UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
FLEMING COMPANIES, INC., *et al.*,	:	**Case Nos. 03-10945 (MFW)**
	:	**(Jointly Administered)**
Debtors.	:	
	:	**Objection Date: August 11, 2003, at 12:00 p.m.**
	:	**Hearing Date: August 14, 2003 at 9:00 a.m.**

OBJECTION OF BFL-PENN, INC., BFL-N.W. EXPWY. INC., BFL-44, INC., BFL-HEFNER, INC., BFL-15, INC., BFL-PORTLAND, L.L.C., BFL-MACARTHUR, L.L.C., BFL-COUNCIL, L.L.C. BFL-YUKON, L.L.C. AND HENRY J. BINKOWSKI TO DEBTOR'S NOTICE REGARDING INITIAL ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SALE MOTION AND BRIEF IN SUPPORT

BFL-Penn, Inc., an Oklahoma corporation, BFL-N.W. Expwy., Inc., an Oklahoma corporation, BFL-44, Inc., an Oklahoma corporation, BFL-Hefner, Inc., an Oklahoma corporation, BFL-15, Inc., an Oklahoma corporation, BFL-Portland, L.L.C., an Oklahoma limited liability company, BFL-MacArthur, L.L.C., an Oklahoma limited liability company, BFL-Council, L.L.C., an Oklahoma limited liability company, and BFL-Yukon, L.L.C., an Oklahoma limited liability company (collectively, "BFL"), and Henry J. Binkowski, an individual residing in Oklahoma ("Binkowski"), hereby file this Objection to the Notice Regarding Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion filed and served by debtor Fleming Companies, Inc., et al.'s ("Fleming" or "Debtor"). Pursuant to 11 U.S.C. § 365(b), BFL and Binkowski object to the assumption and assignment of the facility standby agreement ("FSA") as sought by Debtor based upon (1) Debtor's failure to provide adequate assurance of future performance under the FSA by

Debtor's proposed assignee, AWG Acquisitions, L.L.C. ("AWG"), and (2) the FSA is only one contract of several that comprise the entire complex, intertwined contractual relationship by and among Debtor and BFL and Binkowski, which would result in BFL being severely damaged if Debtor is allowed to assume and assign the FSA to AWG without assuming and assigning to AWG of all remaining agreements among the parties. In support of this Objection, BFL and Binkowski would show the Court as follows:

Background

1. This Objection is filed pursuant to 11 U.S.C. § 365 and Rules 6006 and 9014 of the Federal Rules of Bankruptcy Procedure.

2. On April 1, 2003, Debtor and its related affiliates filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. Debtor is conducting its affairs and managing its property as a Debtor-in-Possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

3. On or about August 5, 2003, Debtor filed and served a Notice Regarding Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion (the "Notice"). Pursuant to the terms of the Notice, any objection to the assignment must set forth in writing, with particularity, the basis for the objection, including lack of adequate assurance of future performance.

4. BFL owns and operates a total of nine (9) retail grocery stores in the Oklahoma City, Oklahoma area, with each of the BFL entities operating one (1) store each. For several years, BFL has used Debtor as its primary grocery wholesaler for all 9 stores, as its lender of long-term financing for all of its stores, and as its landlord of six (6) of the 9 stores, as set forth in various contracts between the parties, including facility standby agreements, subleases,

security agreements, promissory notes, master equipment leases, inventory purchase agreements and personal guaranties of Binkowski, the sole owner of all the BFL entities (collectively referred to as the "Contracts"). Attached to the facility standby agreements are certain exhibits which dictate the price and other terms of the sale of certain products sold to BFL by Debtor, including, but not limited to, the Fleming Flexmate® Marketing Plan, the Fresh and Processed Meat Sell Plan, the Produce Sell Plan, the Bakery/Deli Sell Plan, the Tobacco and Cigarettes Sell Plan and the All Other Products Sell Plan (collectively referred to as the "Plans").

