

# ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Fleming Companies, Inc., <u>et al.</u> , <sup>1</sup>	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
Debtors.	)	

Objection Deadline: May 28, 2003 at 4:00 p.m. prevailing Eastern time  
Hearing Date: June 4, 2003 at 4:00 p.m. prevailing Eastern time

**ORDER AUTHORIZING: (A) SALE OF THREE RICHMAR FOOD STORES FREE AND CLEAR OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES; AND (B) ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED TO SUCH STORES**

Upon consideration of the motion of Fleming Companies, Inc. ("Fleming") and Richmar Foods, Inc., a wholly owned subsidiary of Fleming ("Richmar"), two of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an Order: (A) Authorizing the Sale of Debtors' Richmar Stores Free and Clear of Liens, Claims and Interests; and (B) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Such Sale (the "Sale Motion"); on May 3, 2003, the Debtors' Motion for Order: (A) Scheduling the Date, Time and Place for a Hearing on the proposed Richmar Food Stores Sale Motion; (B) Approving the Form and Manner of Notice

<sup>1</sup> The Debtors are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., L.L.C.; Fleming Foods of Texas, L.P.; Fleming International, Ltd.; Fleming Supermarkets of Florida, Inc.; Fleming Transportation Service, Inc.; Food 4 Less Beverage Company, Inc.; Fuelserv, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; Minter-Weisman Co.; Piggly Wiggly Company; Progressive Realty, Inc.; Rainbow Food Group, Inc.; Retail Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

Thereof; and (C) Approving: (i) Debtors' Auction Procedures; and (ii) Break-Up Fee (the "Procedures Motion") having been filed and served on the parties identified in the Procedures Motion; on May 12, 2003, the Sale Motion having been filed and served on the parties identified therein; on May 12, 2003, the Auction Notice (as defined in the Procedures Motion) having been served upon the persons and in the manner specified in the Procedures Motion; on May 12, 2003, the Cure Notice (as defined in the Procedures Motion) having been served on each counterparty to an executory contract or unexpired lease with any of the Debtors that is to be assumed and assigned to the purchaser; on May 22, 2003, the Order granting the Procedures Motion and a revised Auction Notice (the "Revised Auction Notice") having been served upon the persons served with the Procedures Motion; on May 23, 2003, a notice substantially in the form of the Auction Notice having been published in the Wall Street Journal (national edition); the Debtors having held the auction for the Assets in accordance with the Debtors' Auction Procedures at the offices of Kirkland & Ellis, 153 East 53<sup>rd</sup> Street, New York, NY 10022, on May 30, 2003 at 10:00 a.m. prevailing Eastern time; the Court having reviewed the Sale Motion and any objections, responses and other papers before the Court in connection with the Auction of the Remainder Assets (as defined in the Revised Auction Notice); the Court having heard the statements of counsel in support of the sale of the Remainder Assets, as reflected in the record at the hearing before this Court on the Sale Motion; the Court having considered all testimony presented and evidence admitted at the hearing on the Sale Motion; and the Court finding that (i) notice of the hearing on the Sale Motion and the opportunity of any party in interest to object to the sale of the Remainder Assets were adequate and appropriate as to all parties to be affected by the sale of the Remainder Assets and (ii) the legal and factual bases set forth at the hearing on the

Sale Motion and as set forth in this Order establish just cause for the relief granted herein; the Court hereby makes the following Findings of Fact, and Conclusions of Law.

IT HAVING BEEN FOUND AND DETERMINED by this Court that:

1. The Court has jurisdiction over these chapter 11 cases pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these chapter 11 cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
2. Due, adequate and sufficient notice of the Sale Motion, the Auction Notice, the Revised Auction Notice, the Revised Auction Notice, the Procedures Order, the Cure Notice and the Auction has been given to all affected parties in accordance with the procedures set forth in the Procedures Motion and the Sale Motion and in accordance with the Bankruptcy Rules and other applicable orders of the Bankruptcy Court, and no other or further notice is or shall be required.
3. The Auction was conducted in accordance with the Revised Auction Notice in all material respects. All parties present at the Auction have agreed that the Auction was so conducted.
4. At the Auction, the Debtors determined that Ralphs Grocery Company submitted the highest and best offer for the Remainder Assets. The offer submitted by Ralphs Grocery Company at the Auction, as modified on the record at the Auction, constitutes the highest and best bid for the Remainder Assets.
5. The Debtors have selected Ralphs Grocery Company the Winning Bidder (the "Buyer") for the Remainder Assets. As defined in the Revised Auction Notice, the Remainder Assets are comprised of the 9-Store Assets other than the FTC Approved Assets (as each term is

defined in the Revised Auction Notice). The three store locations included in the Remainder Assets are the following: 1850 W. Lacey Ave., Hanford, California; 4590 N. First Ave., Fresno, California; and 3637 S. Mooney Blvd., Mooney, California. The Debtors selected the Buyer as the Winning Bidder after consulting with the Committee and the Debtors' post-petition lenders in accordance with the Revised Auction Notice.

