

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
Fleming Companies, Inc., et al. : Case No. 03-10945 (MFW)
: Jointly Administered
Debtors. :
:
:

Hearing Date: TBD
Objections by: TBD

**RESPONSE OF GLN, INC. TO EXPEDITED MOTION OF AWG ACQUISITION, LLC
TO COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION BY GLN, INC.
AND KIMBALL'S SUPER FOODS AND CROSS MOTION OF GLN, INC. FOR A
PROTECTIVE ORDER OF GLN, INC. WITH RESPECT TO INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS ISSUED BY FLEMING, INC.
AND AWG ACQUISITION, LLC**

GLN, Inc. (and the subsidiaries of GLN) by its undersigned attorneys, hereby responds to the Expedited Motion of AWG Acquisition, LLC to Compel Production of Documents and Information by GLN, Inc. and Kimball's Super Foods and Cross Motion of GLN, Inc. for a Protective Order of GLN, Inc With Respect to Interrogatories and Request for Production of Documents Issued by Fleming, Inc. and AWG Acquisition, LLC pursuant to Federal Rule of Civil Procedure 26 (c)¹, and Delaware Local Rules 30.2² and 37.1³. In support of this response

¹ Federal Rule of Civil Procedure 26 applies to contested matters pursuant to Federal Rule of Bankruptcy Procedure 9014 (c).

² Rule 30.2 provides:

Pending resolution of any motion under Fed. R. Civ. P. 26 (c) or 30 (d) the timely filing of a motion under either of these rules shall stay the discovery to which the motion is directed pending further order of the court.

³ Rule 37.1 provides:

Any discovery motion filed pursuant to Rules 26 through 37 of the Federal Rules of Civil Procedure shall include, in the motion itself or in a memorandum, a verbatim recitation of each interrogatory, request, answer, response, and objection which is the subject of the motion or shall have attached a copy of the actual discovery document which is the subject of the motion.

and cross motion, GLN and Kimball's Super Foods respectfully represent as follows:

BACKGROUND

1. GLN and Fleming Companies, Inc. (the "Debtor"), are each parties to supply agreements (each a "Facility Standby Agreement" or "FSA"). Pursuant to the FSAs, the Debtor agreed to supply food and other products to GLN and other retailers and GLN agreed to purchase certain minimum quantities or pay a standby fee.

2. In order to persuade GLN and other retailers to enter into the FSAs, the Debtor extended loans, evidenced by promissory notes (the "Notes" or "Note"), in varying amounts. All, or substantially all, of the Notes were accompanied by a letter or an amendment (the "Note Amendment"), executed at the same time as the original Note and FSA, which provided for forgiveness of all, or at a minimum, substantial portions, of the Notes if certain minimum purchase levels are maintained under the FSA.

3. On April 1, 2003, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

4. On July 11, 2003, the Debtor filed the Motion for Order (A) Approving Asset Purchase Agreement with C&S Wholesale Grocers, Inc. and C&S Acquisition LLC, Authorizing (I) Sale of Substantially All of Selling Debtors' Assets Relating to the Wholesale Distribution Business to Purchaser or its Designee(s) or Other Successful Bidder(s) at Auction, Free and Clear of all Liens, Claims, Encumbrances and Interests and (II) Assumption and Assignment of Certain Executory Contracts, License Agreements, and Unexpired Leases, and (B) Granting Related Relief (the "Sale Motion"). Pursuant to the Sale Motion, the Debtor sought permission to sell the Notes to the Purchaser or its Designee free and clear of liens and claims, including the right to setoff.

5. In the order approving the Sale Motion as modified (Docket No. 3142) (the "Sale Order"), the Court allowed the Notes to be sold to the Purchaser or its Designee, provided such sale was to be null and void if it was later determined by this Court that the Notes are part of an integrated executory contract with the FSAs or are executory contracts in their own right.

6. On or about August 29, 2003, GLN and other retailers filed an Omnibus Motion for an Order (A) Determining that the Notes and Note Amendments are Executory Contracts and (B) to Compel the Debtor to (1) Reject Certain Facility Standby Agreements, Notes and Notes Amendments (the "Agreements") Pursuant to 11 U.S.C. § 365(d)(2), or (2) In the Alternative, to Establish a Deadline by Which the Debtors Must Assume or Reject the Agreements (the "Omnibus Motion"). On or about August 4, 2003 the Debtor filed a Notice to Assume and Assign the GLN FSA to AWG (the "Notice to Assume and Assign").

