

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)
) Obj. Deadline: April 14, 2003 at 4:00 pm
) Hearing Date: April 21, 2003 at 12:30 pm
Debtors.) Related Pleading: D.I. 12 and 75

**OBJECTION OF GOLD'N PLUMP FARMS LIMITED PARTNERSHIP, LLP TO
DEBTORS' MOTION FOR AUTHORITY TO PAY PRE-PETITION CLAIMS UNDER
THE PERISHABLE AGRICULTURAL COMMODITIES
ACT AND THE PACKERS AND STOCKYARD ACT**

Gold'n Plump Farms Limited Partnership, LLP ("Gold'n Plump"), by and through its undersigned counsel, hereby objects to the Debtors' Motion for Authority to Pay Prepetition Claims Under the Perishable Agricultural Commodities Act and the Packers and Stockyard Act (the "Motion"), and in support hereof respectfully represents as follows:

Background

1. Gold'n Plump is a wholesale seller of poultry and poultry products. Gold'n Plump's principal place of business is in St. Cloud, Minnesota.

2. Gold'n Plump sold poultry and poultry products to Fleming Companies, Inc. ("Fleming"), one of the Debtors in these jointly administered cases prior to the commencement of such cases. Gold'n Plump's invoices to Fleming were payable on a net seven (7) day basis. Fleming has failed to pay Gold'n Plump for product shipped to Fleming during the period from March 9 through March 31, 2003. The total value of the product shipped to Fleming during the subject period is not less than \$1,016,158.33.

3. As indicated below, the product purchased by Fleming from Gold'n Plump is purchased subject to an express statutory trust under the Minnesota Wholesale Produce Dealers Act.

4. As also indicated below, Gold'n Plump objects to the Motion on the grounds that the Motion fails to adequately protect and recognize Gold'n Plump's rights as the owner of trust assets.

5. Gold'n Plump reserves the right to supplement this objection at any time prior to the hearing on the Motion.

Statutory Trust Scheme

6. The Minnesota Wholesale Produce Dealers Act (the "WPDA") provides that "the produce and products of produce of a wholesale produce dealer and assets and proceeds are held in trust for the benefit of unpaid sellers." Minn. Stat. § 27.138(1)(a)(2000). The term "produce" is defined in Section 27.01 of the Minnesota Statutes to include "poultry and poultry products." Minn. Stat. § 27.01(3)(2000). The term "wholesale produce dealer" is defined in the statute to include "a person who buys from or contracts with a seller for production or sale of produce in wholesale lots or resale." The term "seller," finally, is defined by the WPDA to include both a farmer and a "wholesale produce dealer." Minn. Stat. § 27.01(10)(2000).

7. Fleming is a "wholesale produce dealer" within the meaning of the WPDA and Gold'n Plump is a "seller" entitled to the protections of the WPDA.

8. Section 27.138 of the Minnesota Statutes provides that a wholesale produce seller may commingle trust assets so long as the dealer "maintains the trust assets in a manner that makes the trust assets freely available to satisfy the amounts owed to unpaid sellers." Minn. Stat.

§ 27.138(1)(c)(2000). The statute makes it clear that a dealer “may not divert trust assets in a manner that impairs the ability of unpaid sellers to recover amounts due.” A dealer, moreover, does not transfer title of trust assets “in a transaction intended to impair the ability of unpaid seller’s to recover amounts due or . . . for which the value is inadequate to satisfy filed beneficiary notices.” Minn. Stat. § 27.138(1)(e)(2000).

9. Chapter 27, finally, also makes it clear that “the unpaid seller’s interest in trust assets is paramount to all other liens, security interests, and encumbrances in the trust assets.” Minn. Stat. § 27.138(4)(2000).

10. The provisions of Chapter 27 were interpreted and enforced in Dairy Fresh Foods, Inc. v. Ramette (In re Country Club Market, Inc.), 175 B.R. 1005 (D.Minn. 1994). The Country Club case makes it clear that property held in trust does not constitute property of the estate for purposes of Section 541 of the Bankruptcy Code and that a seller

. . . does not have to perfect a “lien” as against current or future claim holders. Pursuant to the statute, Country Club’s fiduciary duty requires it to maintain sufficient funds, commingled as they are with general revenues, to satisfy unpaid sellers in full. The burden is upon the wholesale produce dealer to ensure that trust assets are maintained. Satisfying that duty protects the beneficiary from “getting in line” behind good faith retail purchasers from Country Club, lenders or other creditors. [Seller’s] interest in the trust fund arose at the moment the produce was delivered, prior to the filing of the bankruptcy petition. This unpaid seller’s rights preceded those of any bona fide purchaser from Country Club, and [Seller] need not have perfected its interest according to the Code at the time of the commencement of the proceeding.