5. BFL-Portland, L.L.C. received notice that the FSA is listed in Debtor's Notice. In actuality, BFL-Penn, Inc., BFL-N.W. Expwy., Inc., BFL-44, Inc., BFL-Hefner, Inc., BFL-15, Inc., BFL-Portland, L.L.C., and BFL-MacArthur, L.L.C. are all original parties to the FSA with Debtor. Pursuant to Joinder Agreements entered into in early 2003 with Debtor, BFL-Council, L.L.C. and BFL-Yukon, L.L.C. became parties to the FSA. Debtor assigned number 4748 to the FSA. *Copies of the FSA and Plans are attached hereto.*

6. The FSA is dated January 4, 2002, at which time BFL-MacArthur, L.L.C. executed an Inventory Purchase Agreement, a Sublease, a Security Agreement, and a Master Equipment Lease, and Binkowski individually executed a Guaranty Agreement, and all BFL entities (other than BFL-Council, L.L.C. and BFL-Yukon, L.L.C., which had not yet been formed) and Binkowski, individually, executed a Reaffirmation of Security Agreements and Guaranty (collectively referred to as the "Agreements"[1]). All BFL entities, including BFL-Council, L.L.C. and BFL-Yukon, L.L.C., entered into similar agreements when two (2) additional stores were opened by BFL in early 2003; however Debtor has never provided BFL with copies of the executed Agreements notwithstanding repeated requests by BFL.

1 The term "Agreements" incorporates the term previously defined as "Contracts."

7. The Agreements specifically mention and incorporate by reference prior Contracts entered into between the parties relating to several of BFL's stores and in effect, reaffirm BFL's obligations as stated in the Contracts. By virtue of the Agreements and certain amendments thereto, the FSA that Debtor seeks to assume and assign obligates the majority of BFL's stores to purchase the majority of their products and supplies from Debtor, and if assigned to AWG, would force the stores to purchase the majority of their products and supplies from AWG. Debtor has not provided BFL with adequate assurance that AWG is willing and has the ability to perform under the FSA and Agreements or that AWG has Plans substantially similar or comparable to those previously negotiated and bargained for between BFL and Debtor in conjunction with the FSA.

8. Furthermore, the FSA is only one contract of several that comprise the entire interconnected contractual relationship between BFL and Debtor. The Agreements are so inextricably interwoven that for all practical purposes, they comprise one single agreement, with one individual, Binkowski, the sole owner of all the BFL entities and guarantor of all obligations of BFL to Debtor. The Agreements contain cross-collateralization, cross-guaranty and cross-default provisions that directly impact the performance and/or termination of the others.

9. Therefore, pursuant to 11 U.S.C. § 365(b), BFL hereby objects to Debtor's assignment of the FSA and AWG's assumption of the FSA based upon Debtor's failure to provide adequate assurance of future performance under the FSA by AWG. BFL further objects because the FSA is only one contract of several that comprise the entire contractual relationship with Debtor and BFL would be severely damaged if Debtor is allowed to assume and assign the FSA without assuming and assigning the remaining agreements.

ARUGMENTS AND AUTHORITIES

I. Debtor has Failed to Provide BFL with Adequate Assurance of AWG's Future Performance.

10. Debtor is required to comply with 11 U.S.C. § 365(b) prior to the assumption and assignment of any executory contracts or unexpired leases, including, but not limited to, promptly curing defaults and/or providing parties with adequate assurance that the assignee is able to perform under the terms of the contract or lease that the Debtor seeks to assume and assign. These prerequisites were imposed by Congress to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance under the contract. *In re Ionosphere Clubs, Inc., 85 F.3d 992 (2nd Cir. 1996)* Although it is understood that an assignee does not have to comply with each and every term in a contract or lease, an assignee must be reasonable and cannot act arbitrarily or capricious when determining his performance under a contract or lease assigned. *In re Evelyn Byrnes, Inc., 32 B.R. 825 (Bankr. S.D.N.Y. 1983)*. To provide adequate assurance means that a debtor must give a party the full benefit of its bargain. *Id.*

11. BFL objects to the assumption and assignment of the FSA as Debtor has failed to provide adequate assurance that AWG is willing and able to perform under the FSA.

12. As previously stated, attached to the FSA are several Plans, which contain the terms and conditions upon which Debtor sells certain products to BFL. Debtor has not provided sufficient information to BFL regarding whether AWG has comparable plans or if AWG will continue to operate under the Plans currently in force.

