

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 03-10945
.
.
FLEMING COMPANIES, INC., .
Et al, . 824 Market Street
.
Debtor, . Wilmington, Delaware 19801
.
May 27, 2003
9:31 a.m.

TRANSCRIPT OF OMNIBUS MOTION HEARING
BEFORE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: You may be seated.

2 THE COURT: Good morning.

3 MS. JONES: Good morning, Your Honor. Laura Davis
4 Jones of Pachulski, Stang, Ziehl, Young, Jones and Weintraub on
5 behalf of Fleming Companies and related debtors. Your Honor, we
6 have an amended notice of agenda before the Court this morning.
7 Before we start that agenda, though, Your Honor, Ms. Miller had
8 asked if she could address the Court on a housekeeping matter.

9 THE COURT: All right.

10 MS. MILLER: Good morning, Your Honor.

11 THE COURT: Good morning, Your Honor.

12 MS. MILLER: Kathleen Miller on behalf of Zurich
13 Insurance. I just wanted to -- Your Honor apparently at the
14 hearing last week on the joint motion of the carriers for relief
15 from the automatic stay to make a payment on a prepetition
16 settlement agreement Your Honor had some questions. The
17 following day a certification of counsel was filed with the
18 agreed upon form of order, and then on Friday we filed another
19 certification of counsel to address Your Honor's questions about
20 the policies and the nature of the claim, and we also filed on
21 Friday a motion to file under seal the underlying settlement
22 agreement, which is confidential, and I just want to make sure if
23 Your Honor needed anything else we could take care of that as
24 well.

25 THE COURT: All right. I didn't see the latter two, so

1 your office may have gotten a call about it, or debtors' counsel
2 may have.

3 MS. MILLER: Okay. Thank you, Your Honor.

4 THE COURT: All right. I'll look for that.

5 MS. JONES: Your Honor, we have several contested
6 matters before the Court today as -- and then at towards the end
7 of the calendar we have a number of motions of the Committee to
8 intervene in the adversary proceedings to which there have been
9 no oppositions on those motions.

10 THE COURT: I don't think we need to do anything on
11 that. There's no opposition, I'll grant those.

12 MS. JONES: Thank you, Your Honor. Your Honor, I'm not
13 sure what's the Court's pleasure in terms of our motion for
14 relief from the cash management order or to proceed with the TRO,
15 as I know people are here with evidence and ready to go forward.

16 THE COURT: Yes. Is there evidence going to be
17 presented on the TROs?

18 MR. LIEBELER: Yes, Your Honor, here, Kirkland and
19 Ellis, one housekeeping matter I know I filed a pro hac vice
20 application. I don't know that it's been granted but I did want
21 to bring that to the Court's attention.

22 THE COURT: All right. I don't know that it has, but
23 it will be.

24 MR. LIEBELER: Okay. We actually did bring two
25 witnesses with us and we're prepared to put on evidence with

1 those two witnesses.

2 MR. WERB: That's fine, Your Honor. Duane Werb on
3 behalf of the plaintiffs requesting the TRO. We, as indicated
4 last week, we do not have any live witnesses today. There were
5 several declarations attached to our memorandum of law when it
6 was originally filed, as well as supplemental affidavits that
7 were filed with the Court on Friday. Hopefully they were hand
8 delivered to chambers, and I know that copies were also hand
9 delivered to debtors' counsel. We'll be relying upon those as
10 well.

11 MR. LIEBELER: Your Honor, with respect to those
12 affidavits, we were served with those late Friday afternoon just
13 before a holiday weekend without any ability to marshal opposing
14 evidence from our client or get witnesses that would oppose
15 those, and we would move to strike the affidavits that were given
16 to us late Friday afternoon. We believe of course that the
17 affidavits that were initially filed -- motion are indeed fair
18 game.

19 MR. WERB: Your Honor, everything in this case is fair
20 game. Let me indicate to the Court that those supplemental
21 declarations were filed at approximately 3:30 on Friday
22 afternoon. That would have been 12:30 west coast time when
23 debtors' lead counsel in this matter would have been -- received
24 that information. Your Honor has a rule with regard to, I
25 believe, amended agendas within a 48-hour period. Well, I would

1 submit to the Court that with the intervening holiday there's
2 been approximately 90 hours which have passed. I notice that
3 there has not been a second amended agenda letter in this case,
4 either, which lists those various declarations. I would submit
5 that we should have the ability to move forward today in light of
6 the fact that this is a TRO. It's not a full-blown evidentiary
7 hearing, and the Court can assign such probative value to these
8 declarations as it deems fit.

9 MR. LIEBELER: Your Honor, I will also point out that
10 after the last hearing, which was a week ago, we asked Mr. Werb
11 if he would provide his witnesses for deposition in the
12 intervening week so we could actually take the discovery from his
13 witnesses that he felt was relevant -- the parties ended getting
14 into a dispute over that we believe Mr. Werb agreed to that, he
15 says he didn't. That's neither here nor there except for the
16 fact that we've had absolutely no access to those witnesses, and
17 then he turns around and gives us on Friday afternoon, when all
18 of my witnesses have gone home for a long holiday weekend, and I
19 can't get to them. I mean, I can certainly get the affidavits
20 and look them over the weekend, and I have, but I don't have the
21 ability to go down to Fleming, my client, over a holiday weekend
22 and get documents or find out what my client's response to those
23 affidavits is. And so even though they are certainly, as Mr.
24 Werb says, 90 hours in between then and now, that's not 90 hours
25 that I have access to my witnesses and can actually forward a

1 substantive and fair response to the -- affidavits.

2 THE COURT: Well, let me say this. I haven't -- I did
3 not get them Friday afternoon and have not had a chance to
4 consider them myself, so I think we'll restrict today's hearing
5 anyway to these original declarations, and if --

6 MR. WERB: Your Honor, there's information in one of
7 those, specifically the supplemental declaration of Suzanne
8 Scott, which is vital to this hearing today. If I may respond to
9 the other comments made by counsel, there was some discussion
10 about the ability to have telephonic depositions taken. Mr. Wynn
11 approached me with regard to that matter last week. However, it
12 was then disclosed to me later that what was envisioned by Mr.
13 Wynn was that representatives of Kirkland and Ellis would be
14 flying to the locations of our clients and taking those
15 depositions, thereby making us available by telephone. Obviously
16 that was inappropriate and unacceptable. In addition --

17 THE COURT: Well --

18 MR. WERB: -- on the 20th of May we forwarded a letter
19 to Mr. Wynn and co-counsel for Mr. Wynn requesting that they
20 produce certain documentation. That documentation included any
21 type of agreements between vendors and Fleming and independent
22 retailers. It also included manuals, also included the specific
23 information upon which Mr. Scott, Michael Scot is the interim
24 treasurer of Fleming had testified about.

25 THE COURT: Well, I don't want to get into the

1 discovery. This is a TRO.

2 MR. WERB: Correct.

3 THE COURT: So I am going to consider it based on the
4 declarations you presented. I'll hear the debtors' live
5 witnesses if they want, and you can present cross, and let's see
6 where we go on that.

7 MR. WERB: Thank you.

8 MR. LIEBELER: Thank you, Your Honor. In that case we
9 would like to call Debbie Alexander. I'm sorry -- sure when I'm
10 about to start an exam but --

11 MR. MILLER: Good morning, Your Honor. Excuse me.
12 Stephen Miller quite frankly on behalf of myself and I raised to
13 address one point in the cash management motion which they filed.
14 And I know Your Honor -- I'm not sure how Your Honor wanted to
15 proceed with the TROs or the cash management order. I noticed
16 debtors were getting ready to proceed with the TRO. However my
17 point really only addressed the cash management order and it's
18 really not on behalf of a client but on behalf of myself as an
19 officer of the Court and I just wanted to address that if I could
20 so that I could leave if that would be acceptable to Your Honor.

21 THE COURT: Well let me hear what you're going to say.

22 MR. MILLER: It was merely in response to paragraph 25
23 of the cash management order -- excuse me, paragraph 25 of the
24 motion that the debtors filed for a stay of the cash management
25 order or other type of relief. That paragraph asserts that there

1 was an erroneous order submitted to the Court. That is a
2 blatantly untrue statement. The order that was submitted to Your
3 Honor and to debtors' counsel was a copy, true and correct copy
4 of Your Honor's cash management order dated April 3. It was
5 highlighted, certain portions of it were highlighted in orange.

6 On April 21 when the issue was raised again, I
7 presented to debtors' counsel a copy of the cash management order
8 dated April 3, once again a true and correct copy. However that
9 order had been highlighted in yellow. Both times the order that
10 was presented to this Court was a true and correct copy of the
11 cash management order. I've gone back through my records. I
12 have the one that was highlighted in orange and I can present
13 that to Your Honor and to debtors' counsel. Any representation
14 that what was submitted to Your Honor was not a true and correct
15 copy is not true. Any arguments that the debtors make based on
16 that argument should not be countenanced or permitted by this
17 Court. If Your Honor has any questions, I'll be more than happy
18 to address them. But that was the sole nature for my filing the
19 affidavit and appearing before Your Honor today.

20 THE COURT: Well let me hear the debtors' response to
21 that.

22 MS. JONES: Your Honor, I think for purposes of today
23 we will be relying on the order as entered by the Court which is
24 obviously the best evidence in this matter. But, Your Honor,
25 from someone that was standing at the podium when that order was

1 handed up, I was standing here with Mr. Wynn, we were given an
2 order and I don't -- you know, it was handed to me from Mr.
3 Miller. I don't know if somebody handed it to him. But it was
4 an order that had inner lineated in it prepetition and, and it
5 was orange highlighting.

6 The second order that we did receive at the second
7 hearing was a yellow highlighting without the words prepetition
8 and. It was the actual order as signed by the Court. Your
9 Honor, I do not know where the error came. We're not in any way
10 trying to put any malicious intent at Mr. Miller or --

11 THE COURT: Well just so it's clear, the only copy I
12 got was the one that had been signed. If you were handed a copy
13 that was in error, I never saw that.

14 MS. JONES: Thank you, Your Honor. And it was
15 referenced by the parties at that hearing and that's why it takes
16 on importance is that people, you know, referenced it to the
17 Court.

18 THE COURT: Well I'll let you make the argument, but I
19 never saw anything other than the one that had my signature.

20 MS. JONES: Thank you, Your Honor.

21 THE COURT: Had the correct inner lineation.

22 MR. MILLER: Thank you, Your Honor.

23 THE COURT: So I don't think Mr. Miller need stay.

24 MS. JONES: I think that's fair, Your Honor.

25 MR. MILLER: Thank you, Your Honor.

1 THE COURT: All right.

2 MR. MILLER: Would you like this order, Your Honor,
3 this copy?

4 THE COURT: I think it's in here.

5 MR. MILLER: Okay.

6 THE COURT: Should I have the one that actually has the
7 highlighting? Mine has the gray.

8 MR. MILLER: I can hand it up, Your Honor.

9 THE COURT: You may.

10 MS. JONES: Do you have a copy, Mr. Miller, that I may
11 see?

12 MR. MILLER: Why don't you see that one so there's no
13 confusion?

14 MS. JONES: Thank you. If I may approach, Your Honor?

15 THE COURT: Yes.

16 MR. WERB: Your Honor, Duane Werb again on behalf of
17 Farris, et al. Your Honor, procedurally can we just have an
18 understanding here? Mr. Liebeler is getting ready to call
19 witnesses. It's our motion for a TRO, so I think procedurally we
20 should go first. But my suggestion would be that since the
21 resolution of the cash management order which is up for
22 reconsideration here may have an impact on this Court's ruling
23 with regard to a TRO and procedurally the cash management issue
24 should be taken up first.

25 THE COURT: Any objection to that?

1 MS. JONES: Your Honor, I think the TRO will provide
2 the Court evidence. Frankly, Your Honor, by our cash management
3 order what I'm going to request the Court is that we be given an
4 opportunity to be heard as a matter of fact and evidence on the
5 issues. Your Honor, there has been an assumption made, and I
6 don't want to make the argument on my cash management order right
7 now, but there has been an assumption made --

8 THE COURT: Well are you presenting any evidence in
9 support of your motion for relief from the cash management order?

10 MS. JONES: Your Honor, what I -- no, on the motion
11 itself. What I am asking -- what I am doing as part of that
12 though is asking the Court to hear evidence in connection with
13 the TRO that we do think does support the cash management order.
14 So I do think they are inextricably intertwined.

15 Your Honor, I do understand the horse is out of the
16 barn with respect to Sara Lee, Nichols and Superior. The mistake
17 that I think has permeated this --

18 THE COURT: Well I know the arguments. Well any
19 objection to hearing the evidence to the extent it applies to
20 both?

21 MR. WERB: Well, Your Honor, procedurally I think it's
22 inappropriate here. That was the debtor that brought a motion
23 before the Court for reconsideration of the cash management
24 order. That thing has been pending before the Court decided to
25 reschedule our TRO which was scheduled for last week.