Id. at 1010.

11. As indicated above, Fleming has an absolute obligation to maintain assets in an amount sufficient to satisfy Gold’n Plump’s valid claim under the WPDA.

Beneficiary's Notice

12. Gold'n Plump filed an appropriate notice under the WPDA on or about April 3, 2003 covering goods invoiced to Fleming by Gold'n Plump between March 9 and March 26, 2003, payment of which was due by no later than April 2, 2003. A copy of Gold'n Plump's initial beneficiary's notice (exclusive of certain of the exhibits attached thereto) is attached hereto and incorporated herein as Exhibit A. Gold'n Plump has attached hereto and incorporated herein as Exhibit B a true and correct copy of the receipt received by Gold'n Plump from the Minnesota Department of Agriculture on or about April 4, 2003.

13. Gold'n Plump filed a supplemental beneficiary's notice under the WPDA on or about April 11, 2003 to cover goods invoiced to Fleming by Gold'n Plump between March 27 and March 31, 2003, the payment for which was due no later than April 7, 2003. A copy of Gold'n Plump's supplemental beneficiaries notice (exclusive of the exhibits attached thereto), which has been file-stamped as received by the Minnesota Department of Agriculture, is attached hereto and incorporated herein as Exhibit C.

Summary of Motion

14. It appears that the Motion is intended to address the rights of claimants under the WPDA, as well as claimants under the Perishable Agricultural Commodities Act ("PACA") and the Packers and Stockyard Act ("PASA"). The Motion includes acknowledgment by the Debtors that the distribution of assets to beneficiaries of a valid trust claim "falls outside of both (i) the priority scheme established by the Bankruptcy Code and (ii) the plan process (i.e., trust beneficiaries may be paid outside of, and prior to, a confirmed plan of reorganization)." Notwithstanding this acknowledgment, the Debtors have proposed to continue to use trust assets during the pendency of this bankruptcy proceeding. In return, Debtors have agreed to prepare a

report “listing those PACA/PASA claims, if any, which they deem to be valid in accordance with this Order.” The Debtors have further requested that the Court provide the Debtors’ authority to pay PACA/PASA claims in its discretion following the completion of its investigation.

15. There is nothing in the Motion that actually requires that the Debtors pay its PACA/PASA claims, whether before or after filing its report. Debtors have also failed to provide Gold’n Plump and the holder of other trust claims in this case with evidence that it intends to retain funds sufficient to pay outstanding trust claims, as required by Minnesota law.

Objections to Motion

16. The procedure contemplated under the Motion falls short of the requirement of the WPDA and the other trust statutes identified in the Motion. At a minimum, any order approving the Motion should require that Debtors exercise good faith and reasonable efforts in reconciling and determining the validity of any trust claims. This means that Debtors should be required to articulate with reasonable specificity the basis for any objection to a filed WPDA, PACA or PASA claim.

17. In addition, any order approving the Motion should also require that the Debtors pay the undisputed amount of all trust claims immediately following submission of its report and promptly schedule an omnibus hearing to resolve any remaining disputes concerning Debtors’ trust claim. Simply put, Debtors should not be permitted to hold otherwise valid trust claims hostage while it pursues litigation over amounts in dispute.

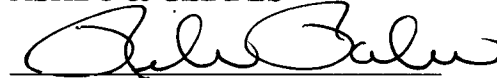
18. Trust claimants are entitled to assurance that Debtors will have sufficient funds to pay the trust claims in full. Accordingly, Debtors should be required to establish a reserve sufficient to pay all trust claims, including claims under WPDA.

19. Finally, Debtors' request that it be allowed to file its report within 90 days following the date on which its proposed order becomes final appears to be an attempt to add an additional 10-day period to the basic 90-day period proposed in the Motion. Debtors' proposed timetable does not adequately address the paramount interests of the holders of valid trust claims in this case. Gold'n Plump submits that Debtors' report should be submitted within 60 days following entry of any order approving the Motion.

WHEREFORE, for the reasons set forth above, Gold'n Plump Farms Limited Partnership, LLP respectfully requests that the Motion be denied and that the Court grant Gold'n Plump such other and further relief as the Court may deem just and equitable.

