

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

In re:

FLEMING COMPANIES, INC., et al.,  
  
Debtors.

Chapter 11

Case No. 03-10945 (MFW)

Jointly Administered

**Objection Deadline: July 10, 2003**

**Hearing Date: July 17, 2003@ 3:00 p.m.**

**MOTION TO COMPEL DEBTORS TO ASSUME OR REJECT EXECUTORY  
CONTRACT OR, IN THE ALTERNATIVE, AUTHORIZE REJECTION THEREOF**

5 Rivers Food Group, Inc. ("**5 Rivers**" or "**Movant**"), by and through its undersigned counsel, hereby moves the Court, pursuant to Section 365 of Title 11 of the United States Code (the "**Bankruptcy Code**") and Rules 4001, 9013 and 9014 of the Federal Rules of Bankruptcy Procedure (hereinafter, the "**Bankruptcy Rules**"), for an order (a) compelling debtors Fleming Companies, Inc., et al. (the "**Debtors**") to assume or reject a certain Facility Standby Agreement with Movant. In the alternative, Movant respectfully requests that the Court enter an Order approving rejection of this contract, effective immediately. The grounds for this Motion are as follows:

**JURISDICTION AND VENUE**

1. The Court has subject matter jurisdiction over this motion under and pursuant to 28 U.S.C. §§ 1334 and 157.
2. Venue of this motion is proper in this District and before this Court under and pursuant to 28 U.S.C. § 1409.

3. This is a core proceeding under and pursuant to 28 U.S.C. § 157(b)(2); and, if opposed by the Debtors or other properly interested parties, also would become a contested matter under and pursuant to Bankruptcy Rule 9014.

### **BACKGROUND**

4. The Movant is and at all times pertinent to this Motion has been the owner and operator of a retail grocery store in Strawberry Plains, Tennessee. In 2002, Debtor Fleming Companies, Inc. ("**Debtor**") entered into a certain Facilities Standby Agreement with 5 Rivers.<sup>1</sup> Pursuant to this Agreement, the Debtor agreed to supply food, grocery, meat, perishables and other related products, supplies and merchandise to Movant at certain prescribed levels. More specifically, the Debtor was supposed to provide at least 50 percent of the products sold by Movant at its grocery store.

5. Movant also had and has obligations under the Facility Standby Agreement. It agreed to purchase product at prices basically set by the Debtor. In addition 5 Rivers agreed to give the Debtor a right of first refusal with respect to certain transactions, including sales of Movant's stock, sales of assets, and leases or subleases. 5 Rivers also agreed to certain contractual penalties in the event it breached its duties under the Facility Standby Agreement.

6. Since before the Petition Date, the Debtor has not supplied products to Movant as required by the Facility Standby Agreement. Movant has been forced to look elsewhere for inventory; however it cannot enter into an arrangement similar to the Facility Standby Agreement with any other vendor without, arguably, breaching its contractual commitments to the Debtor. In addition, it is simply unfair that 5 Rivers continues to face risks and burdens

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<sup>1</sup> Due to its volume, copies of the Facility Standby Agreement and its exhibits are not attached to this Motion. Copies of these documents may be obtained upon request directed to the Movant's Delaware counsel.

under the Facility Standby Agreement when the Debtor is unable or unwilling to comply with its obligations thereunder.

### **RELIEF REQUESTED**

7. The Debtors are in default of their obligations under the Facility Standby Agreement as they have failed to supply requisite levels of product to the Movant for months. While, perhaps, the Debtors could take action to ensure that they meet their contractual obligations in the future, the past defaults cannot be cured. Accordingly, this Court can and should compel the Debtors to either assume or reject the Facility Standby Agreement or, recognizing that the defaults thereunder cannot be cured, compel and authorize the Debtors to reject this executory contract.

8. Section 365(d)(2) of the Bankruptcy Code provides that:

In a case under Chapter 11 ... of this title, the trustee may assume or reject an ... unexpired lease of ... personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such ... lease, may order the trustee to determine within a specified period of time whether to assume or reject such ... lease.

11 U.S.C. § 365(d)(2).

9. In deciding whether to accelerate a debtor's decision to assume or reject an executory contract, a court must "balance the interests of the contracting party against the interests of the debtor and its estate." *In re Physician Health Corporation*, 262 B.R. 290, 292 (Bankr. D. Del. 2001). When performing this balancing test, courts often utilize a variety of factors, including (1) the nature of the interests at stake, (2) the balance of hardships to the litigants, (3) the good to be achieved, and (4) the safeguards afforded to the litigants. *E.g.*, *In re*

*Beker Indus. Corp.*, 64 B.R. 890 (Bankr. S.D.N.Y. 1986) (granting the creditor's motion to expedite the time within which the debtor must assume or reject executory contracts).

10. Under the present circumstances, the balance of the equities favors shortening the Debtors' time to assume or reject and compelling them to assume or reject the Facility Standby Agreement by a date certain. Movants' grocery store operations will suffer if it cannot establish a reliable source of supply. Rejection of the Facility Standby Agreement – and the right of first refusal contained therein – will give 5 Rivers more flexibility in dealing with other potential suppliers. In addition, it is simply unfair for the Movant to bear any obligations under this contract when the Debtor has failed to meet its obligations for months. Furthermore, as described below, the Debtors will never be able to meet the Bankruptcy Code's criteria for assuming this contract, so rejection is a foregone conclusion. Therefore, Movant respectfully requests that, at a minimum, the Debtors be compelled to assume or reject the Facility Standby Agreement within ten (10) days of the date of an order entered by the Court on this Motion.

11. Movant respectfully maintains that assumption of the Facility Standby Agreement is not an option for the Debtors at this point. As note above, the Agreement required the Debtor continuously provide products to 5 Rivers. The Debtors' default cannot be cured – their ability to deliver supplies in, say, May of 2003 is gone forever.

12. Section 365(b) of the Bankruptcy Code provides that an executory contract may not be assumed or assigned unless (a) all defaults are cured, (b) the non-debtor party to the contract is compensated for any default by the debtor and (c) there is adequate assurance given of future performance. Based on the facts recited above, the Debtors cannot meet these requirements, and therefore rejection of the Facility Standby Agreement is a foregone

conclusion. Accordingly, Movant requests that the Court authorize and direct the Debtors to reject this executory contract, effective immediately.

WHEREFORE, 5 Rivers respectfully requests that the Court:

- (1) compel the Debtors to immediately assume or reject the Facility Standby Agreement; or
- (2) authorize and direct the Debtors to reject the agreement, effective immediately;  
and
- (5) grant such other and further relief as the Court deems just and proper.

Dated: July 1, 2003

**STEVENS & LEE**

By /s/ Joseph Grey

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