IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

IN RE:	)	**CHAPTER 11**
	)	**CASE NO. 03-10945 (MFW)**
FLEMING COMPANIES, ET AL	)	**(JOINTLY ADMINISTERED)**
	)	
Debtors	)	**Obj. Due: 7/28/03 @ 4:00 p.m.**
	)	**Hrg. Date: 8/4/03 @ 11:30 a.m.**
	)	
	)	**Re: Docket Item 1906**

LIMITED OBJECTION OF PBP ENTERPRISES, LLC TO THE 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 CONTRACTS, LICENSE AGREEMENTS AND UNEXPIRED LEASES, AND (C) GRANTING RELATED RELIEF

NOW INTO COURT, through undersigned counsel, comes PBP Enterprises, LLC ("PBP") and for its limited objection (the "Objection") to the 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 (D.I. 1906) (the "Sale Motion") of Fleming Companies, Inc., Fleming Transportation Service, Inc., Piggly Wiggly Company, RFS Marketing Services, Inc., Fleming International, Ltd., Fleming Foods of Texas, L.P. and Fleming Foods Management Co., LLC

(collectively, the "Selling Debtors"), respectfully represents:

1.

In support of its Objection, PBP relies upon and incorporates by reference the Affidavit of James F. Barrasso attach hereto as Exhibit A.

2.

PBP Enterprises, LLC ("PBP") is the lessor of certain real estate and improvements thereon located at 7131 North Cocrum Street, Olive Branch, Mississippi. PBP is the successor to Boyle Investment Company, a Tennessee corporation, which by Lease and Agreement dated June 22, 1979 leased to Malone & Hyde, Inc., real estate and improvements thereon consisting of a building used as a grocery store of approximately 24,700 square feet and a parking area of approximately 15,912 square feet (collectively the "Leased Premises"). The original lease, designated as Fleming file number or lease number MS-085, was amended on August 1, 1980 by Amendment No. 1 to Lease Agreement, and was thereafter amended by a modification of Lease Agreement dated October 8, 1990. The original Lease and Agreement, Amendment No. 1 to Lease Agreement and Modification of Lease Agreement are hereafter referred to collectively as the "Lease" and are attached hereto and made a part hereof, as, respectively, Exhibits B, C and D.

3.

The Lease provided certain renewal options to Malone & Hyde, Inc. Fleming Companies, Inc., as successor to Malone & Hyde, Inc., and by notice dated January 22, 1999, a copy of which is attached as Exhibit D, renewed the Lease for a ten (10) year term commencing August 1, 2000 and expiring on July 31, 2010.

4.

The Lease expressly permits Fleming Companies to sublet the Leased Premises to another operator of a grocery store. Upon information and belief, on December 10, 1990, Fleming Companies entered into a certain sublease agreement by which Fleming Companies, acting as sublessor, subleased the Leased Premises to Alan's Big Star No. 142, Inc., Micheal Keith Alan, Carol H. Alan, Gerald Leon Alan and David Randall Alan, collectively acting as subtenant (the "Subtenant").

5.

Pursuant to the Sublease, Subtenant expressly assumed any and all obligations of Fleming Companies pursuant to the Lease.

6.

The Lease is a triple net lease with Fleming Companies, as lessee, responsible for any and all insurance, maintenance, repairs and improvements. In this regard, the Lease provides, in relevant part:

> Lessor shall not be responsible for the upkeep, maintenance, repairs or replacement of any of the fixtures and/or equipment, including the front mechanical doors situated in the building.
>
> It is understood and agreed between the parties, this is a net lease and in addition to the repairs provided for in Clause no. 33 herein, the Lessee accepts the full responsibility for all of the maintenance and repairs to the building, parking lot and service areas including but not limited to, the roof, and agrees to keep the building in as good condition as it was at the time of the commencement of this Lease less ordinary wear and tear, and casualty.

The Lease further provides in paragraph 33 thereof:

> It is further agreed and understood that all repairs including, but not limited to exterior doors to the property herein leased are to be made

> by Lessee, and all labor and material used by it in making any repairs or alterations to be paid for promptly by Lessee and, in no event, shall any mechanic's liens be permitted to be fixed upon the leasehold interest or any other interest in the premises leased. Lessee, at its expense, covenants and agrees to install any safety equipment or comply with any reasonable recommendations that might be made by the Lessor's insurance carrier as the result of the use and occupancy of Lessee promptly upon receipt of written notice from the Lessor.