Dated: April 14, 2003

ASHBY & GEDDES



Christopher S. Sontchi, Esq. (#3159)
Ricardo Palacio (#3765)
222 Delaware Avenue, 17th Floor
P.O. Box 1150
Wilmington, Delaware 19899
(302) 654-1888

-and-

BRIGGS AND MORGAN
Richard D. Anderson
(Minnesota Bar ID #2306)
Julie A. Erskine
(Minnesota Bar ID #315230)
2400 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 334-8640

Attorneys for Gold'n Plump Farms Limited
Partnership, LLP

125014.1

EXHIBIT A



MINNESOTA DEPARTMENT OF AGRICULTURE
 80 WEST PLATO BOULEVARD • ST. PAUL, MINNESOTA 55107-2094
 TELEPHONE: 651/296-8620

**BENEFICIARIES NOTICE OF INTENT TO PRESERVE TRUST ASSETS UNDER
 WHOLESALE PRODUCE DEALERS ACT — STANDARD FORM**

This statement is presented for filing pursuant to M.S. § 27.13B

Filing No: 20037025447
 Filing Date: 2003/04/03
 Filing Time: 5:00 PM

State of Minnesota
 FOR OFFICE USE ONLY
 Processing Office: Secretary of State
 Filed by: etici01

DEBTOR/WHOLESALE PRODUCE DEALER Flaming Companies, Inc.		
MAILING ADDRESS 1945 Lakepoint Drive		
CITY Lewisville	STATE TX	ZIP CODE 75057
SECURED PARTY/SELLER Gold'n Plump Farms Limited Partnership, LLP		
MAILING ADDRESS P.O. Box 1106		
CITY St. Cloud	STATE MN	ZIP CODE 56302
AMOUNT DUE \$803,153.53	DUE DATE OF UNPAID TRANSACTIONS March 16, 2003 through April 2, 2003, as set forth on Exhibit A, attached hereto.*	DATE OF DISHONORED PAYMENT Not applicable

DESCRIPTION AND AMOUNT OF PRODUCE
 Poultry and poultry products, including, without limitation, whole chickens, chicken drumsticks, chicken thighs, chicken wings, chicken breasts, drumettes, chicken hearts and gizzards, chicken livers, marinated chicken pieces, stuffed chicken breasts, bone-in chicken breasts, buffalo wings, chicken patties, chicken nuggets, all as described in more detail on Exhibit A attached hereto and incorporated herein.

*We reserve the right to make an additional filing for unpaid transactions due between April 3 and April 7, 2003, if such transactions are not paid when due.

DESCRIPTION OF TRUST ASSETS
 All products described on Exhibit A attached hereto and all proceeds of such products including, without limitation, all cash and other proceeds obtained from the sale or other disposition of trust assets.

A copy of this form must be submitted to:

Secretary of the State of Minnesota (NOTE: A ~~\$15.00~~ ^{20.00} filing fee is required and must be included with this form.)

County Recorder in _____ buyer's county

The buyer

This notice is effective for 18 months from the date of filing.

EXHIBIT A

EXHIBIT B



Minnesota Department of Agriculture
AG MARKETING SERVICES DIVISION
WHOLESALE PRODUCE DEALERS' LICENSING & AUDITING

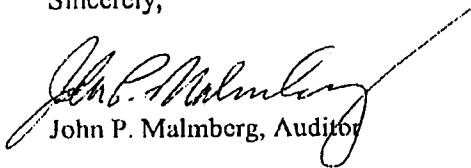
April 4, 2003

Gold n Plump Farms Limited Partnership,LLP
P O Box 1106
St Cloud MN 56302

To Whom It May Concern:

We received your "Beneficiaries Notice of Intent to Preserve Trust Assets under Wholesale Produce Dealers Act" concerning non payment of Fleming Companies Inc. on April 3,2003. By law this is effective for 18 months following the date of filing.

Sincerely,


John P. Malmberg, Auditor



MINNESOTA DEPARTMENT OF AGRICULTURE
 90 WEST PLATO BOULEVARD • ST. PAUL, MINNESOTA 55107-2094
 TELEPHONE: 651/296-8620

**BENEFICIARIES NOTICE OF INTENT TO PRESERVE TRUST ASSETS UNDER
 WHOLESALE PRODUCE DEALERS ACT — STANDARD FORM**

This statement is presented for filing pursuant to M.S. § 27.138

DEBTOR/WHOLESALE PRODUCE DEALER Fleming Companies, Inc.		FOR OFFICE USE ONLY	
MAILING ADDRESS 1945 Lakepoint Drive			
CITY Lewisville	STATE TX		ZIP CODE 75057
SECURED PARTY/SELLER Gold'n Plump Farms Limited Partnership, LLP			
MAILING ADDRESS P.O. Box 1106			
CITY St. Cloud	STATE MN		ZIP CODE 56302
AMOUNT DUE \$803,153.53	DUE DATE OF UNPAID TRANSACTIONS March 16, 2003 through April 2, 2003, as set forth on Exhibit A, attached hereto.*	DATE OF DISHONORED PAYMENT Not applicable	

DESCRIPTION AND AMOUNT OF PRODUCE

Poultry and poultry products, including, without limitation, whole chickens, chicken drumsticks, chicken thighs, chicken wings, chicken breasts, drumettes, chicken hearts and gizzards, chicken livers, marinated chicken pieces, stuffed chicken breasts, bone-in chicken breasts, buffalo wings, chicken patties, chicken nuggets, all as described in more detail on Exhibit A attached hereto and incorporated herein.

