

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  
: :  
: Cure Claim Objection Deadline: 07/28/03 at 4:00 p.m.  
Debtors. : Hearing: 08/04/03 at 11:30 a.m.  
: Contract Assignment #: 4702  
: Proposed Cure Amount: \$0  
: Asserted Cure Claim Amount: \$109,632.00 plus interest  
: on Note  
: :  
: **Related to Docket Items 1906, 1984 and 2002**

**OBJECTION OF CJC GROCERIES, d/b/a MEME'S MARKET TO DEBTOR'S NOTICE  
(AND SUPPLEMENTAL NOTICE) OF POTENTIAL ASSUMPTION AND  
ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED  
LEASES IN CONNECTION WITH SALE MOTION AND PROPOSED CURE AMOUNT**

CJC Groceries, d/b/a Meme's Market ("CJC"), by and through its counsel, Stevens & Lee, P.C, hereby submits its Objection (the "**Objection**") to the Debtor's Notice of Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion (the "**Notice**") and the Debtor's Supplemental Notice of Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases In Connection With Sale Motion (the "**Supplemental Notice**" and, collectively with the Notice, the "**Notices**")<sup>1</sup> and Proposed Cure Amount. In support of its Objection, CJC states as follows:

1. CJC and Fleming Companies, Inc. (the "**Debtor**"), are parties to a Facility Standby Agreement (the "**Supply Agreement**"). Pursuant to the Supply Agreement, the Debtor agreed to sell and deliver and CJC agreed to purchase and receive certain Products, as defined in the Supply Agreement, for resale in CJC's retail grocery stores.

2. Along with the Notice, the Debtor sent a Cure Amount Schedule which details the amount that the Debtor believes is necessary, as of July 11, 2003, to cure the defaults under the Supply Agreement pursuant to 11 U.S.C. § 365 (the "**Cure Amount**"). Pursuant to the Cure Amount Schedule, the Debtor asserts that the Cure Amount for the Supply Agreement, as of July 11, 2003, was \$0.

3. Pursuant to the Notice, if a counterparty to an agreement objects to a stated Cure Amount or the assignment of an executory contract or unexpired lease to the Successful Bidder, then the counterparty must file an objection to the Cure Amount and/or assignment pursuant to the terms in the Notice. Pursuant to the Supplemental Notice, it appears that only objections to the proposed Cure Amount may need to be filed at this time. However, given the confusing nature of the Notices, CJC has included its objection to assignment in this pleading. If any subsequent filing or notice by the Debtor purports to require the filing of an objection to assumption and assignment of the Supply Agreement, this objection is intended to constitute such objection.

4. CJC objects to the assignment of the Supply Agreement for reasons including the following:

(a) The Debtor has breached the Supply Agreement by reason of its failure to perform its obligation to maintain a continuous supply of Product. As a result of such breach, and in order to preserve its business, CJC was forced to replace the Debtor as its primary supplier. The Debtor's breach is incurable and renders the Supply Agreement incapable of assumption and assignment. 11 U.S.C. § 365 (b)(1)(A) and (c).

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<sup>1</sup> All terms capitalized but not otherwise defined herein shall have the meaning ascribed to them in the Notices.

(b) The Debtor has indicated that financial information about the Purchaser and the other bidders will be made available after July 27, 2003. However, CJC has not had an opportunity to review any such information and, so, reserves its right to assert that insufficient evidence of the ability of the Successful Bidder to provide adequate assurance of future performance has been provided.

(c) The Notice states that the Successful Bidder will have six (6) months from closing to determine whether to designate the Supply Agreement for assignment. The Supplemental Notice appears to maintain the same six (6) month Option Period. A potential delay of six (6) months before a determination is made whether to seek assumption and assignment of the Supply Agreement is patently unreasonable. As noted above, the Supply Agreement requires the Debtor to maintain a regular supply of Product to CJC. Assuming the Supply Agreement remains subject to assumption and assignment (which, for the reasons stated above, it does not) the Debtor will certainly lose any remaining ability to perform once the closing occurs. Under such circumstances, a six (6) month Option Period exposes CJC to prejudice unless it is made clear that nothing in any order approving the sale or setting a cure claim prejudices the right of CJC to assert that the Supply Agreement is incapable of assumption and assignment or to seek to compel assumption or rejection at any time, including at any time during the Option Period.

(d) In connection with the Supply Agreement, the Debtor loaned certain sums to CJC (the “**Debtor Loan**”). The Debtor Loan was evidenced by a note (the “**Note**”) and a letter amendment (the “**Note Amendment**”). Pursuant to the Note

Amendment, the Debtor Loan was to be forgiven on an annual basis provided certain purchase levels were maintained. CJC reserves the right to include the entire remaining balance due on the Debtor Loan (once the Debtor provides a payoff statement) as part of its cure claim since, due to the Debtor's breach, CJC is precluded from achieving the levels of purchases from the Debtor required to obtain forgiveness of the Debtor Loan. However, to the extent any portion of the Debtor Loan is not included in CJC's cure claim, the Supply Agreement, the Note and the Note Amendment must all be treated as part of a single integrated transaction which can not be assumed and assigned separately. See In re Phillip Servs., Inc., 284 B.R. 541 (Bankr. D. Del. 2002)(holding that merger agreement and promissory note were interrelated documents and inseparable); In re Karfakis, 162 B.R. 719 (Bankr. E.D. Pa 1993)(certain agreements are indivisible and may therefore only be assumed together or not at all); In re T&H Diner, 108 B.R. 448 (Bankr. D.N.J. 1989)(holding that asset purchase agreement and lease were interrelated documents and refusing to allow the debtor to assume lease, but not asset purchase agreement). To the extent the cure claim allowed to CJC does not include the remaining balance due on the Note, any assignee of the Agreement must also take an assignment of the Note and Note Amendment and provide appropriate forgiveness with an adjustment, if necessary, for purchase volume forgone by the Debtor as a result of its breach of the Supply Agreement.

5. CJC objects to the proposed Cure Amount. The actual amount required to cure defaults under the Supply Agreement as of July 11, 2003 was \$109,632.00, as detailed in Exhibit "A" attached hereto.

WHEREFORE, for the reasons set forth above, CJC respectfully requests the entry of an Order (a) denying the Sale Motion to the extent it seeks approval of the assumption and assignment of the Supply Agreement, and (b) sustaining this objection to the Cure Claim as proposed by the Debtor and, to the extent the Supply Agreement is assumed and assigned, granting a Cure Claim in the amount set forth in Exhibit "A," and (c) granting such further relief as is just and appropriate.

Dated: Wilmington, Delaware  
July 28, 2003

**STEVENS & LEE P.C.**

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Market*