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)
	)	
Debtors.	)	
	)	
	)	

OPINION[1]

Before the Court is the Debtors' Motion to assume and assign two Facility Standby Agreements ("the FSAs") it has with Albertson's, Inc., to Associated Wholesale Grocers, Inc. ("AWG"). Albertson's opposes the Motion. For the reasons set forth below, we deny the Motion with respect to the Tulsa FSA and grant the Motion with respect to the Lincoln FSA.

I. FACTUAL BACKGROUND

On April 1, 2003, Fleming Companies, Inc., and several of its affiliates ("the Debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code. At that time, the Debtors were in the wholesale grocery distribution business, the retail

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

grocery business and the convenience store distribution business. Shortly after filing the petition, the Debtors consummated a sale of their retail grocery business.

Prior to and subsequent to the filing of their petitions, the Debtors had severe financial difficulties and, as a result, were unable to fully perform their wholesale grocery distribution supply agreements with their customers. Consequently, numerous customers, including Albertson's, filed motions seeking relief from the stay to terminate those agreements. A hearing was held on the Albertson's Motion on August 13, 2003, at which time we denied the motion conditioned on the Debtors deciding to assume or reject the FSAs within thirty days.

In the interim, the Debtors marketed their wholesale grocery distribution business. On July 11, 2003, the Debtors filed a Motion for authority to sell that business to C&S Wholesale Grocers, Inc., and C&S Acquisition LLC (collectively "C&S"). After bidding procedures were approved and an auction conducted, C&S was approved as the purchaser of the Debtors' wholesale grocery distribution business assets. Pursuant to the sale, C&S was permitted to designate another purchaser for certain assets. C&S designated AWG as the purchaser of the Albertson's FSAs. On September 3, 2003, the Debtors filed a motion to assume and assign the FSAs to AWG. Albertson's opposed that motion and a

hearing was held on December 4, 2003. The parties have filed post-trial briefs.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A), (G), (M), (N), and (O).

III. DISCUSSION

The decision to assume or reject an executory contract is a matter within the sound business judgment of the debtor. See, e.g., In re Taylor, 913 F.2d 102 (3d Cir. 1990). Once the debtor has established a sound business reason to assume the contract, however, the debtor must comply with the requirements of section 365. Section 365 provides, in relevant part:

> (a) [T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee–
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> > (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

> (C) provides adequate assurance of future performance under such contract or lease.
>
> . . .
>
> (f)(2) The trustee may assign an executory contract or unexpired lease of the debtor only if -
>
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365. Here, the Debtors and AWG seek a determination that the Debtors' assumption and assignment of the FSAs complies with the requirements of section 365. Albertson's contends that the FSAs cannot be assumed and assigned because the Debtors and AWG cannot comply with the requirements of section 365.

Before an executory contract may be assigned, the debtor must first assume the contract and provide adequate assurance of future performance. See 11 U.S.C. §§ 365 (b)(1)(A) & (f)(2)(A). Adequate assurance provides the non-debtor party with needed protection because assignment relieves the debtor and the bankruptcy estate from liability for breaches that occur after the assignment. Determining whether an assignee has provided adequate assurance is a fact-based inquiry that focuses on the specific facts of the proposed assignment. See Cinicola v. Scharffenberger, 248 F.3d 110 (3d Cir. 2001).

A. Tulsa FSA

Albertson's asserts that the Debtors cannot assume and assign the Tulsa FSA because that would result in a modification of material provisions of the FSA. Section 365 requires that when a debtor assumes and assigns a contract the express terms of that contract cannot be modified. Cinicola, 248 F.3d at 119-20.

> An assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and the assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party changed. An assignment is intended to change only who performs an obligation, not the obligation to be performed.

Medtronic Ave., Inc. v. Advanced Cardiovascular Sys., Inc., 247 F.3d 44, 60 (3d Cir. 2001) (citations omitted).

Albertson's contends that AWG cannot satisfy the express terms of the Tulsa FSA because AWG cannot supply Albertson's Oklahoma stores from the Tulsa Facility. In fact, Albertson's asserts that AWG's decision to direct the Debtor to reject the Tulsa Facility lease makes it impossible for AWG to fulfill the express requirements of the Tulsa FSA. Thus, allowing assumption and assignment would impermissibly modify the terms of the Tulsa FSA.

