

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

**DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTION 365 OF THE  
BANKRUPTCY CODE AUTHORIZING DEBTORS TO ASSUME AND ASSIGN CERTAIN  
UNEXPIRED NONRESIDENTIAL REAL PROPERTY LEASES AND SUBLEASES NOT  
RELATED TO C&S SALE**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby move the Court (the “Motion”) for entry of an order (the “Order”), pursuant to section 365 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), authorizing the Debtors to assume and assign certain unexpired nonresidential leases and subleases, identified on the summary attached hereto as Exhibit 1 (the “Assigned Leases”), and to approve the assumption and assignment agreements in connection therewith, attached hereto as Exhibits 2-8 (the “Assignment Agreements”). In support of this Motion, the Debtors respectfully state as follows:

**Jurisdiction**

1. This Court has jurisdiction over this Motion under 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).
2. The statutory bases for the relief sought herein is section 365 of the Bankruptcy Code.

**Background**

3. 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. An official committee of unsecured creditors (the “Committee”) was appointed on April 14, 2003.

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<sup>1</sup> The Debtors are the following entities: FCI Corporation, ABCO Food Group, Inc., ABCO Markets, Inc., ABCO Realty Corp., ASI Office Automation, Inc., C/M Products, Inc., Core-Mark International, Inc., Core-Mark Interrelated Companies, Inc., Core-Mark Mid-Continent, Inc., Dunigan Fuels, Inc., E.A. Morris Distributors, Ltd., 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.

**a. Prepetition Leases: ID-023 and LA-072**

4. Prior to the Petition Date, one of the Debtors, Fleming Companies, Inc. (“Fleming”), entered into certain lease transactions with Montpelier Food Corporation and McDaniel Food Management, Inc., the assignees (the “Prepetition Assignees”) for leases ID-023 and LA-072, respectively (the “Prepetition Leases”), pursuant to which Fleming conveyed its leasehold interest in the Prepetition Leases to the Prepetition Assignees. Notwithstanding Fleming’s assignment of certain of its rights and obligations under the Prepetition Leases to the Prepetition Assignees as part of the above lease transactions, Fleming retained a right of re-entry, remained a party to these leases and retained its primary liability thereunder.

5. In November of 2003, Fleming entered into Assignment Agreements with the Prepetition Assignees, copies of which are attached hereto as Exhibits 7-8, pursuant to which Fleming assigned all of its remaining right, title and interest under the Prepetition Leases to the Prepetition Assignees, subject to approval by this Court. These assignments will release the Debtors from any future contingent liability under the Prepetition Leases, including liability upon any defaults by the Prepetition Assignees.

6. To the extent there are any cure costs associated with the Prepetition Leases, the Prepetition Assignees shall be responsible for any and all such costs or cure claims, in the event the landlords under such leases make any such claim in the future. According to the Debtors’ records, the cure amount for the Prepetition Leases is \$0.00.

7. Furthermore, in consideration for such assignment, the Prepetition Assignee for lease LA-072 will pay \$25,000.00 to Fleming upon the entry of an Order by this Court approving the Assignment Agreement for this lease.

**b. Sandwich Leases to be Assigned Back to the Master Lessors: AR-084, AR-090 and TX-003**

8. In October and November of 2003, Fleming entered into certain Assignment Agreements with the landlords of Assigned Leases AR-084, AR-090 and TX-003, all sandwich leases where Fleming is currently the tenant and the sublandlord. These leases and subleases have no further value to the Debtors’ estates because the Debtors do not make any profit from these sandwich leases.

9. Pursuant to these Assignment Agreements, copies of which are attached hereto as Exhibits 2, 3, and 5, Fleming assigned all of its right, title and interest under the Assigned Leases, as tenant and sublandlord, to such landlords, as identified on Exhibit 1 (together with the Prepetition Assignees, the “Assignees”), subject to Court approval.

10. Furthermore, the Assignees for leases AR-084, AR-090 and TX-003 have agreed to waive any cure costs pursuant to section 365(b)(1)(A) of the Bankruptcy Code. According to the Debtors’ records, the cure amount for these leases is \$0.00.

11. The Assignment Agreements will also release the Debtors from any future contingent liability under the Assigned Leases, including liability upon any defaults by the subtenants, and will relieve the Debtors’ estates of the cost and expenses of administering the subleases as the sublandlords.

c. **Sandwich Lease to be Assigned to the Subtenant: CA-0015**

12. Fleming also entered into an Assignment Agreement with the subtenant for Assigned Lease CA-015. This is another unprofitable sandwich lease where Fleming is currently the tenant and the sublandlord.

