

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

Objection Deadline: October 13, 2003
Hearing Date: October 20, 2003 at 2:00 p.m. prevailing ET

**DEBTORS' MOTION FOR ORDER AUTHORIZING
THE DEBTORS TO REJECT CERTAIN PERSONAL PROPERTY LEASES
AND EXECUTORY CONTRACTS (OCTOBER 2, 2003 MOTION)**

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), hereby move (the "Motion") the Court for entry of an order pursuant to section 365(a) of title 11 of the United States Code (the "Bankruptcy Code"), authorizing the Debtors to reject certain personal property leases and executory contracts (the "Leases and Contracts") more particularly described on Exhibit A hereto. In support of the Motion, the Debtors respectfully state as follows:

¹ The Debtors are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; 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.; Fuelserve, 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. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (M) and (O).

2. Venue in these cases and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein are sections 105(a) and 365 of the Bankruptcy Code.

Background

4. 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 these cases. The Official Committee of Unsecured Creditors was appointed on April 14, 2003.

5. In connection with their efforts to reduce costs and to implement a workable business plan, the Debtors have evaluated the Leases and Contracts² and have determined that the personal property that was subject to the personal property leases is no longer necessary to the Debtors' business or reorganization. The equipment that was subject to

² The Debtors reserve all rights with respect to the characterization of the Leases and Contracts as executory contracts or unexpired leases under section 365 of the Bankruptcy Code.

the MeyerCord Equipment Leases listed on Exhibit A was returned to the lessor several weeks ago, long before September 30, 2003. To the greatest extent possible, any other personal property subject to a personal property lease the Debtors are seeking to reject will be returned or made available to the lessors on or before October 20, 2003. Continuing the Equipment Leases would be an unnecessary expense to the Debtors and burdensome to the estates.

6. Further, the executory contracts listed on Exhibit A are no longer needed by the Debtors in their business and are therefore burdensome to these estates.

Requested Relief and Basis for Relief

7. The Debtors seek authority to reject the Leases and Contracts effective as of dates specified on Exhibit A attached hereto.

8. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may ... reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). "This provision allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed." Stewart Title Guar. Co. v. Old Republic Nat'l Title Co., 83 F.3d 735, 741 (5th Cir. 1996), citing In re Muerexco Petroleum, Inc., 15 F.3d 60, 62 (5th Cir. 1994).

9. The standard applied to determine whether the rejection of an executory contract should be authorized is the "business judgment" standard. See NLRB v. Bildisco & Bildisco, 463 U.S. 513, 524 (1984); Robertson v. Pierce (In re Chi-Feng Huang), 23 B.R. 798, 800 (9th Cir. 1982) (holding that whether an executory contract should be rejected is a matter within the business judgment of the trustee). See also In re Federated Dept. Stores, Inc., 131

B.R. 808, 811 (S.D. Ohio 1991) (“Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases”).

10. Rejection of an executory contract or unexpired lease is appropriate where rejection of the contract or lease would benefit the estate. See Sharon Steel Corp. v. National Fuel Gas Distribution Corp. (In re Sharon Steel Corp.), 872 F.2d 36, 40 (3d Cir. 1989). The standard for rejection is satisfied when a debtor has made a business determination that rejection will benefit the estate. See Commercial Fin. Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (D. Haw. 1985) (“under the business judgment test, a court should approve a debtor’s proposed rejection if such rejection will benefit the estate.”).

11. If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. See, e.g., NLRB v. Bildisco & Bildisco, 462 U.S. at 523 (1984); Group of Institutional Investors v. Chicago M. St. P. & P.R.R. Co., 318 U.S. 523 (1943); In re Sharon Steel Corp., 872 F.2d at 39-40.

12. In applying the business judgment standard, courts show great deference to the debtor’s decisions to reject. See e.g., Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

13. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors seek to reject the Leases and Contracts. The Debtors, in the exercise of their sound business judgment, have determined that the Leases and Contracts are not necessary for the Debtors' restructuring and reorganization efforts and are burdensome to the estates. The personal property subject to the personal property leases on Exhibit A is no longer needed and has either been returned to the lessors or to the extent possible will be returned or made available to the lessors on or prior to October 20, 2003. The executory contracts on Exhibit A are no longer needed in the Debtors' business. The Debtors, in the exercise of their business judgment, have determined that it is in the best interests of the Debtors' creditors and estates to reject all of the Leases and Contracts.

14. The Debtors may have claims against a counter-party arising under, or independently of, the Leases and Contracts. The Debtors do not waive such claims by the filing of this Motion or the rejection of any such Rejected Contract.

15. In light of the need to reject the Leases and Contracts to avoid unnecessary continuing expenses, the Debtors request that the Court enter an order approving the rejection of all of the Leases and Contracts effective as of the dates shown on Exhibit A.

Notice

16. Notice of this Motion has been given to: (i) the Office of the United States Trustee; (ii) counsel to the Debtors' Senior Secured Lenders; (iii) counsel to the Committee of Unsecured Creditors, (vi) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure, and (vii) the contract counterparty with

respect to each of the Leases and Contracts. The Debtors submit that in light of the nature of the relief requested, no other further notice need be given.

No Prior Request

17. No prior motion for the relief requested herein has been made to this or any other court.

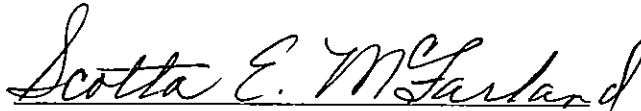
WHEREFORE, the Debtors respectfully request that the Court enter an order authorizing the Debtors to reject each of the Leases and Contracts as provided herein, and granting such other relief as is just and proper.

Dated: September 30, 2003

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