

**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.)	Hearing Date: TBD
_____)	Objections Deadline: TBD

**EXPEDITED MOTION OF AWG ACQUISITION, LLC TO COMPEL
PRODUCTION OF DOCUMENTS AND INFORMATION
BY GLN, INC. AND KIMBALL'S SUPER FOODS**

AWG Acquisition, LLC and Associated Wholesale Grocers, Inc. (collectively “AWG”) hereby move the Court for an order compelling GLN, Inc. (“GLN”) and Kimball’s Super Foods (“Kimball’s”) to produce certain documents and information that have been duly requested in discovery subject to reasonable restrictions on AWG’s subsequent dissemination of such documents and information to its employees and third parties. The timely receipt of such discovery is critical to the conduct of the imminent hearing on the Debtors' Motion to Assume and Assign for which this Court has set aside two days, February 5 and 6, 2004.

Specifically, AWG seeks an order that:

- (i) compels GLN and Kimball’s to immediately produce all requested documents and information regarding sales, profits, costs and losses for stores previously supplied by Fleming;
- (ii) prohibits AWG from disclosing any documents and information produced by GLN and/or Kimball’s and marked “confidential” to any person involved in the management and operation of Homeland[®] grocery stores;

(iii) prohibits AWG from disclosing any documents and information produced by GLN and/or Kimball's and marked "confidential" to any other person unless (a) AWG reasonably believes such person can assist AWG in the present litigation involving GLN and Kimball's; and (b) such person agrees not to disclose the documents and information to any person involved in the management and operation of Homeland[®] stores; and

(iv) requires the parties to schedule all remaining depositions within one week after GLN and Kimball's produce the documents and information requested by AWG.

Pursuant to and in compliance with Local Rule 7.1.1, AWG advises the Court that counsel have conferred and made a reasonable and good-faith effort to resolve this dispute prior to filing this motion. Counsel's efforts were unsuccessful, however.

In support of this motion, AWG states and asserts as follows:

1. On November 7, 2003, AWG, the Debtors, C&S Wholesale Grocers, Inc. and C&S Acquisition, LLC jointly served document requests and interrogatories on GLN and Kimball's. (*See* Exhibits A-D). These discovery requests sought production of, among other things, the following documents and information:

1. Documents concerning any lost profits or out-of-pocket costs GLN and Kimball's claim as a result of Fleming's alleged breaches of the supply agreements (Exh. A, ¶ 12; Exh. B, ¶ 12);

2. Information concerning the gross sales for GLN and Kimball's grocery stores supplied by Fleming from March 1, 2002 to the present (Exh. C, ¶ 49; Exh. D, ¶ 49);

3. Information regarding the gross and net profits for GLN and Kimball's grocery stores supplied by Fleming from March 1, 2002 to the present (Exh. C, ¶¶ 51-52; Exh. D, ¶¶ 51-52); and

4. Information regarding the weekly sales volumes for GLN and Kimball's grocery stores supplied by Fleming from March 1, 2002 to the present (Exh. C, ¶ 53; Exh. D, ¶ 53).
2. GLN and Kimball's have not yet served written responses to AWG's discovery requests. Counsel have discussed the discovery requests and the parties' respective positions, however, most recently on January 8-9, 2004.
3. GLN and Kimball's do not contend that the requested documents and information are irrelevant or otherwise beyond the scope of permissible discovery. *See* FED. R. CIV. P. 26(b). They cannot make such a contention because the requested items are relevant and material to the issues of whether and to what extent, if any, GLN and Kimball's are entitled to recover their alleged "cure amounts" if Fleming's supply agreements with GLN and Kimball's are assigned to AWG. Indeed, GLN and Kimball's assert they incurred losses of \$5.7 million and \$283,000, respectively, as a result of Fleming's alleged prior breaches of the supply agreements. (D.I. 2312, ¶ 5, Exh. D; D.I. 2437, ¶ 5, Exh. D). These purported "cure amounts," according to GLN and Kimball's, include items such as "profit on lost sales," "lost margin on actual sales," "additional labor costs," "loss of sales," "higher cost of goods," and "future loss of revenue and profit resulting from [the] inability to adequately satisfy customer needs." (*Id.*) Accordingly, there is no dispute that the requested documents and information are directly relevant to the "cure" claims of GLN and Kimball's and should be produced.
4. Although GLN and Kimball's have implicitly acknowledged the relevance of the requested business information, GLN and Kimball's have advised that they will not produce the so-called "confidential" information to AWG unless the production is limited to "attorneys eyes only." Stated differently, GLN and Kimball's have refused to produce

the requested documents and information unless AWG agrees to enter into a protective order that only allows AWG's lawyers to see the documents.¹

