

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:) Chapter 11
)
) C.A. No. 03-10945 (MFW)
FLEMING COMPANIES, INC., et. al.,) (Jointly Administered)
)
Debtors.) **Objection Deadline: December 1, 2003**
) **Hearing Date: December 8, 2003 @ 9:30 a.m.**
) **Related Docket No. 4537**

**PLANVIEW, INC.'S RENEWED LIMITED OBJECTION TO (1) DEBTOR'S NOTICE
PURSUANT TO SALE ORDER RE ASSUMPTION AND ASSIGNMENT
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES
PURSUANT TO INSTRUCTION FROM C&S ACQUISITION LLC,
AND (2) CURE AMOUNT (HEARING DATE: DECEMBER 8, 2003)**

TO THE HONORABLE MARY F. WALRATH, UNITED STATES BANKRUPTCY JUDGE:

PlanView, Inc. ("PlanView"), a creditor and party of interest of Fleming Companies, Inc. ("Fleming"), and/or Core-Mark International, 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., (collectively, "Debtors"), by and through its undersigned counsel, hereby files this its Renewed Limited Objection to (1) Debtor's Notice Pursuant to Sale Order Re Assumption and Assignment of

Certain Executory Contracts and Unexpired Leases Pursuant to Instruction from C&S Acquisition LLC, and (2) Cure Amount (the “Objection”), and, in support thereof, would respectfully show unto the Court the following:

A. PROCEDURAL BACKGROUND

1. On or about April 1, 2003 (the “Filing Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United State Code (the “Bankruptcy Code”).

2. On or about July 18, 2003, this Court signed that certain Order (A) Approving Bidding Procedures and Bid Protection in Connection with the Sale of the Wholesale Distribution Business, (B) Approving Assignment Procedures for Affected Executory Contracts and Unexpired Leases, (C) Approving the Form and Manner of Notice, and (D) Setting Sale Hearing Dates (the “Bidding Procedures Order”). Pursuant to the Bidding Procedures Order, the Debtors have sent a Notice and Supplemental Notice Re Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion (the “Original Cure Amount Notice”). The Debtors alleged that the proposed cure amount with respect to PlanView is \$0.00 (the “Debtors’ Cure Amount”). The Debtors have identified the Software License Agreement (as hereinafter defined) with PlanView as Contract No. 1180.

3. The Bidding Procedures Order and the Original Cure Amount Notice provide that any objections to the Debtors’ Cure Amount must have been received before 4:00 p.m. (Eastern Time) on July 28, 2003. On or about July 25, 2003, PlanView timely filed its Limited Objection to Debtors’ (1) Notice and Supplemental Notice Re Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion, (2) Motion for Order (A) Approving Asset Purchase Agreement with C&S Wholesale Grocers, Inc. and

C&S Acquisition, L.L.C., and (B) Authorizing the Assumption and Assignment of Certain Executory Contracts, License Agreements and Unexpired Leases, and (3) Proposed Cure Amount (the “Limited Objection”) (Docket No. 2168). A true and correct copy of the Limited Objection is attached hereto as **Exhibit “A”** and incorporated herein for all purposes. The issues raised in the Limited Objection regarding the cure amount due to PlanView have not yet been resolved and such issues were reserved for determination at a subsequent hearing in accordance with the terms of the Sale Order (as hereinafter defined).

4. On August 15, 2003, the Court signed that certain 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”).

5. On or about September 15, 2003, PlanView filed its Proof of Claim (the “Claim”) in the amount of \$121,691.06 plus accruing interest, costs and attorneys’ fees.

6. On or about November 20, 2003, Debtors filed and served their Notice Pursuant to Sale Order Re Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Pursuant to Instruction from C&S Acquisition LLC (the “Notice”) (Docket No. 4537). Pursuant to the Notice, Debtors have sought to assume the Software License Agreement (as hereinafter defined) and assign it to C&S Acquisitions, Inc. (“C&S”).

7. The Notice provides that any additional objections must be received before 12:00 p.m. (Eastern Time) on December 1, 2003. The Limited Objection should be deemed a continuing objection to the relief requested in the Notice, and the applicable objections raised to the Debtor's Proposed Cure Amount by the Limited Objection are hereby renewed and incorporated herein. However, in an abundance of caution, this Renewed Objection is timely filed to preserve PlanView's objection to the cure amount and limited objection to the proposed assumption and assignment of the Software License Agreement without compliance with the matters set forth herein.

B. FACTUAL BACKGROUND

8. PlanView is a software development and programming company. On or about June 27, 2002, PlanView and Fleming Companies, Inc.¹ entered into that certain Software License Agreement (the "Software License Agreement"). A true and correct copy of the Software License Agreement is attached hereto as **Exhibit "B"** and made a part hereof for all purposes. Pursuant to the Software License Agreement, Debtors licensed that certain software know as *PlanView*TM (the "PlanView Software") from PlanView.

9. The Debtors owe at least \$121,691.06 under the Software License Agreement (as of July 21, 2003), plus attorneys' fees, costs and other charges that continue to accrue thereunder (the "Cure Amount"). The Cure Amount includes pre-petition amounts due of \$116,691.06 plus attorneys' fees and expenses estimated at \$5,000.00. Paragraph 6.0 of the General Provisions of the Software License Agreement provides for the payment of reasonable attorneys' fees. Additional amounts will continue to be due and payable under the Software License Agreement for maintenance, service and other charges.