1 Procedurally I think the cash --

2 THE COURT: Well procedurally though your TRO was filed
3 first, so it should be heard first.

4 MR. WERB: Oh, technically that's possible. But
5 procedurally I would hope that we could proceed with the
6 resolution of the cash management order.

7 THE COURT: Well I'd like to hear the testimony and to
8 the extent that it bears on both -- I see somebody who's not
9 involved in the TRO wants to be heard.

10 MR. KOBBE: Thank you, Your Honor. Kevin Kobbe on
11 behalf of Sara Lee Bakery. We don't have any objection to the
12 Court's taking this in the sequence of TRO first, cash management
13 second, but we do have non-consolidated adversary proceedings
14 here and we'd simply ask the Court for the opportunity to cross
15 examine witnesses if appropriate to the extent that those
16 witnesses are going to be testifying on matters that the Court
17 will rely on for purposes of ruling on the TRO or on the cash
18 management motion.

19 THE COURT: Any objection to that?

20 MR. LIEBELER: No. But I wouldn't anticipate that any
21 of the testimony from the debtors is going to go to that issue.

22 MR. KOBBE: To Sara Lee.

23 THE COURT: All right.

24 MR. LIEBELER: None of the evidence that we're putting
25 on goes to Sara Lee, that's certain.

1 THE COURT: All right. To the extent you're going to
2 use it in your argument on the cash management, I'll allow cross
3 examination by other parties.

4 MR. WICK: Your Honor, if I could be heard? I'm Ronald
5 Wick and I represent American Greetings and Gibson Greetings.
6 And just so we haven't been forgotten, we have a TRO also. We
7 have no objection to the proceeding with the cash management
8 order or the TRO first. It doesn't matter. I just wanted the
9 Court to be aware that we do have a witness present. We filed a
10 declaration. We rely on it. We'll proffer Mr. Rodey's
11 testimony, but if appropriate we will call him live.

12 THE COURT: All right.

13 MR. WICK: Thank you.

14 MS. JONES: Your Honor, if we can go back to the
15 question that Your Honor asked of me or the document that was
16 showed to me by Mr. Miller so that we can excuse Mr. Miller.
17 Your Honor, again for purposes of today, Your Honor, I don't
18 think we have to get into anything other than the order as
19 entered. But, Your Honor, I would make a representation to the
20 Court as an officer of the Court that this is not the order that
21 was submitted to the Court that day.

22 THE COURT: All right. All right. I don't think it's
23 relevant, but --

24 MR. MILLER: And so I can have the last word, I would
25 say that is the one that I submitted to the Court. Thank you,

1 Your Honor. If I could be excused?

2 THE COURT: You may.

3 MR. MILLER: Thank you, Your Honor.

4 MR. LIEBELER: With all that behind us, Your Honor, the
5 debtors would like to call Debbie Alexander. A procedural
6 question for you, I've got exhibits --

7 THE COURT: Well are we going to hear the Farris or are
8 we going to hear American Greetings witness first, which TRO,
9 since we're doing both?

10 MR. LIEBELER: We have two witnesses and the testimony
11 from the witnesses actually goes to both TROs.

12 THE COURT: That's what I suspected. So --

13 MR. LIEBELER: That sort of seemed the intelligent way
14 to organize the exams.

15 THE COURT: The question is whether we shouldn't hear
16 American Greetings first then?

17 MR. LIEBELER: We're happy with either order. It is
18 their motion.

19 THE COURT: Right.

20 MR. LIEBELER: So procedurally they should probably go
21 first.

22 THE COURT: Mr. --

23 MR. WERB: We have no objection to that, Your Honor.

24 THE COURT: Okay.

25 MR. WICK: Let me argue briefly first, Your Honor, and

1 I will proffer and if appropriate to bring Mr. Rodey up, I will
2 do so.

3 THE COURT: All right.

4 MR. WICK: Your Honor, as stated in our papers American
5 Greetings and its wholly owned subsidiary, Gibson Greetings, will
6 participate separately in a central billing arrangement with
7 Fleming. Pursuant to that central billing arrangement American
8 Greetings ships goods directly to retailers and invoices Fleming.
9 Fleming in turn invoices the retailer, collects the retailers
10 money as American Greetings' billing agent, holds back a cut of
11 that money as a service fee and then forwards the rest to
12 American Greetings.

13 We're here today because as of the petition date
14 American Greetings was owed more than 1.6 million dollars for its
15 shipment to retailers, and it is evident that a substantial
16 portion of that money is now in Fleming's possession. Fleming
17 has no interest in that money. It is not property of the estate
18 but Fleming obviously intends to use the money to fund its
19 reorganization. We're here to ask the Court for an order
20 enjoining Fleming from continuing to use American Greetings'
21 money to fund its operations and requiring to turn that money
22 over and account for those collections.

23 We recognize that we have to show a likelihood of
24 success on the merits, Your Honor -- American Greetings will
25 succeed on the merits. Our position is that the American

1 Greetings money is precisely the type of third party obligation
2 first of all covered by paragraph 11 of the cash management
3 order, but even putting that aside there is a constructive trust
4 here. As the Third Circuit held in the Columbia Gas case, when
5 the debtor -- when the debtor acts as a mere conduit for the
6 money, collecting money from one source and forwarding it to its
7 intended recipient federal common law imposes a constructive
8 trust. That is exactly what happened here. I don't know what
9 the nature of Fleming's relationship with some of the previous
10 constructive trust claimants has been, but when a retailer
11 defaulted on a payment to American Greetings American Greetings
12 and not Fleming bore the risk of a loss on that payment.

13 We have submitted the declaration of Mr. Rodey of
14 American Greetings. Mr. Rodey is in the courtroom today. He can
15 testify if need be. I would proffer his testimony that retailers
16 participating in the -- in the Fleming central billing system
17 have defaulted on a number of cases, totaling about \$731,000 over
18 the past five years, losses that Fleming has not covered, losses
19 in which American Greetings has been left to pursue the retailer,
20 in may cases turning it over for collection from the retailer
21 directly.

22 There is documentation with Mr. Rodey's declaration
23 telling -- Fleming is telling American Greetings, we're not
24 paying you because we're not doing business with the retailer
25 anymore, retailer has defaulted. Mr. Rodey would testify if

1 called that he has specifically sought to have Fleming assume the
2 risk of default. Fleming refused. They said, we're just an
3 agent. Now when it doesn't serve their interests they're saying
4 they were not an agent, they actually owed American Greetings a
5 debt. That was not how the parties dealt with each other. While
6 Fleming did on occasion pay American Greetings before collecting
7 from the retailer if the retailer subsequently didn't pay
8 Fleming, Fleming would then dock American Greetings on a
9 subsequent payment and deduct from that payment what it had been
10 -- what the -- what the retailer had defaulted on. Fleming says
11 the parties never intended to create a trust. This is not an
12 express trust case, Your Honor, it's a constructive trust case,
13 and rarely do you need a constructive trust when the parties have
14 gotten together and executed a document that says, this is a
15 trust. That's not a surprise.

16 Neither does Fleming's failure to surrogate the money
17 defeat our claim. This Court has recognized in -- cases
18 subrogation is not a prerequisite. By Fleming's own admission,
19 given the number of vendors with which it deals, subrogation is
20 not practical.

21 Moreover, Your Honor, a critical indicator that this
22 was not a debtor-creditor relationship as Fleming claims is the
23 absence of any provision for the payment of interest. When a
24 retailer delayed or defaulted it was always American Greetings'
25 responsibility, not Fleming's, to take action against the

1 retailer and Fleming was not penalized at all, certainly not with
2 the payment of interest. Fleming simply has no interest in this
3 money, and the likelihood that we will be able to prove that at
4 trial is extremely high.

5 As to irreparability of the harm if injunctive relief
6 is denied, Fleming will continue to spend American Greetings'
7 money, and given Fleming's obviously precarious position it is
8 likely that American Greetings' money will not survive this
9 adversary proceeding if it is permitted to continue to be
10 commingled. It may very well be now or never for American
11 Greetings.

12 As to Fleming, if Fleming prevailed at trial it could
13 recover that money from American Greetings. American Greetings
14 has no liquidity crisis. If there's any doubt about that I'd be
15 happy to call Mr. Rodey. He can produce American Greetings'
16 financial statements into evidence. The balance of harms here
17 tilts decidedly in American Greetings' favor.

18 Finally, Fleming has made much of the public interest
19 saying the public interest favors reorganization. The public
20 interest does not favor allowing a bankrupt debtor to use other
21 people's money to reorganize. The public interest does favor
22 protecting disputed property until the dispute can be resolved,
23 and allowing Fleming to keep that money runs counter to that
24 interest. I would ask that Mr. Rodey's testimony as proffered be
25 accepted. If debtors prefer, or if the Court prefers, I'd be

1 happy to call him live.

2 THE COURT: All right. Any objection to the proffered
3 testimony?

4 MR. LIEBELER: There's no objection per se to the
5 proffered testimony. It may make sense for us to accept the
6 testimony on behalf of David and let me conduct a brief cross on
7 a couple of points.

8 THE COURT: Well, you may cross. I'll accept the
9 proffer as stated, as well as the declaration, into evidence, and
10 you may cross on any points to the extent anything was missed.
11 All right. Mr. Rodey.

12 A SPEAKER: Okay. Mr. Rodey --

13 THE COURT: Please remain standing so you can be sworn.

14 THE CLERK: Please place your hand on the Bible.
15 Please state your full name and spell your last name for the
16 Court.

17 MR. RODEY: Thomas Gilbert Rodey, R-o-d-e-y.

18 THOMAS G. RODEY, AMERICAN GREETINGS' WITNESS, SWORN

19 THE CLERK: Please be seated.

20 CROSS EXAMINATION

21 BY MR. LIEBELER:

22 Q Mr. Rodey, you submitted a declaration in support of the
23 Geronas case, is that right?

24 A Yes, sir.

25 Q And attached to that declaration you included a document

1 that's a central billing agreement between Fleming Companies and
2 American Greetings, is that right?

3 A Yes, sir.

4 MR. LIEBELER: Your Honor, what's your pleasure with
5 respect to getting you copies of the exhibits that I may use in a
6 different order and I don't know if you've got them? May I
7 simply approach?

8 THE COURT: Should we have them marked? I do have the
9 declaration and the exhibits attached. To the extent you're
10 using that, though, let's have that marked so the record is
11 clear.

12 MR. LIEBELER: Let me mark this one, then, debtors' 20,
13 because I've used the first 15 for my affirmative exams. And,
14 Your Honor, if you have a copy of that -- you have a copy of
15 that, right?

16 THE COURT: I do. You can approach the witness with
17 it, though.

18 MR. LIEBELER: Thank you, Your Honor.

19 Q All right. I'm giving you, Mr. Rodey, a copy of what's been
20 marked as debtors' 20 and ask --

21 THE COURT: You can't be heard while you're away from a
22 microphone, so start over again.

23 MR. LIEBELER: I may do that repeatedly because that's
24 the typical rhythm that I'm in, but if I do just yell at me and
25 I'll try to quit.

1 By MR. LIEBELER:

2 Q Mr. Rodey, I've given you a copy of what's been marked as
3 debtors' 20, and can you identify that for me as a copy of the
4 central billing agreement that you attached to your declaration?

5 A Yes, sir.

6 Q Okay. Now, that document is dated on May 15th of 1995, is
7 that correct?

8 A Correct.

9 Q And you did not start working at American Greetings until
10 1997, is that correct?

11 A I had worked there previously, left for a couple of years
12 and started again in '97.

13 Q Okay. Did you work at American Greetings in 1995 when this
14 agreement was signed?

15 A No, sir. No, sir.

16 Q Okay. So you don't have any personal knowledge of the
17 negotiations that took place prior to the formation of this
18 agreement, is that correct?

19 A Correct.

20 Q Okay. Now, does the central billing agreement anywhere say
21 in plain English that it creates a constructive trust?

22 A No, sir.

23 Q And anywhere in the central billing agreement does it say
24 that Fleming is a mere conduit for funds coming from retailers
25 and going back out to American Greetings?

1 A No, sir.

2 Q And if American Greetings had wanted to create an agreement
3 that said that there was a mere conduit type of relationship
4 presumably it could have done so in negotiating this agreement,
5 fair?

6 A Fair.

7 Q You articulated in your declaration a situation where you
8 had a conversation with a Mr. Rich Molinari of Fleming, you
9 recall that?

10 A Yes, sir.

11 Q And in your declaration you pointed out that Mr. Molinari
12 said that Fleming was only an agent with respect to the funds
13 that are coming in from retailers and going back out to your
14 company, correct?

15 A Correct.

16 Q I take it, though, that in your conversation with Mr.
17 Molinari you took the opposite position, isn't that right?

18 A Yes, sir.

19 Q And you took the position that Fleming was not just an agent
20 but in fact that Fleming did bear some of the responsibility for
21 those funds --

22 A Correct.

23 Q -- right?

24 A Correct.

25 Q And at that point in time you were aware of the existence of

1 this central billing agreement, right?

2 A Yes.

3 Q And you took that position at that point in time in spite of
4 the fact that the central billing agreement already existed,
5 isn't that right?

