

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)
)
FLEMING COMPANIES, INC., et al.) **Chapter 11**
) **Case No. 03 – 10945 (MFW)**
Debtors.)
)
) **JOINTLY ADMINISTERED**
)
)

Objection Deadline: August 11, 2003, 12:00

p.m.

Hearing Date: August 14, 2003 at 9:00 a.m.

**SUPPLEMENTAL LIMITED OBJECTION OF BRADLEY OPERATING
LIMITED PARTNERSHIP TO DEBTORS' C&S SALE MOTION AND PROPOSED C&S
SALE ORDER AND OBJECTION TO THE ASSUMPTION AND
ASSIGNMENT OF CONTRACTS NUMBERED 6410, 6411 AND 6413**

Bradley Operating Limited Partnership (“Bradley”) by and through its counsel hereby supplements its previously-filed limited objection (the “Limited Objection”) pursuant to 11 U.S.C. § 365 to aspects of 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 (the “Sale Motion”) and further objects to the proposed assumption and assignment by AWG Acquisition, LLC (“AWG”) of lease numbers 6410, 6411 and 6413. In its Limited Objection, Bradley, a lessor of non-residential real estate located in various shopping centers, objected to the Sale Motion and the original proposed Sale Order on the grounds *inter alia* that the Debtors seek authorization to assume and assign to C&S Wholesale Grocers, Inc. and C&S Acquisition LLC (collectively, “C&S”) or any third party designated by C&S, certain executory contracts and unexpired leases, but failed to designate clearly which contracts or leases are to be assumed and thus failed to provide adequate notice or opportunity to object or to investigate the proposed assignee or whether the obligation to provide adequate assurances of future performance is met. Bradley also objected on the ground that it appeared that Debtors seek, with respect to Bradley’s remaining shopping center

leases with Debtors (the “Bradley Leases”), the authorization and option, but not the obligation, to assume and assign them at some unspecified time in the future, but to foreclose, anticipatorily, any cure claim by Bradley. Bradley further objected on the ground that the Sale Motion seeks to “forever bar” Bradley from seeking recovery from Debtors, C&S or any third party assignee designated by C&S for any default or other obligation arising under its leases occurring prior to the assumption date. Finally, due to the limited time Bradley had to respond to the Sale Motion, Bradley objected on the grounds that it was not able, within that short time period, to determine the Cure Amounts on the Bradley Leases by July 28, 2003. Bradley has since determined these Cure Amounts. Additionally, Debtors have now identified three Bradley leases which it intends to assume and to assign to AWG. Bradley now objects to this proposed assumption and assignment for failure to provide adequate assurances of future performance pursuant to 11 U.S.C. § 365(b)(3). In further support of its previously-filed Limited Objection and in support of its Objection to the Assumption and Assignment of Leases Numbered 6410, 6411, and 6413, Bradley states as follows:

1. In its Limited Objection, Bradley objected to the Sale Motion in part, because the original Proposed Order did not provide for payment of cure amounts that may become due at some time prior to assumption and assignment, which amounts are not included in the Debtors’ Cure Amount Schedule (listing the Cure Amounts for all of Bradley Leases as \$0.00).

2. The version of the Proposed Order circulated prior to the reconvened hearing on the Sale Motion on August 7, 2003 (the “Revised Order”), does not adequately resolve Bradley’s objection. Specifically, the Revised Order states in relevant part:

With respect to all written cure objections filed with the Court by [July 28, 2003] (the “Cure Objections”) by non-debtor counterparties to such Acquired Contracts (the “Cure Objectors”), the Cure Amount shall be limited as follows: (i) the Cure Amount shall be limited to any legal theories, categories, types or kinds of claims that are set forth in the respective Cure Objections; and (ii) no Cure Amount shall be permitted if the Cure Amount was known, or should have been known with reasonable diligence, by the Cure Objector and was not asserted in the respective written Cure Objection with reasonable particularity. All Cure Objections shall be resolved at the hearings regarding the assumption and assignment, including, but not limited to assignability or adequate assurance of future performance, of the applicable Acquired Contracts.
Revised Order ¶ 16.

3. This provision arguably precludes Bradley from including in its cure claims any future amounts that become due prior to the assumption and assignment. As such, Bradley restates its objection with respect to the Revised Order on this issue.

4. In its Limited Objection, Bradley also objected to the Sale Motion to the extent that the Proposed Order did not adequately provide for payment of unknown, contingent, or unliquidated claims.

5. The Revised Order fails to resolve this objection, stating in relevant part:

In addition to any amounts permitted pursuant to paragraphs 15 and 16 above, any non-debtor counterparty to an Acquired Contract shall be entitled to assert at the hearing applicable to the assumption and assignment of such Acquired Contract claims for alleged pecuniary loss, if any, incurred by such party between the date of the Original Cure Notice and the date on which such Acquired Contract is actually proposed to be assumed and assigned (the “Adjusted Cure Amount”). Revised Order ¶ 17.

6. Bradley renews and restates its objection to the extent that this provision of the Revised Order does not include unknown, contingent, or unliquidated claims in the Cure Amounts. Bradley reserves its right to assert as part of its cure claims any such unknown, contingent, or unliquidated claims against the Debtors prior to or after any assignment, which claims should be afforded on an administrative priority. Furthermore, assignees are required to provide adequate assurance of future performance of any assumed Bradley Leases pursuant to 11 U.S.C. § 365 (f)(2)(B) and cannot assume a Bradley Lease without such assurances. Therefore, Bradley objects to the proposed assignment on the ground and to the extent that AWG has not provided assurances that it will, in the future, perform the lessees’ obligations to satisfy any unknown, contingent, or unliquidated claims, including those arising out of events that occurred prior to assignment.