7. On or about November 7, 2003, AWG and Fleming⁴ propounded Interrogatories in connection with both the Omnibus Motion and the Notice to Assume and Assign upon GLN, Kimball's Super Foods ("Kimball's") and other retailers. See Exhs. B and D of AWG's Motion to Compel.

8. On or about November 7, 2003, AWG and Fleming also propounded Document Requests in connection with both the Omnibus Motion and the Notice to Assume and Assign upon GLN and other retailers. See Exhs. A and C of AWG's Motion to Compel.

9. Because of the sensitive, highly confidential and proprietary nature of the information GLN would have to produce, in late November and early December, counsel for GLN proposed a protective order under which only Fleming would receive the confidential information.

⁴ C&S also issued discovery, but it has settled its claim so this motion will solely focus upon AWG and Fleming.

10. Because the issue remained unresolved and GLN had not received a response to the initial protective order, on December 18, 2003, counsel for GLN sent Jeff Kennard a revised protective order that would allow full access of Fleming and its attorneys and access for AWG's attorneys, but not AWG business people, to review and analyze the confidential information. A copy of the proposed Protective Order is attached hereto, and made a part hereof, as Exh. A.

11. The parties had agreed to a January 5, 2004 deadline to exchange discovery. Because GLN had not received a response from AWG or Jeff Kennard about its proposed protective order, counsel for Fleming and GLN spoke that day about what to do concerning the discovery deadline.

12. GLN was willing and prepared to exchange full discovery with Fleming provided that Fleming agreed not to give AWG access to the documents. Because depositions were scheduled the week of January 12, Fleming's counsel was willing to keep the documents confidential for one week. Fleming would not agree to do so for a longer time period because of the impending depositions. Counsel for GLN and Kimball's and counsel for Fleming could not resolve their differences.

13. Counsel for GLN and Kimball's told counsel for Fleming that they were prepared to produce the Kimball's discovery because Kimball's did not seek the entry of a protective order given that AWG did not have stores located nearby the Kimball's store. The Kimball's discovery was not exchanged, however, because counsel for Fleming did not want to receive piecemeal discovery responses.

14. Because counsel for Fleming and GLN could not agree to mutually acceptable terms under which to exchange discovery, on January 5, 2004, counsel for Fleming and GLN agreed to postpone the discovery exchange and the February 5 and 6, 2004 trial dates.

15. On January 8, 2004, counsel for all parties spoke. That call was convened because counsel for AWG wanted to keep the existing trial schedule and wanted to try to resolve the discovery issues. The parties were unable to resolve their differences and both AWG and GLN agreed to seek the court's assistance in resolving the dispute.

RESPONSE TO AWG MOTION TO COMPEL

16. As stated above, Kimball's does not seek the entry of a protective order and it has not refused to produce discovery. Kimball's has not produced discovery because Fleming has stated that it does not want to receive piecemeal discovery responses.

17. GLN has withheld its discovery responses pending the resolution of whether a protective order should be entered and for the reasons set forth in this response and below in GLN's cross motion. In response to the discovery sought here, GLN will produce detailed store by store gross sales, gross margins, net profits and weekly sales data (in response to Interrogatories 49-53) and product cost information (in response to Interrogatory 26 and Request 27). See Exhs. A and C attached to AWG's Motion to Compel.

18. AWG claims that the requested discovery is relevant to AWG's claims in this action, and GLN should therefore be compelled to produce documents and information subject to the terms set forth in ¶8 of its motion.

19. AWG's motion should be rejected partly because Fleming, not AWG, is the debtor in this action. AWG is not a moving party or direct respondent on either the Omnibus Motion or the Notice to Assume and Assign. As to the Notice to Assume and Assign, AWG is simply a hopeful potential assignee. As to the Omnibus Motion, AWG has a more direct interest since, if the Omnibus Motion is granted, the GLN note, currently held by AWG, will revert to the Debtor. However, the confidential information at issue relates to GLN's rejection damage claim and has

nothing to do with the integration issue which will drive whether the note sale is voided. Rather, the rejection damage claim relates to the Notice to Assume and Assign as to which, for the reasons stated above, AWG's interest is far more tenuous.

