

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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In re: : Chapter 11
FLEMING COMPANIES, INC., et al., : Case No. 03-10945 (MFW)
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Debtors. : Jointly Administered
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 : **Objection Deadline: October 28, 2003, at**
 : **12:00 p.m. (Eastern) (Docket Item 4117)**
 :
 : **Hearing Date: November 4, 2003,**
 : **at 2:00 p.m. (Eastern)**
 :
 : **Related Docket No.: 4117**
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**ORDER APPROVING ASSUMPTION AND
ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS
AND UNEXPIRED LEASES TO 36-MACARTHUR, LLC**

Upon the motion¹ (the "Sale Motion") dated July 11, 2003 of Fleming Companies, Inc., Fleming Transportation Service, Inc., Piggly Wiggly Company, RFS Marketing Services, Inc., Fleming International, Ltd., Fleming Foods of Texas, L.P., and Fleming Foods Management Co., LLC (collectively, the "Selling Debtors"), seven of the above-captioned debtors and debtors in possession (collectively, the "Debtors")² in the above-captioned cases, for entry of an order, under Sections 105(a), 363(b), (f), and (m), 364, 365, and 1146(c) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004, 6006, 9014 and 9019 of the Federal Rules

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the APA (as defined herein) and the Sale Motion, and to the extent of any inconsistency, the APA shall govern.

² The Debtors are the following entities: 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

of Bankruptcy Procedure (the "Bankruptcy Rules"), (A) approving the asset purchase agreement (as amended, the "APA"), by and among the Selling Debtors, C&S Acquisition LLC, as Purchaser (including any affiliated assignee or designee of such company, the "Purchaser") and C&S Wholesale Grocers, Inc. ("C&S"), and such other agreements to be entered into among the parties thereto as contemplated therein, (B) authorizing (i) the sale (the "Sale") of substantially all of the Selling Debtors' assets and business operations relating to their Wholesale Distribution Business and certain other assets designated in the APA (the "Acquired Assets") free and clear of all Liens, claims, Encumbrances, Offset Rights, and Interests (except the Permitted Encumbrances and Assumed Liabilities under the APA), pursuant to and as described in the APA to Purchaser or any Third Party Purchaser (as defined therein), as the case may be, and (ii) the assumption and assignment to Purchaser or any Third Party Purchaser, as the case may be, of executory contracts and unexpired leases under Sections 365(a) and (f) of the Bankruptcy Code both as of the Initial Closing Date and during the Option Period, and (C) granting related relief; and upon the Order of this Court dated July 18, 2003, approving the bidding procedures in connection with the Sale and notice of the hearing with respect to the Sale (the "Bidding Procedures Order"); and upon the record made at hearings held before this Court with respect to the relief sought in the Sale Motion on August 4, 2003, August 7, 2003 and August 14, 2003 (collectively the "Sale Hearing"), including the relevant pleadings, the evidence proffered or adduced and arguments of counsel; and upon the Order of this Court dated August 15, 2003 approving the APA and the Sale (the "Sale Order"); and all parties in interest having been heard, or having had the opportunity to be heard, regarding the assumption and assignment of the executory contracts

Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

and unexpired leases to be assumed and assigned as of the next Subsequent Closing Date to 36-MacArthur, LLC (the "36-MacArthur Acquired Contracts"); and it appearing from the affidavits of service filed with the Court that due and sufficient notice of the Sale Motion, the Supplemental List and the relief granted by this Order have been provided to all parties affected thereby; and it further appearing that no other or further notice hereof is required; and upon the Court record of these cases; and it appearing that the relief requested in the Sale Motion regarding the assumption and assignment of the 36-MacArthur Acquired Contracts is in the best interests of the Selling Debtors, their estates, creditors, and other parties-in-interest; and after due deliberation and good and sufficient cause appearing therefor, this Court hereby makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

IT IS HEREBY FOUND AND DETERMINED THAT:³

Jurisdiction, Final Order and Statutory Predicates

A. The Court has jurisdiction to hear and determine the Sale Motion and to grant the relief requested therein, pursuant to 28 U.S.C. §§ 157(b)(1) and 1334(b). This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (N) and (O).