6 A Yes.

7 MR. LIEBELER: No further cross, Your Honor.

8 THE COURT: Any redirect?

9 MR. WICK: Yes, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. WICK:

12 Q Mr. Rodey, what was the purpose of that conversation with
13 Mr. Molinari?

14 A We were trying to collect money for past due and uncollected
15 balances.

16 Q And what was the result of your conversation with Mr.
17 Molinari, given that you took opposite positions?

18 A We were unsuccessful. American Greetings was unsuccessful.

19 Q Are you aware of any occasion on which Fleming covered for a
20 retailer that defaulted on a payment to American Greetings?

21 A No, I am not.

22 MR. WICK: No further questions. Thank you.

23 THE COURT: I should have asked if any of the other
24 parties wished to cross examination Mr. Rodey. All right. You
25 may step --

1 MR. LIEBELER: Actually I may have a couple of brief
2 recross?

3 THE COURT: Yes.

4 RECROSS EXAMINATION

5 BY MR. LIEBELER:

6 Q Mr. Rodey -- Mr. Rodey, what was the exact nature of the
7 dispute between American Greetings and Fleming when you had your
8 conversation with Mr. Molinari? What had happened to cause the
9 loss?

10 A We had had deductions from Fleming against American
11 Greetings for accounts that were, as was reported to us, not
12 paying Fleming, who were no longer out of business. We were
13 trying to recoup that money from Fleming, and we were told no.

14 Q How many other times has that happened in the relationship
15 between Fleming and American Greetings?

16 A It has happened before. I don't have an exact number.

17 Q Can you estimate it, more than five?

18 A -- well, yes, definitely more than five.

19 Q Okay. And in any of those circumstances has American
20 Greetings successfully recovered against Fleming?

21 A No, sir, not to my knowledge.

22 Q Do you have personal knowledge of each of those events?

23 A No, sir.

24 Q Okay. What were the names of some of those other companies?

25 A I would have to get the list, and some of the ones may have

1 been submitted. I believe White's Grocery Store in Tennessee.

2 MR. LIEBELER: All right. No further cross, Your
3 Honor.

4 THE COURT: Anything more?

5 MR. WICK: No, Your Honor.

6 THE COURT: Thank you. You may step down.

7 (Witness excused)

8 THE COURT: Please leave that up here. All right.
9 Debtor wish to present its witnesses?

10 MR. LIEBELER: Yes, please, Your Honor. We would like
11 to call -- I did it again. I'm going to stop before the end of
12 the day -- yes, Your Honor, we would. The debtor would like to
13 call Debbie Alexander.

14 THE CLERK: Please place your hand on the Bible --
15 please state your full name and spell your last name for the
16 Court.

17 MS. ALEXANDER: Debbie Alexander Burklow, B-u-r-k-l-o-
18 w.

19 DEBBIE A. BURKLOW, DEBTORS WITNESS, SWORN

20 THE CLERK: Please be seated.

21 DIRECT EXAMINATION

22 BY MR. LIEBELER:

23 Q Ms. Alexander, for whom do you work?

24 A Fleming Companies.

25 Q And what is your job title at Fleming Companies?

1 A I'm the accounts payable manager for the drop ship
2 department.

3 Q And how long have you been the accounts payable manager for
4 the drop ship department?

5 A Since October of 2000.

6 Q And how long have you worked more generally at Fleming?

7 A I've been there a total of 24 years.

8 Q And for how many of those 24 years have you been involved in
9 one way or another with the drop ship program?

10 A In July of 1999 I was -- became full involved in drop ship.
11 Sometime prior to that I had on occasion instances where I
12 addressed drop ship issues.

13 Q All right. And as a consequence of your work at Fleming are
14 you generally familiar with the way that the DSD program
15 operates?

16 A Yes, I am.

17 Q And could you explain to the Court, please, what the general
18 idea of the DSD program is?

19 A The vendor --

20 A SPEAKER: -- everybody --

21 A The vendor would deliver product directly to the store. The
22 vendor would then send Fleming a copy of the invoice. Fleming
23 would bill the retailer for the invoice, pay the vendor and remit
24 -- receive funds from the retailer.

25 (Pause)

1 Q -- what I've done with the flip chart is try to diagram what
2 you just articulated with the V in the upper left being vendor,
3 the R in the upper right being retailer, so the product is
4 shipped from the vendor to the retailer, is that right?

5 A That's correct.

6 Q And then the down arrow from the V over there to the F, the
7 V is vendor and F is Fleming, the vendor sends an invoice to
8 Fleming and Fleming pays that invoice, is that right?

9 A That is correct.

10 Q And then the third arrow is from Fleming in the lower left,
11 the retailer in the upper right, where Fleming sends an invoice
12 to the retailer and the retailer pays Fleming?

13 A That's correct.

14 Q Now, recently in connection with this case had you been
15 asked to look into some specific aspects of the DSD program?

16 A Yes, I have.

17 Q And what specific aspects were those?

18 A I worked at payment timing and also possible liabilities
19 where Fleming took a loss in drop ship --

20 Q I'd like to first of all to talk some about the timing of
21 the payments that are made between the various parties here. And
22 I'd like you to do that in the context of Gibson Greeting Cards,
23 just as an example. During the course of your work at Fleming
24 had you become familiar with the transactions back and forth
25 between Fleming on the one hand and Gibson Greetings on the

1 other?

2 A Yes, I had.

3 Q Okay. So what specifically would happen after Fleming
4 received an invoice from Gibson for greeting cards that Gibson
5 had shipped off to a retailer?

6 A Fleming would receive the invoice and process it through our
7 drop ship system, which means it would send a transaction to
8 accounts payable that would remit a check to the vendor on that
9 vendor's specific terms, payment terms. It would also bill a
10 retailer on their weekly statement, typically a Friday, and
11 receive payment from that retailer on Monday or Tuesday.

12 Q Okay. Now you've told us that Gibson gave Fleming certain
13 terms. What were those specific payment terms?

14 A Thirty days, generally 30 days from invoice date. We did
15 have some special terms on specialty cards, like Valentine's, the
16 holidays.

17 Q Now, you've told us that Fleming then turns around on a
18 weekly statement puts the amount invoiced from the vendor down to
19 Fleming onto an invoice from -- to the retailer, correct?

20 A Correct.

21 Q When exactly does that occur?

22 A Fleming, in the case of American Greetings and Gibson's,
23 passes the same 30-day terms onto the retailer, so we would bill
24 the retailer and it -- statement on their next weekly statement
25 around 30 days.

1 Q Okay. As a consequence of this -- of this, as a typical
2 matter, when would Fleming get paid by the retailers relative to
3 Fleming's payment back to Gibson?

4 A Generally it would be after we made payment to the vendor.

5 Q Are you aware of specific examples where that happened?

6 A Yes, I am.

7 Q All right. I'd like to --

8 MR. LIEBELER: Your Honor I've premarked a number of
9 exhibits. I don't know if you have them. You -- if you do have
10 them then they're under a different nomenclature, so I can either
11 give you copies of them or --

12 THE COURT: Then why don't you give me copies?

13 MR. LIEBELER: Okay.

14 THE COURT: Just so I don't have to be going back and
15 forth through the declaration.

16 MR. LIEBELER: That's the sensible way to do it. And I
17 apologize if I'm violating the rules -- the record reflect that
18 I've handed you a copy of what is debtors' Exhibit 1 --

19 A SPEAKER: I've got one copy --

20 Q And, Ms. Alexander, can you identify debtors' Exhibit 1 for
21 me, please?

22 A This is a Gibson Greeting invoice to Fleming, KOP Division,
23 for a product shipped to Green Belt Coop.

24 Q All right. And what is the date on that invoice? I know on
25 the -- on the copy it's hard to read, but can you make it out?

1 A It's February 14th, 2003.

2 Q And where do you see that on the document itself?

3 A It's underneath everyday merchandise invoice.

4 Q And did you look at the actual original of this document?

5 A Yes, I did.

6 Q And was the date on it February 14th?

7 A Yes, it was.

8 (Pause)

9 Q And that invoice obliges Fleming to pay Gibson a certain
10 amount of money, right?

11 A That is correct.

12 Q Right. I'm going to give you what's been marked as debtors'
13 2.

14 (Pause)

15 Q And, Ms. Alexander, can you identify debtors 2 for me,
16 please?

17 A This is the accounts payable check detail or the remittance
18 to a check issued from Fleming to Gibson Greetings on March the
19 17th, 2003.

20 Q And does debtors' Exhibit 2 reflect that Fleming paid Gibson
21 on the invoice that we had marked as debtors' 1?

22 A Yes, it is.

23 Q And how do you know that?

24 A The invoice date and invoice number and the amount less cash
25 discount is the same as on the first exhibit.

1 Q And Fleming paid that invoice on what date?

2 A On March the 17th.

3 (Pause)

4 Q Of what year?

5 A 2003.

6 (Pause)

7 Q All right. Ms. Alexander, I've just given you a copy of an
8 exhibit I had marked as debtors' Exhibit 3. And take a look at
9 debtors' Exhibit 3 and identify for that -- identify that for me
10 if you would, please.

11 A This is a Fleming statement to the retailer, Green Belt
12 Consumer Coop, dated March 13th, 2003.

13 Q And does debtors' Exhibit 3 consist in part of an invoice to
14 the retailer for the product that we've been looking at on
15 debtors' 1 and debtors' 2?

16 A Yes, it does.

17 Q And where on debtors' 3 does it show that?

18 A On page nine of the statement, midway down the page, we
19 processed the invoice on March the 10th. The reference number is
20 920337 for 666 28, which is the same as exhibit 1.

21 Q And when you say Fleming processed the invoice, what does
22 that mean?

23 A We billed it on their statement on March the 13th. We
24 initiated it in our system on March the 10th.

25 Q And now this statement contains a whole bunch of other line

1 items, does it not?

2 A Yes, it does.

3 Q And generally what do those line items consist of, just by
4 category?

5 A Product delivered from the warehouse, our Fleming warehouse,
6 to the retailer, various charges for services, leases and various
7 drop ship vendors.

8 Q And this reflects a number of payments over time from Green
9 Belt back to Fleming, right?

10 A Yes, it does.

11 Q Now, this exhibit does not reflect when Fleming was paid on
12 that invoice, is that right?

13 A No, it does not.

14 Q Okay. And let me then show you debtors' 4.

15 (Pause)

16 Q Take a look at debtors' 4 and identify it for me if you
17 would, please.

18 A This is a Fleming statement to a retailer, Green Belt
19 Consumer Coop, dated March the 27th, 2003.

20 Q And does debtors' Exhibit 4 reflect when it was that Green
21 Belt actually paid Fleming for the shipments that we'd been
22 talking about in debtors' 1, 2 and 3?

23 A Yes, it does.

24 Q And where on debtors' 4 does it do that?

25 A On page three, about three quarters of the way down it lists

1 the same invoice dated 3/10, and the line below it shows payment
2 from the retailers on March the 24th, 2003 in the same amount,
3 666.28.

4 Q Okay. I'm going to write up on the flip chart that Fleming
5 was paid on March the 24th of 2003, would that be right?

6 A That's correct.

7 (Pause)

8 Q All right. With respect to -- well, let me do some
9 housekeeping first. Debtors' 1, 2, 3 and 4, are those all
10 documents that Fleming has kept in the ordinary course of
11 business?

12 A Yes, it is.

13 Q And are they true and accurate copies?

14 A Yes, they are.

15 MR. LIEBELER: Your Honor, I'd like to move debtors' 1
16 through 4 into evidence.

17 THE COURT: Well, let's save all that till the end.

18 MR. LIEBELER: Okay. That's fine.

19 THE COURT: After cross.

20 MR. LIEBELER: Sure.

21 Q In this instance when was it that Fleming got paid by the
22 retailer?

23 A On March the 24th.

24 Q And was that before or after Fleming had already paid the
25 vendor?

1 A That was after.

2 (Pause)

3 Q Now, in addition to Gibson Greetings did you also look for
4 specific examples of a transaction with American Greetings?

5 A Yes, I did.

6 Q And what did you find?

7 A The documents that I pulled had similar instances in the
8 processing where Fleming paid American Greetings and then
9 received payment from the retailer.

10 Q And in that instance Fleming receive payment from the
11 retailer after Fleming had paid American Greetings?

12 A That's correct.

13 MR. LIEBELER: And, Your Honor, just for reference,
14 those -- rather than walking through the example with all the
15 documents, those documents are also attached and her affidavit
16 was submitted to the Court, but I don't think it makes sense to
17 walk through another example when it's going to look just the
18 same.

19 THE COURT: All right.

20 Q Now let's turn to Farris, Miles, Foster Farms and Lewis
21 Bakeries for a minute. In the context of your work for this
22 hearing did you try to determine when Fleming paid those four
23 vendors in relation to payments coming in from retailers for
24 shipments made by those vendors?