13. Furthermore, it is BFL's understanding that AWG is a grocer wholesale co-op. Debtor has failed to address whether retailers like BFL will be required to "buy-in" to AWG in

order to receive certain prices, products and rebates available to members of AWG. If BFL is so obligated, the "buy-in" could place a substantial financial hardship on BFL and cause it irreparable harm.

14. Finally, AWG or its parent, Associate Wholesale Groceries, Inc., is the owner of the Homeland chain of retail grocery stores, which is a major competitor of BFL in the Oklahoma City market. BFL has received no adequate assurance from Debtor or AWG that the inherent conflict of interest between AWG's proposed roles as a wholesale supplier to BFL and its ownership of competing stores can be overcome in any realistic manner that would not place a substantial financial hardship on BFL and cause it irreparable harm.

15. These instances represent just a sample of the questions regarding AWG's future performance that have gone unaddressed by Debtor and which will have a significant impact on retailers, including BFL.

II. BFL Objects to the Assumption and Assignment of the FSA on the Basis that the FSA is Only One Contract of Several Between Debtor and BFL that Comprise the Contractual Relationship Between the Parties.

16. The FSA and Agreements were entered into between Debtor and BFL with the understanding that Debtor would provide products, services, locations, financing and financial assistance to BFL for its grocery stores. Pursuant to their terms, the agreements are to be governed by and construed in accordance with the laws of the State of Oklahoma.

17. Under Oklahoma law, separate contracts executed as part of the same transaction may be read together as a single agreement. *15 Okla. Stat. §158; Sunrizon Homes, Inc. v. American Guaranty Investment, Corp., 782 P.2d 103, (Okla. 1998), Holden v. DuBois, 665 P.2d 1175, (Okla. 1983).*

18. It was the clear intent of the parties at the time of the closing of the FSA and

subsequent closings in 2003 that all of the Agreements be viewed as a single, indivisible agreement. The intention is clear merely by reviewing the Agreements. The Agreements are coterminous and contain cross-default, cross-guaranty and cross-collateralization provisions to the extent that it is apparent that one agreement is of little or no utility without the others.

19. For example, the FSA contains a provision that states,

> Term. Unless terminated sooner in accordance with this Agreement, the term of this Agreement will commence on the Effective Date and extend for such time as any Fleming Assistance[2] is being provided to any of the Stores; provided, however, in no event will the term of this Agreement extend beyond twenty (20) years from the date hereof.

See ¶4 of the FSA. As an additional example, by the terms of the FSA and the Sublease between Debtor and BFL-MacArthur dated January 4, 2002 (the same date as the current FSA), if Debtor or AWG fail to provide financial assistance to subsidize the rent due under the Sublease, the FSA terminates pursuant to its own terms. *A copy of the Sublease with BFL-MacArthur, L.L.C. is attached hereto.*

20. In addition, the FSA obligates BFL to purchase the majority of its products and supplies from Debtor. The Debtor entered into the subleases with BFL-MacArthur, L.L.C. and other BFL entities and maintains the underlying leases on each store because BFL operates grocery stores in each retail space and Debtor reaps the benefits of the FSA. The Inventory Purchase Agreement, Security Agreement, Promissory Note and other contracts for each store represent the agreement between the respective BFL entity and Debtor for the initial purchase of the inventory and the security interest in the products both initially purchased and later purchased

2 "Fleming Assistance" is defined in the FSA to mean, "as to ***any*** Store, a lease or sublease of the Store premises between Fleming and a Retailer, any financing or any other financial incentive provided by Fleming to any Retailer or any subsidy or other financial assistance of any nature provided by Fleming to any Retailer. * * *." (Emphasis Added.)

by BFL. Debtor further benefits from the interest income it receives under the Promissory Notes.

21. The cohesiveness of these Agreements is obvious and was intentional on the part of Debtor. If one Contract is separated, it disrupts the overall contractual working relationship bargained for by BFL and Debtor and creates an unstable future for the remaining Contracts, as their functions and purpose are placed at risk and become uncertain.

