IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

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| In re: | ) | Chapter 11 |
| | ) | |
| Fleming Companies, Inc., *et al*., | ) | Case No. 03-10945 (MFW) |
| | ) | (Jointly Administered) |
| Debtors. | ) | |
| | ) | **Re: D. I. Nos. 1906, 2401 & 2815** |

**SUPPLEMENTAL STATEMENT AND RESERVATION RIGHTS OF FOOD GIANT SUPERMARKETS, INC. WITH RESPECT TO (I) 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, AND (II) NOTICE RE POTENTIAL ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SALE MOTION**

Food Giant Supermarkets, Inc. ("Food Giant")[1] hereby files its Supplemental Statement and Reservation of Rights with respect to (i) 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, and (ii) the Debtors' Notice Re Potential Assumption and

[1] All capitalized terms not defined herein shall have the meaning ascribed to such terms in (a) Food Giant's Objection to the Sale Motion (the "Original Objection"), and (b) Food Giants's Supplemental Objection to the Sale Motion (the "Supplemental Objection"), dated, respectively, July 28, 2003, and August 6, 2003.

Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion. In support of its Supplemental Statement and Reservation of Rights, Food Giant respectfully states as follows:

**Updated Procedural and Factual Background**

1. As set forth in the Original Objection and the Supplemental Objection, Food Giant owns and operates a total of 88 grocery stores in Missouri, Alabama, Arkansas, Georgia, Kentucky, Tennessee, Florida and Mississippi. Fleming has served as Food Giant's primary grocery wholesaler for a number of years.

2. Prior to the August 6, 2003 hearing on, *inter alia,* the issues of the enforceability of the alleged waiver of consequential damages contained in the applicable Facility Standby Agreements and the terms of the Proposed Sale Order, Food Giant entered into settlement discussions with AWG Acquisition LLC ("AWG").

3. It is anticipated that these discussions will result in a business resolution of Food Giant's objection to the proposed assumption and assignment of the various agreements between Food Giant and Fleming, including, without limitation, the Food Giant Standby Agreements. However, until a comprehensive resolution of all outstanding issues is reached, Food Giant must press forward with its objections in advance of the August 14, 2003 hearing on the proposed assumption and assignment of any Food Giant agreements.[2]

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[2] One of Food Giant's paramount concerns is that all of the Food Giant Standby Agreements, as well as the Franchise Agreements, Sign Agreements and, except in certain limited circumstances, Subleases, be assigned to AWG, which will then be subject to the hoped for business understanding between Food Giant and AWG. Absent assignment of all of such agreements to AWG, and a definitive understanding with AWG as to the parties' prospective business relationship, Food Giant intends to vigorously litigate all issues with the Debtors. For example, if all of the Food Giant agreements are not assigned to AWG, then Food Giant will press forward with its objection that the Debtors have not provided, and are unable to provide, adequate assurance of future performance of such agreements. The fact that Food Giant may be faced with the prospect of having contracts with more than one party when it originally contracted with

**4.** Food Giant incorporates the Original Objection and the Supplemental Objection by reference as if fully set forth herein and makes the following supplemental statement and reservation of rights.

**5.** On or about August 4, 2003, the Debtors filed their Notice re Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion (the "Initial AWG Assumption Notice") in which the Debtors indicate that, at the hearing currently scheduled for August 14, 2003, they are moving to assume and assign, among other contracts, the following Food Giant contracts, to AWG:

a. FSA's: each FSA listed on Exhibit 4 to the Original Objection; and

b. Real Estate: 6581, 6582, 6583, 6584, 6585, 6587, 6589, 6590, 6591, 6592, 6597, 6600, 6959, 6960, 6961 and 6967

**6.** On or about August 4, 2003, the Debtors also filed their Notice re Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion (the "Initial C & S Assumption Notice") in which the Debtors indicate that, at the hearing currently scheduled for August 14, 2003, they are moving to assume and assign, among other contracts, the following Food Giant contracts, to C & S Acquisition LLC ("C & S"):

a. Franchise Agreements: each Franchise Agreement listed on Exhibit 2 to the Original Objection; and

b. Sign Agreements: each Sign Agreement listed on Exhibit 3 to the Original Objection.

**Supplemental Statement**

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only one party in this integrated transaction, unequivocally demonstrates that only assignment to a single party--not multiple parties--will be able to provide Food Giant adequate assurance of future performance.

**A. Supplement to Cure Amount**

7. Parties, such as Food Giant, that filed timely objections to the Sale Motion, are permitted to supplement their cure claims and/or to provide more detail in connection therewith.

8. As set forth in its prior objections, Food Giant has suffered significant damages as a result of Fleming's ongoing pre- and post-petition defaults under the Food Giant Standby Agreements. First, Food Giant has suffered damages of at least $3,777,176 as a result of, among other items, (i) Fleming's failure to pay incentive payments, (ii) Fleming's failure to pay rebate payments, (iii) Fleming's failure to pay amounts owing under its checkout fixtures program, (iv) Fleming's failure to credit the Notes for forgiveness income, (v) lost rebate and forgiveness income, (vi) the additional costs incurred by Food Giant to obtain products from alternate suppliers, (vii) losses to Food Giant's customer base, (viii) increases to product distribution costs, and (ix) costs and expenses incurred in connection with Fleming's bankruptcy proceedings.

