IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
FLEMING COMPANIES, INC., et al	)	Chapter 11
	)	
Debtors.	)	Docket Nos. 2716, 3521
	)	Hearing Date: December 4, 2003
	)	

POST-HEARING BRIEF OF AWG ACQUISITION, LLC AND ASSOCIATED WHOLESALE GROCERS, INC. IN SUPPORT OF DEBTORS' MOTION TO ASSUME AND ASSIGN CERTAIN EXECUTORY CONTRACTS WITH ALBERTSONS (D.I. 2716, 3521) AND IN OPPOSITION TO ALBERTSON'S OBJECTION (D.I. 4631)

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STATEMENT OF NATURE AND STAGE OF PROCEEDING

On September 3, 2003, the Debtors filed a motion pursuant to Section 365 of the Bankruptcy Code seeking an order authorizing (i) the assumption of two executory supply agreements between Fleming Companies, Inc. ("Fleming") and Albertson's, Inc. ("Albertson's"); and (ii) the assignment of these two supply agreements to AWG Acquisition, LLC ("AWG").[1] (D.I. 3521). The two supply agreements at issue are: (1) Facility Standby Agreement (Tulsa) between Fleming and Albertson's dated June 28, 2002 ("Oklahoma Supply Agreement"); and (2) Facility Standby Agreement (Lincoln) between Fleming and Albertson's dated June 28, 2003 ("Nebraska Supply Agreement"). These agreements, copies of which were introduced into evidence as Exhibits 1 and 2, respectively, are sometimes collectively referred to as "the Supply Agreements" in this brief.[2]

Albertson's filed its written objection (the "Objection") to the Debtor's motion on November 26, 2003. (D.I. 4631). The Court heard evidence on the Debtor's motion on December 4, 2003. (*See* D.I. 4771). At the conclusion of the hearing, the Court directed AWG and Albertson's to simultaneously submit post-hearing briefs by December 24, 2003.

[1] If the Supply Agreements are assigned to AWG Acquisition, LLC, all duties and obligations of AWG Acquisition, LLC will be performed by its parent corporation, Associated Wholesale Grocers, Inc. (Tr. 16:11-21). Accordingly, for simplicity, AWG Acquisition, LLC and Associated Wholesale Grocers, Inc. are collectively referred to as "AWG" in this brief.

[2] The Debtors originally gave notice of the assumption and assignment of the Oklahoma Supply Agreement on August 4, 2003 (D.I. 2716), which notice was supplemented and amended by the instant motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1999, Albertson's constructed a new, state-of-the-art warehouse in Tulsa, Oklahoma to distribute grocery products to its retail stores in the Midwest. (Tr. 121:12-16;185:17-186:2). After operating the Tulsa warehouse for roughly three years at only sixty percent (60%) capacity, Albertson's decided to sell the warehouse. (Tr. 121:19-122:18). In order to maximize the sales price of the Tulsa warehouse, Albertson's deliberately marketed the warehouse to a competitor in the grocery business. (Tr. 122:19-25). That competitor was Fleming.

Approximately 18 months ago, in June 2002, Albertson's sold its Tulsa warehouse to Fleming for more than $78 million *in cash.* (Tr. 121:17-18, 123:1-8; 124:10-12). To facilitate the sale, and despite Albertson's strong preference to self-supply its stores and not do business with third-party wholesalers such as Fleming (Tr. 139:24-140:4), Albertson's agreed to enter into the Supply Agreements with Fleming. (Tr. 124:24-125:3; Objection, p. 18). These agreements set forth the terms and conditions under which Fleming was to supply grocery products to 28 Albertson's retail grocery stores in Oklahoma and 11 Albertson's retail grocery stores in Nebraska. (Ex. 1, Ex. 2; *see* Objection, pp. 1-2). Fleming supplied grocery products to the 39 Albertson's stores in Oklahoma and Nebraska under both of the Supply Agreements for approximately one year. (Tr. 183:10-22).

On April 1, 2003, the Debtors filed their respective bankruptcy petitions. By August 2003, Albertson's had stopped ordering products from Fleming and began supplying all products to these stores out of its own warehouse in Fort Worth, Texas. (Tr. 183:10-22). It did so unilaterally and without first receiving Court approval. This transition to self-supply was, at least in part, the result of a business decision by Albertson's; according to Albertson's, it was "simpler and less complicated" for Albertson's to supply itself and it was more profitable to do so. (Tr. 140:5-25).

At the December 4 hearing, Albertson's witnesses (i.e. Martin Teall and Mark Bohlen) testified that it would be "cumbersome," "complex," and "disruptive" if Albertson's were required to comply with the Supply Agreements and transition the source of supply for its 39 stores to AWG. (Tr. 178:7-16; 186:9-11). Whether it might be difficult or perhaps less profitable for Albertson's to comply with the Supply Agreements is not the issue. The only issue before the Court is whether, under the Bankruptcy Code, the Supply Agreements can be assumed by Fleming and assigned to AWG.

As demonstrated at the hearing, and as further explained below, both Supply Agreements can be assumed and assigned under the Bankruptcy Code because AWG has provided adequate assurance of future performance and none of the technical legal defenses raised by Albertson's have merit. Indeed, Albertson's' arguments that assignment of these contracts is precluded as a matter of law are contradicted by the text of the Bankruptcy Code, the applicable case law, and the terms of the Supply Agreements. Specifically:

? AWG proved it is ready, willing and able to perform the Supply Agreements in accordance with their terms by introducing uncontroverted evidence establishing, among other things, that (i) AWG has the capacity and capability to supply the 39 Albertson's stores; (ii) AWG has already successfully transitioned nearly 500 stores that were previously supplied by Fleming; and (iii)

AWG is able to supply Albertson's private label products and process Albertson's orders;

? Contrary to Albertson's contention, AWG's indirect ownership interest in competing retail grocery stores does not preclude assumption and assignment of the Supply Agreements under Section 365(c)(1) and U.C.C. 2-210(2) because (i) Section 365(c)(1) and U.C.C. 2-210(2) are inapplicable under *In re ANC Rental Corporation, Inc.*, 278 B.R. 714 (Bankr. Del. 2002); (ii) the Supply Agreements allowed Fleming to compete with Albertson's and Fleming did compete with Albertson's; and (iii) Albertson's avoided its professed concerns regarding Fleming's potential misuse of competitive information by including confidentiality provisions in the Supply Agreements and by selectively disclosing information to Fleming;

? Section 365(b) of the Bankruptcy Code does not prohibit assumption and assignment of the Supply Agreements because (i) Fleming has no obligation to cure nonmonetary defaults and (ii) all of Fleming's prior nonmonetary breaches are cureable by Albertson's own agreement; and

? Albertson's contention that the Oklahoma Supply Agreement fails of consideration is without merit because Albertson's received at least $78 million in cash and a commitment to supply groceries in exchange for entering into the Supply Agreements.

It is also fair and equitable to authorize the assumption and assignment of the Supply Agreements to AWG because, if the Court were to rule otherwise, Albertson's would be allowed to retain the substantial benefits of its transaction with Fleming (including its receipt of more than $78 million in cash) but walk away from the long-term contractual obligations it undertook to obtain those benefits. In addition to the payment the bankruptcy estate has already received for the assignment of these contract rights, the bankruptcy estate will also receive additional payment of one percent (1%) of AWG's actual sales to Albertson's if the Supply Agreements are assigned to AWG. (Tr. 4:21-5:3). These payments to the bankruptcy estate could potentially total as much as $10 million. (*Id.*).