6. The Buyer is purchasing the Remainder Assets in good faith and is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code, and is therefore entitled to the protection of that provision, and there is no evidence that the Buyer has not proceeded in good faith in all respects in connection with the Auction. There is no evidence that Buyer has acted in violation of section 363(n) of the Bankruptcy Code.

**Accordingly, it is hereby ORDERED that:**

1. The Sale Motion is approved on the terms set forth herein. The sale of the Remainder Assets to the Buyer is approved on the terms set forth herein.

2. Each objection to the Sale Motion, to the extent such objection has not been withdrawn or resolved, is hereby overruled and denied. Each objection to the sale of the Remainder Assets to the Buyer, to the extent such objection has not been withdrawn or resolved, is hereby overruled and denied.

3. The Debtors are hereby authorized to take any and all actions necessary or appropriate to:

(a) consummate the proposed sale of the Remainder Assets to the Buyer in accordance with the terms and conditions set forth in the purchase agreement between the

Debtors and the Buyer (the "Purchase Agreement"), a copy of which is attached hereto as Exhibit 1; and

(b) perform, consummate, implement and close fully the sale to the Buyer of the Remainder Assets, together with all additional instruments and documents that may be reasonably necessary or desirable to implement such sale.

4. All of the Remainder Assets shall be sold, assigned, transferred, conveyed and delivered to the Buyer free and clear of any and all liens, claims, interests and encumbrances whatsoever on the terms provided in the Purchase Agreement which is hereby authorized, ratified, and approved in its entirety. Nothing in this Order is intended to conflict with the terms of the Order Requiring Segregation of PACA Trust Assets and Authorizing Procedure for Reconciliation and Payment of Valid Claims under The Perishable Agricultural Commodities Act and The Packers and Stockyard Act [Docket No. 725].

5. The Buyer is a good faith purchaser entitled to the protections afforded a purchaser pursuant to 11 U.S.C. § 363(m), and there have been and there are not any violations of section 363(n) of the Bankruptcy Code as a result of the approval of the sale of the Remainder Assets to the Buyer.

6. Debtors are hereby authorized, pursuant to 11 U.S.C. § 365, to assume and assign to the Buyer the Assigned Contracts and Leases (as defined in the Sale Motion) identified in the Purchase Agreement. As a condition to such assumption and assignment pursuant to section 365 of the Bankruptcy Code, the Debtors are hereby ordered to pay to counterparties to such Assigned Contracts and Leases from the purchase price set forth in the Purchase Agreement, the cure amounts set forth in the Cure Notice amended to reflect revised cure amounts agreed to by

the Debtors for certain of the Assigned Contracts and Leases, a copy of which notice is attached hereto as Exhibit 2, which payment shall be in full and final satisfaction of all obligations and as full compensation to the non-Debtor parties for any pecuniary losses under such contracts or leases pursuant to 11 U.S.C. § 365(b)(1). The distribution of the cure payments to the non-Debtor parties shall be made as soon as practicable; provided, however, that if there is a dispute concerning any proposed cure amount, payment shall be made to the respective contract or lease counterparty only after resolution of such dispute, by this Court or otherwise.

7. The Debtors are hereby authorized, pursuant to 11 U.S.C. §§ 363 and 365, as applicable, to assign to the Buyer the Assigned Contracts and Leases. The Debtors are further authorized to take any and all actions necessary or appropriate to consummate the proposed assignment of the various contracts and leases to the Buyer, as specified in the Sale Motion and in the Purchase Agreement. Pursuant to section 365(k) of the Bankruptcy Code, the Debtors are relieved of any liability for any breach of any Assigned Contract or Lease occurring after the assignment of such Assigned Contracts and Leases to the Buyer.

8. The Buyer is not a successor to the Debtors and is not otherwise liable for any of the Excluded Liabilities (as defined in the Purchase Agreement), ~~and each and every holder of any of the Excluded Liabilities hereby is permanently enjoined from commencing, continuing or otherwise pursuing or enforcing any remedy, claim, cause of action or encumbrance against the Buyer related thereto.~~ The Buyer shall only be liable for those liabilities, responsibilities and obligations under the Assigned Contracts and Leases arising from and after the Closing Date on the terms set forth in the Purchase Agreement.

9. Except as otherwise expressly provided in the Purchase Agreement, effective upon the transfer of the Assets to the Buyer, any liens against the Assets shall transfer and attach to the proceeds of the sale with the same force, validity, priority and effect, if any, as said liens had formerly attached to the Assets, subject to the Debtors' ability to challenge the extent, validity, priority and effect of the liens, and subject to and as otherwise provided in any other order of this Court in these chapter 11 cases.

10. This Order is and shall be effective as a determination that, upon transfer of the Remainder Assets to the Buyer, all liens existing as to the Remainder Assets conveyed to the Buyer have been and hereby are terminated and declared to be unconditionally released, discharged and terminated, and shall be binding upon and govern the acts of all entities, including all filing agents, filing officers, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the Remainder Assets conveyed to the Buyer. Except as otherwise provided in this Order, all liens of record as of the date of this Order, shall be forthwith removed and stricken as against the Remainder Assets. All entities described in this paragraph are authorized and specifically directed to strike all such recorded liens against the Remainder Assets from their records, official and otherwise.