9. Furthermore, as set forth in the prior objections, Food Giant continues to incur monetary and non-monetary damages as a result of Fleming's failure to perform its obligations under the Food Giant Standby Agreements and has suffered additional damages which operate to increase the cure costs in connection with Fleming's proposed assumption and assignment of the Food Giant Standby Agreements.

10. Food Giant estimates that it will continue to incur increased freight costs of approximately $1.5 million per year if Fleming continues in default under the Facility Standby Agreement.

11. Even assuming *arguendo* that the Court ultimately determines that Food Giant has waived consequential damages (whatever such damages are defined as under applicable state law), it is important that any consequential damage waiver be strictly limited to the section 365

cure context. Non-debtor counter-parties to the agreements such as Food Giant must still be permitted to assert consequential damages for purposes of the defensive doctrines of recoupment or setoff.

12. Finally, Food Giant reserves its right to allege additional present or future cure claims, and to identify and object to any assumption and assignment of additional agreements that are implicated by the Sale Motion, if any, that are not properly identified by the Debtors.

**B. Adequate Assurance of Future Performance**

13. As indicated above, the Initial AWG Assumption Notice indicates the Debtors intend to assign the Facility Standby Agreement to AWG.[3/] In addition, the Initial AWG Assumption Notice indicates the Debtors intend to assign some (but not all) of the Subleases to AWG.

14. The Initial C & S Assumption Notice indicates the Debtors intend to assign the Franchise Agreements and the Sign Agreements to C & S.

**The Facility Standby Agreement**

15. Under Section 365, the Debtors have the burden of proving that the proposed assignee, C & S, will be able to perform under the Facility Standby Agreement. 11 U.S.C. § 365(f). The Debtors have not made any showing that AWG will be able to fulfill Fleming's obligations under the Food Giant Standby Agreements. For example, Fleming has already

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3/ As set forth in the Original Objection, Food Giant presently is party to only one facility standby agreement with Fleming. However, each notice that Fleming has filed with the Court references at least 7 such agreements. For purposes of this Supplemental Statement, Food Giant assumes that 1 of the 7 listed FSA's is the Facility Standby Agreement. Food Giant objects to the assumption and assignment of any agreement that has been terminated or expired by its own terms. Furthermore, to the extent Fleming, AWG, C & S and/or any other potential assignee asserts that Food Giant is a party to additional agreements (including FSA's), Food Giant objects to any such assumption and assignment absent adequate proof of the existence of such agreements and the satisfaction of all requirements under Section 365 with respect to each such agreement.

closed its Geneva, Alabama warehouse that previously serviced 33 of Food Giant's 88 locations.[4/] Furthermore, as set forth in the Original Objection, the Notes are an integral part of the Food Giant Standby Agreements. On information presently available to Food Giant, it cannot confirm that the Notes are to be transferred to AWG rather than to C & S.

**Subleases**

16. Fleming has also failed to make any showing that AWG will be able to perform under any of the Subleases currently listed for assignment to AWG. Fleming must demonstrate that it is also assuming and assigning each relevant prime lease to AWG and obtain Court approval of such assumption and assignment in order to show that AWG will be able to perform under each applicable Sublease.

**Franchise Agreements and Sign Agreements**

17. Finally, Fleming has also failed to make any showing that C & S will be able to perform under the Franchise Agreements and the Sign Agreements. In order to perform under these agreements, C & S must own (or have sufficient rights to) the underlying assets that are the subject of such agreements. At this point, Food Giant does not have any means of verifying that C & S will have such rights.

18. Food Giant reserves the right, in the event it is unable to come to agreement with Fleming, C & S and AWG as to the disposition of its various agreements with Fleming, to object to any attempted assignment of any agreements among Food Giant and any of the Debtors, including, without limitation, the Food Giant Standby Agreements, Franchise Agreements, Sign

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4/ On information and belief, the remaining 2 warehouses (Nashville and Memphis) that serviced Food Giant's other 55 locations are potentially being transferred to AWG. However, Food Giant does not have information to verify this. In addition, such transfer does not resolve the issues with the 33 locations that were serviced by the Geneva, Alabama warehouse location.

Agreements or Subleases to C & S or to AWG (or any other proposed assignee) without (1) Food Giant's express consent, or (2) satisfaction of all elements of Sections 363 and 365 of the Bankruptcy Code including, without limitation, adequate assurance of future performance.

WHEREFORE, Food Giant respectfully requests that the Court (i) find that the Cure Notices and the Master Cure Notice, as such documents relate to Food Giant entities, do not comply with the Bid Procedures Order; (ii) deny the Cure Amount set forth on the Master Cure Notice and the Cure Notices with respect to each of the Food Giant contracts; (iii) find that the Debtors cannot assume and assign one component of the Food Giant Standby Agreements without satisfying Section 365 and assuming and assigning all components; (iv) deny any approval of the assumption and assignment of the Food Giant Standby Agreements, the Franchise Agreements, the Sign Agreements and the Subleases, (v) find that Fleming's rights under the Notes are subject to recoupment and/or set-off by Food Giant, and that any purchaser of such Notes would take subject to such rights; (vi) find that the Debtors have not provided adequate assurance of the ability of (A) AWG to perform under the Food Giant Standby Agreements or the Subleases, or (B) C & S to perform under the Franchise Agreements or the Sign Agreements, and (vii) grant such other and further relief as the Court may deem proper.

Dated: August 11, 2003

MORRIS, NICHOLS, ARSHT & TUNNELL

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