13. Pursuant to the Assignment Agreement for this lease, a copy of which is attached hereto as Exhibit 4, Fleming assigned all of its right, title and interest under the Assigned Leases, as tenant and sublandlord, to Ralphs Grocery Company ("Ralphs"), the current subtenant under such sublease, as identified on Exhibit 1. The assignment is subject to Court approval.

14. To the extent there is any cure costs, Fleming has agreed to pay for such costs. According to Fleming's records, the cure amount for this lease is \$0.00. In consideration for such assignment, Ralphs will pay \$80,000.00 to Fleming upon the entry of an Order by this Court approving this Assignment Agreement.

15. This assignment will release Fleming from any future contingent liability under the Assigned Lease, including liability upon any defaults by the subtenant and incurring the cost and expenses of administering the sublease as the sublandlord.

d. **Owned Property Sold at the Auction: VA-111**

16. Assigned Lease VA-111 is an owned property that Fleming currently leases to a third-party. This property was auctioned on October 14, 2003 in connection with the Motion to Approve Sale /Motion For An Order (A) Authorizing Sale of Certain of the Debtors' Real Property Free and Clear of Liens, Claims and Interests; and (B) Authorizing Assumption and Assignment of Certain Unexpired Leases [Docket No. 3833]; however, the winning bidder, Robertson Real Estate Group, LLC, submitted only a purchase agreement, and not an assignment and assumption agreement, as required. The purchase agreement was approved by the Court on October 24, 2003 pursuant to sale order [Docket No. 4205]. Approval of the Assignment Agreement, a copy of which is attached hereto as Exhibit 6, by the Court is required under the purchase agreement to consummate the sale of this property.

17. The purchase price for this property is \$ 1,846,000. Because this is an owned property, the cure issue is moot.

**Relief Requested**

18. Pursuant to section 365 of the Bankruptcy Code, the Debtors request authority to assume and assign all of their right, title and interest in the Assigned Leases, as listed on the attached Exhibit 1, to the Assignees pursuant to the terms of the Assignment Agreements.

19. The Debtors further request approval of the Assignment Agreements, attached hereto as Exhibits 2-8, and authority to execute and deliver the Assignment Agreements in connection with the Assigned Leases in order to effectuate the assignments, upon entry of the Order granting this Motion and as contemplated under the Assignment Agreements.

20. The Debtors also request that, pursuant to section 365(k) of the Bankruptcy Code, the Debtors shall be relieved of any liability under the Assigned Leases, accruing or arising after the date the Order is entered authorizing the assignment of such leases and subleases.

**Basis for Relief**

21. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). It is well established that the decision to assume or reject an executory contract or unexpired lease is a matter within the "business

judgment" of the debtor. See In re Taylor, 913 F.2d 102 (3d Cir. 1990); Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36 (3d Cir. 1989).

22. The Debtors have determined, in the exercise of their business judgment, that the Assigned Leases are unprofitable and will not be of any benefit to their estates and creditors. Based on the analysis of the Debtors' real estate consultants, Keen Consultants, LLC, the Assigned Leases have no value to the Debtors' estates.

23. Section 365(k) of the Bankruptcy Code provides that assignment of a lease that has been assumed relieves the trustee and the estate from any further liability for a breach that occurs after the date of the assignment. American Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3<sup>rd</sup> Cir. 1999).

24. Therefore, approval of the Assignment Agreements will release the Debtors from any future contingent liability under the Assigned Leases, including liability upon any defaults by the subtenants and incurring the cost and expenses of administering the subleases as the sublandlords.

25. The assumption and assignment of the Assigned Leases will substantially reduce claims against the Debtors' estates that may result from rejection of such leases and will save the Debtors lease expenses that arise under the Assigned Leases.

26. According to the Debtors' records, the cure amount for the Assigned Leases is \$0.00. Furthermore, the Debtors will receive about \$2,000,000 in consideration for assignment of the Assigned Leases.

27. Accordingly, the Debtors have determined in the exercise of their business judgment that the assumption and assignment of the Assigned Leases is in the best interests of the Debtors, their creditors and their estates.

28. Any party wishing to discuss any outstanding obligations under the Assigned Leases may contact Barb Hall at Fleming Companies, Inc. at (972) 906-8168, [flemingbhall@yahoo.com](mailto:flemingbhall@yahoo.com).

#### **Notice**

29. Notice of this Motion has been given to: (a) the United States Trustee, (b) counsel to the DIP lenders, (c) counsel to the Committee, (d) the Assignees and counter parties under the Assigned Leases, and (e) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

#### **No Prior Request**

30. 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, substantially in the form attached hereto, granting this Motion and such other and further relief as is just and proper.

Wilmington, Delaware

Respectfully submitted,

Dated: November 24, 2003

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