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6  
7 UNITED STATES BANKRUPTCY COURT  
8 DISTRICT OF DELAWARE  
9

10 In re:

11 FLEMING COMPANIES, INC., et al,  
12 Debtor.  
13

Case No. 03-10945 (MFW)  
(Jointly Administered)

Chapter 11 Proceedings

14 **SECOND LIMITED OBJECTION**  
15 **OF SMIRNCO, INC. TO**  
16 **DEBTOR'S (i) MOTION TO**  
17 **ASSUME AND ASSIGN**  
**EXECUTORY CONTRACTS**  
**AND (ii) MOTION TO REJECT**  
**EXECUTORY LEASES AND**  
**EXECUTORY CONTRACTS**

18  
19 Creditor Smirnco, Inc. ("Smirnco"), an Arizona corporation, through counsel  
20 undersigned, objects to the Debtor's motion as set forth in that certain Notice dated July  
21 17, 2003, and Supplemental Notice dated July 19, 2003, re: Potential Assumption and  
22 Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale  
23 Motion (the "Motion"), and any other Notice regarding the assumption and assignment of  
24 executory contracts and unexpired leases (the "Notices") as they relate to the Debtor's  
25 business and contractual relationships with Smirnco. In addition, Smirnco objects to  
26 Debtor's Motion to Reject Certain Executory Contracts and Unexpired Leases (Motion to

1 Reject) to the extent it relates to the Debtor's business and contractual relationships with  
2 Smirnco.

3         Objecting Creditor, Smirnco, was the owner and operator of seven retail grocery  
4 locations in the Phoenix metropolitan area, six of which were acquired from the  
5 Debtor.<sup>1</sup> As a material and unified part of each such transaction, Smirnco became a  
6 subtenant of the Debtor in connection with the real estate leases for each location. In  
7 connection with each sublease location, the Debtor undertook contractual obligations,  
8 including without limitation, those described in a document entitled "Standby Facility  
9 Agreement," by which Debtor agreed to supply wholesale groceries and foods for  
10 Smirnco's use, to each of Smirnco's retail grocery operations. In relation to several specific  
11 locations (Stores #3, 4 and 5), the Debtor also provided a subsidy of the lease payment  
12 due to the Master Landlord of the respective space.  
13

14         In connection with each of the retail locations operated by Smirnco, the Debtor  
15 defaulted in its obligation to supply food under the Facility Standby Agreements. As a  
16 direct result of the Debtor's defaults, four of the six locations (Stores #3, 4, 5 and 6) have  
17 been closed and are no longer in business.

18         It appears from the text of the Debtor's Motions that the Debtor is assuming and  
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<b>Fleming Store #</b>	<b>Smirnco Store #</b>	<b>Address</b>
unknown	#2	4410 W. Union Hills Drive, Suite 1, Glendale, AZ 85308
unknown	#3	3434 W. Greenway Road, Phoenix, AZ 85053
unknown	#4	710 E. Union Hills Drive, Phoenix, AZ 85024
unknown	#5	15472 N. 99 <sup>th</sup> Avenue, Sun City, AZ 85351
unknown	#6	Tatum and Catus, Phoenix, AZ
unknown	#7	1845 N. Scottsdale Road, Tempe, AZ 85281-1563

1 assigning certain executory contracts and leases to various assignees, as well as rejecting  
2 certain leases and abandoning the Debtor's interest in personalty onsite or related to said  
3 rejected leases. However, in the most recent Motion to Reject, and related notices, the  
4 Debtor has used a coded reference ("Debtor's Lease Identification Codes") to identify each  
5 lease and location which purports to be the subject of the Motion to Reject. Despite written  
6 and telephonic attempts to contact the Debtor's counsel to obtain a cross-referenced list  
7 of Smirnco's leases and the applicable Debtor's Lease Identification Codes, Smirnco has  
8 not received from the Debtor, and is not in possession of, information sufficient to establish  
9 whether the Debtor seeks to reject the Smirnco lease locations or to identify the status of  
10 Smirnco's six leases with the Debtor. As a result, Smirnco cannot accurately or adequately  
11 respond to the Debtor's Motion to Reject without appropriate and complete identification  
12 of the locations which Debtor may seek to assume and assign, or reject.  
13

14 In addition, although the Motion to Reject, and related notices, recite that the Debtor  
15 will abandon any interest in personal property on the leased premises or relating to rejected  
16 leases, the Motion does not specify or otherwise expressly address the abandonment of  
17 any interest the Debtor or its estate may claim in personal property of the  
18 subtenant/creditors, such as Smirnco, which have possession of the leased premises.  
19 Without an express rejection and abandonment of any such interest, the  
20 subtenant/creditors, including Smirnco and others similarly situated, will be unable to  
21 exercise their rights of ownership of personalty at each lease location because the removal  
22 and/or disposition of such property could potentially violate the Debtor's automatic stay or  
23 lead to competing claims between the subtenant creditors, master landlords, the Debtor,  
24 encumbrance holders, and potentially others. To permit the abandonment of the Debtor's  
25 interest in sublease locations without addressing what, if any, interest the Debtor asserts  
26

1 that it will, or intends, to retain in such personalty, is not in the best interest of the estate,  
2 its general creditors, master landlords of lease locations which the Debtor intends to reject,  
3 or subtenants of those spaces. As a result, the rejection of a lease location in the  
4 possession of a subtenant (such as Smirnco) should be denied or alternatively, the  
5 rejection should expressly include the rejection and abandonment of any interest the Debtor  
6 has or may claim in personalty belonging to the subtenant.

7  
8 For the reasons set forth herein, Smirnco respectfully requests this Court deny the  
9 Debtor's motion to assume and assign the real estate subleases and Facility Standby  
10 Agreement(s) to which Smirnco is a party. In addition, Smirnco requests this Court deny  
11 the Debtor's motion to reject the leases and contracts to which Smirnco is a party, unless  
12 said rejections include a rejection and abandonment of personalty belonging to a subtenant  
13 and located at a rejected lease location.

14 DATED this 3rd day of September, 2003.

15 TIFFANY & BOSCO, P.A.

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1 Copy of the foregoing mailed  
2 via overnight delivery this 3rd  
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