5. As the Court may recall, one of AWG's subsidiaries (Associated Retail Grocers, L.L.C.) owns a subsidiary (HAC, Inc.) which owns a number of Homeland[®] grocery stores in Oklahoma. Some of these Homeland[®] stores compete with some of the grocery stores owned by GLN and Kimball's. Because AWG has an indirect ownership interest in the Homeland[®] stores, GLN and Kimball's are purportedly concerned they might suffer competitive disadvantage if the requested business information is produced to AWG and it ends up in the hands of employees who manage or operate the Homeland[®] stores. This fear that AWG might misuse the information – albeit unfounded – is the sole basis of GLN and Kimball's demand that the information be restricted to “attorneys eyes only.” (*Id.*).

6. In response to this demand, AWG advised that it could not and would not agree to restrict the production of GLN and Kimball's to “attorneys eyes only” for one simple reason: to prepare for upcoming depositions and the hearing in this matter, AWG's counsel must be able to review and discuss the information produced by GLN and Kimball's with certain AWG employees (and perhaps third-party consultants) who have expertise in the grocery business ***but who have no involvement in the management and operation of the Homeland[®] stores.*** Simply stated, AWG cannot adequately prepare for the upcoming depositions and hearing in this matter if its hands are tied in the manner proposed by GLN and Kimball's. Furthermore, to limit access to “attorneys eyes only”

¹ GLN and Kimball's have offered to produce the requested information to Fleming without a similar restriction, provided that Fleming agrees not to share the information with AWG until after the pending discovery dispute has been resolved. To the best of AWG's knowledge, GLN and Kimball's have not produce the requested information to Fleming as of the date of this motion.

would likely have the effect of unnecessarily increasing AWG's legal fees and expenses for this litigation, which would be inequitable and unfair to AWG. Again, AWG has no objection to prohibiting the disclosure of this information to individuals who have some legitimate connection to the management and operation of Homeland® stores, but AWG must be allowed to draw on the knowledge and skills of those individuals who have no involvement in the management or operation of Homeland® to adequately prepare for discovery and trial. *See, e.g., THK America, Inc. v. NSK Co. Ltd.*, 157 F.R.D. 637, 639-40 (N.D. Ill. 1993) (affirming Magistrate Judge's order allowing employees of party to review sensitive information produced by other party so as to assist in the evaluation and prosecution of the litigation).

7. To eliminate any perceived concern that AWG might use the information to its competitive advantage, and in an effort to resolve this dispute, AWG offered to impose reasonable restrictions on its dissemination of the requested business information. Specifically, AWG proposed that GLN and Kimball's produce the requested information subject to the following conditions: (i) AWG shall be prohibited from disclosing the documents and information to any person involved in the management and operation of stores that grocery compete with GLN-owned and Kimball's-owned stores; and (ii) AWG shall not disclose the documents and information to any other person unless AWG reasonably believes such person can assist AWG in the present litigation involving GLN and Kimball's. GLN and Kimball's rejected this proposal and once again demanded that any production must be limited to "attorneys eyes only."

8. For the reasons discussed above, AWG respectfully requests the Court to issue an order in the form attached as Exhibit E that:

(i) compels GLN and Kimball's to immediately produce all requested documents and information regarding sales, profits, costs and losses for stores previously supplied by Fleming;

(ii) prohibits AWG from disclosing any documents and information produced by GLN and/or Kimball's and marked "confidential" to any person involved in the management and operation of Homeland[®] grocery stores;

(iii) prohibits AWG from disclosing any documents and information produced by GLN or Kimball's and marked "confidential" to any other person unless (a) AWG reasonably believes such person can assist AWG in the present litigation involving GLN and Kimball's; and (b) such person agrees not to disclose such documents and information to any person involved in the management and operation of Homeland[®] stores; and

(iv) requires the parties to schedule all remaining depositions within one week after GLN and Kimball's produce the requested information and documents.

9. The issuance of such an order would not only be fair and equitable to all interested parties, but it would also serve the interests of justice.

10. So as to avoid any further delay and enable the parties to complete all necessary discovery prior to the hearing set for February 5 and 6, 2004, by Motion for Expedited Hearing filed contemporaneously herewith, AWG has requested an expedited telephonic hearing on this matter.

11. AWG further informs the Court that GLN's counsel has advised that he intends to file a motion for protective order addressing similar issues.

Dated: January 14, 2004

Respectfully submitted,

/s/ Selinda A. Melnik

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