Fleming's motion should be granted, and both Supply Agreements should be assumed and assigned to AWG.

LEGAL ARGUMENTS AND AUTHORITIES

I. AWG HAS PROVIDED ADEQUATE ASSURANCE OF FUTURE PERFORMANCE OF THE SUPPLY AGREEMENTS

AWG met its burden to provide adequate assurance of its future performance of the Supply Agreements. 11 U.S.C. §§ 365 (b)(1)(a) and (f)(2)(A). This is a fact-bound inquiry in which the Court considers whether performance is more probable than not. *In re PRK Enters. Inc.*, 235 B.R. 597, 603 (Bankr. E.D. Tex. 1999); *In re Westview 74th Street Drug Corp.*, 59 B.R. 747, 754 (Bankr. S.D. N.Y. 1986). Literal compliance with every term of the assigned contract is not required to further the policy favoring assumption and assignment to allow the debtor to retain valuable contract rights. *In re U.L. Radio Corp.*, 19 B.R. 537, 543 (Bankr. S.D. N.Y. 1982). AWG met its burden of proof by introducing detailed and specific evidence of its experience, its capacity and its ability to perform. While Albertson's attempted to raise questions, Albertson's did not provide any direct evidence that AWG could not perform.

Although Albertson's claimed that AWG would only offer "vague promises" that it is capable of performing the Supply Agreements, in reality AWG presented substantial evidence at the hearing proving that AWG can and will perform both of the Supply Agreements in accordance with their terms:

1. AWG is the fourth largest grocery wholesaler in the United States, operating in 16 states and serving 1,300 individual supermarkets. AWG's expected sales in 2003 are $4 billion. (Tr. 13:10-15; 14:14-23).

2. AWG has already begun serving approximately 490 stores previously served by Fleming, (Tr. 16:2-9), including:

    a. Approximately 50 additional stores from the Oklahoma City warehouse with annual sales of approximately $150,000,000 (Tr. 23:11-23);

    b. 45 stores from the Kansas City, Kansas warehouse, including a 16-store Nebraska chain with annual sales of over $175,000,000 (Tr. 17:9-18:8).

3. AWG incorporated these new stores while maintaining a service level in excess of 97.5% (compared to the requirement in the Supply Agreements of 95%) (Tr.22:12-15).

4. If assigned, the Albertson's Supply Agreements would add only an additional 28 stores to the Oklahoma City warehouse and 11 stores to the Kansas City, Kansas warehouse (Exhibits 1 and 2, Attachments A).

5. Mr. Michael Rand of AWG, who is very experienced in the grocery wholesale business (Tr. 13:3-9; 14:24-15:17), who is currently responsible for the Kansas City, Kansas warehouse (Tr. 28:11-13) and who is also intimately familiar with the Oklahoma City warehouse (Tr. 27:8-12) testified that AWG can maintain service levels in excess of 95% if the Supply Agreements are assigned. (Tr. 23:6-10). Albertson's introduced no evidence to the contrary.

6. Likewise, Mr. Rand testified that AWG has the ability and the capacity to serve the Albertson's Oklahoma stores from the Oklahoma City warehouse and the Nebraska stores from the Kansas City warehouse. (Tr. 27:13-24; 27:25-28:17). Albertson's introduced no evidence to the contrary.

7. Mr. Jerry Garland of AWG, who is also very experienced in the wholesale grocery business (Tr. 42:12-44:5) and who is familiar with AWG's warehouses in Oklahoma City and Kansas City, Kansas (Tr. 44:6-10; 45:11-16), testified that AWG can supply Albertson's in compliance with the Supply Agreements. (Tr. 44:15-45:6; 45:17-24). Albertson's introduced no evidence to the contrary.

8. AWG has supplied publicly-traded chains before, including Dillon's (a subsidiary of Kroger's) in the Springfield, Missouri area from 1980 to 2000 with an average annual volume of around $140 million (Tr. 46:14-47:4) and approximately 100 or so Homeland stores in the Oklahoma City and Amarillo, Texas markets. (Tr. 47:20-48:6). In fact, after an acquisition, AWG supplied a number of Albertson's stores in the Springfield, Missouri. (Tr. 48:7-49:15).

9. AWG is ready, willing, and able to perform the Supply Agreements as written (Tr. 19:9-11; 45:25-46:2), including:

    a. AWG will comply with the Fleming marketing plan, which means that Albertson's will purchase product at the same price and under the same financial terms as it received from Fleming (Tr. 57:22–58:5; 60:7-11; 62:12-16);

    b. The service level requirements (Tr. 58:11-13);

    c. The product dating standards (Tr. 59:25-60:6); and

    d. The confidentiality provision (Tr. 70:13-17).

10. In fact, there is nothing in the Supply Agreements that only Fleming could perform as opposed to some other wholesaler, and Albertson's admits there is nothing about Fleming's Tulsa warehouse that uniquely suited it to supply Albertson's. (Tr. 57:18-21; Tr. 144:18-24).

11. If Albertson's chooses not to utilize AWG's ordering system and instead utilize its own ordering system, AWG can process and translate Albertson's orders. AWG can supply equipment to Albertson's that will read the individual bar codes of the products to be ordered by Albertson's and translate the bar code information into an AWG order. (Tr. 56:12-18). Although Albertson's may have translated its orders itself while Albertson's was purchasing products from Fleming (Tr. 195:14-196:2), AWG can and will translate Albertson's orders to the AWG ordering system, if necessary (Tr. 56:19-23).

12. AWG has a track record of successfully handling large expansions of its business. In 1995, for example, AWG opened its Oklahoma City

> warehouse and another new warehouse that increased its sales by thirty percent (30%). (Tr. 116:3-8). AWG successfully handled this expansion of its business. (*Id.*)

This evidence satisfied AWG's burden of proof. Albertson's offered no concrete evidence to the contrary. Indeed, Albertson's called no witness familiar with AWG's operations or facilities to present evidence that AWG could not perform for Albertson's as it does for 1,300 other grocery stores, approximately 490 of which were formerly supplied by Fleming and just recently transitioned into the AWG distribution system. In fact, Mr. Bohlen who will be responsible for working with AWG if the Supply Agreements are assigned, admitted he has "no experience with the AWG folks." (Tr. 185:20-21).

Albertson's unsuccessfully attempted through cross-examination to create some doubt about AWG's ability to perform. For example, Albertson's made the point that none of the former Fleming retailers are currently being served under Fleming's standard-form supply agreement. But the supply agreements were indeed assigned to AWG by various orders of this Court (Tr. 119:19-120:10) and AWG was prepared to perform under the terms of those agreements if the retailers had so desired. (*See* Tr. 19:9-11). However, because both AWG and the retailers determined that AWG's standard pricing terms were more favorable than Fleming's terms, the retailers instead chose to enter into new supply agreements with AWG. (Tr. 49:20-50:23). Just as it did the other retailers, AWG offered to allow Albertson's to purchase products from AWG under AWG's standard terms. (Tr. 115:9-15). Albertson's rejected this offer (*id.*), however, and AWG stands ready to perform both Supply Agreements per their terms. (Tr. 115:16-18).

