

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
Fleming Companies, Inc., et al.,<sup>1</sup> ) Case No. 03-10945 (MFW)  
) (Jointly Administered)  
Debtors. )  
)  
)

**MOTION FOR AN ORDER PURSUANT TO SECTIONS 363 AND 365 OF THE BANKRUPTCY CODE AUTHORIZING DEBTORS TO ASSUME AND ASSIGN CERTAIN UNEXPIRED NON-RESIDENTIAL REAL PROPERTY LEASE PURSUANT TO AN ASSET PURCHASE AGREEMENT BETWEEN THE DEBTORS AND BASHAS' INC.**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby move the Court (the “Motion”) for entry of an Order (the “Order”), pursuant to sections 363 and 365 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), authorizing the Debtors to assume and assign certain unexpired non-residential lease located at 1221 W. Irvington Road, Tucson, Arizona (the “Tucson Lease”), pursuant to the terms of the Asset Purchase Agreement, attached hereto as Exhibit 1, between the Debtors and Bashas’ Inc. (the “Purchase Agreement”). A copy of the Tucson Lease is attached as Exhibit A to the Assignment Agreement, as defined below. In support of this Motion, the Debtors respectfully state as follows:

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<sup>1</sup> The Debtors are the following entities: FCI Corporation, ABCO Food Group, Inc., ABCO Markets, Inc., ABCO Realty Corp., ASI Office Automation, Inc., C/M Products, Inc., Core-Mark International, Inc., Core-Mark Interrelated Companies, Inc., Core-Mark Mid-Continent, Inc., Dunigan Fuels, Inc., E.A. Morris Distributors, Ltd., Favar Concepts, Ltd., Fleming Foods Management Co., L.L.C., Fleming Foods of Texas, L.P., Fleming International, Ltd., Fleming Supermarkets of Florida, Inc., Fleming Transportation Service, Inc., Food 4 Less Beverage Company, Inc., Fuelserv, Inc., General Acceptance Corporation, Head Distributing Company, Marquise Ventures Company, Inc., Minter-Weisman Co., Piggly Wiggly Company, Progressive Realty, Inc., Rainbow Food Group, Inc., Retail Investments, Inc., Retail Supermarkets, Inc., RFS Marketing Services, Inc., and Richmar Foods, Inc.

### **Jurisdiction**

1. This Court has jurisdiction over this Motion under 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).
2. The statutory bases for the relief sought herein are sections 105(a), 363 and 365 of the Bankruptcy Code.

### **Background**

3. On April 1, 2003 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases"). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case. An official committee of unsecured creditors (the "Committee") was appointed on April 14, 2003.
4. On April 29, 2003, the Debtors filed with this Court a Motion For the Entry of an Order Pursuant to Sections 363(b), 363(f), 554(a) and 1146(c) of the Bankruptcy Code Authorizing And Approving Procedures For the Sale or Abandonment of the Debtors' De Minimis Assets (the "De Minimis Asset Sale Motion"). On May 21, 2003 the Court entered an order approving the De Minimis Asset Sale Motion ("De Minimis Asset Sale Order").

### **Bashas' Transaction**

5. On August 12, 2003, two of the Debtors, Fleming Companies, Inc. and Richmar Foods, Inc. (collectively, the "Seller"), entered into the Purchase Agreement with Bashas' Inc., an Arizona corporation ("Buyer"). The parties' obligations under the Purchase Agreement are subject to the De Minimis Asset Sale Order and entry of the Order granting this Motion.
6. The Purchase Agreement calls for the sale, by the Seller to the Buyer, of (collectively, the "Tucson Store Assets") (i) that certain retail grocery store located at 1221 W. Irvington Road, Tucson, Arizona (the "Tucson Store"), including, without limitation, the Tucson

Lease and all of the owned furniture, fixtures and equipment located in the Tucson Store; (ii) that certain Arizona Liquor License No. 09100032, an Arizona Retailer Liquor License permitting the sale of alcoholic beverages for consumption off of the licensed premises of the Tucson Store; and (iii) that certain Arizona Liquor License No. 09070113, an Arizona Retailer Liquor License permitting the sale of alcoholic beverages for consumption off of the licensed premises of that certain retail grocery store located at 5810 West Peoria Avenue, Glendale, Arizona free and clear of all liens, claims and encumbrances of any kind, pursuant to section 363 of the Bankruptcy Code.

7. The Purchase Agreement further provides for the assumption and assignment of the Tucson Lease by the Seller to the Buyer pursuant to section 365 of the Bankruptcy Code. Seller currently leases the Tucson Lease from a third party pursuant to a lease by and between Fleming Companies, Inc. and Barclay Creswin Properties I, L.L.C., an Arizona limited liability company ("Barclay").

8. Pursuant to the Purchase Agreement, the aggregate purchase price for the assignment and assumption of the Tucson Lease and the purchase of the Tucson Store Assets (the "Purchase Price") shall be Five Hundred Fifty Thousand Dollars (\$550,000.00), payable by wire transfer of immediately available funds on the closing date.

