

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

In re:)	Chapter 11
)	
FLEMING COMPANIES., <u>et al.</u>,)	Case No. 03-10945 (MFW)
)	
Debtors.)	Objection Deadline: June 18, 2003 at 4:00 p.m.
)	Final Hearing Date: August 13, 2003 at 1:00 p.m.
)	

NOTICE OF FILING OF REDACTED MOTION

To: Parties on the attached list.

PLEASE TAKE NOTICE that on June 13, 2003, Albertson's Inc. ("Albertson's") filed, under seal, the **Motion of Albertson's, Inc. for an Order: (A) Lifting the Automatic Stay to Allow Albertson's, Inc. to Terminate the Facility Standby Agreements; or Alternatively (B) Compelling Fleming Companies, Inc. to Reject Such Agreements** (the "Stay Relief Motion") and the Motion of Albertson's, Inc. for Leave to File Motion Under Seal (the "Seal Motion") [Docket No. 1454].


PLEASE TAKE FURTHER NOTICE, that Albertson's has today filed a redacted version of the Stay Relief Motion.

PLEASE TAKE FURTHER NOTICE that on June 25, 2003, the Court held a preliminary hearing (the "Preliminary Hearing") on the Stay Relief Motion and the Seal Motion. At the Preliminary Hearing the Court requested that Albertson's file a redacted version of the Stay Relief Motion that was filed under seal with the Court on June 13, 2003. Accordingly, although this redacted version of the Stay Relief Motion has been filed by Albertson's on July 17, 2003, it is simply a redacted version of the Stay Relief Motion filed by Albertson's on June 13, 2003, and should be treated as though it was filed on June 13, 2003.

PLEASE TAKE FURTHER NOTICE THAT, at the Preliminary Hearing the Court

scheduled a final hearing on the Stay Relief Motion to be held August 13, 2003 at 1:00 p.m.

Dated: July 17, 2003
Wilmington, Delaware



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REDACTED

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: : Chapter 11
: :
FLEMING COMPANIES, INC., et al., : Case No. 03-10945 (MFW)
: :
Debtors. : Objection Deadline: June 18, 2003 @ 4:00 p.m.
: (Subject to Court Approval Pursuant to Motion)
: Hearing Date: June 25, 2003 @ 9:00 a.m.
: (Subject to Court Approval Pursuant to Motion)

MOTION OF ALBERTSON'S, INC. FOR
AN ORDER: (A) LIFTING THE AUTOMATIC STAY TO
ALLOW ALBERTSON'S, INC. TO TERMINATE THE FACILITY
STANDBY AGREEMENTS; OR ALTERNATIVELY (B) COMPELLING
FLEMING COMPANIES, INC. TO REJECT SUCH AGREEMENTS IMMEDIATELY

Albertson's, Inc. ("Albertson's") hereby moves the Court for the entry of an order:

(i) lifting the automatic stay to allow Albertson's to terminate the (a) the Facility Standby Agreement between Fleming Companies, Inc. ("Fleming") and Albertson's, dated June 28, 2002 and (b) the Facility Standby Agreement between Fleming and Albertson's, dated June 28, 2002 (the and, collectively with the the "Agreements"), pursuant to section 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code") and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); or (ii) compelling Fleming, one of the above-captioned debtors and debtors in possession (the "Debtors"), to reject the Agreements immediately, pursuant to section 365 of the Bankruptcy Code and Bankruptcy Rule 6006(1). In support of this Motion, Albertson's respectfully represents as follows:

Introduction

Albertson's brings this Motion because of the immediate and potentially irreparable harm caused by Fleming's failure to fulfill its supply obligations pursuant to the

Agreements.¹ While Fleming has failed to meet the performance requirements of the Agreements since their inception, Albertson's has worked diligently with Fleming both before the commencement of these chapter 11 cases, and in the weeks thereafter in an attempt to resolve Fleming's material breaches of the Agreements. Since April 1, 2003, however, Fleming's performance has rapidly deteriorated to the point where the

Moreover, the massive disruptions caused by Fleming's inability to supply Albertson's stores are detrimentally impacting countless Albertson's employees, who are working tirelessly to maintain store operations. For these reasons, Albertson's has been left with no alternative but to bring this Motion.

General Background

1. On April 1, 2003 (the "Petition Date"), the Debtors commenced their respective cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Pursuant to section 1107 and 1108 of the Bankruptcy Code, the Debtors are continuing to operate their businesses and manage their properties and assets as debtors in possession. No trustee, examiner or committee has been appointed in the Debtors' chapter 11 cases.

