

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
FLEMING COMPANIES, INC., et al.,¹) Case No. 03-10945 (MFW)
) (Jointly Administered)
Debtors.)
) Hearing Date: December 4, 2003 @ 9:00 a.m.
) Re: Docket Nos. 4631 and 3521
_____)

**MOTION TO STRIKE OBJECTION OF ALBERTSON'S, INC.
TO MOTION TO ASSUME AND ASSIGN TO AWG
CERTAIN UNEXPIRED CONTRACTS WITH ALBERTSON'S, INC.**

Associated Wholesale Grocers, Inc. and AWG Acquisition, LLC (collectively, "AWG"), by and through their undersigned counsel, hereby respectfully move this Court pursuant to Fed.R.Bankr.P. Rule 9006 and Local DE Bankruptcy Rule 9006 to strike and disallow as untimely the Objection (the "Objection") of Albertson's, Inc. ("Albertson's") [D.I. 4631] to Debtors' Motion to Assume and Assign to AWG Certain Unexpired Contracts with Albertson's (the "Assignment Motion") [D.I. 3521], and in support thereof respectfully represent the following:

Introduction

Albertson's filed its Objection to the Assignment Motion **76 days after the unextended deadline for doing so and less than five (5) business days prior to the adjourned hearing date** and without any attempt to seek leave to file a late-filed pleading, all in violation of the

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.

Notice of Motion, Fed.R.Bankr.P. Rule 9006 and Local Bankruptcy Rule 9006, and to the detriment and significant prejudice of AWG. Albertson's Objection therefore is not properly before this Court and must be stricken and disallowed as untimely.

On November 26, 2003 at approximately 4:00 p.m., on the eve of the Thanksgiving Holiday, and after most businesses had closed, Albertson's electronically filed² its Objection to the Assignment Motion. Pursuant to the Notice of Motion duly served on Albertson's [D.I. 3521], September 11, 2003 clearly was set forth as the deadline to object or respond, with consequences for failing to do so expressly set forth in bold type. No extensions of the time to object were granted to Albertson's, either by the Debtors, AWG or this Court. Nor has Albertson's, prior to the expiration of the September 11, 2003 deadline -- or since, ever filed with the Court any motion seeking an extension of time to object as required under the Federal and Local Bankruptcy Rules. Nor has Albertson filed with its Objection a request for enlargement of time or attempted to make any showing of cause or excusable neglect for its failure to meet the objection deadline, as required by Fed.R.Bankr.P. Rule 9006(b).

Accordingly, Albertson's has failed to comply with the Notice of Motion and Fed.R.Bankr.P. Rule 9006 and Local DE Rule of Bankruptcy Procedure Rule 9006(c) and its Objection therefore should be stricken and disallowed. *See In re Ceresota Mill Ltd. Partnership*, 211 B.R. 315, 317-318 (BAP 8th Cir. 1997)(after expiration of specified period, late-filed pleading should be stricken where no motion is made establishing cause to enlarge time and excusable neglect).

Further, Albertson's default in this regard has been a continuing one for which there exists neither any cause nor excuse. Albertson's not only ignored the September 11, 2003

² Despite having filed a Notice of Appearance in this case, Delaware counsel for AWG still has not been served with a copy of Albertson's Objection as of the filing of the within Motion to Strike.

deadline to object to the Assignment Motion, but, prior thereto, also ignored the August 11, 2003 deadline to object to AWG as assignee pursuant to the Notice of Initial Assumption and Assignment to AWG Acquisition, LLC [D.I. 2716], which expressly lists Albertson's FSA.

The Debtors' Hearing Agendaes respecting the Assignment Motion consistently have specified the **original** September 11, 2003 Albertson's objection deadline, without any adjournment or agreement to extend same. *See, e.g., D.I. 2716 and D.I. 3521.* Moreover, all adjournments of the hearings on the Assignment Motion occurred *after* expiration of Albertson's deadline to object.

Finally, on November 24, 2003, counsel for Albertson's, Kim Newmarch, contacted counsel for AWG, Mark Benedict, and requested an extension to December 1, 2003 of Albertson's time to Object to the Assignment Motion. Mr. Benedict advised Albertson's counsel that AWG considered Albertson's to be in excess of 60 days late and that any filing of an objection at this juncture would be unduly prejudicial to AWG. Despite Albertson's knowledge of AWG's position, Albertson's not only filed its Objection late afternoon on November 26, 2003, but filed the Objection without any Motion pursuant to Fed.R.Bankr.P. Rule 9006(b) seeking permission to file the Objection untimely or enlarge the time to object. Moreover, in the caption of its Objection, Albertson's cavalierly typed "Objection Deadline: November 26, 2003 @ 4:00 p.m.," -- an objection deadline of its own fabrication.

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WHEREFORE, for all of the above-stated reasons, AWG respectfully requests the Court to strike and disallow Albertson's Objection in its entirety.

Dated: Wilmington, DE
December 2, 2003

Respectfully submitted,

BUCHANAN INGERSOLL P.C.

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