20. According to AWG, one of its wholly owned subsidiaries (Associated Retail Grocers, L.L.C.) owns a subsidiary (HAC, Inc.) which owns a number of retail grocery stores that directly compete with GLN in Oklahoma. See ¶5 of AWG motion. Those AWG stores conduct business under the name of Homeland®.

21. AWG proposes that GLN would be adequately protected if: (1) AWG is prohibited from producing confidential information to any person "involved in the management and operation of Homeland® grocery stores; and (2) AWG is prohibited from giving the confidential information to any other person unless (a) AWG reasonably believes that person can assist AWG in the present litigation and (b) that person agrees not to disclose the confidential information to any person "involved in the management and operation of Homeland® stores.

22. AWG's proposed restrictions do not adequately protect GLN and leave open the possible use, abuse or influence (subconsciously or consciously) of the confidential information upon persons who now or in the future may advise, supervise or interact with Homeland® management, officers or employees, thereby causing GLN serious injury.

23. It should be noted that Homeland® has two stores that are located extremely close to two GLN stores. One store is located only 8 to 10 blocks from GLN's Seminole, Oklahoma store and a second store is located directly across the street from GLN's Ardmore, Oklahoma store.

24. AWG's proposal is especially worrisome because GLN has reason to believe that two of AWG's executives regularly meet with and advise Homeland® management about operations and other strategic issues. Even if this does not occur, GLN believes that some AWG

employees who review the confidential information now or in the future may direct, advise, supervise or meet or interact with Homeland® about its business. In addition, third party consultants or others to whom AWG discloses the confidential information now or in the future may meet, advise, consult or interact with Homeland® about its business.

25. Although AWG's proposal prohibits the express disclosure of the confidential information to Homeland®, the proposal requires GLN to believe that AWG employees, third party consultants or others who review the detailed financial and business information will be completely uninvolved with Homeland®.

26. AWG's proposal does not account for or protect against persons who provide advice to Homeland® and may impart advice that is impacted or colored, consciously or subconsciously, by the confidential information. GLN is unwilling to trust that those persons to whom the confidential information is shown, will be able to erase the knowledge they gain from the GLN confidential information if they are so involved.

27. The AWG proposal should also be rejected because it is difficult to enforce. Even if the protective order states that AWG may not use the information for business purposes, AWG personnel, third party consultants or others who have reviewed the confidential information may advise Homeland® about pricing, marketing or other operating or strategic matters having been armed with the confidential GLN information.

28. Armed with GLN's confidential information, Homeland® could increase its business and market share through minor adjustments to pricing, strategic or marketing strategy, based upon advice given by AWG employees, consultants or others who have reviewed it. It would be difficult to determine if the confidential information had been disclosed much less influenced decisions.

29. If Homeland's® operations are influenced, directly or indirectly, by the confidential information, GLN may have to resort to increased advertising expenditures or cost cutting. In that case, GLN could lose market share, profits would be reduced and it may have to cut prices to retain customers.

30. Because myriad factors influence shoppers to buy one product versus another or to shop at one store versus another, subtle variations in pricing, marketing or strategy may have an impact on GLN's and Homeland's® retail grocery business. Most importantly, shoppers are strongly motivated by price and advertised special deals. Therefore, identifying subtle changes in strategy that resulted from the disclosure of the confidential information will be extremely difficult.

31. Consequently, enforcing the AWG proposal would primarily rest upon AWG, Homeland® or third party consultants voluntarily admitting they had violated the terms of the protective order.

32. Accordingly, compelling GLN to disclose the confidential information under the terms AWG proposes would enable AWG, through Homeland®, to gain a competitive advantage over GLN.

33. In light of the foregoing, GLN respectfully submits that AWG's motion to compel should be denied.

ARGUMENT SUPPORTING CROSS MOTION FOR PROTECTIVE ORDER

34. GLN cross moves for a protective order under Federal Rule of Civil Procedure 26(c) for documents or information produced to AWG concerning gross sales, gross margins, net profits and weekly sales data (in response to Interrogatories 49-53) and cost of goods sold data on a percentage basis.

35. In support of its cross motion, GLN incorporates the arguments it has asserted above in opposition to AWG's motion to compel. For those reasons and the reasons set forth below, GLN cross moves for the entry of a protective order in the form set forth as Exh. A, attached hereto and made a part hereof.

36. Federal Rule of Civil Procedure 26 (c) provides:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...

(2) that the disclosure or discovery may be had only upon specified terms and conditions, including a designation of time or place...