11. Subject to the provisions of this Order, if any person or entity which has filed statements or other documents or agreements evidencing liens on, or interests in, any of the Remainder Assets does not deliver to the Debtors or the Buyer prior to the closing of the sale of the Remainder Assets to the Buyer, in proper form for filing and executed by the appropriate

parties, termination statements, instruments of satisfaction, releases of liens and encumbrances, and any other documents necessary for the purpose of documenting the release of all liens which the person or entity has or may assert with respect to any of the Remainder Assets, the Debtors and/or the Buyer are hereby authorized and directed to execute and file such statements, instruments, releases and other documents on behalf of such persons or ~~entity~~ <sup>entities</sup> with respect to any

of the Remainder Assets. *The Debtors and the Buyer are not authorized to take this action as to the liens of the Debtors' prepetition and postpetition senior secured lenders; provided, however, that the*

12. Each and every term and provision of this Order shall be binding in all respects upon the Buyer, the Debtors, the Debtors' bankruptcy estates, their creditors, all individuals or entities holding an interest in the Debtors, all other entities and third parties, including, without limitation, any entity purporting to hold a lien against the Remainder Assets.

13. Nothing contained in any order of any type or kind entered in these chapter 11 cases, or any related proceeding, subsequent to entry of this Order, shall modify the Buyers' rights under the Purchase Agreement or this Order.

14. The Debtors shall comply with the terms of the post-petition Credit Agreement dated as of May 6, 2003, by and among the Debtors, the lenders party thereto (the "DIP Lenders"), Deutsche Bank Trust Company Americas, as Administrative Agent and Deutsche Bank Securities, Inc. and JP Morgan Chase as Joint Lead Arrangers (the "Credit Agreement"), including section 2.09(b) of the Credit Agreement. Without limiting the generality of the foregoing, the Debtors shall use commercially reasonable efforts to calculate the Net Proceeds (as defined in the Credit Agreement) from the sale of the Assets to be paid at the closing of such sale prior to such closing.

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*Debtors' prepetition and postpetition senior secured lenders shall cooperate with the Debtors in connection with the filing and execution of termination statements, instruments of satisfaction, releases of liens, claims, encumbrances and interests, and any other documents necessary for the purpose of documenting the release of all liens, claims, encumbrances and interests of the Debtors' prepetition and postpetition senior secured lenders in and to the Remainder Assets.*



15. In accordance with section 1146(c) of the Bankruptcy Code, the making or delivery of any instrument or transfer, including the filing of any deed or other document of transfer to evidence, effectuate or perfect the rights, transfers and interest contemplated by the Purchase Agreement shall be in contemplation of a plan or plans of reorganization to be confirmed in these chapter 11 cases, and, as such, shall be free and clear of any and all transfer tax, stamp tax or similar taxes; provided, however, that any such taxes shall be payable by the Debtors and the Buyer (in their respective portions pursuant to the terms of the Purchase Agreement) into an interest bearing escrow account, pending confirmation of a plan or plans of reorganization in these chapter 11 cases. Such instruments, orders and agreements transferring the Remainder Assets to the Buyer shall contain the following endorsement:

“Because this [instrument] has been authorized pursuant to an order of the United States Bankruptcy Court for the District of Delaware, in contemplation of a plan of reorganization of the Debtors, it is exempt from transfer taxes, stamp taxes or similar taxes pursuant to 11 U.S.C. § 1146(c).”

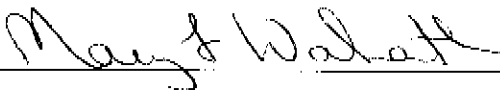
16. This Court retains jurisdiction to:
- (a) Interpret, implement and enforce the terms and provisions of this Order (including the injunctive relief provided in this Order) and the terms of the Purchase Agreement, all amendments thereto and any waivers and consents thereunder and of each of the agreements executed in connection therewith;
  - (b) Compel delivery of the Remainder Assets to the Buyer;
  - (c) Resolve any disputes arising under or related to the sale of the Remainder Assets to the Buyer, including, without limitation, resolving cure amounts owing to counterparties to the Assigned Contracts and Leases; and

(d) Adjudicate all issues concerning alleged liens and any other alleged interests in and to the Remainder Assets or the proceeds of the sale, including the extent, validity, enforceability, priority and nature of all such alleged Liens and any other alleged interests relating to the proceeds of the sale.

17. In order that the parties may hold a closing under the Purchase Agreement less than ten days following the entry of this Order, this Order shall be effective immediately upon entry pursuant to Rule 7062 and 9014 of the Federal Rules of Bankruptcy Procedure, and, notwithstanding Federal Rules of Bankruptcy Procedure 6004(g) and 6006(d), shall not be stayed.

18. Pursuant to Rule 58 of the Federal Rules of Civil Procedure, as made applicable herein by Rule 9021 of the Federal Rules of Bankruptcy Procedure, this Order shall constitute an Order approving the Notice of Motion and the Sale Motion.

Wilmington, Delaware  
Dated: June 4 2003



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Hon. Mary F. Walrath  
United States Bankruptcy Judge