

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.)

**MOTION FOR ORDER AUTHORIZING THE PAYMENT OF
CRITICAL TRADE VENDORS IN EXCHANGE FOR CONTINUING
RELATIONSHIP PURSUANT TO CUSTOMARY TRADE TERMS**

The above-captioned debtors and debtors in possession (the “Debtors”) file this motion (the “Motion”) for entry of an order authorizing payment in the ordinary course of business of certain prepetition claims of critical trade vendors. In support of the Motion, the Debtors respectfully represent as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
2. The statutory bases for the relief requested herein are sections 105(a) and 363(b) of title 11 of the United States Code (the “Bankruptcy Code”).

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.

Background

3. 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"). Contemporaneously therewith, the Debtors filed a motion seeking to jointly administer their chapter 11 cases for administrative purposes only. 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, examiner or committee has been appointed in these cases.

4. The Debtors (collectively, "Fleming") are currently the largest distributor of consumable goods in the United States, supplying food-related and general merchandise products to approximately 45,000 retail locations throughout the country, Hawaii, Canada, the Carribean and the South Pacific with approximately 50 distribution centers throughout the country. For the twelve months ending December 31, 2002, the Debtors generated total net sales of \$17.6 billion. Of the Debtors revenues for the 2002 calendar year, approximately \$15.5 billion or 88% were attributable to the distribution segment of their business and approximately \$2.1 billion or 12% were attributable to the retail segment of their business.

5. The Debtors' distribution business involves purchasing, receiving, warehousing, marketing, selecting and loading, delivering and distributing a wide variety of food items (including groceries, meat, dairy and delicatessen products, frozen foods, produce, bakery goods) as well as general merchandise items (such as health and beauty care related items). The Debtors distribute products purchased from major merchandise trademark holders such as ConAgra Foods, Kraft Foods, Nestle, Procter & Gamble, and General Mills, among others. The

Debtors also offer products under the private Fleming brands, including BestYet™, Comida Sabrosa™, Exceptional Value™, and Nature's Finest® labels. The Debtors' customers include supermarkets, convenience stores, supercenters, discount stores, specialty stores, and gift shops, among others.

6. The Debtors also operate approximately 100 stores under the Food 4 Less, Rainbow Foods, and yes!LESS® trade names in Texas, Arizona, Minnesota, New Mexico, Northern California, Utah, Wisconsin, and Louisiana. Since the fall of 2002, the Debtors have been actively engaged in the process of selling their retail operations in order to concentrate on their core competencies in the distribution segment. The Debtors are currently in discussions with a buyer to sell approximately 32 retail locations of the Rainbow Foods stores in Minnesota.

7. As of the Petition Date, the Debtors have over 20,000 employees. The Debtors' corporate headquarters are in Dallas, Texas, with accounting and information technology operations in Oklahoma City, Oklahoma. The Debtors' Core-Mark subsidiaries, which is a premier distributor of food and consumer products for convenience stores in North America, has its corporate headquarters in San Francisco, California.

8. The food distribution business is highly competitive. The dominant features of the consumable-goods industry are high-volume sales and low-profit margins. Even small changes in pricing can have significant impact on companies like the Debtors. In February 2003, Kmart Corporation, the largest customer of the Debtors' distribution segment, moved in its bankruptcy case currently pending in the Northern District of Illinois to reject its supply agreement with Fleming. In 2002, Kmart accounted for 20% of the Fleming's net sales, and

Kmart listed Fleming as its single largest supplier of food and consumable products in pleadings filed in its bankruptcy case, accounting for \$3.6 billion of total sales per annum.

9. The facts and circumstances supporting this Motion are more fully set forth in the Affidavit of Peter W. Willmott, Chief Executive Officer of Fleming Companies, Inc., in Support of Certain First Day Motions, filed contemporaneously herewith (the “Willmott Affidavit”).