AWG asserts that Albertson's position is without merit because fulfilling the Tulsa FSA from another warehouse will not

have an adverse effect on Albertson's nor impact AWG's ability to perform the Tulsa FSA. AWG contends that the "important feature of the bargain" is "the timely delivery of virtually all of its food and related products," which will not be affected by the closing of the Tulsa Facility. Albertson's disagrees with AWG's assertions. AWG proposes to supply Albertson's Oklahoma stores from its Oklahoma City warehouse. Albertson's argues that this warehouse is further away from the Debtor's Tulsa Facility and, since the FSA provides that Albertson's pays the freight costs from the warehouse to its stores, this will increase Albertson's costs. AWG argues, however, that utilizing its Oklahoma City warehouse will not increase Albertson's freight costs. Since Albertson's has approximately the same number of stores in Oklahoma City and Tulsa, AWG contends that any increase in the freight costs associated with supplying Albertson's Tulsa stores will be offset by a reduction in the freight costs associated with supplying Albertson's Oklahoma City stores.

We disagree with AWG's assertion that this should be the focus of our analysis. Section 365 provides that a debtor's assumption and assignment cannot modify an agreement's express terms; it does not require the other party to the contract to agree to changes, even if the overall impact lowers its costs.

Nor should the court consider only the "important feature of a bargain" or determine whether the parties will be adversely impacted by an assignment. See 11 U.S.C. § 365. The contract must be assigned and enforced according to its terms. Cinicola, 248 F.3d at 119-20.

We must look to Oklahoma law to interpret the Tulsa FSA.[2] Oklahoma law provides that a contract must be considered as a whole so as to give effect to all of its provisions. Mercury Inv. Co. v. F.W. Woolworth Co., 706 P.2d 523, 529 (Okl. 1985) (citing 15 O.S. 1981 §157). Although the court must interpret a contract so as to give effect to the intent of the parties at the time the contract was formed, parol evidence cannot be used unless fraud or mistake is involved in pre-contract negotiations. Mercury, 706 P.2d at 529. Therefore, where a contract is complete and unambiguous, its express language is the only legitimate evidence of the parties' intent. Id.

After reviewing the Tulsa FSA, we conclude that fulfillment from the Tulsa Facility is an essential element of the agreement. In fact, the Tulsa FSA references this requirement on five separate occasions. Since AWG cannot fulfill these provisions, this Motion cannot be granted.

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[2] Both FSAs provide that they are to be governed by and construed in accordance with the laws of Oklahoma.

AWG contends that section 2-614 of the Oklahoma Commercial Code excuses the requirement that it fulfill the Tulsa FSA from the Tulsa Facility. 12A Okla. Stat. Ann. § 2-614(1). Specifically, AWG asserts that section 2-614 provides that where a commercially reasonable substitute is available, failure to ship from a particular location cannot constitute a material breach of an agreement. (Post Hearing Brief of AWG in Support of Debtors' Motion to Assume and Assign at 10.) However, AWG refers to only part of section 2-614, ignoring a crucial detail. Section 2-614 provides that "[w]here without fault of either party the agreed berthing, loading, or unloading facilities fail . . . but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted." 12A Okla. Stat. Ann. § 2-614(1) (emphasis added). Here, the Tulsa Facility did not become unavailable without fault of either party. Pursuant to the sale, AWG (through C&S) could choose which contracts the Debtors would assume and assign to it. AWG could have directed the Debtors to assume and assign the Tulsa Facility to it. Instead, AWG chose not to acquire the rights to the Tulsa Facility and directed the Debtors to reject that lease. Thus, even if there is a "reasonable substitute," we conclude that AWG is not "without fault." Section 2-614 does not excuse AWG from

fulfilling the Tulsa FSA from the Tulsa Facility. Since AWG is not able to perform the Tulsa FSA according to its terms, we conclude that the Motion to assume and assign the Tulsa FSA must be denied.

B. Lincoln FSA

AWG presented significant evidence to establish adequate assurance of its ability to satisfy the Lincoln FSA. First, AWG established that it has the size, expertise and experience in the wholesale grocery distribution business. AWG is the fourth largest grocery wholesaler in the United States, serving over 1,300 individual supermarkets. Through the course of this bankruptcy case, AWG has already begun serving approximately 490 stores previously serviced by the Debtors, including a 16 store Nebraska chain with annual sales over $175 million. Second, AWG has the capacity to service Albertson's eleven Nebraska stores. Mr. Rand of AWG testified about AWG's capacity levels and its ability to maintain the contractual service levels required by the Lincoln FSA from its Kansas City warehouse.