¹ Fleming Companies, Inc. includes any entity that indirectly or directly controls, is controlled by, or is under common control with Fleming Companies, Inc., as the same may exist from time to time.

C. OBJECTION

10. The Software License Agreement may not be assumed without the consent of PlanView under Section 365 of the Bankruptcy Code since it is not assumable because applicable law (i.e. federal patent law) precludes the assignment. See, *In re West Elec.*, 852 F.2d 79, 82-83 (3d. Cir. 1988) (holding that consent is necessary for assignment), *In re Golden Books Family Ent'mt.*, 269 B.R. 300, 308-310 (Bankr. D. Del. 2001) (holding that federal copyright law precludes the assignment of non-exclusive executory contracts without the consent of the debtor), *In re Valley Media, Inc.*, 279 B.R. 105, 135-136 (Bankr. D. Del. 2002), *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997), *In re Catapult Entertainment, Inc.*, 165 F. 3d. 747 (9th Cir. 1999). The Software License Agreement is an executory contract that includes nonexclusive copyright licenses and therefore may not be assumed, assigned or otherwise transferred without the consent of PlanView, which consent has only been obtained as to an assignment to Purchaser subject to the conditions set forth herein. See, *In re Golden Books Family Entert., Inc.*, 269 B.R. 300, 310 (Bankr. D. Del. 2001); *In re Access Beyond Technologies, Inc.*, 237 B.R. 32, 48-49 (Bankr. D. Del. 1999) (citing *In re West Elec., Inc.*, 852 F.2d 79 (3d Cir. 1988)); *In re Patient Educ. Media*, 210 B.R. 237, 243 (Bankr. S.D.N.Y. 1997) (holding that debtor could not assume and assign nonexclusive license without copyright owner's consent); See also, *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1334 (9th Cir. 1984).

11. PlanView does not oppose the assumption and assignment of the Software License Agreement to C&S provided (i) the assumption and assignment occurs promptly upon entry of an order on the Notice, (ii) Purchaser expressly agrees to be bound by the terms and conditions of the Software License Agreement and assumes all obligations thereunder, and in connection therewith, executes and delivers an Assumption and Reaffirmation Agreement in the

form attached hereto as **Exhibit "C"**, (iii) Purchaser provides adequate assurance of future performance; and (iv) all defaults owed under the Software License Agreement are cured, including the payment of charges accrued and attorneys' fees, by the payment in cash of the Cure Amount (\$121,691.06) to PlanView at or prior to the closing and assumption and assignment of the Software License Agreement. The Bankruptcy Code requires that all defaults under the Software License Agreement be cured, and that the Debtors and assignee provide adequate assurance of future performance. Unless the foregoing requirements are met, PlanView objects to any assignment of the Software License Agreement.

12. PlanView objects to the Debtors' Cure Amount since the Debtors' Cure Amount does not include the amounts owing under the Software License Agreement, including charges accrued, attorneys' fees, and other charges and expenses that would be due under the Software License Agreement through the date of assumption and assignment. Accordingly, the Debtors' Cure Amount is incorrect and will need to be increased to include all of these amounts. PlanView states that the correct Cure Amount is approximately \$121,691.06 (through July 21, 2003) subject to increase as further charges continue to accrue. For further details concerning the Cure Amount, see paragraph 7 above.

13. PlanView also reserves its claim for an adjustment to the Cure Amount to include any actual pecuniary loss incurred by PlanView between the date of the Original Cure Notice and the date of any hearing on the assumption and assignment, including, without limitation, any additional charges that may accrue and be due under the Software License Agreement.

14. PlanView objects to the proposed Debtors' Cure Amount because the Debtors' Cure Amount does not include charges accrued and attorneys' fees due under the Software License Agreement, and other costs and charges that may be due after July 21, 2003.

15. PlanView expressly reserves all of its claims against any third parties that may be liable on this claim, and/or against any property (if any) that may be available to satisfy this claim.

WHEREFORE, PlanView hereby requests that the Court (i) require C&S to provide adequate assurance of future performance under the Software License Agreement as a condition to any assignment and assumption contracts, (ii) subject any assumption and assignment to the conditions set forth in paragraph 11 hereof, (iii) require C&S to assume all obligations in the Software License Agreement, and conditions any assumption and assignment on the prompt payment of the Cure Amount (\$121,691.06) to PlanView within ten (10) days of entry of an order approving the assignment; (iv) require C&S to execute the Assumption and Reaffirmation Agreement in PlanView's favor, and the payment of the correct cure amount as a condition to assignment, (v) only allow the assumption and assignment of the Software License Agreement with the consent of PlanView, (vi) determine the Cure Amount at \$121,691.06, subject to increase for any actual pecuniary loss incurred by PlanView between the date of the Original Cure Notice and the date of any hearing on the assumption and assignment, including, without limitation, any additional charges that may accrue and be due under the Software License Agreement, and (vii) grant PlanView such other and further relief as is just and equitable.

Respectfully submitted this ^{1st} ~~26th~~ day of ^{December,} ~~November~~ 2003.

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ATTORNEY FOR PLANVIEW, INC.²

² On July 28, 2003, an Order Granting Application to Appear *Pro Hac Vice* was entered for counsel for Planview.