

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Fleming Companies, Inc., et al.,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Objections Due: 9/16/03 @ 2:00 p.m.
)	Hearing Date: 9/18/03 @ 2:00 p.m.

**HEGENBARTH FOOD GROUP INC. AND RELATED ENTITIES’
MOTION FOR ORDER DEEMING DEALERSHIP AGREEMENTS
WITH THE DEBTORS REJECTED AND TERMINATED**

This motion is filed on behalf of the following related entities: Hegenbarth Food Group, Inc., a Wisconsin corporation (“Hegenbarth”); Hegenbarth & Sons I, LLC, a Wisconsin limited liability company (“H&SI”); Hegenbarth & Sons II, LLC, a Wisconsin limited liability company (“H&SII”); Hegenbarth & Sons III, LLC, a Wisconsin limited liability company (“H&SIII”); and Hegenbarth/Hammond Arcadia, LLC, a Wisconsin limited liability company (“Hegenbarth/Hammond”) (collectively, Hegenbarth, H&SI, H&SII, H&SIII, and Hegenbarth/Hammond are referred to herein as the “Hegenbarth Wisconsin Dealerships”).

For the reasons stated below, the Hegenbarth Wisconsin Dealerships, by their undersigned counsel, hereby move for an order deeming all of the Dealership Agreements (as defined below) they have with Fleming rejected, terminated and of no

further force or effect as a result of the actions of Fleming Companies, Inc. and the actions of its actual and proposed assignees.

1. The relationship between Fleming and the Hegenbarth Wisconsin Dealerships is detailed more fully in the “Objection of the Hegenbarth Wisconsin Dealerships to Debtor’s Cure Notice, Supplemental Cure Notice and Motion Regarding Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection With Sale Motion,” filed with this court July 28, 2003 [Docket No. 2223]. In the earlier filing by the Hegenbarth Wisconsin Dealerships, the defaults and breaches of Fleming under the Dealership Agreements (as defined below) were spelled out in detail.

2. At the time of the previous filing referenced in the prior paragraph, although in default under the Dealership Agreements, Fleming was still partially performing thereunder by providing some inventory to the Hegenbarth Wisconsin Dealerships. Subsequent developments, including notice from Fleming to the Hegenbarth Wisconsin Dealerships that Fleming will no longer be performing under the Dealership Agreements, and other actions by actual and proposed assignees of Fleming, have left the Hegenbarth Wisconsin Dealerships in a desperate situation and without the ability to secure inventory to remain in business. The existing Dealership Agreements preclude the Hegenbarth Wisconsin Dealerships from entering into a primary supply relationship with another wholesaler who will be able to adequately and cost effectively service them.

3. The Hegenbarth Wisconsin Dealerships conduct retail food operations at four locations in Wisconsin. All four locations were operated pursuant to Facility Standby Agreements, Franchise Agreements, leases and certain other agreements between the Hegenbarth Wisconsin Dealerships and Fleming (hereinafter collectively the “Dealership Agreements”). The Hegenbarth Wisconsin Dealerships and Fleming had a “community of interest” in operating four Wisconsin dealerships within the meaning of the Wisconsin Fair Dealership Law (the “WFDL”), Chapter 135, Wis. Stats. Pursuant to the WFDL and the Dealership Agreements, Fleming was a “grantor,” and each of the Hegenbarth Wisconsin Dealerships were “dealers” operating a Wisconsin “dealership” under Wis. Stat. § 135.02.

4. Fleming has gone from the prior defaults referenced above to complete and total non-performance of its obligations to the Hegenbarth Wisconsin Dealerships under the Dealership Agreements. On or about September 8, 2003, representatives of Fleming and its assigns, C&S Wholesale Grocers, Inc. and C&S Acquisition, LLC (together, “C&S”), informed the Hegenbarth Wisconsin Dealerships by telephone that, effective September 11, 2003, Fleming (and C&S) would no longer be fulfilling their obligations under the Facility Standby Agreements and certain other agreements between Fleming and the Hegenbarth Wisconsin Dealerships, and that the Hegenbarth Wisconsin Dealerships should look elsewhere for the source of supply they need to stay in business.

5. In conjunction with the decision to no longer supply the Hegenbarth Wisconsin Dealerships pursuant to the Dealership Agreements, on or about September 8, 2003 representatives of Fleming/C&S also informed the Hegenbarth Wisconsin

Dealerships that the La Crosse food warehouse formerly owned by Fleming and subsequently sold or assigned to C&S, will be closed on September 11, 2003. The presence of a La Crosse warehouse was an integral part of the dealership relationship between Fleming and the Hegenbarth Wisconsin Dealerships. The La Crosse warehouse supplied all of the Hegenbarth Wisconsin Dealerships' inventory needs and provided the Hegenbarth Wisconsin Dealerships with manageable transportation costs as well as the ability to spot-fill short stocked products by utilizing its own trucks and personnel. The Hegenbarth Wisconsin Dealerships now find themselves in a precarious position as a result of the decisions of Fleming and C&S to no longer fulfill their contractual obligations under the Dealership Agreements and to close the La Crosse warehouse. On less than a weeks notice, the Hegenbarth Wisconsin Dealerships must immediately secure a new source of supply.

6. Supervalu, Inc. ("Supervalu"), the proposed assignee of the Dealership Agreements between the Hegenbarth Wisconsin Dealerships and Fleming, has made it clear through numerous conversations that it will not operate under the Dealership Agreements and is asking the Hegenbarth Wisconsin Dealerships to execute new and materially different agreements on significantly less favorable terms. For example, under the agreements proposed by Supervalu, the Hegenbarth Wisconsin Dealerships' freight costs would quadruple; Supervalu will not incur or guarantee the lease obligations for the four locations, which could jeopardize the ability of the Hegenbarth Wisconsin Dealerships to remain in their current locations; and the nearest Supervalu warehouse is

nearly three (3) hours away, precluding the Hegenbarth Wisconsin Dealerships from continuing their past practice with Fleming of spot-filling short stocked products.

7. Fleming's decision to terminate and no longer fulfill its contractual obligation to provide the Hegenbarth Wisconsin Dealerships entities with inventory, combined with the closure of the La Crosse warehouse, and the proposed assignment of the Dealership Agreements to Supervalu (which says it will not honor them) constitutes a substantial change in the competitive circumstances of the Hegenbarth Wisconsin Dealerships without good cause and without consent, and is therefore a violation of the WFDL and grounds for requiring Fleming to repurchase all "house branded" or "private label" inventory. The Hegenbarth Wisconsin Dealerships are therefore entitled to entry of an order confirming the rejection and termination of the Dealership Agreements.

8. Finally, by filing the instant motion, the Hegenbarth Wisconsin Dealerships do not waive their rights to an award of damages to which they may be entitled under the Wisconsin Fair Dealership Law and therefore reserve their rights to file a motion for payment of an administrative claim for such damages.

WHEREFORE, the Hegenbarth Wisconsin Dealerships request that the Court deem all of the Dealership Agreements to be rejected, terminated and of no further force or effect as a result of the actions of Fleming and of the actions of its actual and proposed assignees and that the Court award such further relief as the Court may deem appropriate.

Dated: September 12, 2003.

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