25 A Yes, I did.

1 Q And in so doing did you look at the payment terms that
2 Farris, Miles, Foster Farms and Lewis had given to Fleming?

3 A Yes, I did.

4 Q And what were those payment terms?

5 A For Farris it was three-day terms; for Miles Farmer Market,
6 five days; Foster Farms and Lewis Bakeries, seven days. This is
7 -- these terms are from the invoice date or invoice received
8 date, whichever is later.

9 Q All right. So when Fleming gets an invoice from, say,
10 Farris on day one -- on day two, and the date of the invoice is
11 day one, then Fleming has three days from day two to pay on that
12 invoice, is that right?

13 A That is correct.

14 Q Okay. So it's whichever is the later date, the date on the
15 invoice or the date Fleming receives it?

16 A Yes, that's correct.

17 Q Now, with respect to retailers that have received product
18 from these vendors, did Fleming turn around and give credit terms
19 to those retailers?

20 A Yes.

21 Q And what terms did Fleming give those retailers?

22 A -- are given seven days on a weekly statement.

23 Q May I -- the consequence of your testimony is that the
24 credit terms from Farris and Miles at least, that Farris and
25 Miles were giving to Fleming, were shorter than the credit terms

1 that Fleming turned around and granted the retailers.

2 A That's true.

3 Q Then what consequence does that have with respect to when
4 Fleming got paid on these transactions?

5 A A considerable amount of the time Fleming got paid for the
6 product after the payment was made to the vendor.

7 Q And how often was that true with respect to Farris and
8 Miles?

9 A I would say probably 99 percent of the time.

10 (Pause)

11 Q Let's turn to a different subject, and let's suppose for a
12 moment that a retailer received cards from American Greetings or
13 Gibson Greetings but the retailer simply refused to pay Fleming
14 for them. In your experience who's responsible for that loss?

15 A If -- generally if it's billed on the customer's statement
16 Fleming will maintain the loss.

17 Q And within your experience has that in fact occurred with
18 respect to shipments made by American Greetings?

19 A Yes, that has.

20 (Pause)

21 Q I've given you a copy, Ms. Alexander, of what I've had
22 marked as debtors' Exhibit 5. Tell us please what exhibit
23 debtors' Exhibit 5 is.

24 A It is an American Greetings invoice to Fleming, KOP
25 Division, for a product shipped to Budways Food Market.

1 Q And that was shipped to Budways Food Market from whom?

2 A From American Greetings.

3 Q And what is the amount on that invoice?

4 A 2,057.66.

5 Q And then the amount that Fleming was actually to pay was
6 slightly less than that amount, is that right?

7 A That's correct.

8 Q And why is that?

9 A Two percent cash discount.

10 (Pause)

11 Q I've given a you a copy of debtors' 6, Ms. Alexander. Take
12 a look at debtors' Exhibit 6 and tell us what it is, please.

13 A This is a transaction from our accounts payable system
14 showing that American Greetings received payment from Fleming for
15 this particular invoice in the amount of \$2,016.51 with the check
16 dated June 6th, 2002.

17 Q How can you tell from debtors' Exhibit 6 that it refers to
18 the invoice that is debtors' Exhibit 5?

19 A The invoice number and the invoice date are the same.

20 Q And is there any other way to tell?

21 A The amount with -- less the two percent cash discount is the
22 same.

23 Q Okay. And so the check -- the check screen print from your
24 system that indicates that payment was made ties back to the
25 actual invoice, correct?

1 A Yes, it does.

2 (Pause)

3 Q All right. Ms. Alexander, I've given you a copy of what
4 we've marked as debtors' Exhibit 7, and can you tell me what
5 debtors' Exhibit 7 is, please?

6 A This is a Fleming statement to the retailer, Budways Food
7 Market, dated June the 6th, 2002.

8 Q And does this statement to Budways Food Market include a
9 line item on it for the shipment that we've been talking about in
10 debtors' 6 and debtors' 5?

11 A Yes, it does.

12 Q And where is that?

13 A On page three, the last line has an invoice dated 6/2/02
14 from American Greetings referencing the invoice number and the
15 amount of 2,016.51.

16 Q And the line item on page three of debtors' 7 ties back to
17 the invoice, debtors' 5, correct?

18 A That's correct.

19 Q And that statement reflects that Budways was billed for that
20 shipment that American Greetings sent to Budways, right?

21 A Correct.

22 (Pause)

23 Q All right. Ms. Alexander, I've given you a copy of debtors'
24 8. Take a look at debtors' 8 and tell us what that is, please.

25 A This is a Fleming statement to Budways Food Market dated May

1 1st, 2003.

2 A And does that statement contain further data with respect to
3 what happened or what Budways did with the payment that Fleming
4 had requested it make in debtors' 7?

5 A Yes, it does.

6 Q And where does debtors' 8 do that?

7 A On page three of the invoice it shows the June 6th, 2002
8 invoice two thirds of the way down, statement total amount,
9 7,605.26, which is the total amount on the statement in Exhibit
10 7.

11 Q All right. So Exhibit 7 asks Budways to pay some \$7,000 and
12 more, some of which was for the shipment that American Greetings
13 had made, right?

14 A That's correct.

15 Q And debtors' 8 reflects that Budways paid how much of that
16 7,000?

17 A They made a payment on June 10th of \$4,685.

18 Q And can you tell what that payment of 4,685 represents?

19 A This is the rent payment.

20 Q How do you know that?

21 A On each of the statements they are billed weekly a lease
22 rent, and it ties back to the same amount.

23 Q And so the remaining balance of \$2,000 and change was not
24 paid. What did Fleming do with respect to that balance?

25 A On approximately a year later, April the 25th, we wrote off

1 on this particular statement to bad date a total of 2,920.26,
2 which included the American Greetings invoice.

3 Q Now, as a consequence of that write-off who bore the loss
4 for Budways' failure to pay Fleming?

5 A Fleming did.

6 Q To the best of your knowledge did Fleming ever turn around
7 and try to seek that amount that was written off from American
8 Greetings?

9 A No, they did not.

10 Q How do you know that?

11 A Normally in the course of business the accounts receivable
12 department would go through the shop ship department, my
13 department, to approach the vendor for discrepancies or issues.

14 (Pause)

15 Q Now, has that same sort of event happened with respect to
16 other vendors other than just American Greetings?

17 A Yes, it has.

18 Q To your knowledge, for example, has it occurred with respect
19 to Foster Farms?

20 A Yes, it has.

21 Q Okay. Now, as a historical matter over your course of time
22 at Fleming, when these amounts were written off, not just with
23 respect to American Greetings but with respect to all vendors,
24 does Fleming usually try to recover those write-off amounts from
25 the vendors?

1 A Generally they do not.

2 Q Okay. And typically what just happens to that money? Who
3 bears the loss?

4 A Fleming bears the loss.

5 Q Are you generally familiar with Fleming's computer systems?

6 A Yes, I am.

7 Q And if -- well, are there -- are there one or two systems
8 for accounts receivable and accounts payable?

9 A Accounts receivable and accounts payable systems are two
10 different systems, separate, not operating or communicating
11 between them.

12 MR. LIEBELER: Okay. Thank you. Nothing further, Your
13 Honor.

14 THE COURT: Cross?

15 CROSS EXAMINATION

16 BY MR. WICK:

17 Q A couple of questions, Ms. Burklow. You testified regarding
18 an invoice from Fleming to Budways that Budways did not pay --

19 A Correct.

20 Q -- in the amount of a little over \$2,000. What collection
21 efforts did Fleming undertake with respect to that money?

22 A That would be in the accounts receivable department, not in
23 my area. With it being on there for a year I would think that
24 the typical methods would be used.

25 Q But you don't know?

1 A I don't know.

2 Q What reason did Budways give for nonpayment?

3 A I don't know.

4 Q The invoice --

5 (Pause)

6 Q -- the second invoice to Budways, debtors' Exhibit 8, is
7 dated May 1st, 2003, correct?

8 A I'm sorry. Which exhibit is that?

9 Q Debtors' 8.

10 A Okay.

11 Q It's dated May 1st, 2003, correct?

12 A Yes, it is.

13 Q And does that invoice reflect additional shipments to
14 Budways that took place during 2003?

15 A Yes, it does.

16 Q So a year after nonpayment of this invoice Budways was still
17 an open account with Fleming, correct?

18 A That's correct.

19 Q You testified that generally Fleming bore the risk of loss
20 where a retailer defaulted. Are you aware of any occasion on
21 which Fleming did not bear the loss and charged American
22 Greetings for a retailer's nonpayment?

23 A Yes, I am.

24 Q So Fleming did not always bear the loss?

25 A No.

1 MR. WICK: No further questions.

2 THE COURT: Anybody else?

3 MR. WERB: Yes, Your Honor.

4 CROSS EXAMINATION

5 BY MR. WERB:

6 Q Ms. Burklow, you executed an affidavit on May 19th, 2003 in
7 connection with this case, did you not?

8 A Yes, I did.

9 Q And in your affidavit you indicated here that you had 24
10 years of experience with Fleming?

11 A Yes.

12 Q And for the most part --

13 MR. LIEBELER: Your Honor, I object -- ask that --
14 counsel give her a copy of the affidavit --

15 THE COURT: Well, do you have a copy to give her?

16 MR. LIEBELER: I don't know that I have a copy --

17 MR. WERB: I'm sorry, I don't have an extra one, Your
18 Honor.

19 THE COURT: The one filed in your case, is that the one
20 you're referring to?

21 MR. WERB: Your Honor, no.

22 THE COURT: Which one?

23 MR. WERB: This is the affidavit of Debbie Alexander --

24 (Pause)

25 MR. WERB: This would be the -- this would be docket 11

1 dated 5/19/03.

2 THE COURT: Eleven in which adversary?

3 MR. WERB: This would appear to be in the Farris
4 Produce adversary.

5 THE COURT: -- question.

6 (Pause)

7 MS. JONES: Your Honor, if I may?

8 THE COURT: You may.

9 MR. WERB: And perhaps we should have that marked as an
10 exhibit because it should be part of the record and she'll be
11 testifying from it.

12 THE COURT: All right. We'll have it marked as F-1.
13 All right?

14 BY MR. WERB:

15 Q Now, according to your --

16 MR. WERB: I'm sorry.

17 THE COURT: Wait one second.

18 Q According to your affidavit, Ms. Burklow, as I indicated,
19 you've been employed with Fleming for approximately 24 years,
20 correct?

21 A That's correct.

22 Q And you've been the accounts payable manager for the drop
23 shipping program for how long?

24 A Since October of 2000.

25 Q Okay. And prior to that were you involved with the drop

1 ship program?

2 A Yes. July, 1999 I moved up on the city and became a
3 supervisor for the drop ship program.

4 Q Okay. Now, describe for the Court your job responsibilities
5 in connection with your position that you currently hold with
6 Fleming.

7 A My job functions is to run the drop ship department, be
8 familiar with the different accounts and payment methods. I have
9 three supervisors and about 25 clerical associates that I
10 supervise.

11 Q Okay. And do you have the occasion to deal directly with
12 vendors?

13 A Yes, I do.

14 Q Did you have the occasion in this particular case to deal
15 with any of the plaintiffs? And let me specifically relate
16 Farris, Foster Farms, Lewis Bakeries and the -- fourth plaintiff?

17 A Miles?

18 Q Miles Produce?

19 A I knew of circumstances but not directly.

20 Q No personal, direct contact with any of the representatives
21 of those companies, is that correct?

22 A Yes.

23 Q Okay. You have any idea as to the volume of business that
24 these companies did with Fleming?

25 A Yes.

1 Q You do? Then -- and would you please explain to us the
2 knowledge that you have with respect to that?

3 A Well, you see, what I can say on this is that on Farris and
4 Miles they are primarily in one division, our Massalon Division.
5 They handle approximately ten or fewer stores on a bill --
6 program.

7 Q Okay.

8 A As far as Foster Farms, Foster Farms is primarily in our
9 west coast divisions, which would be Phoenix, Salt Lake, Norcal,
10 Fresno and Phoenix, I believe. And Lewis Bakeries, they are in
11 several of our divisions as well.

12 Q Okay. Now, with regard to the level of your involvement in
13 this case here, would it be fair to say that there would be
14 hundreds if not thousands of invoices that would come back and
15 forth between these various vendors?

16 A Yes.

17 Q Literally thousands, correct?

18 A Probably so.

19 Q Okay. So you really have no personal knowledge with respect
20 to individual invoices that may come to your attention in terms
21 of when Fleming would have paid, other than to look at Fleming
22 records?

23 A That's correct.

24 Q Okay. Now, just so that I understand this correctly, you
25 have no involvement with the receivables department at Fleming,

1 is that correct?

2 A That's correct.

3 Q Do you have a representative in the courtroom here today
4 from Fleming who is knowledgeable and participates or who runs
5 the accounts receivable department for Fleming?

6 MR. LIEBELER: Objection, argumentative.

7 THE COURT: Overruled.

8 A I don't know if Mike Scott could be classified as that, but
9 no one specifically from the accounts receivable.

10 Q So the extent of your knowledge with regard to perhaps when
11 accounts are swept by Fleming is based upon speculation and not
12 on personal, firsthand knowledge, is that true?

