

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
Fleming Companies, Inc., et al., ¹)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	

**DEBTORS' MOTION FOR ORDER PURSUANT TO SECTION 365(a) OF THE
BANKRUPTCY CODE AUTHORIZING THE DEBTORS TO REJECT
CERTAIN UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY,
PERSONAL PROPERTY LEASES AND EXECUTORY CONTRACTS IN
CONNECTION WITH SALE ORDER AND PURSUANT TO C&S OPTION NOTICES
DATED JANUARY 7, 2004, INCLUDING, AMONG OTHERS, A REAL PROPERTY
LEASE WITH JENECAPROPERTIES, LLP (FEBRUARY 2, 2004 HEARING)**

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), hereby submit this motion (the "Motion") for entry of an order (the "Order") pursuant to Section 365(a) of the Bankruptcy Code authorizing the Debtors to reject certain unexpired leases of nonresidential real property, personal property leases and executory contracts (collectively, the "Rejected Contracts," which are listed on Exhibit A and Exhibit B to the proposed Order attached hereto). In support of this Motion, the Debtors respectfully state as follows:

Jurisdiction

1. This Court has jurisdiction to consider the Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M) and (O).

¹ The Debtors are the following entities: Core-Mark International, Inc.; 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 Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 105(a) and 365 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”).

Background

4. On April 1, 2003 (the “Petition Date”), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the “Chapter 11 Cases”). The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases. An official committee of unsecured creditors (the “Committee”) was appointed on April 14, 2003.

5. As part of the Debtors’ distribution business, 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”) supplied a full line of grocery products to grocery stores, supercenters and specialty retailers (the “Wholesale Distribution Business”). Among the assets of the Wholesale Distribution Business were certain executory contracts and unexpired leases relating to the Wholesale Distribution Business.

6. On August 15, 2003, the Court entered an order (the “Sale Order”)²: (a) approving the Asset Purchase Agreement (as amended from time to time the “APA”) by and

² The full title of the Sale Order is as follows:

(Continued...)

among the Selling Debtors and C&S Wholesale Grocers, Inc. and C&S Acquisition LLC and (b) authorizing (i) the sale of substantially all of the Selling Debtors' assets relating to the Wholesale Distribution Business to C&S Acquisition LLC (the "Purchaser") or its designee(s), free and clear of all liens, claims, encumbrances, and interests and (ii) assumption and assignment of certain executory contracts, license agreements and unexpired leases.

7. The Sale Order granted the Debtors the authorization to assume and assign to Purchaser certain executory contracts and unexpired leases of real and personal property associated with the Wholesale Distribution Business (the "Acquired Contracts"). In accordance with this Court's Order (A) Approving Bidding procedures and Bid Protection in Connection with the Sale of the Wholesale Distribution Business, (B) Approving Assignment Procedures for Affected Executory Contracts and Unexpired Leases, and (C) Setting Sale Hearing Dates [Docket No. 2034] (the "Bidding Procedures Order") entered on July 18, 2003, the Debtors on or about August 4, 2003, filed with the Court and served upon the relevant non-debtor counterparties and their counsel, a list of the executory contracts and unexpired leases (the "Initial Assignment List") to be assumed and assigned under the APA on the Initial Closing Date (as defined in the APA) to Purchaser or applicable third parties (the "Third Party Purchasers").

8. In accordance with Sections 2.5 and 2.6 of the APA, Purchaser (or applicable Third Party Purchaser) may upon written notice during the six months following the Initial Closing Date (the "Option Period"), require Debtors to either (a) assume and assign to

Order (A) Approving Asset Purchase Agreement By and Among Fleming Companies, Inc., C&S Wholesale Grocers, Inc., C&S Acquisition LLC and the Other Parties Named Therein, (B) Authorizing (I) Sale of Substantially All of Selling Debtors' Assets Relating to the Wholesale Distribution Business to Purchaser or Its Designee(s) Free and Clear of All Liens, Claims, Encumbrances and Interests and (II) Process for Assumption and Assignment of Certain Executory Contracts, License Agreements and Unexpired Leases to Purchaser or Its Designee(s) and Establishing the Maximum Cure Amount with Respect Thereto and (C) Granting Related Relief [Docket No. 1906].