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Statement of Facts

The Facility Standby Agreements

3. Traditionally, Albertson's has supplied its retail grocery stores from warehouse distribution centers that it owns and operates. In 2001, however, as part of a

¹ A copy of the Agreement and the Agreement are attached hereto as Exhibits A and B respectively.

corporate restructuring, Albertson's sold its warehouse distribution center in Tulsa, Oklahoma (the "Tulsa Facility") to Fleming. In connection with the sale of the Tulsa Facility, Albertson's entered into the Agreements, pursuant to which Fleming agreed to supply eight categories of "food, grocery and related products" to Albertson's stores in

4. The Agreements heavily incentivize Albertson's to purchase all of the Products necessary for its stores from Fleming. The Agreement provides that Albertson's is expected to annually purchase of Products. While the Agreement does not require Albertson's to purchase any specific amount of Products, the Agreement does not terminate until the later of (i)

(Agreement ¶ 4). Moreover, the Agreement obligates Albertson's (Agreement, Attachment A.).

5. Under the Agreement, Albertson's is expected to annually purchase of Products from Fleming's warehouse (the Facility") for the Agreement's

6. Even more critically, because Albertson's no longer has a dedicated warehouse distribution facility to serve these markets,

Accordingly, both Agreements provide that

(Agreement ¶ 1;
Agreement ¶ 1). The Agreements similarly contain marketing plans,

7. Recognizing the critical importance of a consistent supply of Products for the Albertson's retail stores, the Agreements specifically establish a target weekly service level (*i.e.*, order fulfillment level) of percent (the "Service Level") on each of the departments contemplated by the Agreements. (Agreement ¶ 5; Agreement ¶ 5). This Service Level, which is interestingly less than the percent service level achieved by Albertson's owned warehouse facilities, is to be calculated based upon the number of cases of Products shipped compared to the number ordered, with certain adjustments. (*Id.*). The Agreements further provide that Fleming is in material breach of the Agreements if the average weekly Service Level of all departments (the "Average Service Level")

(*Id.*).

Prepetition Performance Under the Agreements

8. From the inception of the Agreements in 2002, Albertson's experienced considerable difficulties in achieving the level of service for which it had contracted. For July and August 2002 (which Periods are excluded for determining material breach of the Agreements), the combined Average Service Level for the Facility and the Facility was percent and percent, respectively. These significant shortfalls required

Albertson's to supplement store inventory from its own warehouse facility in and from other third parties. In addition to service difficulties, considerable problems existed with Product quality and pricing. Most troubling was the fact that Albertson's was receiving Products that were

Despite these considerable difficulties, believing that these problems were associated with the "start-up" of the supply Agreements, Albertson's continued to work with Fleming in an effort to resolve the difficulties that it was experiencing.

9. It soon became clear, however, that the initial difficulties were not solely attributable to start-up problems. Specifically, quality

and pricing problems continued unabated into the first quarter of 2003, and the Average Service Level failed to meet the required service level of percent for three of the first seven Periods contemplated by the Agreements. Nonetheless, despite the serious consequences presented by Fleming's failures, Albertson's continued to work with Fleming so that the Agreements would provide the benefits that each party had contemplated only months earlier.

Postpetition Performance Under the Agreements

10. Fleming's commencement of its chapter 11 cases in April 2003 brought about what can only be described as a calamitous series of service failures. Not only did Fleming's quality and pricing problems persist (and in fact exacerbate), but its Average Service Level dropped precipitously. Specifically, during April, Fleming reported the following Average Service Level:

For May 2003, Fleming's reported results were even more disastrous:

11. All told, Fleming has now failed to satisfy the 95 percent Average Service Level for five Periods. Accordingly, pursuant to paragraph 5 of the Agreements, Fleming has been, and continues to be, in material breach under the Agreements.

12. Although Albertson's has been sympathetic to Fleming's plight, the rapid decline in the Average Service Level, coupled with continuing quality problems has required Albertson's to undertake Herculean efforts to insure that its stores in have sufficient quality inventory during this critical period.

