

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re:	)	Chapter 11
	)	
Fleming Companies, Inc., <u>et al.</u> ,	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
	)	
Debtors.	)	Hearing Date: August 4, 2003 at 9:00 a.m.
	)	Objections Due: July 28, 2003 at 4:00 p.m.

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**LIMITED OBJECTION OF GROCERY (OK) QRS 15-5, INC. TO: (1) DEBTORS' MOTION FOR ORDER (A) APPROVING ASSET PURCHASE AGREEMENT: WITH C&S WHOLESALE GROCERS, INC. AND C&S ACQUISITION LLC, (B) AUTHORIZING (I) SALE OF SUBSTANTIALLY ALL OF SELLING DEBTORS' ASSETS RELATING TO THE WHOLESALE DISTRIBUTION BUSINESS TO PURCHASER OR ITS DESIGNEE(S) OR OTHER SUCCESSFUL BIDDER(S) AT AUCTION, FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS AND (II) ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACT, LICENSE AGREEMENTS AND UNEXPIRED LEASES, AND (C) GRANTING RELATED RELIEF; AND (2) NOTICE OF PROPOSED CURE AMOUNT FOR LEASE NUMBER 6672 (Re: DOCKET NOS. 1906 AND 2002)**

GROCERY (OK) QRS 15-5, Inc. ("GROCERY"), by and through its attorneys, hereby files this limited objection to the above-captioned Debtors' (the "Debtors"): (1) Motion For Order (A) Approving Asset Purchase Agreement With C&S Wholesale Grocers, Inc. And C&S Acquisition LLC, (B) Authorizing (I) Sale Of Substantially All Of Selling Debtors' Assets Relating To The Wholesale Distribution Business To Purchaser Or Its Designee(s) Or Other Successful Bidder(s) At Auction, Free And Clear Of All Liens, Claims, Encumbrances And Interests And (II) Assumption And Assignment Of Certain Executory Contracts, License Agreements And Unexpired Leases, And (C) Granting Related Relief, dated July 11, 2003 (the "Motion"); and (2) Notice of Proposed Cure Amount for Lease Number 6672, and respectfully represents as follows:

## BACKGROUND

1. GROCERY is the owner and landlord of certain nonresidential real property and improvements located at 420 South 145th East Avenue (corner of Admiral Place) in Tulsa, Oklahoma (the "Premises"). Pursuant to a lease agreement, dated as of June 28, 2002 (the "Lease"),<sup>1</sup> Fleming Companies, Inc. leased the Premises from GROCERY.

## LIMITED OBJECTIONS

2. GROCERY makes this limited objection in respect of the Debtors': (a) proposed cure amount relating to the existing defaults under the Lease; and (b) failure to provide adequate assurance of future performance of the obligations under the Lease.

3. Specifically, GROCERY objects to the proposed assumption and assignment of the Lease because the Debtors have scheduled the cure amount at \$0. See Notice Re Potential Assumption And assignment Of Certain Executory Contracts And Unexpired Leases In Connection With Sale Motion, dated July 11, 2003, Cure Amount Schedule. Section 365(b)(1) of the United States Code (the "Bankruptcy Code") provides, in pertinent part, that if there is a default under an executory contract or unexpired lease, a debtor may not assume such contract or lease unless, the debtor

(A) cures, or provides adequate assurance that the [debtor] will promptly cure, such default; (B) compensates, or provides adequate assurance that the [debtor] will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such contract or lease.

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<sup>1</sup> The Debtors identify the Lease as number 6672 in the Debtor's Cure Amount Schedule. See Notice Re Potential Assumption And assignment Of Certain Executory Contracts And Unexpired Leases In Connection With Sale Motion, dated July 11, 2003. The Debtors have a copy of the Lease. Copies will be provided to other parties upon reasonable request.

11 U.S.C. § 365(b)(1). Accordingly, any assumption (and subsequent assignment) of the Lease must be accompanied by payment to GROCERY for all amounts owed under the Lease. GROCERY currently holds a cure claim in the amount of \$1,377,000.00 for the basic rent payment that was due on July 25, 2003, plus late charges and interest. (See Lease ¶ 6 and 7(a)(ii), (iii)). In addition, GROCERY holds a cure claim of not less than \$39,876.31 for all costs and expenses, including attorneys' fees, that have been incurred by GROCERY in connection with the exercise and enforcement by GROCERY of any of its rights under the Lease. (See, e.g., Lease ¶ 7(a)(i)(C)). These amounts do not include other additional rent: (a) that has accrued, but for which payment is not yet due or (b) will be incurred after June 30, 2003 for legal fees, etc.

4. GROCERY reserves its right to amend this limited objection in the future as circumstances may require and to assert any and all claims against the Debtors (and their assigns and/or successors) arising out of the Lease, including, without limitation, claims for insurance, utilities, maintenance and repair, attorneys' fees or damage to the Premises.

5. GROCERY further objects to the assumption and assignment of the Lease due to the absence of adequate assurances of future performance of the obligations under the Lease. Section 365(f)(2) of the Bankruptcy Code provides, in pertinent part, that a debtor may assign a lease only if "(A) the [debtor] assumes such . . . lease; . . . and (B) adequate assurance of future performance by the assignee of such . . . lease . . . is provided, whether or not there has been a default in such . . . lease." 11 U.S.C. § 365(f)(2). As such, GROCERY should be provided with sufficient information as to the financial wherewithal of any proposed assignee and whether such assignee will remain liable for all obligations relating to the assignment of the Lease. To date, GROCERY has not received, let alone been satisfied by, any such information.

CONCLUSION

WHEREFORE, GROCERY respectfully requests that the Court sustain the limited objections contained herein and grant such other and further relief as the Court deems just and proper.

Dated: July 28, 2003  
Wilmington, Delaware

Respectfully submitted,

REED SMITH LLP

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