13 A No. I know that certain accounts as a standard policy would
14 be statement on Friday and funds remitted on Monday or Tuesday as
15 a general rule.

16 Q As a general rule? And you have personal knowledge that
17 that takes place in each and every case?

18 A Not in each and every case, I said generally.

19 Q Well, let's take for an example right now, you've made
20 reference here with regard to Farris with a turnaround time of
21 three days for payment.

22 A Yes.

23 Q What if I were to tell you that that's simply untrue, that
24 instead the payment turnaround time could be anywhere from 11 to
25 18 days, what would your response be to that?

1 A Depends on when we received the invoice.

2 Q So your testimony that the turnaround time is three days
3 isn't actually correct?

4 A Yes, it is. It says three days from invoice date or receipt
5 date.

6 Q But if a payment is received 11 days or 18 days after the
7 fact, that would go well beyond the three days that you've
8 referenced in your affidavit?

9 MR. LIEBELER: Objection, ambiguous when he says after
10 the fact, he's not specifying other --

11 THE COURT: Overruled.

12 Q With regard to -- would you please --

13 A No. I was going to say ask me again.

14 Q Okay. So if the turnaround time for Farris was anywhere
15 from 11 to 18 days for payment, that would go well beyond what
16 you've indicated in your affidavit which is three days?

17 MR. LIEBELER: Objection, ambiguous.

18 THE COURT: Overruled.

19 A If that were true, yes.

20 Q You've also referenced Miles Farmers Market and I believe
21 both in your affidavit and in the testimony on direct that the
22 turnaround time was five days, is that correct?

23 A That's correct.

24 Q What if I were to tell you that that's simply untrue and
25 that the turnaround time was anywhere from nine to 13 days, would

1 you have any evidence to contradict that today?

2 A Yes.

3 Q And what would that be?

4 A In a lot of examples that we pulled for Farris and Miles, it
5 did not indicate that.

6 Q Do you have that other information with you today?

7 A I believe I had some attachments of invoices with my
8 affidavit of what, the 22nd.

9 Q Well what if I were to tell you that the information that
10 you have collected in your affidavit on behalf of Miles is
11 inconsistent with what was actually the practice with Miles and
12 Fleming?

13 A I don't think that would be true.

14 Q Okay.

15 MR. WERB: Your Honor, this brings up the point now
16 with regard to the supplemental affidavits that we filed,
17 specifically with regard to Miles of the President of the
18 company, Frank Canjemi provided us with --

19 THE COURT: Well, I'm not going to consider it. You
20 can continue the cross and make your argument at the end.

21 MR. WERB: Your Honor, would we be permitted to use the
22 document for the purpose of impeachment?

23 THE COURT: Yes.

24 MR. WERB: Okay.

25 (Pause)

1 MR. WERB: Your Honor, may I present this?

2 THE COURT: You may. Which one are you --

3 MR. WERB: Your Honor, this would have been -- I'm
4 unaware as to what the docket number would be. This was filed on
5 Friday.

6 THE COURT: Which declaration?

7 MR. WERB: This would be the supplemental declaration
8 of Frank Canjemi.

9 THE COURT: All right. Shall we mark that as F-2?

10 MR. WERB: Yes, please.

11 THE COURT: And you may approach the witness with that.

12 MR. WERB: Thank you.

13 (Pause)

14 MR. WERB: One moment, Your Honor.

15 (Pause)

16 BY MR. WERB:

17 Q Ms. Burklow, I don't expect you to be in a position to speed
18 read this document, so I'm going to try to be as brief as
19 possible in asking a few questions here. What Mr. Canjemi has
20 done was to go back to January 6th of this year and what he was
21 able to do was to take the billing statements that were
22 apparently sent two-day air from his company to Fleming and those
23 billing statements would then be received by Fleming. We did
24 that for 10 consecutive weeks and that's what's attached to this
25 document. Now what I'd like you to do is first of all let's

1 refer to Exhibit B, B-1. Do you have that?

2 A The track by tracking number document?

3 Q That's correct.

4 A Okay.

5 Q Now you'll notice on B-1 that the --

6 MR. LIEBELER: Your Honor, I object as lack of
7 foundation for proper impeachment. He said he wanted to use this
8 to impeach her with it. She needs to have seen it or have
9 experience with it before and there's no foundation for that yet.

10 THE COURT: No. Overruled. You may proceed.

11 MR. WERB: Okay.

12 Q You'll notice there are a few dates there, the date that it
13 was sent and the date received by Fleming and would you indicate
14 what those dates are that you see there on B-1?

15 A January the 8th, 2003 at 11:19 a.m. delivered to the
16 Oklahoma City office.

17 Q And this would have been sent, as you see there, on January
18 6th, correct?

19 A Correct.

20 Q Okay. Now let's turn to the next page, Exhibit B-2. Are
21 you there?

22 A Yes.

23 Q Okay. Now although we have a billing statement that was
24 dated the 6th of January, I'd like you to take a look at B-2 which
25 is Fleming document here and would you please indicate for us the

1 date that it shows that it was received?

2 A On the 10th.

3 Q On the 10th?

4 A Correct.

5 Q Okay. Now let's next look at the date here, Fleming states
6 that it received it on the 10th, the remittance shows on the date
7 of the check as being what, do you see that?

8 A January 15th.

9 Q January 15th. Now according to the contents of this
10 declaration, Mr. Canjemi indicates that the check was not
11 received until the 20th. Now --

12 MR. LIEBELER: Your Honor, I object to that. That is
13 not improper impeachment. Mr. Canjemi is not here. The
14 affidavit is not --

15 THE COURT: Sustained.

16 MR. LIEBELER: -- a proper question.

17 MR. WERB: Your Honor, I will refer to paragraph 14 of
18 Mr. Canjemi's declaration and in this declaration he --

19 THE COURT: Well rephrase the question.

20 Q Would you please refer to paragraph 14 and take a look at
21 paragraph 14 for a moment?

22 (Pause)

23 A Okay.

24 Q Okay. We have no dispute about January 6th as being the
25 date for the billing statements, would you agree with me on that?

1 A Yes.

2 Q There would be no dispute here with regard to the date that
3 it was posted by Fleming as being January 10th, would you agree
4 with me on that?

5 A It was received in our mail room at that time.

6 Q Okay. And would you agree with me that the date of the
7 remittance as contained on the check would have been January
8 15th?

9 A That is correct.

10 Q And according to Mr. Canjemi that the --

11 MR. LIEBELER: Objection, Your Honor.

12 Q -- check was actually received on the 20th --

13 MR. LIEBELER: Objection, Your Honor.

14 THE COURT: Sustained.

15 Q Even taking away for a moment the date of receipt by Mr.
16 Canjemi, the time frame between the 6th and the 15th was surely
17 more than five days, is that correct?

18 A Between the 6th and the 15th?

19 Q Correct.

20 A Yes. But I didn't say between the date it was generated.

21 Q Your testimony has been that according to Miles Farmers
22 Market that the turnaround time for payment was five days, is
23 that correct? That's what you've testified to.

24 A On which one?

25 Q Miles.

1 A Miles? Yes.

2 Q Okay. But in this particular case, this one example
3 demonstrates that that's not true, would you agree with me?

4 A No, not necessarily. I would have to see a calendar to see
5 if that falls on a weekend. We don't cut checks during the
6 weekend. The 10th received date means that's when we received it
7 in my department and we would have processed it and the terms set
8 up in our drop ship system are five days.

9 Q But in this case Mr. Miles was not paid in five days?

10 A The check was remitted. I didn't say when the funds were
11 received. You have mailing time on receipts.

12 Q Let's just take one more as an example and we'll do it
13 randomly for the purpose of conserving time here. Let's go to --
14 let's go to I-1. Do you have that, ma'am?

15 A Yes.

16 Q Okay. Would you please indicate the date that you see that
17 the billing statement was sent by Miles to Fleming?

18 MR. LIEBELER: Which exhibit are you on?

19 MR. WERB: I-1.

20 MR. LIEBELER: Thank you.

21 MR. WERB: You're quite welcome.

22 A The date that it was sent was March 3rd.

23 Q March 3rd and the date that it was received?

24 A March 5th.

25 Q Okay. Now let's turn to Exhibit I-2. Are you there?

1 A Uh-huh.

2 Q Does this Fleming document reflect the date of receipt?

3 A Yes, it does.

4 Q And what does that say?

5 A March the 10th.

6 Q Okay. So even though it was received by Fleming on the 5th,
7 it was marked as being received on the 10th, a difference of five
8 days?

9 MR. LIEBELER: Objection, foundation, Your Honor.

10 There's no -- there's no testimony that ties I-2 to I-1. Without
11 Canjemi here, there's no way to tell.

12 THE COURT: Overruled.

13 Q Now does this reflect the date of the check?

14 A Yes, it does.

15 Q And what date is that?

16 A March the 14th.

17 Q Okay. And your policy would have been when these checks
18 were cut to mail them out in what fashion?

19 A The checks are mailed the date of the check.

20 Q Okay. And how are they mailed?

21 A How are they mailed?

22 Q How?

23 A U.S. Mail.

24 Q U.S. Mail. Not overnight delivery or anything like that?

25 A No.

1 Q First class?

2 A Yes, regular mail.

3 Q Okay. So the time that it was sent on the 3rd until the
4 time that the check was cut on the 14th, we have more than five
5 days intervening, is that true?

6 A In looking at those terms, yes.

7 Q Okay. Now based upon what we have here, and quickly by way
8 of summary, out of the 10 billing statements that we have here
9 four of them, according to Mr. Canjemi, and that could be the
10 subject of dispute by counsel here, we paid in 13 days, five were
11 paid in 10 days and one was paid in nine days, but none were paid
12 in five days?

13 MR. LIEBELER: Objection, Your Honor. Counsel's
14 testifying to the contents of the declaration.

15 THE COURT: Sustained.

16 Q How many independent retailers does Fleming deal with?

17 A I don't know a total off the top of my head.

18 Q Could you give us an approximation as to number of
19 independent supermarket customers or retailers out there across
20 America?

21 A I would say probably 4,000 ball park.

22 Q Okay. And could you perhaps, since you are now in charge of
23 the drop ship program for accounts receivable, can you give the
24 Court some indication as to number of independent vendors that
25 would supply those 4,000 independent retailers?

1 A Somewhere between -- or probably on the average about 700.

2 THE COURT: How many?

3 THE WITNESS: 700.

4 Q So these vendors would consist of companies like Farris and
5 Foster Farms and Sara Lee, et cetera?

6 A That's correct.

7 Q Okay. Now if when Fleming swept a bank account of one of
8 these independent retailers, if the amounts collected were
9 inconsistent with the amount of the invoice presented, what steps
10 if any would Fleming take?

11 A It would depend on the reason for deduction.

12 Q Well let me -- let me rephrase that and say what would be
13 the level of interaction that Fleming would engage in with regard
14 to making an inquiry?

15 A They would contact the retailer directly to find out the
16 reason.

17 Q Would you contact the vendor?

18 A Would AR contact the vendor? Usually not, no.

19 Q Okay. And you've indicated that Fleming over the years has
20 I believe sustained some significant losses with regard to the
21 amounts that were not paid by retailers to which you remitted to
22 vendors, is that true?

23 A I do know that Fleming bore the loss, yes.

24 Q Okay. Did that -- that economic loss sustained by Fleming,
25 did that relate to any of the plaintiffs at issue here?

1 A Yes.

2 Q Which one?

3 A Farris.

4 Q Farris?

5 A Yes.

6 Q Okay. How so?

7 A We had an instance where a store was closed in February
8 2002. We received a invoice from Farris at some point, maybe a
9 month prior to our payment and we paid it in August of 2002 and
10 had no recourse to bill the retailer.

11 Q Have you provided information to that in your declaration?

12 A It's not in here.

13 Q Okay. Anyone else?

14 A Not that I can think of off the top of my head.

15 Q Okay. Well you mentioned here in your affidavit a reference
16 to Foster Farms and this amount of \$669.52?

17 A Yes.

18 Q And according to your knowledge and information that that
19 was money that was paid by Fleming to Foster Farms that you had
20 not received --

21 A Correct.

22 Q -- from the retailer?

23 MR. WERB: Your Honor, I would at this time like to
24 submit the supplemental affidavit of Susan Kotch which deals--

25 THE COURT: Well you can cross examine her on that.

1 You want to identify it?

2 MR. WERB: Your Honor, again I don't have a docket
3 number since this was filed on Friday.

4 THE COURT: All right. Let's just identify it as F-3.

5 MR. WERB: May I hand a copy to the witness?

6 THE COURT: You may.

7 (Pause)

8 BY MR. WERB:

9 Q Now apparently in your affidavit, and bear with me for a
10 moment -- when exhibit in your affidavit, Ms. Burklow, would this
11 particular matter relate to, the Exhibit A, B, C or D?

12 A Which issue are we talking?

13 Q This would be the supposed remittance of \$669.52 that
14 supposedly was not paid by Liberty Market.

15 MR. LIEBELER: Same objections, rule of completeness,
16 if you're going to ask about an affidavit, you should give her a
17 copy of it.