#### **Relief Requested**

9. Pursuant to section 365 of the Bankruptcy Code, the Debtors request authority to assume and assign the Tucson Lease to the Seller pursuant to the terms of a certain assumption and assignment agreement, substantially in the form of Exhibit B attached to the Purchase Agreement (the "Assignment Agreement"). The Debtors further request approval of the form of the Assignment Agreement and authority to execute and deliver the Assignment Agreement in connection with the Tucson Lease, in order to effectuate the assignment, upon entry of the Order granting this Motion and as contemplated under the Purchase Agreement.

10. The Debtors also request that, pursuant to sections 365(k) and 363(b) of the Bankruptcy Code, the Debtors be relieved of all liability under the Tucson Lease, accruing or arising after the date the Order is entered, authorizing the assignment of such lease and that the Tucson Lease be transferred free and clear of all liens, claims and encumbrances of any kind, pursuant to the terms of the Purchase Agreement.

#### **Basis for Relief**

11. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). It is well established that the decision to assume or reject an executory contract or unexpired lease is a matter within the "business judgment" of the debtor. See In re Taylor, 913 F.2d 102 (3d Cir. 1990); Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36 (3d Cir. 1989). The business judgment standard mandates that a court approve a debtor's business decision unless the decision is the product of bad faith, whim or caprice. See, Lubrizol Enters. v. Richmond Metal Finishes, 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 10571 (1986).

12. The Debtors have determined, in the exercise of their business judgment, that the Tucson Lease is unprofitable and is not necessary for the Debtors' reorganization efforts. The assumption and assignment of the Tucson Lease is required under the Purchase Agreement. If the Debtors are not able to assume and assign the Tucson Lease, the sale of the Tucson Store Assets to the Buyer will be severely jeopardized and will likely result in reduced proceeds for these estates.

13. Furthermore, the approval of the Assignment Agreement will release the Debtors from any future contingent liability under the Tucson Lease and, at the same time, the assignment of the Tucson Lease will reduce claims against the estates that may result from rejection of such lease.

14. The Debtors also contend that they are receiving reasonable consideration for the assignment of the Tucson Lease and the sales of the Tucson Store Assets to the Buyer.

15. Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Whether a sale of assets pursuant to section 363(b) of the Bankruptcy Code should be approved in a particular case is a matter left to the Court's discretion, giving due consideration to the sound business judgment of the proponent of the sale. See Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996); In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986) (requiring good faith purchase); In re Delaware and Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991) (concluding that the requirements for a sale outside the ordinary course of business include a sound business purpose, adequate and reasonable notice, a fair and reasonable price, and a good faith purchaser).

16. Additionally, pursuant to section 365(b)(1)(A) of the Bankruptcy Code "[i]f there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee cures, or provides adequate assurance that the trustee will promptly cure such default..." Subject to the entry of the Order granting the Motion, the Buyer will pay the applicable cure amount, as stated in Exhibit C of the Purchase Agreement, for the Tucson Lease at the closing of the transactions as contemplated under the Purchase Agreement.

17. Finally, the Seller acknowledges and agrees that upon an entry of an Order approving the assumption and assignment of the Tucson Lease, the Debtors will not have any obligation whatsoever under the Tucson Lease arising from and after the date of the closing. Accordingly, approval of the assignment of the Tucson Lease is in the best interests of the Debtors, their creditors and their estates.

**Notice**

18. Notice of this Motion has been given to: (a) the United States Trustee, (b) counsel to the senior secured lenders, (c) proposed counsel to the Committee, (d) Bashas' Inc., (e) Barclay, the counterparty to the Tucson Lease, and (f) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

**No Prior Request**

19. No prior Motion for the relief requested herein has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form attached hereto, granting this Motion and such other and further relief as is just and proper.

Wilmington, Delaware

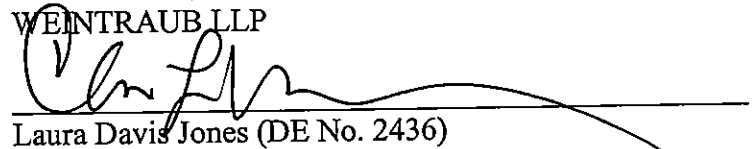
Dated: Aug 20, 2003

Respectfully submitted,

KIRKLAND & ELLIS  
James H. M. Sprayregen, P.C. (ARDC No. 6190206)  
Richard L. Wynne (CA Bar No. 120349)  
Geoffrey A. Richards (ARDC No. 6230120)  
Haleh Rahjoo (CA Bar No. 192137)  
Kirkland & Ellis LLP  
777 South Figueroa Street  
Los Angeles, CA 90017  
(213) 680-8400 (Telephone)  
(213) 680-8500 (Facsimile)

and

PACHULSKI, STANG, ZIEHL, YOUNG, JONES &  
WEINTRAUB LLP



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Laura Davis Jones (DE No. 2436)  
Ira D. Kharasch (CA No. 109084)  
Scotta E. McFarland (DE No. 4184)  
Christopher J. Lhulier (DE No. 3850)  
919 North Market Street, 16<sup>th</sup> Floor  
P.O. Box 8705  
Wilmington, Delaware 19899-8705 (Courier No. 19801)  
(302) 652-4100 (Telephone)  
(302) 652-4400 (Facsimile)

Counsel for the Debtors and Debtors in  
Possession