

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
Fleming Companies, Inc., et al., ) Bk. No. 03-10945(MFW)  
)  
Debtors. ) ***Re: Docket No. 1906***

**SUPPLEMENTAL LIMITED OBJECTION OF  
LEVEL FOOD CENTER, INC. TO DEBTOR’S MOTION TO  
SELL FSA-RELATED PROMISSORY NOTE  
FREE AND CLEAR AND RESERVATION OF RIGHTS  
REGARDING CONSEQUENTIAL DAMAGES ISSUE**

Level Food Center, Inc., (“Level”) files this supplemental limited objection to the debtor’s motion to sell, *inter alia*, a promissory note executed by Level in favor of the debtor, and further, Level reserves its rights in relation to the arguments raised by the debtors respecting the consequential damages issue.

1. Level and the debtor are parties to a Facility Stand-By Agreement (“FSA”). The debtors have identified Level’s FSA as an executory contract that they, at least preliminarily,<sup>1</sup> will assume and assign to the purchaser, C&S.

2. In connection with the FSA, Level executed a promissory note (“Note”) in favor of the debtor which was modified by letter agreement of the same date. The letter agreement (“Forgiveness Agreement”) provides that the Note balance will be forgiven at the rate of 20% annually for each year that Level reaches a certain purchase level under the FSA.

3. Level does not object to the assumption and assignment of the Note, FSA and

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<sup>1</sup>Level’s understanding of the APA is that the buyer C&S will have a period of up to 6 months to determine whether specific FSAs will be assumed and assigned or rejected.

Forgiveness Agreement, so long as the three documents are viewed as one integrated transaction that must be assumed or rejected in toto. As it stands, however, C&S apparently intends to buy only the Note as part of this Sale, and leave for a later determination whether to take the FSA and Forgiveness Agreement. If permitted to do so, C&S would effectively sever one part of the integrated transaction, the Note, from the other parts, the FSA and Forgiveness Agreement, allowing it to take the sweet, but leave the bitter. The Bankruptcy Code expressly forbids such a result, because it requires an assumption and assignment of the entire agreement, not just part of an agreement.

4. In this case, it is manifest that the Note, FSA and Forgiveness Agreements are parts of an integrated transaction. In fact, the Forgiveness Agreement (attached hereto as Exhibit "A") expressly states that it amends the terms of the Note. In bold letters at the end of the Forgiveness Agreement it is stated:

**THIS AGREEMENT, THE NOTE, THE FACILITY STANDBY AGREEMENT  
AND ALL OTHER DOCUMENTS EXECUTED IN CONNECTION  
HEREWITH REPRESENT THE FINAL AGREEMENT OF THE PARTIES. . .**

Thus, the parties intended all three of the subject documents to be considered the "final agreement" of the parties, singular, not plural.

5. It is simply impossible at this time to sever the Note from the Forgiveness Agreement and the FSA. If C&S wants the Note, it must also take the other parts of the agreement. If C&S is not yet able to determine whether it wants the FSA, the remedy is simple: exclude the Note from the Sale Order until such time as C&S decides that it wants to accept the entire contract. If C&S later decides to reject the contract, the entire contract is rejected, including the Note.

6. The debtors have argued that because the FSA contains a waiver of consequential

damages, Level may not assert such damages as part of its cure claim. This issue is not ripe for adjudication because no final determination has been made by either the debtor or the buyer C&S whether Level's FSA will be assumed or rejected. But if the Court decides that it may rule on the consequential damages issue at the time, Level reserves the right to argue that waiver it signed is inapplicable to some or all of the damages it asserted in its cure claim, whether because of unconscionability, public policy, or because the alleged damages can not be classified as "consequential."

FERRY, JOSEPH & PEARCE, P.A.

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-and-

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Attorneys for Level Food Center, Inc.

Dated: August 6, 2003

**CERTIFICATE OF SERVICE**

I, Rick S. Miller, Esquire, hereby certify that on this 6th day of August, 2003, I caused a copy of the foregoing SUPPLEMENTAL LIMITED OBJECTION OF LEVEL FOOD CENTER, INC. TO DEBTOR'S MOTION TO SELL FSA-RELATED PROMISSORY NOTE FREE AND CLEAR AND RESERVATION OF RIGHTS REGARDING CONSEQUENTIAL DAMAGES ISSUE to be served upon the following parties in the manner indicated:

SEE ATTACHED SERVICE LIST

On penalty of perjury I swear the foregoing is true and correct.

/s/ Rick S. Miller  
Rick S. Miller (# 3418)