A. Critical Vendors

10. By the nature of their business, the Debtors deal with vendors that are typically the sole suppliers of uniquely branded products for which there are no viable substitutes, such as food products from major food distributors like those mentioned above including, but not limited to, ConAgra Foods, Kraft, and Nestle. (collectively, the “Merchandise Suppliers”). The Debtors estimate that over 90% of the goods they distribute are branded products for which there is only one supplier. While for the remaining 10% of goods, the Debtors may be able to find alternative sources of supply, in the vast majority of cases, the Debtors are operating on timelines of a matter of days to supply the goods, which makes it impractical to find alternate sources of goods in such a short period of time.

11. In addition to the Merchandise Suppliers, the Debtors rely on other vendors to support their core business functions by way of administrative and ancillary support, such as production of advertising circulars for goods distributed (collectively, with the Merchandise Suppliers, the “Critical Vendors”). The Debtors estimate that, as of the Petition Date, they owe the Critical Vendors approximately \$100 million (the “Critical Vendor Claims”).

**B. Proposed Terms and Conditions
of Payment of Critical Vendor Claims**

12. The Debtors request authorization to pay all, a portion or none of the Critical Vendor Claims as determined by the Debtors in their sole discretion in order to continue the vital goods and services provided by the Critical Vendors. The Debtors propose to condition the payment of Critical Vendor Claims on the agreement of individual Critical Vendors to continue supplying goods and services to the Debtors on such customary trade terms (including, but not limited to, credit limits, pricing, cash discounts, timing of payments, allowances, rebates, coupon reconciliation, normal product mix and availability and other applicable terms and programs) that were most favorable to Fleming and in effect between such trade creditor and Fleming on a historical basis within one-hundred twenty (120) days of the Petition Date (the "Customary Trade Terms"). The Debtors reserve the right to negotiate new trade terms with any Critical Vendor as a condition to payment of any Critical Vendor Claim.

13. To ensure that Critical Vendors deal with the Debtors on Customary Trade Terms, the Debtors propose that (a) a letter substantially in the form of the letter attached hereto as Exhibit A be sent to the Critical Vendors (the "Critical Trade Agreement") along with a copy of the Order and (b) checks used to pay Critical Vendors contain a legend substantially in the following form:

Acceptance of this check is subject to the Order
Authorizing Payment of Prepetition Critical Vendor
Claims in Exchange for Continuing Relationship
Pursuant to Customary Trade Terms, dated April
__, 2003, Case No. 03-10945 (MFW) (Jointly
Administered).

14. The Debtors further propose that they be authorized to reserve their rights to obtain written acknowledgment of the Customary Trade Terms of a Critical Vendor Creditor before paying such creditor's Critical Vendor payment, such written acknowledgment to be substantially in the form of Exhibit B attached hereto. If the Debtors request such acknowledgment, they may rely upon a confirming memorandum setting forth the Customary Trade Terms, whether received by facsimile, electronic mail, express mail, or by other customary modes of delivery. For those Critical Vendors who have agreed to ship on other than Customary Trade Terms, the Debtors reserve the right to obtain written acknowledgment of such terms on a case-by-case basis. The Debtors also reserve their right to contest any invoice of any Critical Vendor Creditor under applicable non-bankruptcy law.

15. Some of the Critical Vendors also may have obtained mechanics' liens, possessory liens, or similar state law trade liens (the "Trade Liens") on the Debtors' assets, based upon Critical Vendor Payment held by such Critical Vendors. As a further condition of receiving payment on a Critical Vendor Payment, the Debtors propose that a Critical Vendor Creditor must agree to take whatever action is necessary to remove the Trade Lien at such Critical Vendor Creditor's sole cost and expense.

16. If a Critical Vendor refuses to supply goods and/or services to the Debtors on Customary Trade Terms following receipt of payment on its Critical Vendor Claim, or fails to comply with any Critical Trade Agreement entered into between such Critical Vendor and the Debtors, then the Debtors may seek authority, in their discretion and without further order of the Court, to declare that provisional payments made to Critical Vendors on account of Critical

Vendor claims be deemed to have been in payment of then-outstanding postpetition claims of such vendors and require that the Critical Vendor shall then immediately repay to the Debtors any payment made to it on account of its Critical Vendor Claims without giving effect to any rights of setoff, claims, provision for payment of reclamation or trust fund claims, or otherwise.

