

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

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In re:	:	Case No. 03-10945 (MFW)
	:	(Jointly Administered)
FLEMING COMPANIES, INC., et al.,¹	:	
	:	Chapter 11
Debtors.	:	
-----X	:	
ASSOCIATED WHOLESALE	:	
GROCERS, INC.,	:	
	:	
and	:	
	:	
AWG ACQUISITION, LLC,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Adv. No. _____
	:	
NASH FINCH COMPANY,	:	
	:	
Defendant.	:	
-----X		

**VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF
UNDER FEDERAL BANKRUPTCY RULE 7065 AND DAMAGES**

Plaintiffs Associated Wholesale Grocers, Inc. and AWG Acquisition, LLC (collectively, “AWG”), by their counsel, under Federal Bankruptcy Rule 7065, which applies Federal Rule of Civil Procedure 65, ask this Court to enjoin Defendant Nash-Finch Company (“Nash-Finch”) from interfering with the Asset Purchase Agreement approved by this Court. AWG seeks this injunction because Nash-Finch’s conduct is harming AWG and, if not enjoined, will cause AWG

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.; 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.

to suffer irreparable harm. AWG's Motion for Temporary Restraining Order and/or Injunctive Relief in Support of this Verified Complaint is filed contemporaneously herewith and incorporated by reference herein.

For its Verified Complaint for Injunctive Relief under Federal Bankruptcy Rule 7065 and Damages, AWG states as follows:

Jurisdiction and Venue

1. Associated Wholesale Grocers, Inc. is a Missouri corporation with its principal place of business in Kansas City, Kansas. AWG is a wholesaler of grocery and supermarket products operating in a cooperative manner.

2. AWG Acquisition, LLC is a Kansas limited liability company and is an affiliate of Associated Wholesale Grocers, Inc.

3. On information and belief, Nash-Finch is a Delaware corporation with its principal place of business in Minneapolis, Minnesota.

4. This Court has subject-matter jurisdiction under 11 U.S.C. § 105 and 28 U.S.C. §§ 157 and 1334. This is a core proceeding as defined in 28 U.S.C. § 157(c)(1).

5. This Court has personal jurisdiction over Nash-Finch under 10 Del. C. § 3111.

6. Venue is proper in this Court under 28 U.S.C. § 1409.

Factual Allegations Common to All Counts

7. Robert Taylor d/b/a Lancaster Bestway, and/or Shopwise of Monticello KY, and Shopwise of Campton, KY (individually and collectively "Retailer Taylor") is a retail grocery-store operator supplied by AWG.

8. Mark Stevens and/or Stevens Grocery, Inc., Stevens of Shepherdsville, Inc. and Stevens & Tedrow Grocery, Inc. (collectively "Retailer Stevens") are retail grocery-store operators currently supplied by AWG.

9. On or about April 1, 2003, Fleming Companies, Inc. and certain of its affiliates (individually and collectively “Fleming”) filed for relief under Chapter 11 of Title 11 of the Bankruptcy Code.

10. On or about July 7, 2003, Fleming, C&S Wholesale Grocers, Inc. and Surry Acquisition, LLC and certain of their affiliates (individually and collectively, “C&S”) entered into an asset purchase agreement (“Fleming APA”) (Exhibit B to Docket Item 1906 in the Main Case) for substantially all the assets of Fleming relating to its wholesale business.

11. Pursuant to Section 2.6 of the Fleming APA, C&S was authorized to enter into third-party agreements with “third-party purchasers,” as defined in the Fleming APA, whereby C&S had the ability to sell its rights to acquire portions of the Fleming Assets to third-party purchasers, such as AWG.

12. On or about July 11, 2003, Debtors filed a motion for this Court’s approval of the Fleming APA (the “Sale Motion”) (Docket Item 1906 in the Main Case).

13. On or about August 1, 2003, Fleming, C&S, and AWG executed that certain Assignment, Assumption and Consent (“AWG APA”) whereby, among other things, C&S and Fleming acknowledged C&S’s assignment of certain rights under the Fleming APA to AWG.