B. This Order constitutes a final and appealable order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rule 6006(d), the parties may consummate the assumption and assignment of the 36-MacArthur Acquired Contracts immediately upon entry of this Order. To any extent necessary under Bankruptcy Rule 9014 and Rule 54(b) of the Federal

³ Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052. Any statements of the Court from the bench at the Sale Hearing shall constitute

Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7054, the Court expressly finds that there is no just reason for delay in the implementation of this Order.

C. The statutory predicates for the relief sought herein are Sections 105(a) and 365 of the Bankruptcy Code, as complemented by Rules 2002, 6006(a) and (c) and 9014 of the Bankruptcy Rules.

Retention of Jurisdiction

D. It is necessary and appropriate for the Court to retain jurisdiction to, among others things, interpret, implement, and enforce the terms and provisions of this Order and to adjudicate, if necessary, any and all disputes concerning or relating in any way to the assumption and assignment of the 36-MacArthur Acquired Contracts.

Notice of the Assumption and Assignment

E. As evidenced by the affidavits of service previously filed with this Court, (i) proper, timely, adequate, and sufficient notice of the Sale Motion and the assumption and assignment of the 36-MacArthur Acquired Contracts has been provided in accordance with Sections 102(1) and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6006, and 9014 and in substantial compliance with the Bidding Procedures Order.

F. Actual written notice of the August 14, 2003 hearing, the Sale Motion and any adjournments or continuances thereof, and the assumption and assignment of the 36-MacArthur Acquired Contracts and a reasonable opportunity to object or be heard with respect to the Sale Motion and the assumption and assignment of the 36-MacArthur Acquired Contracts has been afforded to all interested persons and entities, including, but not limited to: (i) counsel to the

additional findings of fact and conclusions of law as appropriate and are expressly incorporated by reference into this Order to the

Official Committee of Unsecured Creditors (the "Committee"); (ii) counsel to the Agents for the Debtors' pre-petition lenders and post-petition lenders; (iii); counsel to Purchaser; (iv) all non-debtor counterparties to the 36-MacArthur Acquired Contracts; (v) counsel to the United States Trustee; (vi) any entity that has filed a notice of appearance and demand for service of papers in these bankruptcy cases pursuant to Bankruptcy Rule 2002; and (vii) all parties holding Liens against the Selling Debtors' estates.

G. In accordance with the provisions of the Bidding Procedures Order and the hearing held on July 17, 2003, the Debtors served a supplemental assignment list (the "Supplemental List") (Docket 4117) upon each non-debtor counterparty to a 36-MacArthur Acquired Contract. The service of the Supplemental List, in connection with service of the Original Cure Notice (as defined in the Sale Order), the Supplemental Cure Notice (as defined in the Sale Order) and notice of the Sale Motion and the hearing to consider the assumption and assignment of the 36-MacArthur Acquired Contracts, was good and sufficient and appropriate under the circumstances and no further notice need be given in respect of the assumption and assignment of the 36-MacArthur Acquired Contracts. Such non-debtor counterparties have had an opportunity to object to the assumption and assignment of their respective 36-MacArthur Acquired Contracts, including without limitation the cure amounts due and adequate assurance of future performance in respect thereof.

II. On August 4, 2003, Purchaser identified AWG Acquisition, LLC ("AWG Acquisition"), a wholly owned subsidiary of Associated Wholesale Grocers, Inc. ("AWG"), as a Third Party Purchaser pursuant to the APA. Pursuant to the Sale Order, AWG Acquisition was

extent not inconsistent herewith.

approved as a Third Party Purchaser of certain of the Debtors' assets. 36-MacArthur, LLC ("36-MacArthur") is a designee of the Third Party Purchaser, AWG Acquisition. The Supplemental List specifically identified 36-MacArthur as the proposed assignee of the AWG Acquired Contracts.

