

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	§	Chapter 11
	§	Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., <u>et al.</u>	§	(Jointly Administered)
	§	<b>Related Docket Item:</b>
Debtors.	§	<b>Hearing: 10/20/03 @ 2:00 a.m.</b>
		<b>Objections Due: 10/13/03</b>

**OBJECTION OF GRAND ISLAND PROPERTIES, LLC TO DEBTORS' SECOND  
MOTION TO EXTEND THE TIME TO ASSUME, ASSUME AND ASSIGN OR REJECT  
UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

Grand Island Properties, LLC ("Grand Island"), hereby objects to the Debtors' Second Motion Pursuant to Section 365(d)(4) of the Bankruptcy Code for entry of an Order Extending Time to Assume, Assume and Assign, or Reject Unexpired Leases of Nonresidential Real Property (the "Debtors' Second Motion"), and states as follows:

**BACKGROUND**

1. Grand Island owns the property located at 1602 West 2<sup>nd</sup> Street, Grand Island, Nebraska (the "Property"). Pursuant to a lease dated December 8, 1993, (the "Lease") Grand Island leased the Property to an entity, which was later indirectly acquired by Fleming Companies, Inc. ("Fleming").

2. The Grand Island Lease was listed in the Debtors' Notice RE: Initial Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion, which seeks to assume and assign the Grand Island Lease to AWG Acquisition, LLC ("AWG Acquisition").

3. Grand Island filed an objection to the cure amount and to the assignment of the Lease on the basis of failure to provide adequate assurance of future performance (docket nos. 2187 and 2946).<sup>1</sup>

4. Pursuant to the Purchase Agreement between the Debtors and C&S, there is a six month option period for the designation of leases to be assumed and assigned.

5. The Debtors' Second Motion the Debtors seek to extend the time to assume, assume and assign, or reject leases to a time beyond the option period under the Purchase Agreement. Grand Island will be prejudiced by this extension and therefore, requests that it be denied as to the Grand Island Lease.

### **THE OBJECTION**

6. Debtors have the burden to show "cause" why the time to assume or reject should be extended. In re Channel Home Centers, Inc., 989 F.2d 682 (3<sup>rd</sup> Cir. 1993), cert. denied, 114 S.Ct. 184 (1993). Debtors' Motion acknowledges this burden. (Debtors' Second Motion ¶ 12). The Debtors assert that "cause" exists because of the large and complex nature of these cases. (Debtors' Second Motion ¶ 15). While an extension for the remainder of the Debtors' leases may be appropriate due to the nature of these cases, any "cause" that may exist is outweighed by the potential prejudice to Grand Island.

7. The potential assignee of the Lease, AWG Acquisition, is a newly formed entity. AWG Acquisition has provided a Pro Forma financial statements (Ex. A). The Pro Forma Balance Sheet as of August 16, 2004, shows no cash, total assets of \$213,600,000 and a net worth of \$99,900,000. The Pro Forma Operating Statement shows Net Income for the 12 month period ending August 16, 2004 of -\$100,000. The Pro Forma Statement of Cash Flow for 12 months

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<sup>1</sup>Grand Island has also filed a Motion to Compel the Debtors to comply with their post-petition obligations (docket no. 3926).

ending August 16, 2004, shows Net Income of \$26,415,000. Additionally, AWG Acquisition has advised that it is not offering a guarantee from its parent company, Associated Wholesale Grocers, for which it provided the 2002 annual report as a part of AWG Acquisition's adequate assurance in this case.

8. Pursuant to Section 20.14 of the Lease, the Lessee must have a net worth of \$250,000,000. Clearly, AWG Acquisition can not satisfy this requirement.<sup>2</sup> Without being able to satisfy this requirement, Grand Island asserts that the Lease can not be assigned to AWG Acquisition.<sup>3</sup>

9. The Debtors have sublet the Property. That sub-lease is set to expire by its own terms at the end of this calendar year.

10. If the Debtors' Second Motion is granted, the Debtors will have until March 31, 2004 to assume, assume and assign, or reject the Lease. It is clear that the Debtors do not want to assume the Lease. It is equally clear that the Lease can not be assumed and assigned to AWG Acquisition. Thus, the only option for the Debtors would be to reject the Lease. If the Debtors wait until March 31, 2004 to reject the Lease, Grand Island will lose the opportunity to mitigate its damages and potentially enter a new lease with the current sub-tenant. If the Debtors are required to make a determination with respect to the Lease with sufficient time prior to the end of the year, Grand Island is hopeful that it can mitigate its damages by entering a lease with the current sub-tenant. That opportunity may be lost if the sub-lease expires and the sub-tenant finds a new location. Accordingly, Grand Island requests that to the extent that the Debtors' Second Motion is granted, that the time be extended only until November 30, 2003.

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<sup>2</sup>It does not appear that even with a guarantee from Associated Wholesale Grocers that this requirement would be satisfied.

<sup>3</sup>Grand Island also asserts that AWG Acquisition can not otherwise satisfy the requirement of providing adequate assurance of future performance.

WHEREFORE, Grand Island requests that the Debtors' Second Motion be denied as requested above.

Dated: October 13, 2003

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of **October, 2003**, a copy of the foregoing ***Objection of Grand Island Properties, LLC to Debtors' Second Motion to Extend the Time to Assume, Assume and Assign or Reject Unexpired Leases of Nonresidential Real Property*** was served on the following parties by facsimile:

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