14. On or about August 15, 2003, this Court entered an Order (A) Approving Asset Purchase Agreement By and Among Fleming Companies, Inc., C&S Wholesale Grocers, Inc., C&S Acquisition LLC and the Other Parties Named Therein, (B) Authorizing (I) Sale of Substantially All of Selling Debtors’ Assets Relating to the Wholesale Distribution Business to Purchaser or Its Designee(s), Free and Clear of All Liens, Claims, Encumbrances, and Interests and (II) Process for Assumption and Assignment of Certain Executory Contracts, License Agreements and Unexpired Leases to Purchaser or Its Designee(s) and Establishing the

Maximum Cure Amount With Respect Thereto and (C) Granting Related Relief (the “Sale Order”) (Docket Item 3142 in the Main Case).

15. Pursuant to the Sale Order, the Court, among other things, approved the Fleming APA, approved the sale of assets, and approved the transfers contemplated by the Fleming APA to AWG.

16. In the Sale Order, this Court further acknowledged AWG’s rights as a third-party purchaser under the Fleming APA.

17. Retailer Taylor and Retailer Stevens entered into certain Facility Standby Agreements (“FSAs”) with Fleming prior to the Petition Date as set forth in **Exhibit “A”** (“Retailer FSAs”) (Retailer Taylor and Retailer Stevens are collectively the “Retailer.”) Copies of each Retailer FSA are attached hereto collectively as **Exhibit “B.”** Retailer also entered into those certain “Forgiveness Notes” set forth on **Exhibit "C"** (“Retailer Forgiveness Notes”). Copies of the Retailer Forgiveness Notes are attached hereto collectively as **Exhibit "D.”** AWG purchased, among other things, the Retailer Forgiveness Notes and rights in the Retailer FSAs pursuant to the Fleming APA.

18. As approved by this Court, certain assets covered by the Fleming APA have been sold, assigned, or otherwise transferred to AWG, along with supply agreements, leases, subleases, inventory, equipment and distribution centers, which include Retailer Forgiveness Notes and certain rights in the Retailer FSAs.

19. At this point, the transfer of certain FSAs to AWG under the Fleming APA is in various stages.

20. Retailer Taylor and AWG entered into certain arrangements for Retailer Taylor’s benefit concerning, among other things, the Retailer FSAs and the Retailer Forgiveness Notes

relating to Retailer Taylor, which arrangements constitute obligations of Retailer Taylor ("Retailer Transaction").

21. AWG has performed to its detriment certain of its obligations under and in connection with both the Fleming APA and the Retailer Transaction.

22. At all times mentioned herein, Defendant Nash-Finch was intimately aware of AWG's rights under the Fleming APA; in fact, during the sale process in this Court, Nash-Finch unsuccessfully tried to purchase those rights from Debtors. During that unsuccessful attempt, Nash-Finch acquired certain proprietary information regarding certain rights being sold by the Debtors, including the identity of certain retailers and their obligations pursuant to the Retailer Forgiveness Notes and Retailer FSAs, that it is now using to tortiously and wrongfully interfere with the Fleming APA and the Sale Order.² Likewise, at all times mentioned herein, on information and belief, Defendant Nash-Finch was aware of the existence of the Retailer Transaction.

23. Nash-Finch has tortiously and wrongfully interfered with the Sale Order approving the Fleming APA, the Fleming APA, the AWG APA, and the Retailer Transaction by, among other things, upon information and belief, paying Retailer Taylor approximately \$300,000.00 to induce Retailer Taylor to substitute Nash-Finch as supplier in place of AWG and to retag Retailer Taylor's stores.

24. On information and belief, in addition to Retailer Taylor, Nash-Finch is also attempting to induce other retailers, which includes, at a minimum, Retailer Stevens, to breach

² Specifically, on or about July 22, 2003, at 9:00 a.m., representatives from Nash-Finch met with representatives from Fleming. At that meeting, at their request, Nash-Finch was given copies of all Fleming's supply agreements and FSAs as well as a summary worksheet of all stores, purchases, and connected contracts. The Nash-Finch representatives were Jan Weinreis, Director of Distribution Accounting, Bruce Cross, Senior Vice President for Business Transformation, Jerry L. Nelson, President and COO, David J. Bersie, Senior Vice President for Food Distribution, Jerry L. Poore, Vice President of Distribution and Logistics, and Christopher A. Brown, Executive Vice President of Merchandising. The Fleming representatives were David E. Smith and Milton Milam.

certain obligations they have to AWG pursuant to similar agreements originally executed with Debtors, and rights in which were subsequently acquired by AWG pursuant to the Fleming APA, which likewise tortiously and wrongfully interferes with the Fleming APA and the Sale Order.