7. Furthermore, Bradley objected to the amount of the Cure Amounts listed in the Debtors’ Cure Amount Schedule, which lists all of Bradley’s Cure Amounts as \$0.00. Although Bradley was not able to determine the proper amount of its cure claims in the limited time available to object to the Sale Motion, Bradley has since determined the amounts of its cure claims which greatly exceed \$0.00.

8. The Debtors have listed the Cure Amount in their Cure Amount Schedule for the lease at The Meadows Shopping Center (store no. NE 012) as \$0.00 which is inaccurate. Bradley’s records indicate that Debtors’ payment obligations under that lease are currently overdue in the amount of

\$15,769.22, with additional amounts accruing until the date the proposed assignment closes. A true and correct copy of the current billing statement for this lease is attached hereto as Exhibit A.

9. The Debtors have listed the Cure Amount in their Cure Amount Schedule for the lease at Park Plaza Shopping Center (store no. WI 135) as \$0.00 which is inaccurate. Bradley's records indicate that Debtors' payment obligations under that lease are currently overdue in the amount of \$33,106.91, with additional amounts accruing until the date the proposed assignment closes. A true and correct copy of the current billing statement for this lease is attached hereto as Exhibit B.

10. The Debtors have listed the Cure Amount in their Cure Amount Schedule for the lease at Oak Creek Center (store no. WI 902) as \$0.00 which is inaccurate. Bradley's records indicate that Debtors' payment obligations under that lease are currently overdue in the amount of \$123,693.96, with additional amounts accruing until the date any proposed assignment closes. A true and correct copy of the current billing statement for this lease is attached hereto as Exhibit C.

11. The Debtors have listed the Cure Amount in their Cure Amount Schedule for the lease at Edgewood Shopping Center (store no. NE 031) as \$0.00 which is inaccurate. Bradley's records indicate that Debtors' payment obligations under that lease are currently overdue in the amount of \$98,906.56, with additional amounts accruing until the date any proposed assignment closes. A true and correct copy of the current billing statement for this lease is attached hereto as Exhibit D.

12. The Debtors have listed the Cure Amount in their Cure Amount Schedule for the lease at White Bear Hills Shopping Center (store no. MN 029) as \$0.00 which is inaccurate. Bradley's records indicate that Debtors' payment obligations under that lease are currently overdue in the amount of \$23,231.10, with additional amounts accruing until the date the proposed assignment closes. A true and correct copy of the current billing statement for this lease is attached hereto as Exhibit E.

13. Furthermore, certain payment obligations are currently accruing under one or more of the Bradley Leases that may not become due and payable until after the closing any of the assumption and assignment agreement. The accruing obligations may include, without limitation, tax obligations, common area maintenance expenses ("CAM"), periodic and minimum rent obligations, special assessments, utilities, periodic repair costs and reserves, and other costs and attorney's fees. Due to the representations in the Sale Motion that Debtors shall have no liability for such amounts after the closing, Bradley objects and

expressly reserves the right to collect all such amounts from the Debtors and/or the Purchaser and/or any assignee.

14. In their Notice Re Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion (the “Notice of Assumption”), the Debtors have indicated their intention to assume lease no. NE 031 (Edgewood Shopping Center), lease no. NE 012 (The Meadows Shopping Center), and lease no. NE 110 (Bishop Heralds Shopping Center) and assign these leases to AWG.

15. Before any assignment, Bradley is entitled to complete payment of the Cure Amounts for these leases, including any amounts which accrue prior to the date the proposed assignments close, and adequate assurances of future performance by AWG pursuant to 11 U.S.C. § 365(b)(3).

16. To date, the only information that Bradley has received regarding AWG as adequate assurances is a purported balance sheet listing cash reserves and the name of an individual at AWG.

17. Bradley objects to the Sale Motion and Notice of Assumption on the ground and to the extent that they do not afford adequate assurances of future performance by the proposed Purchaser or other assignee in the context of the shopping center leases here in issue. To provide such adequate assurances, Bradley believes that a financially responsible party or parent corporation must provide an unconditional and express guarantee of the Purchaser’s or other assignee’s future performance of all of the tenant obligations under the Bradley Leases.

18. Bradley further objects to the Sale Motion and the Notice of Assumption on the ground and to the extent that they do not satisfy the adequate assurance of future performance requirements for a lease of real property in a shopping center as provided by 11 U.S.C. § 365(b)(3). The requisite assurances must include, but are not limited to, assurances related to the source of rent, the level of percentage rent, the financial condition and operating performance of the proposed assignee and its guarantors, adherence to lease provisions and the non-disruption of the tenant mix and balance.

WHEREFORE, Bradley respectfully requests that this Court enter an order:

A. preserving Bradley’s rights to receive payment of all obligations and amounts currently accruing under the Remaining Bradley Leases but which may not yet have come due or may not come due until after the effective date of any assumption and assignment;

B. preserving Bradley's rights to recover for any unknown, contingent or potential defaults obligations and/or liabilities that may occur or accrue, in whole or in part, prior to any assumption and assignment;

C. requiring that the Debtors and any assignee provide all of the adequate assurances of future performance required for a lease of real property in a shopping center as set forth in 11 U.S.C. § 365(b)(3); and

D. Altering the Revised Order to specifically authorize Bradley to make the foregoing claims or assert its rights under the Bradley Leases.

DATED: August 8, 2003

Respectfully submitted,

Bradley Operating Limited Partnership

By: _____
One of its Attorneys

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