Purchaser or any Third Party Purchasers, any executory contracts or unexpired leases not included on the Initial Assignment List or (b) exclude the assignment of any executory contracts or unexpired leases to Purchaser. Purchaser and applicable Third Party Purchaser(s) have provided notice of their desire to exclude the Rejected Contracts from assets acquired pursuant to the APA.

9. The Rejected Contracts all relate to the Wholesale Distribution Business. Upon information and belief, the Debtors have little or no personal property remaining at any of the real property locations included as Rejected Contracts. To the extent the Debtors have any personal property at any of the real property locations included in the Rejected Contracts, the Debtors either will promptly remove such property on or before the effective date of rejection, or, in the alternative, abandon such property as de minimis assets to the landlords of such Rejected Contracts. The Debtors will make on or before January 31, 2004, or have already made, the personal property subject to any personal property leases included in the Rejected Contracts available to the lessors under those personal property leases.

Relief Requested

10. The Debtors seek authority to reject the Rejected Contracts listed in Exhibit A to the Order, effective January 31, 2004.

11. The Debtors seek authority to reject the Rejected Contracts listed in Exhibit B to the Order, effective ten days following the entry of an order authorizing the assumption and assignment of the related prime leases set forth on Exhibit B (the "Sublease Rejection Date").

Basis for Relief

12. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, “subject to the court’s approval, may ... reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). “This provision allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed.” Stewart Title Guar. Co. v. Old Republic Nat’l Title Co., 83 F.3d 735, 741 (5th Cir. 1996 (citing In re Muerexco Petroleum, Inc., 15 F.3d 60, 62 (5th Cir. 1994))).

13. The “business judgment” standard is applied to determine whether the rejection of an executory contract or unexpired lease should be authorized. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 524 (1984); see In re Taylor, 913 F.2d 102 (3d Cir. 1990); Sharon Steel Corp. v. Nat’l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.), 872 F.2d 36 (3d Cir. 1989). Rejection of any executory contract is appropriate where rejection of the contract would benefit the estate. Id. at 40. The standard for rejection is satisfied when a debtor has made a business determination that rejection will benefit the estate. See Commercial Fin. Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (Bankr. D. Haw. 1985) (“under the business judgment test, a court should approve a debtor’s proposed rejection if such rejection will benefit the estate.”).

14. If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. at 523; Group of Institutional Investors v. Chicago M. St. P. & P.R.R. Co., 318 U.S. 523 (1943); Sharon Steel Corp., 872 F.2d at 39-40.

15. In applying the business judgment standard, courts show great deference to the debtor's decision to reject. See, e.g., Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor's decision to assume or reject an executory contract "should be granted as a matter of course.").

16. In the instant case, pursuant to section 365(a) of the Bankruptcy Code, the Debtors seek to reject the Rejected Contracts. The Debtors, in the exercise of their sound business judgment, have determined that the Rejected Contracts are not necessary for the Debtors' restructuring efforts -- indeed, retaining the Rejected Contracts will hinder their restructuring efforts. In light of the fact that the Rejected Contracts relate to the Wholesale Distribution Business and because substantially all of the assets of the Wholesale Distribution Business have been sold to Purchaser pursuant to the APA, the Debtors will derive no value from the Rejected Contracts. Purchaser and applicable Third Party Purchasers have provided notice of their desire to exclude the Rejected Contracts from assets acquired pursuant to the APA. Unless the Debtors are allowed to reject the Rejected Contracts, the Debtors would continue to incur administrative expenses arising under the Rejected Contracts, while deriving no value from the Rejected Contracts. Accordingly, the Debtors, in the exercise of their business judgment, have determined that it is in the best interests of the Debtors' estates and their creditors to reject all of the Rejected Contracts.

17. The Debtors propose a January 31, 2004 effective date of rejection as to all nonresidential real property leases listed in Exhibit A to the Order attached to hereto, because the Debtors are current on their obligations pursuant to section 365(d)(3) of the Bankruptcy Code, the Debtors have or will have surrendered the locations to the landlords on or before

January 31, 2004, and the Debtors will not withdraw any of the locations from Exhibit A without the consent of the counterparties thereto. The Debtors have also provided two-weeks notice of their intent to reject by service of this motion two-weeks prior to the proposed January 31, 2004 effective date of rejection. Further, the Debtors are entitled to a January 31, 2004 effective date of rejection of any personal property lease or executory contract listed on Exhibit A because any personal property that is subject to such a lease will be returned or made available to the lessor on or before January 31, 2004 and the Debtors will not perform or expect performance under any executory contract that is listed on Exhibit A after January 31, 2004.