This task has been rendered all the more difficult by the fact that Fleming has experienced extensive shortfalls in every Product category. And while, pursuant to available remedies at law, Albertson's has charged back Fleming for certain extensive additional costs it has incurred,

Fleming's repeated failures have caused considerable harm to Albertson's in

Notice of Breach

13. The Agreements specifically provide that in the event of a material breach by Fleming,

14. Owing to Fleming's inability to fulfill its contractual obligations on numerous occasions under the Agreements, Albertson's has notified Fleming that it is in default. Further, representatives of Albertson's met with Fleming's representatives and advisors on myriad occasions to discuss alternative arrangements to help Fleming perform. Indeed, as late as May 29, 2003, Fleming committed that it would shortly be able to bring the Average Service Level back to the contractual rate of percent. Specifically, Fleming committed that it would raise the Average Service Level of to percent by June 9, 2003, and that the other Product departments would be up to the agreed Average Service Level by June 16, 2003. Again, desirous of working with Fleming on appropriate resolution of the outstanding issues, Albertson's agreed to this time-line, all the while attempting to supplement Fleming's increasing shortfalls In fact, despite Albertson's enormous efforts

15. Despite Fleming's commitments, it is now quite clear that Fleming has not, nor can it meet its obligations under the Agreements. Specifically, in Fleming's Service Level report for June 10, 2003, for Products, despite Fleming's commitment, it was only available to achieve a Service Level of percent. For the Products, a service level of only percent was achieved. Even more critically, throughout the Product categories, the Service Level has shown no improvement, with an average Service Level of only percent.

16. There can be no dispute that Fleming is in material breach of the Agreements, and pursuant to their terms, Albertson's has the right to terminate them and thus relieve Albertson's and Fleming of their respective obligations under the Agreements. As difficult as this may be, it is also readily apparent that Fleming will not, if ever, be able to substantially perform its obligations under the Agreements. While Albertson's has, both prior to the commencement of these cases and, since the Petition Date, attempted to work with Fleming, it should no longer be required to place its own business at risk by attempting to perform under contracts to which Fleming has not, and cannot, perform. Not only has Albertson's dedicated considerable resources to filling the significant and increasing gaps left by Fleming, but it is now risking its own business The retail grocery business is highly competitive, especially in the markets at issue due to the predominance of other retailers To put it simply, Albertson's cannot be placed at a serious competitive disadvantage Absent the termination of the Agreements, Albertson's will find itself either precisely in that position, Accordingly, Albertson's has no choice but to seek the relief set forth in this Motion.

Request for Relief

17. By this Motion, Albertson's seeks the entry of an order: (a) lifting the automatic stay, pursuant to 362(d) of the Bankruptcy Code and Bankruptcy Rule 4001, to allow Albertson's to terminate the Agreements; or (b) compelling Fleming to reject the Agreements immediately, pursuant to section 365 of the Bankruptcy Code and Bankruptcy Rule 6006(b).²

The Court Should Lift the Automatic Stay So That Albertson's May Terminate the Agreements

18. The Court should lift the automatic stay pursuant to section 362(d) of the Bankruptcy Code so that Albertson's may exercise its contractual remedies and terminate the Agreements. Section 362(d) of the Bankruptcy Code provides, in pertinent part, that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . such as terminating . . . the stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; [or]

(2) with respect to a stay of an act against property under subsection (a) of this section, if— (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d)(1) and (2).

19. The burden of proof on a motion for relief from the stay under section 362(d) is a shifting one. Section 362(g) provides that:

In any hearing . . . concerning relief from the stay of any act under subsection (a) of this section—(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and (2) that the party opposing such relief has the burden of proof on all other issues.

² Albertson's is prepared to present evidence at the hearing to support all factual arguments underlying this assertion, as well as other factual assertions set forth in this Motion, in accordance with Bankruptcy Rule 9014(e).

11 U.S.C. § 362(g).

20. Relief from the automatic stay to allow a party to terminate a contract with a debtor is appropriate if a debtor is unable to assume the contract under section 365 of the Bankruptcy Code. See, e.g., In the Matter of West Electronics, 852 F.2d 79, 83-84 (3rd Cir. 1988) (lifting the automatic stay to permit party to terminate a contract with a debtor on the grounds that the debtor's inability to assume the contract meant that it had no legally cognizable interest in the contract); In re Valley Media, Inc., 279 B.R. 105, 138 (Bankr. D. Del. 2000).

21. In this instance, even assuming the Agreements are executory contracts, Fleming is unable to assume the Agreements because, among other things, it cannot satisfy section 362(b)(1)(A) of the Bankruptcy Code that provides, in relevant part, that a debtor may not assume an executory contract unless it "cures, or provides adequate assurance that [it] will cure, such default." As explained above, Fleming simply cannot cure the defaults that currently exist under the Agreements. The result of the foregoing is, of course, that Fleming does not have any equity, or even a legally cognizable interest, in the Agreements. Under these facts, Albertson's has satisfied the requirements set forth in section 362(d)(2)(A) of the Bankruptcy Code. Accordingly, the automatic stay should be lifted to allow Albertson's to terminate the Agreements in accordance with the terms thereof.

