

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
Fleming Companies, Inc., et al.,) Case No. 03-10945 (MFW)
) (Jointly Administered)
Debtors.)
[Re: Docket No. 2034]

Objections Due: July 28, 2003 @ 4:00 p.m.
Hearing Date: August 4, 2003 @ 11:30 a.m.

**COMBINED OBJECTION TO CURE AMOUNT AND
TO ASSIGNMENT OF EXECUTORY AGREEMENTS**

**TO: HONORABLE MARY F. WALRATH
BANKRUPTCY JUDGE**

GIUNTA'S MARKET, INC., (the "Objectant") by its attorneys,
Finkel Goldstein Berzow Rosenbloom & Nash, LLP and Jaspán Schlesinger &
Hoffman LLP, as and for its combined objections to cure amount and to the
proposed assumption and assignment of leases respectfully alleges and shows this
Court as follows:

GENERAL BACKGROUND

1. According to the Cure Amount Schedule prepared by the
Debtors, Objectant's contract assignment numbers are 6646 and 5065. That
Schedule alleges that the cure amount on Objectant's executory agreements total
\$-0- which is totally erroneous.

2. Objectant owns and operates a retail supermarket located at East Bradford Plaza, 700 Downington Pike, West Chester, Pennsylvania. The Objectant is a former customer of the Debtors who supplied Objectant.

THE FACILITY STANDBY AGREEMENT

3. At first instance, Objectant contends that to the extent that the Debtors seeks to assign their obligations under a so called facility stand-by agreement ("FSA") such agreement cannot be assigned as it was unilaterally terminated by the Debtors pursuant to a written notice dated May 14, 2003 sent to the Objectant, a copy of which is annexed hereto and made a part hereof as **EXHIBIT "A"**.

4. The Objectant was told by the Debtors that they could not supply Objectant with inventory any longer and that Objectant should find a new wholesale grocer. Objectant experienced damages under the FSA, a copy of which is annexed hereto as **EXHIBIT "B"** as will be hereafter described.

5. Under the Debtors' FSA supply agreement, the Debtors agreed to dedicate sufficient resources to adequately and properly supply the Objectant with merchandise in the ordinary course of Objectant's business. It is typical in the supermarket industry for a wholesale grocer to maintain a service level of at least 95%. If a lower service level is maintained, the retail merchant will be unable to have adequate merchandise on its shelves to properly service its customers. In the Debtors' case, service levels under the FSA during the years

2001 and 2002 were generally less than 90%. These service leveled deficiencies resulted in lost sales, customer dissatisfaction and the loss of customers, excessive labor costs and additional significant other damages. The debtors' breaches under the terminated FSA resulted in damages estimated at \$873,640.00 for a 3-1/2 year period ending on May 25, 2003.

6. In addition to the damages set forth above, Objectant is a member of Retail Marketing Group LLC, a co-operative buying group which obtains promotional rebates and funding from manufacturers based upon high volume purchases. Because the Debtors breached their obligations under the FSA by failing to pay the obligations which it owed to their suppliers, Objectant lost promotional funding totaling \$53,727.01 in 2001 and \$72,473.37 in 2002.

7. Under provisions of §365 of the Bankruptcy Code, in order to assume and assign this "terminated agreement" damages totaling \$999,841.38 would have to be paid to the Objectant at the time of assignment.

THE SUBLEASE

8. The Debtors were one of the largest, if not the largest wholesale grocer in the United States. Its primary business was the sale of supermarket inventory to retail merchants. In that regard, as is typical in the wholesale grocery business, the Debtors provided various financial accommodations to their store merchants to facilitate their business. These

accommodations often consisted of entering into lease and sublease agreements and providing long-term or short-term financing for acquisitions by the customers.

9. Objectant entered into a sublease agreement and sublease amendment with the Debtors, a copy of which is annexed hereto and made a part hereof as **EXHIBIT "C"**. As the Court can readily see, the sublease agreement contains successive five (5) year terms which are automatically renewable unless cancelled by the Debtors on 90 days' notice before the expiration of any particular renewal. Objectant was continuously assured by the Debtors that it was not a landlord but a wholesale grocer and that its sole interest was to sell groceries to the Objectant. Objectant was continuously assured by the Debtors that as long as Objectant remained a faithful customer, the subleases would be extended and that the lease agreements were made for the benefit of the store operators and not the Debtors. Based upon these express representations, Objectant operated its business and made long-term financial commitments as will be hereafter set forth. The supermarket business is a highly competitive low profit margin business where it is incumbent that substantial sums of money are spent to continuously renovate, update and maintain the supermarket facility. In that regard, Objectant spent \$1,500,000.00 to renovate and expand its store in 1999. Approximately \$900,000.00 of the loan remains due and owing to Objectant's bank. Objectant would not have spent this amount of money based upon a five (5) year sublease. The amount of the expenditure could not be amortized over a five (5) year period

and allow Objectant to earn a profit. These expenditures were only made based upon the Debtors' express representations that the lease would always belong to the Objectant as long as they remained a "Fleming Customer". Objectant was a loyal Fleming customer since 1982 and Objectant's family has operated a supermarket in West Chester, Pennsylvania for 76 years. The objectant remained a loyal Fleming Customer until Fleming terminated their relationship without fault of the Objectant.

10. The Objectant contends that the various executory agreements with the Debtors under which it supplied groceries to Objectant constitute an integrated transaction. As such, before any executory agreement could be assigned by the Debtors to any third party, the damages incurred by the Objectant must be paid in full. In summary, those damages consist of the following:

(Space below intentionally left vacant)

- (a) Damages under Supply Agreement \$ 873,640.00;
 - (b) Lost promotional funding \$ 126,200.00;
 - (c) Renovation expenses based on a full lease term \$ 900,000.00
- Total: ¹\$ 1,899,840.00

Dated: July 24, 2003

GIUNTA'S MARKET, INC.

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¹ Objectant reserves the right to supplement its curé payment.