18 THE COURT: I think he did.

19 MR. LIEBELER: No, that was Ms. Kotch's supplemental
20 affidavit. He didn't give a copy -- just give her a copy of her
21 affidavit --

22 THE COURT: Doesn't -- she still has it. Do you not
23 have your affidavit?

24 THE WITNESS: Yes.

25 MR. LIEBELER: Okay. I wasn't aware that she did.

1 Your Honor, I think actually two affidavits, one from the 19th
2 and one from the 22nd, and I think that may be the other
3 affidavit. That's the trouble. She submitted two affidavits and
4 I think he's --

5 MR. WERB: Yes, but we only presented one and this
6 would be the --

7 THE COURT: Which affidavit do you have of yours?

8 MR. WERB: The affidavit would be docket 11.

9 THE WITNESS: Dated 5/19.

10 MR. WERB: Yes, yes. She has the correct one.

11 A Okay. It's Exhibit A.

12 Q Exhibit A?

13 A Yes.

14 Q Okay. And could you explain for us where the reference is
15 for the \$669?

16 A On page one of the statement from Fleming to Patterson
17 Liberty Market, the fourth line down on the total past due, it's
18 dated 3/11/03, reference number for Foster Farms 706979 in the
19 amount of 669.52.

20 Q Now this Exhibit A that you're referring to was generated by
21 whom?

22 A It's our Fleming statement to the retailer.

23 Q This is not the statement that you would have received
24 directly from Foster Farms, is that correct?

25 A No.

1 Q What I'd like to do is, in Ms. Kotch's supplement
2 declaration, direct your attention to Exhibit A.

3 (Pause)

4 A Okay.

5 Q Okay. And this reflects Foster Farms and you'll notice the
6 amount in the lower right-hand corner of \$669.52?

7 A Correct.

8 Q In the upper right-hand corner do you see a date there as
9 well?

10 A Yes.

11 Q And what is that date?

12 A February 4th.

13 Q Of 2003?

14 A Correct.

15 Q Now the documents from Foster Farm involving the invoices
16 that would be forwarded to Fleming, do you have knowledge as to
17 how they were received?

18 A They were received through electronic filing, our EDI,
19 electronic data interchange.

20 Q Okay. And with that in mind, I'd like to direct your
21 attention to Exhibit B. Do you see the date that this invoice
22 was transmitted?

23 A Yes.

24 Q And what date is that?

25 A February 4th, 2003.

1 Q Okay. And on page or Exhibit C -- are you there?

2 A Yes.

3 Q Okay.

4 A Oh, C of which one?

5 Q Of Ms. Kotch's affidavit.

6 A Okay.

7 Q Do you see the \$669.52?

8 A Yes, I do.

9 Q And do you see the date --

10 A Yes, I do.

11 Q -- that it was paid? And what was that date?

12 A The date of the check is 3/19/03.

13 Q Okay. So in other words here you're indicating that you

14 paid on the 11th, but you had an invoice that was sent on

15 February 4th and a payment span of 44 days?

16 A That's correct.

17 Q True?

18 A Yes. This is not a typical instance.

19 Q Did this invoice simply get lost somewhere?

20 A Yes, it was misprocessed.

21 Q Oh, okay. So this isn't typical of what happens with

22 Fleming, correct?

23 A No. This example was pulled due to the payment not being

24 made from the retail.

25 Q Do you have any evidence suggesting that Liberty Market did

1 not pay that?

2 A Our statement is dated 5/16 and it still remains open.

3 Q Do you have that statement with you? Is that attached here?

4 A Yes, it is.

5 Q And what is the date of that statement?

6 A May the 16th.

7 Q Okay. It appears there's some confusion here with regard to
8 when the bill was received, when it was actually paid, but this
9 in no way reflects the process of how bills are paid by Fleming,
10 it's the exception, isn't it?

11 A In this particular instance, yes.

12 MR. WERB: One moment, Your Honor.

13 (Pause)

14 Q Just to clarify that amount that was paid, that was pursuant
15 to the drop ship program for central billing involving Foster,
16 correct, the amounts that we've just referred to, that 669?

17 A Yes, that was Foster Farms.

18 Q Okay. Now we turn once again quickly to your declaration,
19 again docket 11, at the bottom of page two, paragraph five you
20 indicate here again that based on your knowledge and belief that
21 it would be the practice of Fleming to bear the risk of loss on
22 DSD transactions?

23 A I have known that Fleming has beared the loss on some DSD
24 transactions, yes.

25 Q Okay. And what is the current state of affairs on that

1 subject matter, is it something that --

2 A I'm sorry?

3 Q -- Fleming continues to do to this date?

4 A I'm not sure I understand the question.

5 Q Well does -- in your continuing as best as possible in the
6 ordinary course of business here, notwithstanding the filing of
7 bankruptcy, to operate your business, correct?

8 A Uh-huh.

9 Q And does the practice still stand that Fleming will bear the
10 risk of loss for non-payment received from an independent
11 retailer?

12 A I wouldn't say that that would be the case. We have -- we
13 have taken loss on instances. Is that for everything, no. And
14 is that a stated policy, no. But I do know that we have beared
15 the risk of loss.

16 Q What is -- I'm asking you more specifically now, do you have
17 knowledge in the capacity in which you function as the accounts
18 payable manager for Fleming, do you have knowledge as to the
19 current position of Fleming with regard to bearing the risk of
20 loss for non-payment received from independent retailers?

21 A That would come from the credit department.

22 Q Isn't it something that you would know in your position?

23 A That's out of my department. I'm not responsible for that
24 aspect. Do I know of occasions? Yes. Am I responsible, no.

25 Q I want to direct your attention to Ms. Kotch's affidavit

1 that you have there, and referring to Exhibit D, would you turn
2 to that? It's not exactly marked as D, so forgive me, but it
3 would be the page following Exhibit C.

4 A The vendor partner manual?

5 Q Correct.

6 A Okay.

7 Q Now this vendor partner manual has an effective date of what
8 would you say?

9 A This particular one is February 17th, 2003.

10 Q Okay. And what I'd like you to do is turn to page seven,
11 specifically directing your attention to at or near the top where
12 it says overview 1.1 summary. Would you please refer to the
13 second paragraph and read what that states?

14 A This manual, that one?

15 Q Yes.

16 A "This manual is effective for all orders placed on or after
17 February 17th, 2003. It is Fleming's intention to update and
18 revise this manual on a regular basis. Advance notice will be
19 given to our vendors prior to the effective date of all charges."

20 Q Okay.

21 A "This and all future versions of the manual may be found on
22 Visionette."

23 Q And what is Visionette? Would you describe that for the
24 Court?

25 A Visionette is a web based system that supplies information

1 to the retailers and to the vendors.

2 Q Okay. Is this proprietary information? In other words,
3 would anybody have access to this information on your web site?

4 A No, not anybody.

5 Q Who would be entitled to receive this type of information?

6 A Our vendor partners, the retailers, some brokers.

7 Q Would it include Foster Farms?

8 A I don't know specifically.

9 Q But you will admit that Foster Farms is a participate in the
10 DSD, drop ship program?

11 A Yes, they are.

12 Q I now direct your attention to page 32. Are you there yet?

13 A Yes.

14 Q Okay. And at the top I make reference to 8.3 DSD invoicing
15 guidelines. What I'd like you to do, next to those little double
16 sets of question marks, is to read what's next to the second set
17 or the second -- the sentence after the first paragraph.

18 A "Fleming does not accept or assume any financial
19 responsibilities relating to DSD shipments."

20 Q Doesn't accept any financial responsibility relating to DSD
21 shipments. And if you will, read the next sentence or paragraph?

22 A "Fleming does not accept" --

23 Q No, Fleming -- vendor invoices.

24 A Oh, "Vendor invoice should be submitted on a weekly basis.

25 Any invoice that is greater than 60 days old will not be

1 processed. Amounts disputed by the retailer and deducted from
2 Fleming will be deducted from the vendor. It is the vendor's
3 sole responsibility to resolve these disputes directly with the
4 retailer. Any vendor inquiries regarding payment disputes should
5 be submitted within 90 days of the deduction."

6 Q If I read that correctly then, it's not Fleming then that
7 goes back to the retailer to make the inquiries with regard to
8 deductions on the part of invoices, but it would be the vendor's
9 sole responsibility to deal directly with the independently
10 retailer?

11 A In the real world that doesn't happen.

12 Q Is that what's stated in this manual?

13 A Yes, it is.

14 Q And this manual was expressly designed for the vendor
15 participants in the Fleming DSD program, is that correct?

16 A That's correct.

17 MR. WERB: One moment.

18 (Pause)

19 Q One more reference. I direct your attention to page seven
20 once again.

21 (Pause)

22 Q On page seven under 1.1 general instructions, 1.2, excuse
23 me, that lead in paragraph, would you read the first sentence?

24 A "The policies and procedures within this manual will apply
25 to all vendors and all Fleming distribution facilities unless

1 otherwise noted."

2 Q Okay. So there's no dispute that it applies to all vendors
3 who are participating in the DSD program nationwide with respect
4 to Fleming?

5 A This is generally for all Fleming.

6 Q Okay. Thank you.

7 MR. WERB: I have no further questions at this time.

8 THE COURT: Anybody else?

9 (Pause)

10 CROSS EXAMINATION

11 BY MR. KOBBE:

12 Q Ms. Alexander, I gather that some vendors had abbreviated
13 payment terms with Fleming? You testified for example that
14 Farris had three-day terms?

15 A That's true.

16 Q And that some of these terms were shorter than the terms
17 that Fleming had with its retailers, correct?

18 A Yes.

19 Q But that was never the case with Sara Lee, was it?

20 A That's not totally true.

21 Q Well didn't Sara Lee have 28-day terms with Fleming?

22 A They did, but those terms were past on to some of the
23 retailers.

24 Q I'd like to better understand your testimony about the risk
25 of loss. Was it your testimony that Fleming always bore the risk

1 of loss?

2 A No.

3 Q Sometimes?

4 A Sometimes they did, yes.

5 MR. LIEBELER: Objection, Your Honor. This is outside
6 the scope of direct. On the direct the testimony's --

7 THE COURT: Overruled.

8 MR. LIEBELER: -- constrained to --

9 THE COURT: Overruled.

10 MR. LIEBELER: May I make my record, Your Honor?

11 THE COURT: You may. But --

12 MR. LIEBELER: I just wanted to say that her testimony
13 was restricted to the six individual plaintiffs that we're doing
14 TROs on today and not with respect to Sara Lee. That's all I
15 wanted to say.

16 Q Your testimony was then that Fleming sometimes bore the risk
17 of loss?

18 A That's true.

19 Q Whose job at Fleming was it to determine whether Fleming or
20 the vendors bore the risk of loss?

21 A That would be the -- ultimately the credit manager.

22 Q It wasn't your job then?

23 A No, it wasn't.

24 Q And in fact with respect to that vendor policy manual that
25 we've just seen, you weren't involved in the formulation of that?

1 A In some portions, yes.

2 Q Were you involved with respect to the risk of loss
3 provisions of the policy manual?

4 A No, I didn't, no.

5 Q In fact, ma'am, you don't know when it was appropriate for
6 Fleming to bear the risk of loss as opposed to the vendor, do
7 you?

8 A That was not a decision I made, no.

9 Q Fleming received a fee based on some percentage of the
10 amounts collected, didn't it?

11 A Yes, in most cases.

12 Q And that fee was because Fleming was acting as a billing and
13 collection agent, wasn't it?

14 A It was a processing fee, yes.

15 Q Processing fee for Fleming to act as a agent for processing
16 the money, correct?

17 A It was a processing fee for our efforts in billing the
18 retailer and making payment to the vendor, yes.

19 Q Thank you.

20 MR. KOBBE: Nothing further.

21 MR. WERB: I have a few questions, Your Honor.

22 MR. LIEBELER: Your Honor, don't I get to redirect
23 before Mr. Werb gets another bite at the apple.

24 MR. WERB: Go ahead.

25 THE COURT: You may.

1 MR. LIEBELER: Not that he's not a good cross examiner,
2 but --

3 MR. WERB: I'll gladly share my apples with you.

4 THE WITNESS: I don't know that I want to go on the
5 record as being an apple.

6 THE COURT: Sustained.

7 REDIRECT EXAMINATION

8 BY MR. LIEBELER:

9 Q Turning to the last issue first, Ms. Alexander, you've
10 looked at the vendor partner manual, have you not?

11 A Yes, I have.

12 Q And you're certainly aware now of the policy that exists in
13 that manual, are you not?

14 A Yes, I am.

15 Q That policy notwithstanding, as a historical matter
16 throughout your experience at Fleming, is it true that Fleming
17 has borne some of the risk of loss with respect to DSD
18 transactions?