Albertson's also made the point that AWG did not have a lot of detailed information about Albertson's operations and did not have a written transition plan. (Tr. 36:21-24; 38:18-23; Objection ¶ 31). While irrelevant, Albertson's is wholly responsible for this lack of information. Mr. Garland explained that he requested information from Albertson's about its private-label (Tr. 75:7-10) and the inventory supplied by Fleming to compare to AWG's inventory (Tr. 97:21-24), but Albertson's refused to provide the information to AWG. (*Id.*). As Mr. Garland said, "It takes two to put together a transition plan" and Albertson's did not participate. (Tr. 113:1-11). In any event, written transition plans were not necessary to accomplish the transition of the approximately 490 other Fleming-supplied stores into the AWG system because, as Mr. Rand testified, the preparation of a written transition plan is not essential. (Tr. 21:17-22:4).

Albertson's argues that AWG cannot perform the Oklahoma Supply Agreement because it has closed the Tulsa warehouse and rejected the lease. (Objection ¶ 31).[3] But Albertson's does not explain how the closure of the Tulsa warehouse would have any material impact on the performance of the Oklahoma Supply Agreement. Albertson's has not made such an argument because it cannot do so. Albertson's does not argue that its stores would experience increased freight charges because, as Mr. Garland testified, the freight charges from AWG's Oklahoma City warehouse will be substantially identical to the freight charges that otherwise would have been incurred from Fleming's Tulsa warehouse.[4] (Tr. 117:17-25). Furthermore, Mr. Teall admitted that there was nothing

[3] Albertson's does not contend that the closure of the Tulsa warehouse prohibits assignment of the Nebraska Supply Agreement.

[4] Similarly, no freight issues were raised by Albertson's regarding the Nebraska Supply Agreement, presumably because eighty percent (80%) of the products supplied in

about the Tulsa warehouse, as opposed to any other warehouse, that made it uniquely suited to supplying Albertson's Oklahoma stores. (Tr. 144:18-24) This is consistent with Oklahoma law that a failure to ship from a particular location cannot constitute a material breach of an agreement if a "commercially reasonable substitute" is available:

> Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

12A OKLA. STAT. ANN. § 2-614(1). Therefore, Mr. Teall has admitted that shipment from another warehouse is a "commercially reasonable substitute" for shipment from Tulsa. Moreover, the closure of the Tulsa warehouse will not deprive Albertson's of "the timely delivery of virtually all of its food and related Products," which is the "important feature of the bargain" that Albertson's has claimed it will lose. (Objection ¶ 32). Albertson's will receive the benefit of its bargain.

In its written objection, Albertson's questioned AWG's ability to supply private-label products. (Objection ¶ 31). The evidence, however, shows that AWG can supply Albertson's with Albertson's private label products:

? AWG currently supplies approximately 2,000 private label products to its customers (Tr. 110:4-22);

? AWG currently supplies chain-specific private label products to chains such as Piggly Wiggly® and ALPS (Tr. 111:3-16);

? In the recent past, AWG supplied Dillon's, a publicly-traded grocery store chain, with Dillon's own private label products (Tr. 47:5-19);

Nebraska was ordered from Fleming's Tulsa warehouse and AWG proposes to supply from its Kansas City, Kansas warehouse.

- ? A wholesaler can supply private label products to its customers by (i) stocking the private label goods in its warehouse, (ii) cross-docking the products through its warehouse or (iii) utilizing a combination of the two (Tr. 71:8-17; 72:11-21; 74:12-75:20); and

- ? Albertson's admits, as it must, that the Supply Agreements allow cross-docking (Tr. 134:9-15, 137:4-6). Neither the Oklahoma Supply Agreement nor the Nebraska Supply Agreement specifically mandates the manner in which Fleming was to supply private label goods (Ex. 1, Ex. 2). This is demonstrated by the fact that Fleming utilized cross-docking to supply private-label and other products to Albertson's under both of the Supply Agreements (Tr. 133:20-134:5).

Both Mr. Garland and Mr. Teall agree that the parties need to mutually analyze and determine the appropriate method to supply private label goods in this situation. (Tr. 74:24-75:15, 134:22-135:2). Both agree that the ultimate solution may involve a combination of cross-docking and stocking of private label goods. (Tr. 74:12-23, 75:16-20, 134:19-135:2). However, Mr. Teall agrees that Albertson's has not provided AWG with any information to enable AWG to decide the most economical way to handle Albertson's private-label business. (Tr. 135:3-7). Therefore, the only impediment to working out a plan to handle private-label products under the terms of the Supply Agreements is a current lack of communication, an impediment created by Albertson's that will be removed if this Court orders assignment. (Tr. 134:24-135:1).

Finally, Albertson's presented evidence that the transition from Albertson's current self-supply to AWG might be difficult. (Tr. 162:18-163:18). Albertson's relied largely on difficulties experienced in the transition to Fleming in 2002. (Tr. 176:24-177:20; 185:17-21). At trial, it became obvious that many of the transition problems that Albertson's experienced with Fleming arose because the Fleming contract was an exception to Albertson's general rule that it does not use third-party suppliers. For example, Mr. Bohlen testified that his employees did not know whom at Fleming to contact about orders or problems because "it was something that our people were not accustomed to." (Tr. 178:7-16). Mr. Teall testified that it would be "simpler and less complicated" for Albertson's to self-distribute (Tr. 140:7-9) and that "it's just harder to do it with a third-party supplier." (Tr. 167:22-23). But Albertson's nevertheless voluntarily contracted with a third-party, Fleming, and cannot now argue against assignment because AWG is also a third-party supplier. Moreover, the Fleming situation was different from AWG's situation: Fleming was not only taking on Albertson's as a new customer, it was also taking on a non-union facility in Tulsa it had never operated and it was closing its unionized warehouse in Oklahoma City, which led to logistical and labor difficulties that AWG will not face. (Tr. 169:19-170:20). As such, these complaints do not preclude assumption and assignment of the Supply Agreements.

None of the questions raised by Albertson's amount to evidence sufficient to overcome the facts that AWG, the nation's fourth largest grocery wholesaler, has the capacity, the expertise and the desire to perform the Supply Agreements and that it has already successfully transitioned nearly 500 supermarkets previously served by Fleming. The evidence establishes that AWG has sustained its burden to prove adequate assurance of future performance, specifically that AWG can supply the 28 Albertson's stores in Oklahoma and the 11 Albertson's stores in Nebraska pursuant to and in compliance with the terms of the Supply Agreements.

II. AWG'S INDIRECT OWNERSHIP OF COMPETING RETAIL GROCERY STORES IN OKLAHOMA DOES NOT PRECLUDE ASSUMPTION AND ASSIGNMENT OF THE SUPPLY AGREEMENTS.

Albertson's argues that Section 365(c)(1) and alleged "applicable nonbankruptcy law" — specifically, 12A OKLA. STAT. ANN. § 2-210(2) — prevent Fleming from assigning both Supply Agreements to AWG because AWG is "a direct competitor of Albertson's in the Oklahoma and Nebraska markets." This is argument is based on the fact that AWG indirectly owns a number of retail grocery stores that compete with Albertson's retail stores in Oklahoma[5] and the testimony of Messrs. Teall and Bohlen that they would "prefer" not to do business with a competitor. (Tr. 168:11-14; 192:15-17). According to Albertson's, the existence of this ownership interest in competing stores precludes the assumption and assignment of both Supply Agreements as a matter of law. (*See* Objection, pp. 7, 13-14; *see also* Tr. 79:7-80:8).

