

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**

HOLIDAY SUPERMARKETS, INC., (the "Objectant") by its attorneys,
Finkel Goldstein Berzow Rosenbloom & Nash, LLP and Jaspan 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 4778, 4779, 6705 and 6685. The Schedules
allege that the cure amount on Objectant's executory agreements total \$-0-, which is
totally erroneous.

2. Objectant owns and operates retail supermarkets located at 6499
Sackett Street, Philadelphia, PA, Frankford & Pratt Streets, Philadelphia, PA, 2401

Welsh Road, Philadelphia, PA, 7938 Dungan Road, Philadelphia, PA, and 9910 Frankford Avenue, Philadelphia, PA.

3. In addition to the foregoing, Objectant's relationship with the Debtor goes back to 1979. As such, there have been many forms of various executory agreements signed between the parties and it is impossible to determine from the cure amount schedules received from Fleming exactly what the Debtor seeks to assign. This is particularly so since all communications from Fleming are sent to the Objectant's main address at 6499 Sackett Street, Philadelphia, Pennsylvania and the cure amount schedule has limited information.

THE FACILITY STANDBY AGREEMENT

4. 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"**.

5. 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"** (Objectant believes that the attached Exhibit "B" is the operative main FSA, however, there may be other FSAs related to the Dungan Road and

Castor Avenue locations and Objectant reserves its rights in connection therewith) as will be hereafter described.

6. 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 Objectant's fiscal years from June 4, 1999 through June 3, 2003 were generally less than 90%. These service level 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 \$2,701,547.92. Objectant also maintains a store at 7938 Dungan Road, Philadelphia, Pennsylvania. To the extent that the Debtor seeks to assign executory agreements relating to the store, Objectant reserves the right to supplement this objection to assert cure amounts on this store which opened on January 8, 1003 without the support of the Debtor. Objectant reserves its rights to supplement this cure notice by alleging additional damages for the period from January 1, 2003 through March 31, 2003 together with calculating post-petition damages for the period from April 1, 2003 through May 25, 2003.

7. 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 \$76,932.20 in 2001 and \$115,091.25 in 2002.

8. Under provisions of §365 of the Bankruptcy Code, in order to assume and assign this "terminated agreement" damages totaling \$2,893,571.37 would have to be paid to the Objectant at the time of assignment.

THE SUBLEASE

9. 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.

10. Objectant entered into various sublease agreements with the Debtors. The Debtor's cure amount schedule which Objectant received make it impossible to determine what leases the Debtor seeks to assume and assign. For the Court's ready reference, a copy of the three cure amount schedules received from the Debtor are

annexed hereto and made a part hereof as **EXHIBIT "C"**. The sublease agreements typically contain 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 \$2,250,000.00 to renovate or acquire its stores over the last four years alone. Objectant would not have spent no less than \$2,250,000.00 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. In one instance, the Debtor gave a comfort letter to the Objectant. In another instance, the Debtor allowed the sublease to expire and the Objectant entered into a direct lease with the Landlord. 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". The Objectant remained a loyal Fleming Customer until Fleming terminated their relationship without fault of the Objectant.

11. 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 Objectants must be paid in full. In summary, those damages consist of the following:

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(a)	Damages under Supply Agreement	\$ 2,701,547.92
(b)	Lost promotional funding	\$ 192,023.45
(c)	Acquisition costs and/or renovation expenses based on a full lease term	<u>\$2,250,000.00</u>
	Total:	<u>¹\$5,143,571.37</u>

Dated: July 24th, 2003


HOLIDAY SUPERMARKETS, INC.

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¹ Objectant reserves the right to supplement its cure payment.