

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

In Re:

Fleming Companies, Inc., et al.,  
Debtors.

CHAPTER 11

Case No. 03-10945 (MFW)  
(Jointly Administered)

**Objection Deadline: April 9, 2003 at 12:00 p.m. prevailing Eastern Time**

**Hearing Date: April 10, 2003 at 11:30 p.m. prevailing Eastern time**

**LIMITED OBJECTION OF HERSHEY FOODS CORPORATION  
TO MOTION FOR ORDER AUTHORIZING THE PAYMENT OF  
CRITICAL TRADE VENDORS IN EXCHANGE  
FOR CONTINUING RELATIONSHIP PURSUANT TO CUSTOMARY TRADE TERMS**

Hershey Foods Corporation (“Hershey”), by its attorneys, Klehr Harrison Harvey Branzburg & Ellers LLP, hereby objects (the “Objection”) to the Motion (the “Critical Vendor Motion”) for Order Authorizing the Payment of Critical Trade Vendors in Exchange for Continuing Relationship Pursuant to Customary Trade Terms, and respectfully represents as follows:

**Jurisdiction**

1. This Court has jurisdiction to consider this matter 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 basis for the relief requested in the Critical Vendor Motion is section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”).

## **Background**

3. On April 1, 2003 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors have retained possession of their respective assets and are authorized, as debtors-in-possession, to continue the operation and management of their respective businesses.

4. Prior to the Petition Date, Hershey shipped to the Debtors goods for which it has not been paid of approximately \$17,000,000.00. Included within these shipments were goods sold on credit in the approximate amount of \$12,000,000.00 for which Hershey has timely asserted a reclamation claim, pursuant to section 2-702 of the Uniform Commercial Code.

5. At the “First Day” hearing as to the Debtors’ cases, the Debtors stated that they have substantial free unsecured assets in their estates. The Debtors, however, did not give any details as to the nature or value of these assets.

6. On April 2, 2003, the Debtors filed the Emergency Motion (the “Financing Motion”) Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 Fed. R. Bankr. P. 4001(b) and 9014, and Del. Bankr. LR 4001-2, (A) for Interim and Final Order Authorizing the Use of Cash Collateral and Grant of Adequate Protection Nunc Pro Tunc to the Petition Date, and (B) Approving Post-Petition Financing and Related Relief.

7. Pursuant to the Financing Motion, the Debtors seek to encumber all of the currently free unsecured assets of their estates. However to date there has been no disclosure of the nature or value of those unsecured assets.

8. On April 2, 2003, Hershey filed a Limited Objection to the Financing Motion.

9. On April 4, 2003, the Debtors filed the Critical Vendor Motion.

10. Pursuant to the Critical Vendor Motion, the Debtors seek broad authority to spend \$100 million on a “critical vendor” program (the “Program”), while at the same time borrowing the same amount under a post-petition debtor-in-possession financing facility.

11. The Debtors’ financing motion and critical vendor motion are inexorably intertwined. At the same time those motions, if approved, would apparently encumber all unsecured assets in the estate and distribute \$100,000,000 to pre-petition unsecured creditors. In addition, certain vendors may get post-petition liens to secure post-petition trade credit.

12. If the relief requested were to be granted it would effectively dispose of significant assets of the estate and affect the rights of all constituents in this proceeding.

13. Normally, before such dramatic relief is granted, substantial disclosures would be required akin to those required in a disclosure statement mandated under § 1125 of the Bankruptcy Code since all the relief requested alters the normal scheme of distribution mandated by the Code.

14. While ultimately it may prove wise to approve a \$100,000,000 critical vendor program and it may be appropriate to encumber all assets of the estate to finance such a program, it is not appropriate to do either on an expedited basis with the lack of disclosure that exists in this case.

15. Simply stated, the Debtor seeks dramatic extraordinary relief while at the same time providing such a paucity of information to creditors that it is impossible to evaluate the merits of the motions.