I. Based on the findings set forth in paragraphs E through H above, such notice was good and sufficient, and appropriate under the circumstances, and no other or further notice of the Sale Motion, the November 4, 2003 hearing (Docket 4115), or any adjournment or continuances thereof, or the assumption and assignment of the 36-MacArthur Acquired Contracts shall be necessary or required.

II. ORDERS OF THE COURT:

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, EFFECTIVE IMMEDIATELY, AS FOLLOWS:

1. The relief requested in the Sale Motion with respect to the assumption and assignment of the 36-MacArthur Acquired Contracts is granted and approved to the extent provided herein, and the assumption and assignments contemplated thereby are hereby approved to the extent provided herein.

2. Attached hereto as Exhibit A is a schedule setting forth the 36-MacArthur Acquired Contracts that the Selling Debtors are authorized to assume and assign to 36-MacArthur as of the next Subsequent Closing Date. Subject to the terms of the APA, 36-MacArthur shall have the right to defer or revoke any 36-MacArthur Acquired Contract from Exhibit A at any time prior to the next Subsequent Closing Date, and to the extent so deferred or revoked, such Acquired Contract shall no longer be deemed a 36-MacArthur Acquired Contract.

The Selling Debtors shall provide prompt notice to the non-debtor party to any Acquired Contract that is so revoked or deferred.

3. The Selling Debtors and 36-MacArthur have cured (or as of the next Date, will have cured), or have provided adequate assurance of a prompt cure of, all defaults arising under the 36-MacArthur Acquired Contracts that are required to be cured by Section 365(b)(1)(A) of the Bankruptcy Code (after giving effect to Section 365(b)(2) of the Bankruptcy Code).

4. As to each 36-MacArthur Acquired Contract noted thereon, Exhibit A also sets forth in the column headed "Cure Amount" the amount payable under Section 365(b)(1)(B) of the Bankruptcy Code (the "Cure Amount") for such 36-MacArthur Acquired Contract. As to all specified Cure Amounts, 36-MacArthur shall pay, or cause to be paid from the Cure Escrow, the applicable Cure Amount within 10 business days following the next Subsequent Closing Date. The provisions of this paragraph 4 satisfy the requirements under Section 365(b)(1)(B) of the Bankruptcy Code that the Selling Debtors compensate or provide adequate assurance of prompt compensation for any defaults as to each of the 36-MacArthur Acquired Contracts. The non-debtor parties to the 36-MacArthur Acquired Contracts shall not be entitled to any further or additional compensation other than as provided in this paragraph 4 on account of defaults under its 36-MacArthur Acquired Contract accruing, arising or otherwise relating to the period prior to the next Subsequent Closing Date.

5. No objections to the assumption and assignment of the 36-MacArthur Acquired Contracts had been filed with the Court as of the deadline to file objections, October 28, 2003.

6. With respect to those 36-MacArthur Acquired Contracts being assigned to 36-MacArthur on the next Subsequent Closing Date, none of AWG, AWG Acquisition, C&S,

Purchaser or any of their affiliates, successors or assigns, shall have any liability or obligations, and, subject to the terms of the Joinder Agreement, 36-MacArthur shall be the sole party responsible for the liabilities and obligations under such 36-MacArthur Acquired Contract arising or relating to the period from and after the effective date of such assignment to 36-MacArthur. Similarly, none of 36-MacArthur or any of its affiliates, successors or assigns, shall have any liability or obligations, and, subject to terms of the APA, C&S, Purchaser, their affiliates or other Third Party Purchaser, as the case may be, shall be the sole party responsible for the liabilities and obligations under any Acquired Contract that is not a 36-MacArthur Acquired Contract arising or relating to the period from and after the effective date of such assignment of such other Acquired Contract to either C&S, Purchaser, their affiliates or other Third Party Purchaser. With respect to those 36-MacArthur Acquired Contracts being assigned to 36-MacArthur on the next Subsequent Closing Date, none of the Debtors or their respective successors shall be responsible for the liabilities or obligations under such 36-MacArthur Acquired Contract arising or relating to the period of time from and after the effective date of such assignment to 36-MacArthur.