37. Courts have consistently recognized the need to enter protective orders to protect confidential and proprietary information during discovery. Accord, United States of America v. Dentsply Int'l, Inc., 187 F.R.D. 152 (D. Del. 1999). Under Rule 26(c) the burden is on GLN to show good cause. Good cause exists when disclosure will result in a clearly defined and serious injury to the party seeking the protective order. Publiker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984). In determining good cause, the court must balance the risk of injury without the protective order and the requesting party's need for the information. Pansy v. Borough of Stroudsburg, 23 F. 3d 772, 787 (3d Cir. 1994).

38. For the reasons set forth herein, GLN can show good cause to enter the proposed protective order to prevent AWG from gaining access to discovery that will provide it with a competitive business advantage over GLN and would cause serious injury to GLN.

39. AWG admits that it is the parent of Homeland® and that Homeland® directly competes with GLN. In addition, two Homeland® stores are located extremely close to two GLN stores.

40. As stated above, the disclosure terms AWG proposes rely upon AWG employees and its consultants or others to whom it decides (in its sole discretion) to disclose the confidential information to self police the disclosure, use or influence of the confidential information upon advice that those persons may give to Homeland®.

41. The highly competitive nature of the retail grocery industry renders the extremely sensitive and proprietary information invaluable to persons advising Homeland® about its strategy and operations. Even subtle changes by Homeland® (with the recommendations and advice of AWG personnel who have reviewed the confidential information) in strategy, pricing or marketing, may result in GLN losing sales and profits. See, e.g. Carpenter Tech. Corp. v. ARMCO, Inc. 132 F.R.D. 24 (E.D. Pa. 1991) (denying in-house attorney who was involved in competitive business decisions access to confidential information).

42. If Homeland's operations are influenced, directly or indirectly, by the confidential information, GLN may have to resort to increased advertising expenditures or cost cutting. In any case, the loss of market share, profits or having to cut prices to retain customers, would result. Such damage is the type of serious injury Rule 26(c) is designed to prevent.

43. Accordingly, the issuance of GLN's proposed protective order is necessary to protect its business and to prevent AWG, through Homeland, from gaining a competitive advantage over GLN.

44. In determining whether in-house counsel should gain access to confidential business information, Delaware courts have analyzed whether the attorney would have a difficult time compartmentalizing his knowledge. Dentsply, 187 F.R.D. at 160. AWG's proposal requires that the court place its faith in the ability of AWG's employees and others to whom the confidential

information is disclosed to compartmentalize the confidential information despite their possible involvement with Homeland management.

45. GLN respectfully submits that such faith would be misplaced given the difficulty in compartmentalizing, erasing or not allowing themselves to be influenced by that information, of policing adherence to the protective order, and the serious injury that would result from a violation.

46. Furthermore, as stated above, Fleming's business people will get all of the confidential information. That approach fairly balances the interests of GLN and AWG under the circumstances. Fleming, not AWG, is the debtor in this action. AWG is not a moving party or direct respondent on either the Omnibus Motion or the Notice to Assume and Assign. As to the Notice to Assume and Assign, AWG is simply a hopeful potential assignee. As to the Omnibus Motion, AWG has a more direct interest since, if the Omnibus Motion is granted, the GLN note, currently held by AWG, will revert to the Debtor. However, the confidential information at issue relates to GLN's rejection damage claim and has nothing to do with the integration issue which will drive whether the note sale is voided. Rather, the rejection damage claim relates to the Notice to Assume and Assign as to which, for the reasons stated above, AWG's interest is far more tenuous.

47. In light of the foregoing, GLN respectfully submits that it has shown good cause to support the entry of the attached proposed Order granting this Motion.

48. GLN respectfully asks that its cross motion be heard on the same date and time as AWG's motion to compel.

**CERTIFICATION OF COUNSEL IN ACCORDANCE WITH FEDERAL RULE OF
CIVIL PROCEDURE 26 (C) AND LOCAL RULE 7.1.1**

49. Undersigned counsel hereby certifies that, in good faith, he attempted to resolve the subject of this motion with counsel for Fleming and AWG, as aforesaid, by telephone calls on January 5, 2004 and January 8, 2004, but such efforts did not resolve the matter.

WHEREFORE, GLN respectfully requests that the Court enter the attached Order.

Dated: Wilmington, Delaware
January 15, 2004

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