Albertson's is wrong and its arguments are both factually and legally untenable for the following reasons:

? The Supply Agreements allowed Fleming to compete with Albertson's; indeed, the Supply Agreements did not prohibit Fleming from acquiring or taking financial interests in stores in Oklahoma and Nebraska;

? Although Fleming was a competitor of Albertson's, on both the wholesale and retail levels, Albertson's nevertheless voluntarily entered into both Supply Agreements with Fleming;

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[5] AWG's affiliate, HAC Inc., owns and operates 43 grocery stores that operate in Oklahoma under the trade name "Homeland." (Tr. 79:7 to 17). HAC operates approximately 14 Homeland stores in the Oklahoma City area. (Tr. 79:18 to 79:20). Neither AWG nor any of its subsidiaries own any retail grocery stores in Nebraska, however. (Tr. 81:9 to 81:13).

? Albertson's was admittedly able to implement procedures to protect itself from the potential risks of doing business with a competitor by negotiating confidentiality provisions into the Supply Agreements and selectively withholding business information from Fleming; and

? Section 365(c)(1) of the Bankruptcy Code and U.C.C. § 2-210(2) are inapplicable under *In re ANC Rental Corporation, Inc.*, 278 B.R. 714 (Bankr. Del. 2002).

A. <u>Albertson's Knowingly and Voluntarily Entered Into the Supply Agreements With a Competitor and Implemented Procedures to Protect Itself From The Potential Risks of Doing Business With a Competitor.</u>

Albertson's suggestion that it would be "wholly inequitable" to require it to do business with a "competitor" is disingenuous. Although Albertson's makes much of the fact that an AWG affiliate owns a handful of retail grocery stores in Oklahoma that compete with Albertson's stores, Albertson's ignores the fact that the Supply Agreements allowed Fleming to compete with Albertson's and Fleming did, in fact, compete with Albertson's.

If it were truly important to Albertson's that its retail stores not be supplied by a competitor, Albertson's could have included a provision in the Supply Agreement that expressly prohibiting Fleming (or its assignee) from competing with Albertson's. There is, however, no provision in either of the Supply Agreements that prohibited Fleming from owning competing stores or acquiring additional competing stores in Oklahoma or Nebraska. (Ex. 1; Ex. 2; Tr. 145:25-146:10). Likewise, neither of the Supply Agreements prohibited Fleming from acquiring security interests in competing grocery stores. (*Id.*).

In addition, the evidence presented at the hearing demonstrated that Fleming did, in fact, compete with Albertson's and that Fleming was a competitor of Albertson's when Albertson's entered into the Supply Agreements. Among other things, Fleming owned at least one competing retail grocery store in Oklahoma (Tr. 80:21-81:5), Fleming possessed substantial financial interests in a number of competing retailers throughout Oklahoma (*see*, *e.g.*, Tr. 63:24-64:10), and Fleming was a retail competitor of Albertson's in other markets, such as Salt Lake City and El Paso (Tr. 145:1-145:4).

Although Albertson's claims that it would suffer competitive harm if it were forced to do business with a "competitor," Albertson's has admitted it was able to eliminate these same competitive concerns when it dealt with Fleming by including confidentiality provisions in both Supply Agreements and by simply withholding sensitive business information from Fleming. (Tr. 146:16-149:21). Both of the Supply Agreements expressly provide that confidential information "shall not be disclosed by either party to any third party without the express written consent of the other party." (Ex. 1, ¶ 14(c); Ex. 2, ¶ 14(c)). Furthermore, as explained by Mr. Teall, when Albertson's was purchasing groceries from Fleming pursuant to the Supply Agreements, Albertson's did not disclose its pricing information, marketing plans, and other such competitive information to Fleming. (*Id.*). Despite Albertson's claim in its objection that AWG could not engage in "horse-trading" by "not requiring the disclosure of confidential information" (Objection, p. 14), Mr. Teall acknowledged that Albertson's was allowed to withhold this business information from Fleming under the terms of the Supply Agreements (Tr. 149:5-149:13) and that it was "good business" for Albertson's to withhold this information. (Tr. 149:14-149:15). Mr. Teall also acknowledged that

Albertson’s would continue to withhold this sort of business information from AWG — and thus implement the same protections against its perceived risk of doing business with AWG — if the Supply Agreements are assigned to AWG. (Tr. 149:16-149:21).

Furthermore, AWG will become bound by and comply with the express confidentiality provisions found in both of the Supply Agreements if the agreements are assigned. (Tr. 70:10-17). AWG will, therefore, be prohibited from disclosing confidential and proprietary information to any third party without Albertson’s express written consent. (Ex. 1, ¶ 14(c); Ex. 2, ¶ 14(c)).

Even if the Supply Agreements did not contain express confidentiality provisions, AWG would nevertheless maintain the confidentiality of any information received from Albertson’s and ensure that such information could not be used to the benefit of any other stores, including those in which AWG possesses an indirect ownership interest. As Mr. Garland explained at the hearing, AWG maintains all customer information in strict confidence (Tr. 66:19-67:6) and AWG’s reporting structure ensures that information regarding other customers is not available to those involved in the operation of the stores in which AWG has an indirect ownership interest. (Tr. 69:1-70:6).

Accordingly, despite Albertson’s professed concern that it would suffer competitive disadvantages and economic harm if it was forced to do business with AWG, the record reflects that these concerns are unfounded because (i) Albertson’s chose to do business with a “competitor” when it entered into the Supply Agreements in June 2002 and (ii) Albertson’s was admittedly able to implement procedures to protect itself from the potential risks of doing business with a competitor. Thus, Albertson’s would have the same benefit of its bargain with all of the same rights, obligations and protections.

B. Section 365(c)(1) and 12A OKLA. STAT. ANN. § 2-210 are Inapplicable and Do Not Bar Assumption and Assignment of the Supply Agreements.

Albertson's contends that under Section 365(c)(1) and alleged applicable nonbankruptcy law, 12A OKLA. STAT. ANN. § 2-210(2), the Supply Agreements cannot be assigned to AWG without Albertson's consent. Because Albertson's obviously does not consent to the assignment, Albertson's asserts that Fleming's motion must be denied as a matter of law.

Albertson's is wrong because: (i) U.C.C. § 2-210(2) does not fall within the narrow "applicable law" exception of Section 365(c)(1) and, as a result, Section 365(c)(1) is not applicable in this case; and (ii) even if the Oklahoma statute constituted "applicable law" under Section 365(c)(1), this statute would not bar assignment of the Supply Agreements to AWG because Albertson's will receive the benefit of its bargain if the agreements are assigned to AWG.

1. Section 365(c)(1) is not applicable

Section 365(c)(1) of the Bankruptcy Court prohibits assignment of executory contracts when "applicable law" excuses the nondebtor party "from accepting performance from or rendering performance to an entity other than the debtor" without the nondebtor party's consent. 11 U.S.C. § 365(c)(1). This section is intended to relieve the nondebtor party from having to deal with a party other than the debtor when it would be relieved from doing so under applicable nonbankruptcy law. 3 COLLIER ON BANKRUPTCY, ¶ 365.06 (15th ed. 1999).

