

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re)	Chapter 11
)	
FLEMING COMPANIES, INC., <u>et al.</u> ,)	Case No. 03-10945 (MFW)
)	
Debtors.)	Jointly Administered
)	
)	Related to Docket Nos. 4535 and 4709
)	
)	Hearing Date: continued to 1/5/04 at 2:00 p.m.

**SUPPLEMENTAL OBJECTION OF THE RANDALL BENDERSON
1993-1 TRUST TO NOTICE PURSUANT TO SALE ORDER RE
ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY
CONTRACTS AND UNEXPIRED LEASES PURSUANT TO INSTRUCTION
FROM SUPERVALU INC. (HEARING DATE: DECEMBER 8, 2003)**

The Randall Benderson 1993-1 Trust (“Benderson”), by and through its undersigned counsel, hereby files this supplemental objection to the Notice Pursuant to Sale Order re Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Pursuant to Instruction From Supervalu Inc. (Hearing Date: December 8, 2003) (the “Notice”), which was filed by the above-captioned debtors and debtors-in-possession (the “Debtors”), and in support thereof, respectfully represents as follows:

Background

1. On or about April 1, 2003 (the “Petition Date”), the Debtors each filed a voluntary petition under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). Upon information and belief, the Debtors are still operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. Prior to the Petition Date, predecessors of the Debtors entered into leases for non-residential real property located in: (i) East Aurora, New York, which has been designated by the Debtors as lease no. NY-060 (the “East Aurora Lease”), (ii) Attica, New York, which has been designated by the Debtors as lease no. NY-059 (the “Attica Lease”), and (iii) Cheektowaga, New York, which has been designated by the Debtors as lease no. NY-035 (the “Cheektowaga Lease”); with the East Aurora Lease and the Attica Lease, collectively hereinafter referred to as the “Leases”). The Debtors are the current tenants under the Leases, and Benderson is the current landlord under the Leases.

3. Subsequent to the Petition Date, Benderson received a notice from the Debtors that the Debtors may assume and assign the Leases to other parties, as well as two other leases that the Debtors were a party to with affiliates of Benderson. In response to such notice, on or about July 25, 2003, Benderson filed the Landlords’ Objection to Debtor’s Statement of Cure Amount for Store #NY060 - East Aurora, NY (Contract Assignment #7012), Store #NY059 - Attica, NY (Contract Assignment #7013), Store #NY035 - Cheektowaga, NY (Contract Assignment #7014), Store #NY042 - Orchard Park, NY (Contract Assignment #7062), and Store #NY056CS - Orchard Park, NY (Contract Assignment #6431) (Docket No. 2490) (the “Original Cure Objection”).

4. Pursuant to the Original Cure Objection, as of July 25, 2003, Benderson asserted that certain cure amounts were owed to Benderson if the Debtors desired to assume and assign the Leases. On or about November 21, 2003, the Debtors filed the Notice, pursuant to which they sought to assume and assign the Leases to proposed assignees. On or about December 2, 2003, Benderson filed an Amended Cure Objection to include revised cure amounts that were owed

under the Leases as of that time (Docket No. 4709) (the “Amended Cure Objection”).

5. Since the filing of the Amended Cure Objection, Benderson has attempted to obtain adequate assurance information concerning the proposed assignees for the Cheektowaga Lease and the East Aurora Lease.¹ However, to date, Benderson has only obtained limited information regarding the proposed assignee for the East Aurora Lease, DJR Foods, Inc. (“DJR”), which reveals, among other things, that DJR has a negative net worth. To date, Benderson has not obtained any information regarding the proposed assignee for the Cheektowaga Lease, Mask Foods, Inc. (“Mask”). Upon information and belief, Mask is currently assembling its adequate assurance information and will be forwarding it to Benderson in the near future. However, unless and until Benderson is provided with adequate assurance of the proposed assignees’ ability to perform under the Leases in the future, Benderson objects to the assumption and assignment of the Cheektowaga Lease and the East Aurora Lease, and submits that the hearing with respect to the Notice and the Leases cannot go forward at the January 5, 2004 hearing.

Benderson’s Supplemental Objection to the Assumption and Assignment of the Leases

6. Benderson objects to the assumption and assignment of the Leases pursuant to sections 365(b) and (f) of the Bankruptcy Code. Bankruptcy Code sections 365(b)(1), 365(b)(3) and 365(f)(2) require the Debtors to present evidence that either the Debtors, or any proposed assignee, will be able, financially and otherwise, to fully perform the tenant’s obligations under the Lease. In order to evaluate the evidence that the Debtors must tender, at a minimum, Benderson is entitled to receive, without limitation, financial projections for the proposed

¹ Upon information and belief, the Debtors have since decided to reject the Attica Lease. However, if such is not the case, then Benderson also needs information regarding the proposed assignee for the Attica Lease, BB&T Supermarkets, Inc.

assignees, balance sheets reflecting the proposed assignees' assets and liabilities at the time of assignment, financial and personnel information regarding the proposed assignees, the extent to which any other entities are responsible for the proposed assignees' operations and financial health, and disclosure of the proposed management of the proposed assignees and their qualifications. Without any such evidence of the proposed assignees' ability to perform in the future, the Court must deny the relief sought in the Notice with respect to at least the East Aurora Lease and the Cheektowaga Lease.

WHEREFORE, for all the foregoing reasons, Benderson respectfully requests that the Court enter an order that denies the Debtors' request to assume and assign the Leases until further information is provided with respect to the proposed assignees' adequate assurance of future performance under the Leases, and that grants such other and further relief as the Court deems just and proper.

Dated: December 29, 2003
Wilmington, Delaware

/s/ Karen C. Bifferato
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