18. With respect to the real property subleases listed on Exhibit B to the Order attached hereto, the Debtors propose that the rejection of such leases be effective ten days following the entry of an order authorizing the assumption and assignment of the related prime leases set forth on Exhibit B (the "Prime Leases"). Concurrently with the filing of this Motion, the Debtors have filed their "Notice Pursuant to Sale Order re Assumption and Assignment of Certain Executory Contracts and Unexpired Real Property Leases, Pursuant to Instruction From C&S Acquisition LLC, Including, Among Others, a Real Property Lease with Camelback & 44th Street Associates (Hearing Date: February 2, 2004)" (the "Prime Lease Assignment Notice"). Pursuant to the Prime Lease Assignment Notice, the Debtors are seeking to assume and assign the Prime Leases. Upon entry of an order (the "Assignment Order") authorizing the assumption and assignment of the Prime Leases, the Debtors will provide written notice to the counterparties to the Rejected Contracts listed on Exhibit B setting forth the Sublease Rejection Date which will be ten days following the date of entry of the Assignment Order. The Debtors, the Purchaser, and the subtenants to the Rejected Contracts listed on Exhibit B have consented to such treatment.

19. The Debtors may have a claim against a contract counter-party arising under, or independently of, the Rejected Contracts. The Debtors do not waive such claims by filing of this Motion or the rejection of any such Rejected Contracts.

20. The Debtors propose that deadline by which time the parties to the Rejected Contracts listed on Exhibit B shall file proofs of claim for the rejection of such Rejected Contracts be thirty (30) days after the Sublease Rejection Date, and that if a proof of claim based upon rejection of the nonresidential real property leases listed on Exhibit B is not timely filed in accordance with the Order, such claim shall be forever barred.

21. This Court, in the *Order Establishing a Bar Date for Filing Proofs of Claim and Proofs of Interest and Approving Form and Manner of Notice Thereof* entered on June 27, 2003 [Docket No. 1695], provided that the bar date for filing claims based upon the rejection of an unexpired lease or executory contract was thirty (30) days after the effective date of the rejection. In light of the Debtors' request in this Motion that the effective rejection dates of the Rejected Contracts listed on Exhibit A be prior to the entry of the Order approving this Motion, the Debtors request that the deadline for filing claims based upon the rejection of such Rejected Contracts be established as thirty (30) days after the date of an Order approving the rejections of such Rejected Contracts thereby giving potential claimants additional time in which to file any rejection related claims. The Debtors further request that the Order approving the rejection of the Rejected Contracts and setting the bar date for the related claims provide that any related claim not filed by the bar date be forever barred.

22. In light of the need to reject the Rejected Contracts to avoid unnecessary administrative expenses, the Debtors request that the Court enter an Order approving the

rejection of all of the Rejected Contracts effective as of January 31, 2004 in the case of those Rejected Contracts listed on Exhibit A, and with respect to those Rejected Contracts listed on Exhibit B, effective as of the date of the assumption and assignment of the prime leases associated with such contracts.

Notice

23. Notice of this Motion has been given to: (a) the United States Trustee; (b) counsel to the senior secured lenders; (c) counsel to the Committee; (d) all parties who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure; and (e) the contract counterparty or landlord(s) with respect to each of the Rejected Contracts.

24. Parties to a Rejected Contract who wish to discuss any outstanding obligations remaining under such Rejected Contract may contact Barbara Hall at flemingbhall@yahoo.com.

No Prior Relief

25. No prior Motion for the relief requested herein for the Rejected Contracts listed in Exhibit A and Exhibit B to the Order attached hereto has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court enter an order authorizing the Debtors to reject each of the Rejected Contracts as provided herein and that this Court grant any such further relief as is necessary.

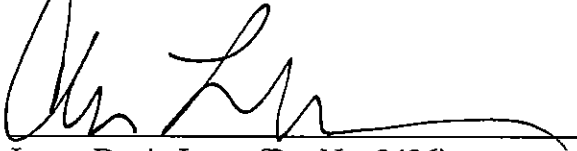
Dated: January 15, 2004

Respectfully submitted,

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