

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re) Chapter 11
) Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., et al.,) Jointly Administered
)
Debtors.) **Obj. Deadline: 8/11/03 at noon**

**OBJECTION OF W.H. KOCH TO THE NOTICE RE INITIAL ASSUMPTION
AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND
UNEXPIRED LEASES IN CONNECTION WITH SALE MOTION [D.I. 2716]**

W.H. Koch Company, Inc. (“Koch”), by and through the undersigned counsel, hereby objects to the assumption and assignment of the FSA (defined below) proposed by the above-captioned debtors (“Debtors”) in the *Notice Re Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion* [D.I. 2716]

(“Notice”). In support of this Objection, Koch respectfully states as follows:

1. On or about April 1, 2003, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (“Bankruptcy Code”).

2. Pursuant to a Facility Standby Agreement (“FSA”),¹ designated as number 2305 in the Notice, Koch agreed to purchase goods from Fleming Companies, Inc. (“Fleming”), one of the Debtors, and Fleming agreed to supply Koch’s stores with a certain percentage of its good. In conjunction with the FSA, Fleming lent funds to Koch in the original principal amount of \$725,000, pursuant to the terms of a Promissory Note (“Note”) and term letter (“Term Letter”) dated January 17, 2003. Copies the Note and Term Letter are attached hereto as Exhibit A.

Under the Term Letter, Fleming will forgive the balance due under the Note at a rate of 1/7th per

¹A true and correct copy of the FSA is attached as Exhibit A to the *Objection of W.H. Koch to the Notice Re Potential Assumption and Assignment of Certain Executory Contracts and Unexpired FSAs in Connection with Sale Motion [D.I. 2002]* [D.I. 2297] (“Cure Objection”).

year for every year in which Koch meets certain threshold purchase order levels set in the FSA.

3. On August 4, 2003, the Debtors disseminated the Notice, which states that they intend to assume and assign the FSA to “AWG Acquisition, LLC or its designated affiliate” (“AWG”).

3. Koch objects to the Debtors’ proposed assumption and assignment of the FSA to the AWG on the limited basis set forth herein.²

4. Koch requests confirmation that, in addition to the FSA, the Note and Term Letter will also be assumed and assigned to AWG. Although the Notice makes no reference to the Note and the Term Letter, it is Koch’s understanding that these will also be assigned to AWG. The FSA, Note and Term Letter together constitute one transaction between Fleming and Koch and must be assumed and assigned as such. All three documents were executed on January 17, 2003, and the document specifically reference each other. Moreover, the loan forgiveness structure bargained for in the Term Letter is lost if it is separated from the FSA. Section 365(f) of the Bankruptcy Code requires that a debtor assume the contract *cum onere* without any change. *See In re ANC Rental Corp.*, 277 B.R. 226, 238-39 (Bankr. D. Del. 2002) (“The [debtor], however, may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.”) (quoting, *In re Italian Cook Oil*, 190 F.2d 994, 997 (3rd Cir. 1951)).

²Per the procedures approved by this Court, this Objection does not address cure of defaults under the FSA, which was addressed in the Cure Objection filed on July 28, 2003. Koch reserves the right to supplement the cure amount asserted in the Cure Objection to the extent certain claims alleged therein were unquantified or became due after the date the Cure Objection was filed. Additionally, Koch reserves all of its rights related to the assertion of alleged consequential damages in the Cure Objection.

WHEREFORE, for all of the foregoing reasons, Koch respectfully requests that the Court deny the Debtors' request to assume and assign the FSA to AWG, unless and until it is confirmed that the Note and Term Letter will also be assumed and assigned to AWG.

Dated: August 11, 2003
Wilmington, Delaware

CONNOLLY BOVE LODGE & HUTZ LLP

/s/ Michelle McMahon
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Counsel for W.H. Koch Company, Inc.

CERTIFICATE OF SERVICE

I, Michelle McMahon, hereby certify that on August 11, 2003, I caused a copy of the **Objection of W.H. Koch Company, Inc. to the Notice Re Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection With Sale Motion [D.I. 2716]** to be served upon the following persons and in the manner indicated:

BY HAND DELIVERY

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/s/ Michelle McMahon
Michelle McMahon (No. 3900)