19 A Yes, it is.

20 Q And that's true historically for what portion of the time
21 that you've been involved with the DSD program?

22 A Probably I would say at least the last 10 years.

23 Q Now take a look at Ms. Kotch's Exhibit C-2 if you would, and
24 I think that's the -- yeah, it's Exhibit C in the Kotch
25 supplemental affidavit and that reflects the payment to Foster

1 Farms, the one that Mr. Werb was cross examining you about?

2 A Yes.

3 Q Do you see that?

4 A Yes.

5 Q And that check reflects that Fleming paid Foster Farms on
6 what day?

7 A On March the 19th.

8 Q And in the exhibits that were attached to your affidavit--

9 THE COURT: Excuse me. I don't have the exhibits to
10 her May 19th affidavit. Does anybody else?

11 MR. LIEBELER: I have a copy of those, Your Honor.

12 THE COURT: Thank you.

13 MR. LIEBELER: You're welcome.

14 Q And within the exhibits to your May 19th affidavit, at
15 Exhibit B what is that document?

16 A Exhibit B?

17 Q Yes.

18 A This is an invoice from Foster Farms.

19 Q I'm sorry, I got the wrong one. I meant Exhibit C within
20 your affidavit.

21 A This is the payment detail.

22 Q And the payment detail reflects in your affidavit that
23 Foster Farms was paid on what day?

24 A March the 19th, 2003.

25 Q And Mr. Werb was arguing that there was some confusion as

1 between the parties about when Foster Farms was paid. Do your
2 records and his affidavit's records reflect the payment date
3 that's the same?

4 A Yes, it does.

5 Q Is there any confusion there at all?

6 A No.

7 Q And is there any confusion about the fact that Fleming had
8 not been paid at that point in time?

9 A As of the statement of May 16th, they had not been paid from
10 the retailer.

11 Q And that's May 16th of 2003, right?

12 A That's correct.

13 Q And so there's no confusion about the fact that Fleming has
14 paid out money to the vendor and Fleming has not yet even now as
15 we stand here today to your knowledge been paid by the retailer?

16 A That's correct.

17 Q Now in the ordinary course of Fleming's business when
18 Fleming pays money out to a vendor, does Fleming check to see
19 that it has been paid for that same payment already?

20 A No, we do not.

21 Q And why is that?

22 A When the drop ship department processes a invoice, we have a
23 separate transaction going to our accounts payable system and a
24 separate one to our accounts receivable system. They are two
25 different systems and they do not interact with each other.

1 Q And so there may be some issue about when Fleming actually
2 received the invoice at issue here, but there's no dispute about
3 the fact that Fleming paid out money before Fleming received the
4 money, fair?

5 A Correct.

6 Q All right. Let's turn then to Mr. Canjemi -- is it Canjemi
7 -- Mr. Canjemi's affidavit and take a look at the pages that Mr.
8 Werb had you look at which are B-1 and B-2? Do you see those?

9 A No. Is this --

10 THE COURT: Exhibit F-2, do you have that, Canjemi's
11 affidavit?

12 MR. LIEBELER: May I approach, Your Honor, just to find
13 it?

14 THE WITNESS: I have this one.

15 (Pause)

16 MR. LIEBELER: Your Honor, these have not been marked
17 so why we don't do that. Canjemi was F-2?

18 THE COURT: F-2.

19 MR. LIEBELER: And then the supplemental Kotch
20 affidavit was what?

21 THE COURT: F-3.

22 MR. LIEBELER: Your Honor, I've taken the liberty of
23 marking those for the witness.

24 THE COURT: Okay.

25 Q All right. Taking a look at F-2, Ms. Alexander, at page --

1 Exhibit B-1?

2 A Okay.

3 Q And then B-2 and Mr. Werb asked you some questions about
4 receipt of various invoices from one of his clients. Is there
5 anything on B-1 that indicates -- well, first of all, B-1 looks
6 like it's a tracking document from an overnight delivery service,
7 correct?

8 A That's what it appears to be.

9 Q Is there any reflection on B-1 of what exactly was
10 transmitted?

11 A No.

12 Q In other words, can you tell from B-1 that in fact the
13 invoice or whatever it was -- whatever it is at B-2 was in fact
14 in that package?

15 A I don't know.

16 Q And you can't tell that from these documents, can you?

17 A No.

18 MR. LIEBELER: Nothing further, Your Honor.

19 RECROSS EXAMINATION

20 BY MR. WICK:

21 Q Ms. Burklow, on occasions on which Fleming would take the
22 loss when a retailer did not pay, was it Fleming's practice to
23 then go to the vendor and advise them of Fleming's decision?

24 A I wouldn't think that was always the case, but I don't know.
25 Not to my knowledge.

1 Q You have no knowledge that Fleming, in other words, would go
2 to American Greetings and say, hey, one of your retailers didn't
3 pay, we just took a \$2,000 loss for you?

4 A That's correct. I don't know of any knowledge of that.

5 Q So as far as you know whenever there was interaction between
6 Fleming and American or Gibson Greetings about a default, it was
7 in the context of American Greetings or Gibson Greetings being
8 liable, correct?

9 A Ask that again, please.

10 Q Okay. Let me break it up a little bit. If American or
11 Gibson Greetings sent Fleming an invoice, Fleming sent the
12 retailer and invoice and the retailer didn't pay, if Fleming
13 decided that American or Gibson Greetings should bear the loss
14 then they would charge them back on a future invoice or a future
15 payment, correct?

16 A I have known of instances where that has happened, yes.

17 Q That's how that -- so that would -- it would just be
18 communicated to the vendor that the retailer didn't pay and the
19 vendor was being charged back, correct?

20 A Correct.

21 Q Okay. However, if a retailer didn't pay and Fleming bore
22 the risk of loss, Fleming ordinarily wouldn't have any
23 interaction, to your knowledge, with the vendor about that,
24 correct?

25 A Correct.

1 Q So on all occasions where Fleming had an interaction with a
2 vendor about a retailer's default, the interaction was in the
3 context of the vendor bearing the loss, correct?

4 A To my knowledge.

5 MR. WICK: No further questions. Thank you.

6 (Pause)

7 RECROSS EXAMINATION

8 BY MR. WERB:

9 Q When I asked you earlier with regard to the number of
10 vendors that service the independent retailers I believe your
11 answer was 700?

12 A Approximately 700.

13 Q Does that represent 700 vendors who participated in the drop
14 ship delivery program?

15 MR. LIEBELER: Outside the scope of redirect, Your
16 Honor.

17 THE COURT: Overruled.

18 A 700, approximately 700 vendors are participating in one way
19 or the other in a DSD program, yes.

20 Q Okay. And is it your testimony that you're not responsible
21 for making decisions with respect to risk of loss?

22 A That's correct.

23 Q Okay. The -- with regard to the collection of a fee for
24 remitting payment, was such an arrangement in existence between
25 Fleming, the independent retailer and the plaintiffs in this

1 case?

2 A There were different terms with each vendor.

3 Q Okay. And again the terms would be, regardless of whether
4 it was two percent or three percent, it would be for the express
5 purpose of processing and ultimately remitting that payment to
6 the vendor, correct?

7 A Well sometimes what we received from Fleming or from the
8 vendor we passed onto the retailer.

9 Q I'm not --

10 A The fee that we got from the vendor we sometimes passed to --
11 -- we gave the retailer that money.

12 Q Well we're not -- that's not my question. My question is
13 specifically the relationship between Fleming and the independent
14 vendors, the vendors, that whatever -- whatever process was
15 involved in terms of remitting payment to the vendor, that that
16 would entail the collection of an administrative fee of some
17 percentage or other method for determining, correct?

18 A Usually, yes.

19 Q Okay. Thank you. One more thing. I'm sorry. You
20 indicated and described the payment program as a bill-through
21 program, I believe your --

22 A That's the terminology that's used.

23 Q Great, thank you.

24 THE COURT: Anybody else? All right. Thank you. You
25 may step down.

1 THE WITNESS: Thank you. Should I leave these exhibits
2 here?

3 THE COURT: Leave all the exhibits there, yes. Let's
4 take a --

5 (Witness excused)

6 MR. LIEBELER: Your Honor, one housekeeping matter.
7 Should we move those exhibits into evidence at this point?

8 THE COURT: Well let's wait one second and take a short
9 break. Okay.

10 (Recess)

11 MR. LIEBELER: Just as a housekeeping matter, Your
12 Honor, of what should we do with the exhibits?

13 THE COURT: Well do you want to move them, discuss at
14 this point?

15 MR. WERB: Yes, Your Honor. We would move the
16 admission of those exhibits.

17 THE COURT: All right. We're not -- I'm missing
18 everybody. Who wants to move -- they're debtors' exhibits?

19 MR. LIEBELER: Your Honor, I will move debtor exhibits
20 and I think we've marked 1 through 8.

21 MS. JONES: And 20.

22 MR. LIEBELER: And 20, that's correct. And we --

23 THE COURT: Any objection to those?

24 MR. WERB: No objection, Your Honor.

25 THE COURT: All right. They're admitted.

1 MR. LIEBELER: Thank you, Your Honor.

2 MR. WERB: And likewise on behalf of plaintiff we would
3 move the admission of I believe Exhibits F-1 through F-3.

4 THE COURT: Any objections?

5 MR. LIEBELER: Actually we have the objection with
6 respect to the use of these supplemental affidavits as we've
7 already talked about. But for the purposes of keeping a record
8 of the examination, I have no objection to having them lodged, I
9 guess I would say.

10 THE COURT: Any objection -- I guess the exhibits
11 principally are what were used, the exhibits attached to the
12 supplemental affidavits.

13 MR. LIEBELER: That's a fair way to break it out. I
14 have no objection to the exhibits. I do have an objection to the
15 declarations themselves as we've talked about.

16 THE COURT: All right. Except for Ms. Burklow's
17 affidavit which I think is F-1, any objection to that?

18 MR. LIEBELER: No objection to F-1. No objection, Your
19 Honor.

20 THE COURT: All right. F-1 in its entirety will be
21 admitted and the exhibits to F-2 and F-3 to the extent they were
22 part of the examination will be admitted. All right. Did the
23 debtor have another witness?

24 MR. LIEBELER: We do, Your Honor. The debtor would
25 like to call Mr. Mike Scott, please.

1 (Pause)

2 THE CLERK: Please state your full name and spell your
3 last name for the Court.

4 THE WITNESS: Michael Scott, S-c-o-t-t.

5 MICHAEL SCOTT, DEBTOR'S WITNESS, SWORN

6 THE CLERK: Please be seated.

7 DIRECT EXAMINATION

8 BY MR. LIEBELER:

9 Q Mr. Scott, can you describe your current employment, please?

10 A Certainly. I am a principal with Alex Partners, a firm that
11 specializes in working with companies through restructurings, and
12 in that role I'm currently serving as the interim treasurer for
13 Fleming.

14 Q And as the interim treasurer, what has been your involvement
15 with the reorganization that Fleming is currently undergoing?

16 A I'm involved in a number of areas of the reorganization
17 including treasury functions such as looking and working with the
18 bankers on credit agreements, helping the company manage its
19 short term and longer term cash flows, and I also have the
20 accounts receivable function reports up to me as well.

21 Q And in connection with your involvement with Fleming have
22 you recently been asked to look at some issues with respect to
23 Fleming's DSD program?

24 A Yes, I have.

25 Q And what issues were those?

1 A There are two priority issues I've been asked to look at
2 specifically for today. One is to look at the timing patterns
3 for the six parties involved in today's hearing, to look at the
4 timing of when the debtor made payments to vendors typically and
5 also when the debtor received payments from retailers typically.
6 The second area was to look at the issue of whether or not the
7 debtor bore a credit loss for its relationship with its retailers
8 that received product through DSD -- through the DSD program.

9 Q I know you were sitting in the back of the Courtroom when
10 Ms. Alexander testified and we put up the flip chart
11 demonstrating the basic structure of the DSD program. Was her
12 testimony consistent with your basic understanding of who pays
13 what to whom in the DSD program?

14 A Yes, it was.

15 Q Rather than have you walk through that again, I'd just
16 rather refer to it there.

17 A Yes.

18 Q Let's take a look at the first of the issues that you said
19 you examined and that's payment timing. Did you examine the
20 timing of payments to and from Fleming vis a vis particular
21 vendors?

22 A Yes, I did. I looked at a sampling of transactions from
23 each of the six companies that are here today.

24 Q Okay. And what specifically were you trying to find out?

25 A What I was specifically trying to find out is on specific

1 transactions understand exactly what the date was that Fleming
2 made payment to a vendor and compare that to the date that
3 Fleming received payment from a retailer for the related shipment
4 and determine whether Fleming typically received money in advance
5 of payment to vendors or paid in advance.

6 Q And what --

7 MR. WERB: Objection, Your Honor. I'd like to --

8 THE COURT: You have to talk into a microphone.

9 MR. WERB: Your Honor, if Mr. Scott's being called upon
10 to testify today with regard to an analysis of the payment
11 history of the plaintiffs in this case, I would object to that
12 since we have seen no written documentation, no reports or
13 analysis indicating what that payment history would have been,
14 notwithstanding the fact that we made a specific request in
15 writing on Tuesday, May 20th, for that information.

