and B.A. Karbank & Co., LLP, as Realtors, (Doc. 321) is granted.

**IT IS SO ORDERED** this 13th day of August, 2004.

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JANICE MILLER KARLIN  
United States Bankruptcy Judge

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the **MEMORANDUM AND ORDER** was deposited in the United States mail, postage prepaid on this 13<sup>th</sup> day of August, 2004 to the following:

James E. Bird  
Polsinelli Shalton & Welte PC  
700 W 47th St Ste 1000  
Kansas City, Mo. 64112-1802

Scott J. Goldstein  
Lisa A. Epps  
1000 Walnut Street, Suite 1400  
Kansas City, Mo. 64106

T. Bradley Manson  
Alvin D. Shapiro  
Shapiro, Manson & Karbank  
10801 Mastin, Suite 820  
Overland Park, Ks. 66210

Todd W. Ruskamp  
Shook, Hardy & Bacon LLP  
2555 Grand Blvd  
Kansas City, MO 64108

Thomas O'Neal  
Shughart Thomson & Kilroy, PC  
1800 Twelve Wyandotte Plaza  
120 W. 12<sup>th</sup> Street  
Kansas City, Mo. 64105

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DEBRA C. GOODRICH  
Judicial Assistant to:  
The Honorable Janice Miller Karlin  
Bankruptcy Judge