As the Court recently noted in *In re ANC Rental Corporation, Inc.*, this Court follows the majority of courts which hold that

> for Section 365(c)(1) to apply, the applicable law must specifically state that the contracting party is excused from accepting performance from a third party under circumstances where it is clear from the statute that the identity of the contracting party is crucial to the contract or public safety is at issue.

278 B.R. 714, 722 (Bankr. Del. 2002) (emphasis added). Section 365(c)(1) is therefore inapplicable – and thus does not bar assignment of a contract in bankruptcy – unless (i) public safety is at issue or (ii) the applicable nonbankruptcy law expressly puts the *identity of the performing party* in issue and expressly excuses the nondebtor party from accepting performance from anyone other than the debtor. *Id.* Stated differently, absent the existence of public safety concerns, Section 365(c)(1) becomes operative only if applicable nonbankruptcy law prohibits assignment on the rationale that the identity of the contracting party is material to the agreement. *E.g., In re Catapult Entertainment, Inc.*, 165 F.3d 747, 752 (9th Cir. 1999). Examples of contracts that oftentimes cannot be assigned under nonbankruptcy law because the identity of the contracting party is material to the agreement include personal services contracts (*e.g.*, *In re West Electronics, Inc.*, 852 F.2d 79, 83 (3rd Cir. 1988)), patent licenses (e.g., *Catapult*, 165 F.3d at 750-51) and non-assignable government contracts (e.g., *In re West Electronics, Inc.*, 852 F.2d 79 (3rd Cir. 1988) (government contract to manufacture military equipment not assignable)).

Albertson's raises no public safety issues and, thus, this standard is inapplicable here. As a result, the applicability of Section 365(c)(1) to this matter is dependent on whether Oklahoma's version of U.C.C. § 2-210(2) – the only alleged "applicable nonbankruptcy law" cited by Albertson's – expressly excuses Albertson's from accepting performance from any party other than Fleming. It does not.

Under the Uniform Commercial Code, as adopted in Oklahoma and elsewhere, contracts and contract rights are generally and freely assignable. *American Bank of Commerce v. City of McAlester*, 555 P.2d 581, 585 (Okla. 1976); *Boston Helicopter Charter, Inc. v. Agusta Aviation Corp.*, 767 F. Supp. 363, 376 (D. Mass. 1991) (noting that "assignability is normal and permissible in the context of contracts for the sale of goods"). U.C.C. § 2-210(2), however, establishes a limited exception to this general rule:

> [U]nless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance.

12A OKLA. STAT. ANN. § 2-210(2). This Section is designed to prevent one party from assigning its contract rights when doing so would materially impair the other party's ability to realize the benefit of its bargain, such as in cases involving "exclusive dealing contracts" or "where a material personal discretion is sought to be transferred." 12A OKLA. STAT. ANN. § 2-210, cmt. 4; *see also Sally Beauty Co., Inc. v. Nexxus Products Co., Inc.*, 801 F.2d 1001, 1006 (7th Cir. 1986) (stating that section balances "the policy of promoting free alienability of contracts with the need to protect the obligee from having to accept 'a bargain he did not contract for.'").

Relying entirely on two factually-distinguishable cases, neither of which applies Oklahoma law, Albertson's asserts that Oklahoma's version of U.C.C. § 2-210 is "applicable law" that imposes an absolute and blanket prohibition against "the assignment of a contract to a direct competitor without the obligee's consent." Albertson's is wrong for at least three reasons.

First, contrary to Albertson's suggestion, the text of U.C.C. § 2-210 does not expressly prohibit one party from assigning a contract if the purported assignee is a "competitor" of the other party. Unlike other statutes that impose an absolute prohibition on the assignment of contracts (e.g., patent licenses), U.C.C. § 2-210 expressly provides that contract rights may be assigned except in those limited instances when one party's ability to realize the benefit of its bargain would be materially frustrated if the contract were assigned to another party. To determine whether U.C.C. § 2-210 precludes assignment in a particular case, a Court would necessarily be required to perform a comprehensive and case-by-case factual analysis. *In re Neuhoff Farms, Inc.*, 258 B.R. 343, 351 (Bankr. E.D.N.C. 2000). Although the identity of the proposed assignee could potentially be a factor in this analysis, the statute does not make the identity of the proposed assignee the sole or even controlling factor, and it certainly does not impose an absolute bar on assignment if the proposed assignee is a "competitor." In other words, the statute does not make it clear "that the identity of the contracting party is crucial to the contract." Thus, on its face, U.C.C. § 2-210 does not satisfy the standards recognized by this Court in *ANC Rental Corporation* and therefore necessarily falls outside the exception of Section 365(c)(1). *Neuhoff*, 258 B.R. at 349-50 (holding that "U.C.C. § 2-210 is not a body of law that falls under the 'applicable law' category within the narrow provision of § 365(c)(1)").

Next, the cases that Albertson's cites in support of its argument are factually distinguishable and inapposite. The first case cited by Albertson's, *Sally Beauty Co., Inc. v. Nexxus Products Co., Inc.*, 801 F.2d 1001 (7th Cir. 1986), was a non-bankruptcy case involving the alleged improper termination of an exclusive distributorship agreement.

The defendant, Nexxus Products Company ("Nexxus"), entered into an agreement with Best Barber & Beauty Supply Company ("Best") under which Best was to serve as the exclusive distributor of Nexxus' hair care products throughout most of Texas and devote its "best efforts" to promote their sale. *Id.* at 1001-02, 1007. Best was subsequently merged into Sally Beauty Company ("Sally"), a wholly-owned subsidiary of Alberto-Culver Company ("Alberto") which was a direct competitor of Nexxus. As a result, Nexxus canceled the agreement and Sally sued for breach of contract. *Id.* at 1001-02.

The Court in *Sally Beauty* only addressed the limited issue of whether, under U.C.C. 2-210(1), "the duty of performance under an exclusive distributorship may not be delegated to a competitor in the marketplace – or the wholly-owned subsidiary of a competitor – without the obligee's consent." *Id.* at 1007-08. The Court held that it could, primarily because the implied duty of "best efforts" – the only standard under which Sally's performance would be judged – did not adequately protect Nexxus and exposed Nexxus to risks that were not part of its original bargain. *Id.*

The second case cited by Albertson's is *In re Nedwick Steel Co.*, 289 B.R. 95 (Bankr. N.D. Ill. 2003). In *Nedwick*, a German manufacturer of specialty steel products, Brockhaus, entered into an exclusive distributorship agreement with Nedwick, pursuant to which Nedwick was to use its "best efforts" to promote, market and sell Brockhaus' products in North America. *Id.* at 95-97, 99. After Nedwick filed its petition under Chapter 11, Nedwick filed a motion to approve assignment of the exclusive distributorship agreement to Wickeder. *Id.* at 96. Brockhaus opposed the motion on the ground that the proposed assignment was prohibited by U.C.C. § 2-210(2) because Brockhaus and Wickeder were competitors. *Id.* at 97-98.

Based largely on the Seventh Circuit's analysis and holding in *Sally Beauty*, the *Nedwick* court concluded that, under U.C.C. § 2-210(2), Nedwick could not assign its exclusive distributorship agreement with Brockhaus to Wickeder under these limited circumstances. *Id.* at 99.