Relief Requested

17. By this Motion, the Debtors seek entry of an order authorizing, but not requiring them to pay, in the reasonable exercise of their business judgment, the prepetition claims of certain Critical Vendors that are essential to the uninterrupted functioning of the Debtors' business operations. Payment of the Critical Vendor Claims is vital to the Debtors' reorganization efforts as (a) goods and services provided by the Critical Vendors are often the only source from which the Debtors can procure certain goods or services, (b) failure to pay the Critical Vendor Claims would, in the business judgment of the Debtors, very likely result in the Critical Vendors terminating their provision of goods/and or services to the Debtors, and/or (c) the Critical Vendors would themselves be irreparably damaged by the Debtors' failure to pay the Critical Vendor Claims. The relief requested in this Motion is subject to the terms of any cash collateral agreements reached with the Debtors by the Prepetition Lenders.

Basis For Relief

18. Given the nature of the business in which 90% of goods supplied to customers are specific branded products, the relief requested in the Motion is critical to support the Debtors' operations. As a result of the Debtors' recent liquidity crisis driven by the cessation of funding from the Secured Lenders, an increasing amount of the Debtors' Critical Vendors

have demanded payment on cash in advance to release orders or have required more stringent trade terms. The Debtors will not be able to operate if all Critical Vendors demand unreasonable trade terms. The relief requested in this Motion is therefore critical to enable the Debtors to continue existing relationships with Critical Vendors on customary and historical trade terms that will enable the Debtor to function and reorganize.

19. In addition, the relief requested herein, if granted, will likely avert the filing of countless reclamation claims, suits, liens and motions by claimants seeking payment of or priority for their claims on a variety of grounds. Avoiding the time, distraction and considerable expense of litigating the merits of such claims will benefit the Debtors, their estates and creditors, while facilitating the administration of these cases.

20. Section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), provides: “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Section 105(a) grants bankruptcy courts broad authority and discretion to enforce the provisions of the Bankruptcy Code either under specific statutory fiat or under equitable common law principles. “The ability of a Bankruptcy Court to authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). This equitable common law principle “was first articulated by the United States Supreme Court in Miltenberger v. Logansport, C. & S.W. R. Co., 106 U.S. 286 (1882), and is commonly referred to as either the ‘doctrine of necessity’ or the ‘necessity of payment’ rule.” Ionosphere Clubs, *Supra* 98 B. R. at 175-76. “The Supreme Court, the Third Circuit and the District of

Delaware all recognize the court's power to authorize payment of pre-petition claims when such payment is necessary for the debtor's survival during chapter 11." In re Just For Feet, Inc., 242 B.R. 821, 825 (D. Del. 1999). "The necessity of payment doctrine recognizes that paying certain pre-petition claims may be necessary to realize the goal of chapter 11 -- a successful reorganization." Id. at 825-26.

21. Under the doctrine of necessity, a bankruptcy court may exercise its equitable power to authorize a debtor to pay certain critical prepetition claims. See In re Columbia Gas Syst., Inc., 136 B.R. 930, 939 (Bankr. D. Del. 1992) (quoting In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (recognizing that "[i]f payment of a prepetition claim 'is essential to the continued operation of [the debtor], payment may be authorized'")).

22. The Critical Vendors represent the Debtors' only viable sources of certain essential food and consumer products and necessary services to ensure smooth distribution of those products to the Debtors' customers. The Debtors might not be able to obtain such goods and services if they fail to satisfy the Critical Vendor Claims. Delay or interruption in their ability to obtain these critical goods and services would have a significant adverse effect on the Debtors' estates.