16. In the Critical Vendor Motion, the Debtors fail to disclose pertinent information that is key to a determination of the relief requested therein. Among these material omissions are the Debtors' failure to

- (a) identify which creditors are to be paid as "critical vendors;"
- (b) identify the terms under which the "critical vendors" are to be paid their pre-petition claims;
- (c) identify the terms under which the "critical vendors" are to provide services post-petition;
- (d) identify the allocation of the payments to be made under the Program between the Debtors' grocery and convenience store divisions, and;
- (e) discuss the Debtors' business plan for the reorganization of these two divisions, namely, which division will require a greater allocation of the Debtors' resources, which division is more important to the Debtors' reorganization and will survive post-petition.

17. On April 4, 2003, the Debtors served a Notice as to the Critical Vendor Motion which set a hearing date of April 21, 2003 for the Critical Vendor Motion with an objection deadline of April 14, 2003.

18. On April 7, 2003, at 5:27 p.m., Hershey received by facsimile, an Amended Notice which abruptly changed the hearing date to April 10, 2003 at 11:30 a.m. and the objection deadline to April 9, 2003 at 12:00 p.m. This change resulted in the shortening of the time set for the hearing by over a week and effectively provided only 48 hours' notice of the hearing date, and 24 hours' notice of the objection deadline. This accelerated hearing schedule was effected with no additional disclosure of material facts that would allow creditors to evaluate the issues related to the Critical Vendor Motion.

19. The organizational meeting to form an official committee of unsecured creditors is currently scheduled for April 10, 2003 at 1:00 p.m.

20. Hershey hereby submits its Objection to the Critical Vendor Motion.

**Objection**

21. Hershey objects to the Critical Vendor Motion on the following grounds:

(a) There has been insufficient disclosure to justify the relief requested;

(b) There has been insufficient time provided to allow creditors a meaningful opportunity to obtain formal discovery; and

(c) The Debtors have not responded to requests for informal discovery or even to requests for information.

22. The court's equitable powers under section 105(a) of the Bankruptcy Code, to permit prepetition payments to "critical vendors" is extraordinary relief. 11 U.S.C. §§ 362(a)(6), 507, 547, 726, 1122, 1129(b)(1); *In re Just For Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999); *In re Coserv, L.L.C.*, 273 B.R. 487, 494 (Bankr. N.D. Tex. 2002).

23. While such extraordinary relief may be appropriate in this case, it should only be permitted after full disclosure of the Debtors' business plan, budget, and a detailed explanation of the critical vendor program. The disclosures made to date are simply inadequate to permit creditors to make an informed decision concerning the merits of such a program.

24. In addition to the need for meaningful disclosure, creditors require enough time to evaluate the disclosures. The expedited way in which this motion has been handled has not provided sufficient time for creditors to obtain or evaluate the motions.

25. On April 7, 2003, Hershey through its counsel requested information concerning the Motion from the Debtors through their counsel. To date no response has been received.

26. The Debtors have failed to provide evidence that satisfies the requisite elements set forth by the case law. In fact, the Critical Vendor Motion is devoid of any information upon which creditors could rely in supporting or opposing the Motion. This is particularly troublesome since the Debtors have chosen to expedite consideration of this matter, and an official committee of unsecured creditors has yet to be appointed in these cases.

27. Moreover, the Debtors' attempts to rush this Court into granting the relief with a hearing on short notice further taints the effects of their failure to provide meaningful disclosures in the Critical Vendor Motion for several reasons. First, the Debtors have provided the creditors with little time to respond to and prepare for a hearing on the Critical Vendor Motion. More importantly, however, by moving the hearing such that it precedes the organizational meeting (by one hour), the Debtors have also eliminated from the pool of potential objections, any objection that might be filed by the official committee of unsecured creditors to be appointed in the Debtors' cases to protect the interests of general unsecured creditors. The committee would need time to form, organize and obtain counsel and potentially obtain discovery as to the Critical Vendor Motion before making any determinations as to its impact on unsecured creditors. Again, the Debtors are seeking to circumvent the dictates of the Bankruptcy Code for the protection of creditors generally, let alone, the priorities dictated by the Code's absolute priority rule and its policy of equality of distribution.

28. Accordingly, for the reasons stated above, Hershey respectfully requests that this Court deny the Critical Vendor Motion.

**Conclusion**

WHEREFORE, Hershey respectfully requests that this Court enter an Order: (a) denying the Critical Vendor Motion; and (b) granting such other and further relief as this Court deems just and proper.

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Dated: April 9, 2003

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