**COUNT I—TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY
INJUNCTION**

25. AWG realleges all preceding paragraphs as if set forth in this Count.

26. Nash-Finch has committed wrongful acts by improperly interfering with this Court's prior orders and with AWG's contractual and business rights acquired under the Fleming APA as to those assets identified as AWG Assets under the AWG APA.

27. As described in its Motion for Temporary Restraining Order and/or Injunctive Relief under Federal Bankruptcy Rule 7065 and Memorandum in Support of Same, filed contemporaneously herewith, AWG has a likelihood of success on the merits of its claims.

28. Nash-Finch's conduct has caused and will continue to cause AWG irreparable harm, including loss of customers, loss of sales, dilution of AWG's goodwill, confusion for existing and potential customers, and injury to AWG's reputation.

29. The harm these wrongful acts will cause to AWG is both imminent and irreparable; the amount of damages sustained by AWG will be difficult, if not impossible, to ascertain if these acts continue and are not permanently enjoined.

30. As described in its Motion for Temporary Restraining Order and/or Injunctive Relief, filed contemporaneously herewith, any "harm" Nash-Finch will suffer if the requested relief is granted is outweighed by the harm to AWG if relief is denied.

31. The public interest favors a temporary restraining order and/or injunctive relief to bar Nash-Finch from profiting from its tortious actions, and to protect the integrity of AWG's validly-acquired contract rights.

32. AWG has no adequate remedy at law and, therefore, is entitled to an injunction restraining Nash-Finch and all persons acting in concert with them from engaging in such further wrongful conduct.

**COUNT II—TORTIOUS INTERFERENCE WITH CONTRACTUAL AND/OR
BUSINESS RELATIONS OR EXPECTANCY**

33. AWG realleges all preceding paragraphs as if set forth in this count.

34. AWG had a valid contractual and/or business relationship or expectancy upon acquiring certain contractual and business rights under the Fleming APA as to those assets identified as AWG Assets under the AWG APA.

35. Nash-Finch knew of this contractual and/or business relationship or expectancy through its acquisition of information in this Court's sale process, including this Court's prior orders approving the AWG APA and other documentation describing AWG's contractual and business rights acquired under the AWG APA.

36. Nash-Finch improperly and intentionally interfered with this contractual and/or business relationship or expectancy which induced or caused its breach or termination.

37. Nash-Finch also improperly and intentionally interfered with this Court's prior orders approving the Fleming APA, as to those assets identified as AWG Assets under the AWG APA, and with AWG's rights acquired under the AWG APA and the Retailer Transaction.

38. But for Nash-Finch's conduct as previously set forth, because of the rights acquired under the AWG APA, AWG was reasonably certain to have continued this contractual and/or business relationship or expectancy.

39. AWG has suffered and will continue to suffer damages as a direct and proximate result of Nash-Finch's misconduct.

WHEREFORE, AWG prays for entry of judgment in its favor, and against Defendant Nash-Finch, together with its costs, fees and expenses, and any and all further and other relief the Court deems just and equitable.

RELIEF REQUESTED

WHEREFORE, AWG respectfully requests this Court to issue an Order finding as follows:

- A. Granting a temporary restraining order and/or preliminary injunction pending final determination of this case enjoining Nash-Finch Company from interfering with AWG's contractual and business relationships as acquired under the Fleming APA as to the assets identified as AWG Assets under the AWG APA and the Retailer Transaction;
- B. Permanently enjoining Nash-Finch Company from interfering with AWG's contractual and business relationships as acquired under the Fleming APA as to the assets identified as AWG Assets under the AWG APA and the Retailer Transaction;
- C. Awarding AWG its actual damages;
- D. Awarding AWG the costs of this action, including reasonable attorneys fees; and
- E. Awarding AWG all other and further relief this Court deems just and equitable.

Dated: November 20, 2003
Wilmington, Delaware

Respectfully submitted,

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