23. Payment of critical trade claims during a chapter 11 case has been authorized in this District and elsewhere where the payment of such claims is essential to the continued operation of the businesses. See, e.g., In re W.R. Grace & Co., et al., Case No. 01-01139 (JJF) (Bankr. D.Del. Apr. 2, 2001); In re Ameriserve Food Distrib., et al., Case No. 00-

0358 (PJW) (Bankr. D.Del. Jan. 13, 2000) ; In re Gross Graphic Sys., Inc., et al., Case No. 99-2756 (PJW) (Bankr. D.Del. July 30, 1999); In re Harnischfeger Indus., Inc., et al., Case No. 99-2171 (PJW) (Bankr. D.Del. June 7, 1999); In re Discovery Zone, Inc., et al., Case No. 99-941 (JJF) (D.Del Apr. 21, 1999). Similarly, payment on terms similar to the those proposed in the Motion and Order were approved in In re Kmart Corporation, et al., Case No. 02-B02474 (Bankr. N.D. Ill. Jan. 25, 2002).

24. Further, 11 U.S.C. §364(b) provides:

The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

Section 364(b) of the Bankruptcy Code grants the Court broad authority, at the outset of a case, to approve borrowing arrangements, out of the ordinary course of business, that are critical to the ongoing operation of a debtor. In re Payless Cashways, Inc., 268 B.R. 543 (Bankr. W.D. Mo. 2001). The court in Payless Cashways treated the debtor's motion to pay "critical" vendors on the condition, inter alia, that those vendors agree to extend postpetition credit on standard industry terms on an unsecured basis in an amount equal to not less than the full amount of such vendor's prepetition claim as a borrowing request under section 364 of the Bankruptcy Code. Id. at 547. The Payless Cashways Court approved the "critical" vendor motion based on section 364(b) of the Bankruptcy Code, stating that courts have broad authority under section 364(b) to allow a debtor to obtain credit and recognizing that the promise of a priority administrative expense claim, subject to the senior claims of lienholders might be an inadequate inducement to

vendors (in a case such as Payless Cashways where the debtor did not have post-petition financing in place). In such a case, the debtor may well need something else to offer to its suppliers in order to obtain credit. Id.

25. The Debtors submit that the Court should grant the relief requested herein pursuant to section 105(a) and/or section 364(b) of the Bankruptcy Code. As described above, the goods and services provided by the Critical Vendors are critical to the ongoing operation of the Debtors' estates. Additionally, the Court has the authority to allow the Debtors to obtain credit, out of the ordinary course of business pursuant to section 364(b) of the Bankruptcy Code.

26. As described above, the goods and services provided by the Critical Vendors are critical to the ongoing operation of the Debtors' estates. Additionally, the Court has the authority to allow the Debtors to obtain credit, out of the ordinary course of business pursuant to section 364(b) of the Bankruptcy Code. Accordingly, under the circumstances, the Court should authorize the Debtors to pay, pursuant to section 105(a) and/or section 364(b) of the Bankruptcy Code, the Critical Vendor Claims.

27. Nothing in this Motion should be construed as, or be deemed to be, an assumption or rejection of an executory contract or unexpired lease between the Debtors and any creditor, including, but not limited to, the Critical Vendors. Further, the Debtors reserve the right to contest on non-bankruptcy grounds the amount claimed by any of the Critical Vendors to be in the ordinary course of business.

Notice

28. Notice of this Motion has been given to (a) the United States Trustee; (b) counsel to the senior secured lenders; (c) counsel to the indenture trustees; (d) counsel to the ad hoc trade committee; and (e) counsel to certain PACA claimants. In light of the nature of the relief requested, the Debtors submit that no further notice is required.

No Prior Request

29. No prior Motion for the relief requested herein has been made to this or any other Court.

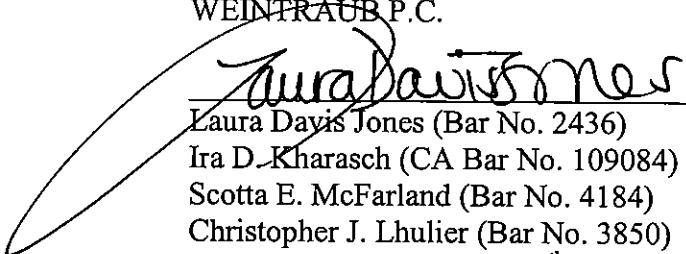
WHEREFORE, the Debtors respectfully request that the Motion be granted and that this Court grant any such further relief as is necessary.

Dated: April 2, 2003

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