22. Finally, it has been rumored that Debtor is not going to seek to assign the BFL Promissory Notes to AWG but that they would instead be assigned to an unrelated party. The Promissory Notes between BFL and Debtor are demand notes, however, the Promissory Notes provide they are to be paid on an installment basis so long as demand is not made. This is indicative of the parties' intent that so long as BFL does not default on the FSA, subleases or other Contracts, it is highly unlikely Debtor would make demand on the Promissory Notes. If the Promissory Notes are not kept part of the whole contractual relationship and are not assigned to the holder of the other agreements, there could well be a financial disincentive for the assignee of the Promissory Note to continue to allow BFL to make payments on an installment basis as the assignee would not be reaping the financial benefits of the other contracts. A party holding the Promissory Notes and no other agreements has no interest in the long-term viability of BFL and may simply wish to collect the largest amount it can obtain as soon as possible. If BFL is forced to pay the Promissory Notes on demand, it would place BFL in a severe financial hardship.

Conclusion

23. While BFL and Binkowski sympathize with Debtor's financial situation and its need for capital, Debtor's proposed sale should not be allowed to force retailers, such as BFL, to

the same unfortunate fate of bankruptcy.

24. BFL and Binkowski reserve the right to amend this Objection at any time prior to the hearing on August 14, 2003 if BFL receives additional information regarding the potential assumption and assignment of additional contracts entered into between Debtor and BFL and Binkowski.

WHEREFORE, for the foregoing reasons, BFL and Binkowski move the Court to enter an Order pursuant to 11 U.S.C. § 365(b) prohibiting the assumption and assignment of the FSA based upon Debtor's failure to provide adequate assurance of future performance under the FSA by Debtor's assignee, AWG, and for Debtor's failure to assume and assign all of the contracts that comprise the entire contractual relationship between BFL, Binkowski and Debtor and for such other and further relief as the Court may deem just and proper.

Dated: August 11, 2003

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

/s/ William M. Kelleher

Tobey M. Daluz, Esq. (No. 3939)
William M. Kelleher, Esq. (No. 3960)
919 N. Market Street, 17th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: daluzt@ballardspahr.com
kelleherw@ballrdspahr.com

and

Melvin R. McVay, Jr.
Vickie J. Buchanan
PHILLIPS McFALL McCAFFREY
McVAY & MURRAH, P.C.
One Leadership Square, 12th Floor
211 North Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-4100
Facsimile: (405) 235-4133

Attorneys for BFL and Binkowski

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)
Debtors.	:	
	:	

CERTIFICATE OF SERVICE

I, William M. Kelleher, Esquire, certify that on this 11th day of August, 2003, I caused a true and correct copy of the foregoing objection to be served on the attached service list in the manner indicated.

BALLARD SPAHR ANDREWS &
INGERSOLL, LLP

By: /s/ William M. Kelleher
William M. Kelleher (No. 3961)

HAND DELIVERY

Laura Davis Jones, Esquire
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub, P.C.
919 Market Street, 16th Floor
Wilmington, DE 19801

Joseph J. McMahon, Esquire
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2313
Wilmington, DE 19801

Scott Cousins, Esquire
Greenberg Traurig LLP
The Brandywine Building
1000 West Street, Suite 1540
Wilmington, DE 19801

David Fournier, Esquire
Pepper Hamilton LLP
1201 Market Street, Suite 1600
Wilmington, DE 19801

FIRST CLASS MAIL

Richard L. Wynne, Esquire
Kirkland & Ellis
777 South Figeroa Street
Los Angeles, CA 90017
(213) 680-8500

James H.M. Sprayregen, P.C.
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2200

Scotta E. McFarland, Esquire
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub, P.C.
10100 Santa Monica Blvd., 11th Floor
Los Angeles, CA 90067
(310) 201-0760

Andrew P. DeNatale, Esquire
White & Case
1155 Avenue of the Americas
New York, NY 10036
(212) 354-8113

Paul Aronzon, Esquire
Milbank, Tweed, Hadley & McCoy LLP
601 South Figueroa Street, 30th Floor
Los Angeles, CA 90017
(213) 629-5063