*We reserve the right to make an additional filing for unpaid transactions due between April 3 and April 7, 2003, if such transactions are not paid when due.

DESCRIPTION OF TRUST ASSETS

All products described on Exhibit A attached hereto and all proceeds of such products including, without limitation, all cash and other proceeds obtained from the sale or other disposition of trust assets.

John P. Mulvaney
Recorder
651 296 8620

A copy of this form must be submitted to:

_____ Secretary of the State of Minnesota (NOTE: A \$15.00 filing fee is required and must be included with this form.)

_____ County Recorder in _____ buyer's county

The buyer
 Department of Agriculture

This notice is effective for 18 months from the date of filing.



EXHIBIT C



MINNESOTA DEPARTMENT OF AGRICULTURE
 90 WEST PLATO BOULEVARD • ST. PAUL, MINNESOTA 55107-2094
 TELEPHONE: 651/296-8620

**BENEFICIARIES NOTICE OF INTENT TO PRESERVE TRUST ASSETS UNDER
 WHOLESALE PRODUCE DEALERS ACT — STANDARD FORM**

This statement is presented for filing pursuant to M.S. § 27.138

DEBTOR/WHOLESALE PRODUCE DEALER Fleming Companies, Inc.		FOR OFFICE USE ONLY  	
MAILING ADDRESS 1945 Lakepoint Drive			
CITY Lewisville	STATE TX		ZIP CODE 75057
SECURED PARTY/SELLER Gold'n Plump Farms Limited Partnership, LLP			
MAILING ADDRESS P.O. Box 1106			
CITY St. Cloud	STATE MN		ZIP CODE 56302
AMOUNT DUE \$213,004.80	DUE DATE OF UNPAID TRANSACTIONS April 3, 2003 through April 7, 2003, as set forth on Exhibit A, attached hereto.	DATE OF DISHONORED PAYMENT Not applicable	

DESCRIPTION AND AMOUNT OF PRODUCE

Poultry and poultry products, including, without limitation, whole chickens, chicken drumsticks, chicken thighs, chicken wings, chicken breasts, drumettes, chicken hearts and gizzards, chicken livers, marinated chicken pieces, stuffed chicken breasts, bone-in chicken breasts, buffalo wings, chicken patties, chicken nuggets, all as described in more detail on Exhibit A attached hereto and incorporated herein.

DESCRIPTION OF TRUST ASSETS

All products described on Exhibit A attached hereto and all proceeds of such products including, without limitation, all cash and other proceeds obtained from the sale or other disposition of trust assets.

A copy of this form must be submitted to:

_____ Secretary of the State of Minnesota (NOTE: A \$15.00 filing fee is required and must be included with this form.)

_____ County Recorder in _____ buyer's county

_____ The buyer

This notice is effective for 18 months from the date of filing.

CERTIFICATE OF SERVICE

I, Ricardo Palacio, Esquire hereby certify that on April 14, 2003, I caused one copy of the foregoing **Objection of Gold'n Plump Farms Limited Partnership, LLP to Debtors' Motion for Authority to Pay Prepetition Claims Under the Perishable Agricultural Commodities Act and the Packers and Stockyard Act** to be served upon the persons on the attached list by first class United States Mail, postage prepaid, unless otherwise indicated.

A handwritten signature in black ink, appearing to read 'Ricardo Palacio', written over a horizontal line.

Ricardo Palacio

**Fleming Companies Objection
Service List**

HAND DELIVERY

Julie Compton, Esq.
Office of the United States Trustee
844 King St., Room 2313
Wilmington, DE 19801

HAND DELIVERY

Laura Davis Jones, Esq.
Pachulski Stang Ziehl Young & Jones
919 N. Market St., 16th Floor
Wilmington, DE 19801

HAND DELIVERY

Scott D. Cousins, Esq.
Greenberg Traurig LLP
1000 West Street, Suite 1540
Wilmington, DE 19801

E-MAIL AND U.S. MAIL

James H.M. Sprayregen, PC
Richard L. Wynne
Kirkland & Ellis
777 South Figueroa St.
Los Angeles, CA 90017

E-MAIL AND U.S. MAIL

Andrew P. DeNatale, Esq.
Lenders White & Case
1155 Avenue of the Americas
New York, NY 10036-2787