Based on these two cases, and these two cases alone, Albertson's argues that U.C.C. § 2-210 absolutely prohibits the assignment of any contracts to a competitor. That is an incorrect statement of the law and a gross overstatement of the holdings in *Sally Beauty* and *Nedwick*. Indeed, these cases are factually distinguishable and entirely inapplicable to the situation presented here for a number of reasons:

? First, unlike the Supply Agreements at issue here, the contracts at issue in *Sally Beauty* and *Nedwick* were exclusive distributorship agreements. This is a highly significant distinction because exclusive distributorships are akin to personal service contracts insofar as the principal gives its selected agent – and only the selected agent – the exclusive right to sell the principal's products in a particular area. The principal's financial success is, therefore, necessarily and completely dependent on the service and loyalty of its agent. That is not our case here. The Supply Agreements are not manufacturer distributorship agreements; instead, they are contracts for the purchase of fungible goods. Contracts between two sophisticated business entities for the sale and purchase of fungible commodities are not subject to Section 365(c)(1). *In re Cajun Elect. Coop., Inc.*, 230 B.R. 693 (Bankr. M.D. La. 1999) (authorizing assumption and assignment of electricity supply agreements). In addition, the Supply Agreements do not give Fleming the exclusive right to sell to Albertson's; indeed, if it chooses to do so, Albertson's need not purchase any grocery products from Fleming. (*See* Ex. 1, ¶ 3(c); Ex. 2, ¶ 3(f)). Furthermore, there is nothing in the Supply Agreements that was unique to Fleming and that only Fleming could perform. (Tr. 57:18-21). In other words, the personal performance by Fleming was not an essential and material component of its bargain, and Albertson's has not contended otherwise. Hence, unlike the exclusive distributorship agreements in *Sally Beauty* and *Nedwick*, the Supply Agreements at issue in this case do not contain indicia of personal discretion and dependence commonly found in personal service agreements.

? Second, the exclusive distributorship agreements in *Sally Beauty* and *Nedwick* contained no performance standards except an implied requirement that the agent use its "best efforts" to market and sell the principal's products, which is a subjective standard that confers substantial discretion on the agent. That is not our situation here because the Supply Agreements contain clear and definite performance standards, such as requiring Fleming to price products in accordance with a specific pricing plan (Ex. 1, ¶ 2; Ex. 2, ¶ 2), maintain minimum service levels (Ex. 1, ¶ 5; Ex. 2, ¶ 5), and meet minimum product dating criteria (Ex. 1 – Exhibit B, p. 5; Ex. 2 – Exhibit B, p. 7). The Supply Agreements, moreover, specifically allow Albertson's to terminate the agreements, upon proper written notice, if these standards are not met. (Ex. 1, ¶ 6(b); Ex. 2, ¶ 6(b)). Consequently, unlike the principals in *Sally Beauty* and *Nedwick*, Albertson's is not required to rely solely on the subjective "best efforts" of AWG if these agreements are assigned. On the contrary, AWG will be required to comply with specific and objective performance criteria and, if AWG fails to do so, the Supply Agreements provide a mechanism for Albertson's to seek relief.

? Next, the overriding concern raised by the principals in *Sally Beauty* and *Nedwick* was that the agent would, at minimum, have less of an incentive to sell the principal's products and, at worst, it might have a mandate to thwart the sale of its products since the agent was under the direct control of a direct competitor. Unlike the parties in *Sally Beauty* and *Nedwick*, Albertson's does not contend that AWG's ability or incentive to supply groceries to Albertson's will be impaired if the Supply Agreements are assigned. Albertson's cannot make such a contention because it would belie reality. As stated above, if AWG fails to ship products ordered by Albertson's at the right time and in the right quantities (i.e. if it fails to meet the service level requirements), then Albertson's may terminate the agreements if AWG fails to cure the default after receiving proper written notice. (Ex. 1, ¶ 6(b) Ex. 2, ¶ 6(b)). Because AWG obviously wants to perform the Supply Agreements for the remainder of their terms, AWG has a very strong incentive to consistently supply products to Albertson's in compliance with the terms and conditions of the agreements. AWG makes money by selling groceries to its customers – the more volume the better. Indeed, AWG has a four-corners policy and will sell on equal terms to stores located on each of the four corners of an intersection. (Tr. 70:21-71:7). Thus, AWG has a strong incentive to sell product to Albertson's in order to increase AWG's profitability and maximize the return on its investment in acquiring the rights to both of these Supply Contracts.

? Finally, U.C.C. § 2-210 provides that the section applies to contracts "[u]nless otherwise agreed." Here, the parties agreed otherwise. Indeed, both of the Supply Agreements contain provisions expressly authorizing assignment to a third party:

> This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective successors and assigns. Except as expressly provided herein, neither this agreement nor the rights and obligations of either party shall be assignable, and any purported assignment in contravention hereof shall be void without the consent of the non-assigning party. However, if either party should consent to an assignment <u>or if without the non-assigning party's consent the rights and obligations of a party are transferred by operation of law or otherwise, the assigning party or transferring party shall require that such rights and obligations be assumed by the transferee</u>. . . .

(Ex. 1, ¶ 14(b); Ex. 2, ¶ 14(b) (emphasis added)).

The inclusion of this provision into the agreements shows that Fleming and Albertson's contemplated the Supply Agreements might be assigned by operation of law without Albertson's consent (i.e. in bankruptcy) and made provisions for such a contingency. Stated differently, these provisions acknowledge and establish that the Supply Agreements are indeed assignable in bankruptcy. Of course, if Albertson's truly believed the Supply Agreements could not be assigned under Oklahoma law,[6] as it now claims, then there would have been no reason or need for Albertson's to include this provision in each of the Supply Agreements.

Accordingly, U.C.C. § 2-210 is inapplicable and does not fit within the narrow "applicable law" exception of Section 365(c)(1). Thus, Section 365(c)(1) does not bar assignment of the Supply Agreements to AWG in this case.

[6] The parties agree that Oklahoma law governs the agreements. (Ex. 1, ¶9; Ex. 2, ¶9).

2. U.C.C. § 2-210 would not bar assignment in any event

Even assuming that U.C.C. § 2-210 fit within the exception of Section 365(c)(1), the statute would not bar assignment of the Supply Agreements to AWG in any event because the assignment will not materially impair Albertson's ability to realize the benefit of its bargain and, as a result, none of the enumerated conditions in the statute are applicable.

As demonstrated at the hearing, Albertson's will receive the benefit of its bargain if the Supply Agreements are assigned to AWG. Among other things:

? AWG can and will supply products to Albertson's on the exact same pricing terms in the agreements (Tr. 57:22-58:5; 60:7-11; 62:12-16);

? AWG can and will meet the service level requirements in the agreements (Tr. 58:11-31);

? AWG can and will meet the product dating requirements in the agreements (Tr. 59:25-60:6);

? AWG can and will comply with the confidentiality provisions in the agreements (Tr. 70:13-17); and

? If Albertson's wants to continue utilizing its own ordering system to process orders from the retail stores, regardless of the reason, AWG will develop a translation program to electronically translate orders from Albertson's ordering system to AWG's ordering system (Tr. 56:19-23).

There will, therefore, be no material impairment of Albertson's ability to perform or receive performance under the Supply Agreements. Likewise, as discussed above in Section II(1), assigning the agreements to AWG will not materially increase Albertson's risk, if any, because Albertson's is admittedly able to eliminate any perceived concern that AWG might try to use the business relationship to obtain a competitive advantage by simply withholding sensitive pricing and other business information from AWG, as it did with Fleming. (Tr. 146:16-149:21).