22. Moreover, pursuant to section 362(d)(1) of the Bankruptcy Code, a party in interest may seek relief from the automatic stay for cause. Since the Bankruptcy Code does not define "cause," bankruptcy courts decide what constitutes "cause" to lift the automatic stay on a case-by-case basis. In re Rexene Products Co., 141 B.R. 574, 576 (Bankr. D. Del. 1992) (citing In re Fernstrom Storage & Van Co., 938 F.2d 731, 735 (7th Cir. 1991)). Relief from the automatic stay should be granted when the party seeking such relief can show that:

- (a) the debtor or the debtor's estate will not be greatly prejudiced;
- (b) the hardship to the movant by maintenance of the automatic stay considerably outweighs the hardship to the debtor; and
- (c) the movant has a reasonable chance of prevailing on the merits.

Id.

23. For the reasons articulated above, including because (a) Fleming is in material breach of the Agreements, (b) Fleming cannot cure its material breaches under the Agreements and (c) Fleming's continued material service failures are significantly disruptive and harmful to Albertson's operations, cause exists to lift the automatic stay pursuant to section 362(d)(1) of the Bankruptcy Code.³

Alternatively, Fleming Should be Compelled to Reject the Agreements Immediately

24. Section 365(d)(2) of the Bankruptcy Code provides, in pertinent part, that "the court, on request of any party [to an executory contract], may order the [debtor] to determine within a specified period of time whether to . . . reject such contract."⁴ "Congress intended this provision to prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate." Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.), 973 F.2d 1065, 1079 (3d Cir. 1992) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5845). As such, courts have provided that under section 365(d)(2) of the Bankruptcy Code, a debtor has a reasonable time to decide

³ Pursuant to Bankruptcy Rule 4001(a)(3), Albertson's also requests that such order take effect immediately for all of the reasons stated herein.

⁴ Solely for purposes of this Motion, Albertson's stipulates that the Agreements are executory contracts. Albertson's hereby reserves any and all of its rights to object on all legal and factual grounds to any assertion that the Agreements are executory in nature.

whether to assume or reject. See In re Wheeling - Pittsburgh Steel Corp., 54 B.R. 385, 388 (Bankr. Pa. 1985) (noting that a debtor is entitled to reasonable time to assume or reject).

25. In exercising their discretion to determine what constitutes a reasonable time, bankruptcy courts consider all, or a combination of, several factors, including: "the nature of the interests at stake; the balance of hurt to the litigants; the good to be achieved; the safeguards afforded those litigants; whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary." In re Beker Indus. Corp., 64 B.R. 890, 896 (Bankr. S.D.N.Y. 1986); see also Hiser v. Blue Cross of Greater Philadelphia, 89 B.R. 503, 513 (Bankr. E.D. Pa. 1988) (providing that a motion to compel must be decided by "weighing 'the nature of the interests at stake, the balance of hurt to the litigants, the good to be achieved, and the safeguards afforded those litigants'" (citations omitted); In re Wallace, 122 B.R. 222, 234 (Bankr. D. N.J. 1990) (noting, in a chapter 13 proceeding, that a reasonable time is "left to the bankruptcy court's discretion in light of the circumstances of the case"); In re Charrington Worldwide Enters., Inc., 98 B.R. 65, 70 (Bankr. M.D. Fla. 1989) (directing debtor to file motion within seven days to assume executory contract).

26. Consideration of these factors demonstrates that, even if the Court were to decline to lift the automatic stay, this Court should order Fleming to reject the Agreements immediately. Despite repeated attempts by Albertson's to resolve this matter on a consensual basis, Fleming has (a) consistently failed to satisfy its obligations under the Agreements, including its obligation to provide Albertson's with Products at the Average Service Level, and, (b) despite repeated assurances to the contrary, failed to cure the existing defaults, resulting in a material breach of the Agreements. Fleming's consistent failure to meet the contractual Service Level and the continuous deterioration of the Average Service Level, in violation of the

Agreements, not to mention continuing quality problems, has caused serious disruptions to Albertson's operations. For example, Fleming's breach of the Agreements has forced Albertson's to expend significant amounts of money, manpower and time to obtain replacement Products.