In its brief, Albertson's contends that AWG cannot assume and assign the FSAs because AWG cannot provide adequate assurance of its ability to purchase, stock and ship Albertson's private label merchandise. AWG argues (and Albertson's concedes),

however, that the Lincoln FSA does not require the Debtors to purchase, stock and ship its private label goods. Therefore, that does not preclude the assumption and assignment of the Lincoln FSA to AWG. Nonetheless, AWG presented evidence that it was able to supply Albertson's with its private label goods.

Albertson's contends, however, that AWG cannot provide adequate assurance because it does not intend to fulfill the Lincoln FSA. To support this position, Albertson's asserts that AWG has not really assumed any of the other facility standby agreements that it purchased from the Debtors, but has instead required that each grocer execute new supply agreements on different terms.

Although AWG has apparently renegotiated every contract it was assigned, this does not establish its inability to satisfy the requirements of the Lincoln FSA in this case. As discussed in depth above, section 365 requires the assignee to assume all contractual obligations. By assuming the Lincoln FSA, AWG is bound by its terms. AWG will not be able to supply Albertson's under different terms unless Albertson's itself agrees to a new wholesale grocery distribution agreement. Despite Albertson's contention, we find that AWG has established that it is ready, willing and able to satisfy the Lincoln FSA as written and has

established its ability to fulfill all of its obligations. Accordingly, we conclude that AWG has provided adequate assurance of future performance of the Lincoln FSA.

C. Ability to Cure

Albertson's also contends that the Debtors cannot assume and assign the FSAs because they are unable to cure the material, non-monetary defaults under the agreements. While the parties have agreed that the Court should not reach a determination on the actual cure amount at this time, we must determine whether the Debtors' default under the Lincoln FSA is curable to conclude that the contract may be assumed and assigned.

Albertson's asserts that the Debtors' prior failure to fulfill their contractual obligations caused Albertson's to suffer considerable harm that cannot be compensated. Section 365 provides that a debtor cannot assume an executory contract on which there has been a default unless it cures or provides adequate assurance that it will promptly cure such default. 11 U.S.C. §365(b)(1)(A). Despite disagreement regarding when the Debtors originally breached the FSAs, and the extent of that breach, the parties do not dispute that the Debtors did breach the FSAs.

Albertson's contends that the Debtors' failure to satisfy the service levels and product dating requirements caused Albertson's to suffer irreparable harm including: an erosion of customer support, a drop in employee morale, a disruption in the Albertson's Ft. Worth Facility and corporate headquarters, and lower sales and profits. While Albertson's originally filed a proof of claim to estimate the damages, it now contends that the damages cannot be quantified with certainty because these were incurable non-monetary damages. AWG disagrees with Albertson's assertion that the Debtors' breach is incurable. Specifically, AWG contends that the asserted damages are curable by the payment of money damages.

We agree with AWG that Albertson's alleged damages are curable. Our conclusion is supported by the fact that Albertson's originally filed a proof of claim estimating in damages suffered as a result of the Debtors' breach at approximately $4 million. Although Albertson's no longer asserts that claim, because it could not quantify the damages with "exacting certainty," it continues to assert that the Debtors' defaults have caused it serious economic harm. We find that there is nothing unique about Albertson's damages that render them incurable. They are normal damages arising from the breach

of a supply agreement. Our conclusion is bolstered by Albertson's conduct following the Debtors' breach. When Albertson's began self-supplying its stores, thereby incurring the asserted damages, Albertson's deducted the costs associated with its self-supplying from monies it owed to the Debtors. This confirms its ability to calculate the damages caused by the Debtors' breach. Accordingly, we conclude that the alleged damages can be quantified and cured by prompt payment.

IV. CONCLUSION

For the foregoing reasons we grant in part and deny in part the Debtors' Motion to Assume and Assign the FSAs.

An appropriate Order is attached.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

Dated: February 27, 2004

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	)	
FLEMING COMPANIES, INC., et al.	)	Case No. 03-10945 (MFW)
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Debtors.	)	
	)	
	)	

ORDER

AND NOW, this **27th** day of **FEBRUARY 2004**, upon consideration of the Debtors' Motion to assume and assign two Facility Standby Agreements it has with Albertson's, Inc., to Associated Wholesale Grocers, Inc., and the objection of Albertson's, it is hereby

ORDERED that the Debtors' Motion is **GRANTED** with respect to the Lincoln Facility Standby Agreement; and it is further

ORDERED that the Debtors' Motion is **DENIED** with respect to the Tulsa Facility Standby Agreement.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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