Accordingly, the evidence proves that Albertson's will realize the benefit of its bargain in all material respects if the agreements are assigned to AWG. As a result, neither the language nor spirit of U.C.C. § 2-210 preclude assignment of the Supply Agreements to AWG in this case. Albertson's cannot credibly argue otherwise.

III. SECTION 365(B) OF THE BANKRUPTCY CODE DOES NOT PROHIBIT ASSIGNMENT OF THE SUPPLY AGREEMENTS TO AWG.

Albertson's asserts that Section 365 of the Bankruptcy Code prohibits the assignment of the Supply Agreements to AWG because, according to Albertson's, (i) Section 365 requires Fleming to cure its prior nonmonetary defaults under the agreements and (ii) as a matter of law, these prior defaults are incurable. This argument flies in the face of the plain language of the Bankruptcy Code and the plain language of Albertson's' own documents.

A. There is No Obligation to Cure Fleming's Prior Nonmonetary Defaults Under Section 365(b)(2)(D).

The plain language of Section 365(b)(2)(D) of the Bankruptcy Code reflects that Fleming need not cure its prior nonmonetary defaults as a condition to assuming and assigning the Supply Agreements. *See, e.g., In re Bankvest Capital Corp.*, 290 B.R. 443 (1st Cir. BAP 2003); *In re GP Express Airlines, Inc.*, 200 B.R. 222, 234 (Bankr. D. Neb. 1996). When the language of the Bankruptcy Code is clear and unambiguous, no further inquiry or reference to legislative history is necessary. *See Toibb v. Radloff*, 501 U.S. 157, 163 (1991); *United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 241 (1989).

The text of Section 365 (b)(2)(D) is clear and unambiguous: A debtor need not cure nonmonetary defaults before assuming an executory contract. The statute provides that the obligation to cure defaults before assuming an executory contract does not apply to "the satisfaction of any penalty rate *or* provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease." 11 U.S.C. § 365(b)(2)(D) (emphasis added). This language addresses two separate issues. *See In re Bankvest Capital Corp.*, 290 B.R. at 446 (citing *In re GP Express*, 200 B.R. at 233-34). The first issue is that the debtor need not cure any penalty-rate obligation. *Id.* The second issue excuses the debtor from having to cure any nonmonetary obligations. *Id.*

Excusing a debtor from curing nonmonetary defaults makes sense in the context of assuming executory contracts, especially when considering that many nonmonetary defaults involve events that occurred in the past and cannot be cured. *See In re BankVest*, 290 B.R. at 447. For example, the failure to maintain the premises in a certain condition, failure to seek approval, and failure to provide reasonable consent are defaults of nonmonetary obligations that cannot be cured. *See id.* Each would have occurred in the past, and there is no way to go back in time to undo them. So, unless section 365(b)(2)(D) of the Bankruptcy Code is interpreted to include all nonmonetary obligations, many executory contracts and unexpired leases would not be subject to assumption in bankruptcy. *Id.* Certainly, if Congress wanted to limit the right to assume executory contracts to those involving only monetary defaults, then it would have stated so in Section 365. It did not.

Instead, because it wanted to excuse debtors from curing nonmonetary defaults, Congress used the word "or" to indicate that the scope of subparagraph (D) was broader than just merely the "satisfaction of any penalty rate" and extends to defaults resulting from the failure to perform nonmonetary obligations in an executory contract. The use of the word "or" connotes disjunction and requires that a separate and distinct meaning and significance attach to the terms or phrases separated by the word "or." *See, e.g., United States v. Lawrence*, 915 F.2d 402, 407 (8th Cir. 1990). The word "or" means that the word "penalty" only modifies "rate" and not the language after the word "or." Moreover, repeating the operative words at the beginning of section 365(b)(2) – that is, "provision relating to," after the word "or," reflects Congress' intent that subparagraph (D) apply to two distinct standards: One for the penalty-rate provision and one for any nonmonetary obligations.

Albertson's relies on the Ninth Circuit's opinion *in In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029 (9th Cir. 1997),[7] to support its assertion. This position has been criticized by several courts and leading commentators as being inconsistent with the plain language of Section 365 and the policy behind Section 365's broad grant of the right to assume contracts. Moreover, according to those courts and commentators, if taken to the extreme, the Ninth Circuit's opinion would preclude the assumption and assignment of most contracts. For example, Collier on Bankruptcy states:

> In a very close, but questionable, textual reading of [Section 365(b)(2)(D)], …[t]he [*Claremont*] court concluded that the adjective "penalty" in the phrase "satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations" modified "provision" as well as rate…. Whether or not the court was correct in its grammatical parsing of the phrase, it seems that Congress' intent in enacting the subparagraph was to address…a situation…where the trustee cannot go back in time to undo an act or omission of the debtor but could compensate for any actual pecuniary loss that the other contracting party suffered as a result of the default.

3 COLLIER ON BANKRUPTCY, § 365.05[4] (15th ed. rev. 2000).

Albertson's further relies on the Third Circuit's opinion in *In re Joshua Slocum*, 922 F.2d 1081, 1092 (3d Cir. 1990), to support its position. This reliance is misplaced.

Joshua Slocum was a shopping-center case. More specifically, it was case about whether the lease in question was a shopping-center lease triggering the special protections afforded by the shopping-center provisions of Section (b)(3) and about whether the bankruptcy court properly excised certain provisions from a shopping-center lease. It was not a case about Section 365(b)(2).

This is not a shopping-center case; therefore, this case does not involve the special protections afforded to shopping-center leases by the Bankruptcy Code under Section 365(b)(3). Hence, Albertson's reliance upon *Joshua Slocum* is misplaced.

Consequently, the Court should find that Fleming's alleged historical nonmonetary defaults do not preclude assumption and assignment pursuant to Section 365(b)(2)(D), and the Court should enter an order authorizing the assumption and assignment of the Supply Agreements to AWG.

B. Fleming's Alleged Prior Nonmonetary Defaults Are Not Incureable

The Court need not reach the issue of whether Section 365 of the Bankruptcy Code requires Fleming to cure its alleged prior nonmonetary defaults because these defaults are cureable by the express agreement of Albertson's.[8] Consequently, Albertson's suggestion that Section 365 prohibits assumption and assignment of the

[7] *Claremont* is distinguishable from our case because, among other things, the contract at issue in that case terminated pre-petition.

[8] Fleming's alleged failures to satisfy the service level and product dating requirements in the Supply Agreements are the only alleged nonmonetary breaches identified in Albertson's objection. (Objection, ¶¶ 6-7, 24-25).

Supply Agreements because Fleming is "unable to cure the material, non-material defaults under the Agreements" is without merit.

Notably, both Supply Agreements specifically recognize the distinction between monetary and nonmonetary defaults and contemplate that any material breaches by Fleming – ***including the failure to maintain minimum services levels and other types of nonmonetary breaches*** – may be cured by bringing Fleming's performance into compliance with the terms of the Supply Agreements. Paragraph 6(b) in the Supply Agreements provides:

> If Fleming fails to perform in any material respect any of its obligations under this Agreement, then Fleming shall be in default. Albertson's may issue a notice of default to Fleming, identifying the nature of the default. Subject to Section 5 of this Agreement, Fleming shall then have fifteen (15) days from receipt of such notice to cure the default to the reasonable satisfaction of Albertson's. Failing such cure, Albertson's shall have the right to immediately terminate this Agreement by written notice and pursue all remedies available under this Agreement. . . Anything to the contrary notwithstanding, in the event of a monetary default, Fleming shall have five days from receipt of the notice of termination from Albertson's within which to cure the monetary default. Albertson's remedy with respect to monetary damages shall be limited solely to direct damages, if any, suffered by Albertson's. . . .