7. Any provision restricting the assignment of or the effectiveness of any 36-MacArthur Acquired Contract shall be null, void and of no force and effect in connection with the assignment to Purchaser or any of its designees, including without limitation, the following provisions:

- (i) any provision of any 36-MacArthur Acquired Contract or any agreement ancillary thereto that purports to prohibit, condition, or otherwise restrict the assignment by the Selling Debtors to 36-MacArthur;

(ii) any provision of any 36-MacArthur Acquired Contract or agreement ancillary thereto that permits the landlord at any time after closing to declare a default, terminate, modify, or cancel the lease, increase the payments or obligations thereunder (including without limitation, increasing the rent), exercise a right (whether based in law, equity, or otherwise) of recapture or termination, require the payment of any fee, impose any penalty, prevent the assignee from exercising any renewal options, seek damages, or seek other relief by reason of (a) the assignment of the lease to 36-MacArthur or its designee(s) or (b) a change of control of the Selling Debtors;

(iii) any provision of any 36-MacArthur Acquired Contract or agreement ancillary thereto that purports to terminate or modify the applicable agreement (including without limitation, by increasing the rental obligations) if any of the Selling Debtors cease to be a party to such agreement; or

(iv) any provision that requires a payment to any entity, including without limitation, the non-debtor party, as a result of, as a condition to, or relating to the transfer or assignment of such agreement.

8. Pursuant to Section 365(k) of the Bankruptcy Code, the Debtors shall have no liability under any 36-MacArthur Acquired Contract (that has not been deferred or revoked) following the next Subsequent Closing Date.

9. Subject to the payment of the Cure Amount identified in paragraph 4, each non-debtor party to a 36-MacArthur Acquired Contract is hereby barred from asserting against AWG, AWG Acquisition, 36-MacArthur, or any other designee any default, claim or liability existing, accrued, arising or relating to a period prior to the next Subsequent Closing Date.

10. The failure (if any) of the Selling Debtors or AWG, AWG Acquisition, 36-MacArthur, or any other designee to enforce at any time one or more terms or conditions of any 36-MacArthur Acquired Contract shall not be a waiver of such terms or conditions, or of any of the rights of any such party to enforce each and every term and condition of such 36-MacArthur Acquired Contract.

11. Except to the extent actually assumed and assigned to 36-MacArthur or any designee none of AWG, AWG Acquisition, 36-MacArthur, or any other of its designees shall have any liability under any Acquired Contract, including any 36-MacArthur Acquired Contract.

12. This Court retains jurisdiction, even after the closing of these chapter 11 cases, to:
- (a) interpret, implement and enforce the terms and provisions of this Order;
 - (b) enter orders in aid or furtherance of the assumption and assignment of the 36-MacArthur Acquired Contracts;
 - (c) compel delivery of all 36-MacArthur Acquired Contracts to 36-MacArthur or the applicable designee noted on Exhibit A;
 - (d) adjudicate any and all remaining issues concerning the Selling Debtors' right and authority to assume and assign the 36-MacArthur Acquired Contracts and the rights and obligations of AWG, AWG Acquisition, 36-MacArthur, or any other designee with respect to such assignment and the existence of any default under any such 36-MacArthur Acquired Contract;
 - (e) adjudicate any and all issues and/or disputes relating to the Debtors' right, title, or interest in the 36-MacArthur Acquired Contracts and the proceeds thereof; and

(f) re-open the Debtors' chapter 11 case to enforce the provisions of this Order.

13. This Order shall be effective immediately upon entry and Bankruptcy Rule 6006(d) shall not apply.

14. The provisions of this Order are non-severable and mutually dependent.

Dated: Wilmington, Delaware

Jan. 6, 2009

Maureen Walsh
UNITED STATES BANKRUPTCY JUDGE