7.

Upon information and belief, Subtenant quit the Leased Premises some time prior to the filing of Voluntary Petition for Reorganization of Fleming Companies.

8.

PBP does not have access to the interior of the Leased Premises. Nonetheless, since the filing of the Voluntary Petition, PBP has conducted limited inspections of the Leased Premises. That inspection has revealed that there is extensive damage to the roof which, apparently, has not been properly maintained in accordance with the Lease. The inspection also revealed that the heating and air conditioning systems require replacement. PBP is unable to determine whether the damage to the Leased Premises occurred before or after the Debtors' bankruptcy filing.

9.

While PBP does not have access to the interior of the building, a visual inspection form outside suggests that there may be damage to the interior, the flooring in particular, which must be repaired.

10.

Repair and/or replacement of the roof, heating and air conditioning systems and interior (to the extent required) are all obligations of Fleming Companies under the Lease, and Fleming's failure to do so constitutes an event of default under the Lease which must be cured as a condition to assumption and assignment of the Lease consistent with the express requirements of 11 U.S.C. § 365.

11.

PBP is in the process of securing estimates for necessary repairs and replacements to the building. It has obtained an estimate of repairs to the roof which indicate necessary repairs will cost $98,659.15. A copy of the estimate is attached hereto as Exhibit F.

12.

Fleming Companies has advised PBP that it intends to assume the Lease and assign it to C&S Wholesale Grocers, Inc. or its designee. The notice to PBP indicates that no amount is necessary for cure. PBP agrees that no payment obligations are owed at this time, but avers that requisite cure includes payment by Fleming Companies or other acceptable arrangements for necessary repairs or replacements.

13.

Certain provisions of the Selling Debtors' proposed sale order (the "Sale Order") are not authorized by the Bankruptcy Code and represent overreaching by the Debtors. First, decretal paragraph "i" of the Sale Order provides for an injunction against counterparties to Acquired Contracts which seeks to preclude them from asserting against the Selling Debtors or their estates not only defaults arising prior to the Initial Closing Date and actual pecuniary losses arising from such defaults, but also "any other obligation under the Acquired Contracts arising or incurred prior to the Initial Closing Date." Nothing in the Bankruptcy Code authorizes this relief. Other obligations under Acquired Contracts arising after the deadline for asserting cure claims but before the applicable closing date, such as those arising in the ordinary course of performance of the Acquired Contracts, should remain obligations of the Debtors.

14.

Second, the Sale Order provides: "[T]he Selling Debtors shall not be responsible for any material Cure Costs associated with Acquired Contracts that are not essential to the Business and are readily replicated with other Third Parties." Sale Order, ¶ i. Again, nothing in the Bankruptcy Code authorizes such a limitation. The Debtors must assume contracts *cum onere,* or not at all.

15.

Third, the Sale Order states: "The Cure Escrow and the procedures described above constitute adequate assurance of future performance under such Acquired Contracts . . . ." Sale Order, ¶ k. Provision of a mechanism for cure has nothing to do with adequate assurance of future performance. The Debtors have an independent obligation to make such a showing, which at this time has not been met.

16.

No information concerning any proposed assignee's ability to perform under the Lease has been furnished to PBP, and demand is hereby made for such information. PBP understands from the notices transmitted that it will have until August 11, 2003, or a later date if its Lease does not appear on the initial list of contracts to be assumed and assigned, to object to adequate assurance of future performance and reserves the right to do so.

17.

PBP has no objection to the assumption and assignment of the Lease provided that Fleming Companies either cures the default by placing into escrow an amount sufficient to make the necessary repairs and/or replacements or otherwise makes adequate provision for such repairs and replacements.

WHEREFORE, PBP Enterprises, LLC, respectfully requests that the proposed assumption and assignment of the Lease be conditioned upon Fleming Companies either depositing into escrow an amount sufficient to pay for all necessary repairs and replacements of the roof, heating and air conditioning system and such other items as may be discovered by a thorough inspection of the Leased Premises or that Fleming Companies otherwise make appropriate arrangements for the prompt performance of necessary repairs and replacements, and that PBP be provided such other and further relief as may be just and equitable.

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