(Ex. 1, ¶ 6(b); Ex. 2, ¶ 6(b)) (emphasis added).

Therefore, for Albertson's to say that Fleming's prior nonmonetary defaults cannot be cured as a matter of law is belied by the terms of the contracts Albertson's negotiated and signed. Indeed, the Supply Agreements not only distinguish between monetary and nonmonetary defaults, but they also specify specific means to cure both types of breaches. Simply stated, the Supply Agreements provide for the cure of both monetary and nonmonetary defaults.

In addition, the evidence demonstrated that Albertson's has been compensated for the out-of-pocked losses it claims it sustained as a result of Fleming's prior breaches and withdrawn all other claims. Albertson's admitted that it deducted its "substantial" out-of-pocket costs from its wire transfers to Fleming even though Albertson's profited when it began self-supplying its stores in Oklahoma and Nebraska. (Tr. 140:15-25; 141:1-15). Moreover, although Albertson's calculated the monetary value of other losses it claimed it incurred as a result of Fleming's deficiencies and originally identified a witness to testify about those losses, Albertson's chose to withdraw those claims on the morning of trial, presumably for tactical reasons. (Tr. 143:13-22). However, Albertson's prior assertion that it suffered monetary damages as a result of Fleming's alleged nonmonetary breaches is tantamount to an admission that such alleged defaults gave rise to quantifiable "pecuniary loss" and, as a result, the Bankruptcy Code authorizes assumption and assignment in this case. *See* 11 U.S.C. 365(b)(1)(B). That is, if damages from a nonmonetary breach are quantifiable and compensable, an executory contract is assignable by virtue of Section 365(b)(1)(B). Thus, because Albertson's has quantified its alleged losses (or at a minimum admitted it could have quantified its alleged losses), the Supply Agreements are assignable.

As explained in the previous section, Fleming need not cure the nonmonetary defaults before assuming and assigning the Supply Agreements under Section 365. However, even the Court were to rule otherwise, the terms of the Supply Agreements establish that Fleming's prior nonmonetary defaults may be cured and the evidence proves that these defaults have either been cured or waived. Consequently, the Supply Agreements should be assumed and assigned to AWG.

IV. ALBERTSON'S ARGUMENT THAT THE OKLAHOMA SUPPLY AGREEMENT "FAILS OF CONSIDERATION" IS SPURIOUS AND A RED HERRING.

Albertson's argues that because the lease for Fleming's Tulsa warehouse was rejected, the Oklahoma Supply Agreement fails for lack of consideration. (Objection p. 18). Albertson's argues that the grocery pricing formula of the Oklahoma Supply Agreement includes a fixed fee, based in part on the costs of operating the Tulsa warehouse, and because the Tulsa warehouse was closed, the consideration for the Oklahoma Supply Agreement has failed. But Albertson's cannot meet the test of failure of consideration under Oklahoma law – the failure of performance must be so fundamental that it "defeats the object of the contract." *Bonner v. Oklahoma Rock Corp.*, 863 P.2d 1176, 1186 (Okla. 1993). Indeed Albertson's witnesses admitted that despite the closing of the Tulsa warehouse, Albertson's received, and will continue to receive, exactly what it bargained for – the sale of the warehouse to Fleming and a continuing supply of groceries at a favorable price.

Albertson's built the Tulsa warehouse in 1999 (Tr. 121:12-16) but was only able to operate it at sixty percent (60%) capacity. (Tr. 121:19-22). Albertson's considered shutting the facility down and was facing a substantial write-off of its investment in the warehouse. (Tr. 122:10-15). Therefore, in 2002, Albertson's sold the warehouse to its competitor Fleming for $66 million plus inventory for a total of approximately $78 million in a cash lump sum. (Tr. 121:17-18; Tr. 123:3-8; 124:10-12). Albertson's admitted in its Objection that part of the consideration for the Oklahoma Supply Agreement, including the fixed fee was the cash payment of at least $78 million which Albertson's received: "The Tulsa Agreement obligated Albertson's to pay Fleming the

Fixed Fee *as consideration for Fleming's acquisition* and operation of the Tulsa Facility." (Objection p. 18, emphasis added). Albertson's has not paid the cash back – this object of the contract has not been defeated – and therefore, there has been no failure of that portion of the consideration.

The other consideration received by Albertson's for the fixed fee was groceries. As Mr. Teall made clear, the fixed fee under the Oklahoma Supply Agreement was part of a method of pricing groceries which gave Albertson's an incentive to maximize its purchase of groceries – an incentive that will survive if the Supply Agreements are assigned to AWG. (Tr. 129:3-13; 131:18-25). Increased purchases by Albertson's will benefit Fleming because Fleming will receive one percent (1%) of Albertson's actual purchases from AWG. (Tr. 4:21-5:3). Mr. Teall believes that the fixed fee in Tulsa was beneficial to Albertson's because it helped Albertson's minimize its product costs over the long term. (Tr. 132:12-18).

Finally, Albertson's admitted there was nothing unique about the Tulsa warehouse. (Tr. 144:18-24). Mr. Teall could not identify anything about the Tulsa warehouse that made it uniquely suited to serving Albertson's Oklahoma stores. (*Id.*) Therefore nothing about the closing of the Tulsa warehouse defeats the purpose of the Oklahoma Supply Agreement. There is no failure of consideration if the grocery pricing formula under the Oklahoma Supply Agreement is applied to groceries supplied from a different warehouse. As discussed above (*see* Section I), AWG proposes to service these stores from Oklahoma City, which is acknowledged to be a "commercially reasonable substitute." Hence, all of the benefits Albertson's bargained for under the Oklahoma Supply Agreement – i.e., a reliable grocery supply and a favorable long-term pricing mechanism – will remain in place if the Oklahoma Supply Agreement is assigned to AWG. Albertson's will, in other words, receive the benefit of its bargain.

For these reasons, the Oklahoma Supply Agreement should be assumed and assigned to AWG.

CONCLUSION AND REQUEST FOR RELIEF

AWG Acquisition, LLC has proven it is ready, willing and able to perform both Supply Agreements in accordance with their terms. AWG has met its burden of providing adequate assurance of future performance of the Supply Agreements and none of the technical legal defenses raised by Albertson's have merit. It is appropriate for the Court to authorize assumption and assignment of these contracts under Section 365.

It is also fair and equitable for the Court to authorize assumption and assignment in this case because, if the Court were to rule otherwise, Albertson's would be allowed to retain the substantial benefits of its recent transaction with Fleming (including its receipt of more than $78 million in cash) but walk away from its long-term contractual obligations. Although Albertson's may "prefer" to avoid the Supply Agreements, the evidence establishes that Albertson's will realize the benefit of its bargain if the agreements are assigned to and performed by AWG.

Accordingly, the Court should grant Fleming's motion and authorize the assumption and assignment of the Albertson's Supply Agreements to AWG Acquisition, LLC forthwith.

Dated: December 24, 2003

Respectfully submitted,

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