To put it simply, this Court should not permit Fleming to use the bankruptcy process to the detriment of Albertson's.

27. Accordingly, because Fleming has been in default under the Agreements for an extended period of time, has failed to satisfy its obligations under the Agreements, including on a postpetition basis, and has provided no indication that it is capable of curing its defaults or performing under the Agreements, as evidenced by the continuing deterioration in Average Service Level, Albertson's respectfully requests that this Court compel Fleming to reject the Agreements immediately.

Motion Filed Under Seal

28. Albertson's has sought to file this Motion under seal in a motion filed contemporaneously herewith (the "Seal Motion"), because it believes that the Motion, and more specifically, the Agreements contain extremely sensitive and confidential information regarding the Debtors' business operations that Albertson's has agreed to keep confidential, and because it contains sensitive and confidential business information regarding Albertson's ongoing business operations.

Notice

29. For the reasons stated above and in the Seal Motion, this Motion has been filed with the Court, and served only upon counsel to the Debtors. In light of the nature of the relief requested and for the reasons set forth herein and in the Seal Motion, Albertson's submits

that no further notice should be given until the Seal Motion is granted or denied, at which time this Motion will be further served on the (a)(i) the Official Committee of Unsecured Creditors and (ii) the Office of the United States Trustee, if the Seal Motion is granted, or (b)(i) the Official Committee of Unsecured Creditors, (ii) the Office of the United States Trustee and (iii) those persons requesting notice under Rule 2002 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, if the Seal Motion is denied.

Prior Request

30. No previous motion for the relief requested herein has been filed in this or any other court.

WHEREFORE, Albertson's respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit C: (i) lifting the automatic stay, pursuant to 362(d) of the Bankruptcy Code and Bankruptcy Rule 4001, to allow Albertson's to terminate immediately the Agreements in accordance with the terms thereof; or, in the alternative, (ii) compelling Fleming to reject the Agreements immediately, pursuant to section 365 of the

Bankruptcy Code and Rule 6006(b) of the Bankruptcy Rules; and (iii) granting such other and further relief as the Court may deem proper.

Dated: June 12, 2003
Wilmington, Delaware

Respectfully submitted,



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ATTORNEYS FOR ALBERTSON'S, INC.

EXHIBIT A

FILED UNDER SEAL

EXHIBIT B

FILED UNDER SEAL

EXHIBIT C

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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

**ORDER: (A) LIFTING THE AUTOMATIC STAY TO
ALLOW ALBERTSON'S, INC. TO TERMINATE THE FACILITY
STANDBY AGREEMENTS; OR ALTERNATIVELY (B) COMPELLING
FLEMING COMPANIES, INC. TO REJECT SUCH AGREEMENTS IMMEDIATELY**

This matter coming before the Court on the Motion of Albertson's Inc. for an Order: (A) Lifting the Automatic Stay to Allow Albertson's, Inc. to Terminate the Facility Standby Agreements; or Alternatively (B) Compelling Fleming Companies, Inc. to Reject Such Agreement Immediately (the "Motion"); the Court having reviewed the Motion and having heard the statements of counsel and evidence in support of the Motion at a hearing before the Court (the "Hearing"); the Court finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and (c) notice of the Motion was sufficient under the circumstances; and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:¹

1. The Motion is GRANTED in its entirety.

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion

2. If Fleming fails to perform all of its obligations under the Agreements, (i) the automatic stay shall be lifted, pursuant to section 362(d) of the Bankruptcy Code, to allow Albertson's, Inc. to terminate the Agreements in accordance therewith and (ii) Fleming shall be deemed to reject the Agreements effective as of the effective date of this Order, pursuant to section 365 of the Bankruptcy Code and Rule 6006(b) of the Bankruptcy Rules.

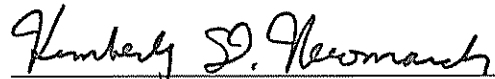
3. This Order shall take effect immediately upon its entry in accordance with Bankruptcy Rule 4001(a)(3).

Dated: _____, 2003

UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I, Kimberly D. Newmarch, hereby certifies that on July 17, 2003, I caused copies of the foregoing **Notice of Filing of Redacted Motion re: Motion of Albertson's, Inc. for an Order: (A) Lifting the Automatic Stay to Allow Albertson's, Inc. to Terminate the Facility Standby Agreements; or Alternatively (B) Compelling Fleming Companies, Inc. to Reject such Agreements Immediately** to be served via hand delivery and first class mail upon the attached service list.



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