16 THE COURT: Well are we going to talk about a report or
17 --

18 MR. LIEBELER: We're not going to talk about a report.
19 What Mr. Scott did is he created a number of spreadsheets that
20 reflect the payment histories from a number of vendors and did
21 that over the course of the last week and up through, as I
22 understand it, late Friday afternoon. And so he did given the
23 time restraints of the TRO and we really had no other option.

24 THE COURT: All right. Overruled, I'll let him testify
25 subject to cross for purposes only of the TRO.

1 MR. WERB: But again we haven't seen these spreadsheets
2 or anything. I mean we're being bootstrapped.

3 THE COURT: I assume we'll see them today. Overruled.

4 MR. WERB: Very well.

5 BY MR. LIEBELER:

6 Q All right. Now I think you've just told us that you were
7 trying to find out when payment made -- when Fleming made
8 outgoing payments relative to incoming payments and tell us what
9 you did, please, in order to go about finding that out?

10 A Okay. For each of the six companies, I guess I should
11 reference the six companies being American Greetings, Foster
12 Farms, Miles, Gibson Greetings, Lewis Bakeries and Farris
13 Produce. For each of those six parties, I looked at disbursement
14 that the debtor made during the month of March as being an
15 example month, March of 2003. And for each of those transactions
16 where we made payment to the vendor, I went back and looked to
17 identify the invoice where we billed the retailer for that
18 product and then looked for two other pieces of data; number one,
19 what was the timing on which we made payment to the vendor for
20 the product that was shipped and number two, what was the day on
21 which we received payment from the retailer for the related
22 product.

23 Q And how did you go about finding the invoices at issue?

24 A The -- first of all, on the accounts payable system I was
25 able to query and identify all the payments made to those

1 vendors. And I should say that I was able to do that through the
2 company's food system information system. I should say that the
3 company runs on multiple systems. They run some of their
4 invoicing on food systems and the other portion of their invoices
5 are run off of an SAP system. Because of the constraints of
6 time, I was not able to extract the data from the SAP system. So
7 what I'm going to be talking about today is a subset of the total
8 transactions during the month of March.

9 Q Okay.

10 A But first I looked for our history on making checks out to
11 these six vendors, identified the invoice number and the date
12 that we were originally invoiced by the vendor.

13 Q And did you or members of your staff do that physically on
14 computer terminals?

15 A Yes, we did.

16 Q And pulled up the particular invoices and looked at them?

17 A Right.

18 Q And then with respect to the dates upon which Fleming
19 received payment from the various retailers, how is it that you
20 found that data out?

21 A In order to do that we had to, first of all, search our
22 system to determine which invoice we -- or on which date and
23 invoice we billed the customer for the receipt of goods, and that
24 was a manual process where we had to look for accounts
25 receivables that had been billed to customers -- or I'm sorry, to

1 retailers around the time period of which we understood the
2 product was shipped. And once we -- and so we just scanned
3 through invoices to retailer on electronic system, we have a scan
4 of the invoices to the retailers until we identified the invoice
5 that included the product that was shipped. And then once we
6 identified that invoice to the retailer, we were able to then
7 look and see when that payment was made by the retailer by
8 looking at a -- we made hand copies of the check that the
9 retailer paid with and scanning to look for the check.

10 Q And for what period of time did you look at this data for
11 these six retailers -- these six vendors?

12 A We looked at payments that were made to vendors during the
13 month of March of 2003.

14 Q And I think you alluded to this earlier, but let's just make
15 sure the record's clear on it, did you look at all of the data
16 for a particular vendor for the month of March?

17 A Again we did not look at all the data. We only had time to
18 go through one of the company's account systems and the result of
19 that is there would be certain distribution centers that are
20 running on SAP and therefore the data has not been accessed yet.
21 And so we have a subset of the total disbursements made during
22 that time period.

23 Q Do you have any knowledge of what that data is that you have
24 not looked at?

25 A In terms of the volume of the data?

1 Q In terms of what the outcome is going to be, would you
2 expect it to be any different or do you have any basis for
3 knowing what it is one way or the --

4 MR. WERB: Objection, calls for speculation.

5 MR. LIEBELER: Can I finish my --

6 MR. WERB: Sorry.

7 MR. LIEBELER: -- question first?

8 Q Just do you have any basis to believe that it would be any
9 different or any basis to believe it would be the same as the
10 data that you have analyzed here today?

11 MR. WERB: Objection based upon speculation and
12 improper foundation which would --

13 THE COURT: Sustained.

14 MR. WERB: Thank you.

15 MR. LIEBELER: Okay.

16 Q You don't know what that data says that you -- because
17 you've not looked at it, is that fair?

18 A That's correct.

19 Q And so you just don't know one way or the other what it's
20 going to tell us, is that right?

21 A That's correct.

22 Q Okay. Now let's turn -- I'm going to give you a copy of
23 what I have had marked as debtors' 10.

24 (Pause)

25 Q And, Mr. Scott, would you tell us please what debtors' 10

1 is?

2 A This is a summary of the results of analysis that I
3 performed that weighs out the invoices that were paid during the
4 month of March for Gibson Greetings and documents the date that
5 Fleming made payment to the vendor and the date that the customer
6 made payment to Fleming.

7 Q And on the exhibit, which is the column that indicates when
8 the vendor was paid by Fleming?

9 A The column that's labeled check date and in brackets vendor
10 paid, that's the column that reflects the date of the payment to
11 the vendor from Fleming.

12 Q And then which column indicates the date upon which the
13 customer turned around and paid Fleming?

14 A That would be on the column labeled date customer paid.

15 Q Now in -- when I examined -- when Ms. Alexander was
16 testifying, we used the terminology retailer. Which part is the
17 retailer in your analysis here?

18 A That would be the customer I've identified. I'm using
19 customer and retailer interchangeably.

20 Q And then on the right-hand side of debtors' Exhibit 10, what
21 are those two columns for, tell us, please?

22 A The column that's labeled AP paid prior to cash received, if
23 that column has a Y in it, that indicates that for that invoice
24 that Fleming paid the vendor prior to receiving payment from the
25 retailer for that particular invoice. And if it had a N, then

1 that would indicate that in fact the opposite was true, that
2 Fleming received payment from the retailer prior to making
3 payment to the vendor for the invoice.

4 Q And how many N's are there on debtors' 10?

5 A There are no.

6 Q And what does the right-hand column tell us?

7 MR. WICK: Your Honor, I'd like to object, first of
8 all, to further questioning about Exhibit 10. It's not been
9 offered into evidence.

10 THE COURT: Overruled. He'll offer it at the end.

11 MR. WICK: Your Honor, I would object further on the
12 grounds that there's been no testimony tying the entries on
13 debtors' 10 to the underlying invoices from Gibson Greetings.

14 MR. LIEBELER: Fair point, I can lay the foundation.

15 THE COURT: All right.

16 Q Mr. Scott, did you or your staff in fact look at the actual
17 invoices from Gibson Greeting in order to create debtors' 10?

18 A Yes, we did. We looked at the invoice from Gibson
19 Greetings.

20 Q And is debtors' 10 an accurate and complete summary of the
21 partial set of invoices that you looked at?

22 MR. WICK: Objection, Your Honor. The invoices haven't
23 been offered.

24 THE COURT: Overruled.

25 A Yes, it is a complete set of the subset of data we looked at

1 which included the data from the food systems.

2 Q And the right-hand column, what does the right-hand column
3 tell us?

4 A That column reflects the gap between the number of days
5 between when the vendor was paid by Fleming compared with the
6 receipt of funds from the retailer by Fleming. So, for example,
7 in the first row where it's three days, that would indicate that
8 Fleming received payment from the retailer three days after
9 having made payment to the vendor.

10 Q And based on the analysis you conducted to come up with
11 debtors' 10, what did you conclude about the timing of payments
12 with respect to Gibson Greetings?

13 A With respect to Gibson Greetings, we concluded that in the
14 examples we looked at that Fleming made payment to Gibson
15 Greetings in all cases prior to receiving payment from the
16 retailers for the product that was shipped by Gibson.

17 Q Debtors' 11.

18 (Pause)

19 Q And tell us, please, Mr. Scott, what is debtors' 11?

20 A Debtors' 11 represents the analysis, the same analysis that
21 I did for Gibson Greetings, same approach to the analysis but it
22 was done for American Greetings Corp.

23 Q And with respect to American Greetings, did you or your
24 staff physically look at screen prints of all of the relevant
25 invoices for the month of March 2003?

1 A Yes, we did.

2 Q And is debtors' 11 a --

3 A Or, I'm sorry, to clarify, we looked at invoices related to
4 the payments that were made during the period of March, 2003. So
5 there may have been other invoices rendered that were not paid
6 during the month of March, but we did look at the ones on which
7 we made payment.

8 Q Understood, sir. 11 does not reflect invoices that Fleming
9 received in the month of March but rather it reflects invoices
10 that Fleming paid out on during the month of March, is that
11 right?

12 A That's correct.

13 Q And similar to debtors' 10, is debtors' 11 a full and
14 accurate summary of the partial set of data that you were able to
15 look at?

16 MR. WICK: Same objection.

17 THE COURT: Overruled.

18 A Could you please ask the question again?

19 Q Sure. Is debtors' 11 an accurate and complete summary of
20 the invoices that you looked at in the month of March for
21 American Greetings?

22 A Yes, it is.

23 Q And did you undergo the same processes to create debtors' 11
24 that you did debtors' 10?

25 A Yes, I did.

1 Q And what are your conclusions with respect to debtors' 11?

2 A For the arrangement with American Greetings Corp. in all the
3 cases that we analyzed, in each case Fleming made payment to the
4 American Greetings prior to receiving payment from the retailer
5 for the related product.

6 (Pause)

7 Q Mr. Scott, I've just given you debtors' 12, and tell us what
8 debtors' 12 is.

9 A Debtors' 12 is a similar analysis that was done for Lewis
10 Bakeries, and again, looking at the period of payments made
11 during the month of March for Lewis.

12 Q And with respect to debtors' 12 did you look at the -- all
13 of the underlying data to create debtors' 12 as you did for
14 debtors' 10?

15 MR. WICK: I will likewise object this line of
16 testimony as it relates to Lewis Bakeries. We have no reference
17 point here, Judge. We don't know what this relates to. The --

18 THE COURT: Well, you can -- it's subject to cross, so,
19 overruled, for the time being.

20 Q And with respect to debtors' 12 just like debtors' 10, did
21 you and your staff look at all of the underlying invoices, you
22 know, the check documents indicating payment and the documents
23 that indicated when Fleming was paid?

24 A Yes, we did.

25 Q And is debtors' 12 an accurate summary of all of those

1 underlying documents?

2 A Yes, it is.

3 Q And from your analysis that you conducted on debtors' 12,
4 what do you conclude with respect to Fleming's payments to Lewis
5 Bakeries in the month of March, 2003?

6 A For Lewis Bakeries -- to the cases we look at the debtor
7 made payment to Lewis Bakeries prior to receiving payment from
8 the retailers for the related -- for the related product.

9 (Pause)

10 Q Mr. Scott, I've just given you debtors' 13.

11 MR. LIEBELER: And it may make sense, Your Honor, just
12 to permit a standing objection on the grounds that --

13 THE COURT: I will.

14 MR. WICK: -- be fine.

15 MR. LIEBELER: -- counsel have articulated -- make
16 sense to do that?

17 THE COURT: All right.

18 Q And what is debtors' 13, Mr. Scott?

19 A Debtors' 13 is a similar analysis for Miles Farmers' Market
20 done in a similar fashion to what I've just described for the
21 other analyses.

22 Q And with respect to debtors' 13, what were your conclusions
23 with respect to Fleming's payment to Miles Farmers' Market?

24 A A similar conclusion. In each of the transactions that we
25 evaluated Fleming made payment to Miles Farmers' Market prior to

1 receiving payment from the retailers for the related product.

2 (Pause)

3 Q And, Mr. Scott, debtors' 14, which I have just handed to
4 you, is the same grill with respect to Foster Farms, is that
5 right?

6 A That is correct.

7 Q And the conclusions, as I understand it, on Foster Farms are
8 a little bit different. Take a look at Exhibits 14, and based on
9 your analysis that you conducted there tell us what your
10 conclusions are on Foster Farms.

11 Q On Foster Farms there was not a, as is -- was the case in
12 the other examples, there was not 100 percent of the time when
13 Fleming made payment to the vendor prior to receipt of payment
14 from the retailer. Instead what the analysis demonstrates is
15 that in a larger majority of the transactions payments were made
16 to Foster Farms in advance of receipt but not in all cases.

17 Q There's no -- there's no total on Exhibit -- on debtors' 14
18 telling us sort of what percentage. Have you done that
19 calculation?

20 A I have -- I've not done the calculation.

21 Q Okay. Just eyeballing through the pages of 14, how often
22 was -- did Fleming pay out money to Foster Farms before receiving
23 the corresponding money from the retailers?

24 A It looks to me like probably about 80 percent of them.

25 MR. LIEBELER: Thankfully the last one, Your Honor, is

1 debtors' 15.

2 (Pause)

3 BY MR. LIEBELER:

4 Q And, Mr. Scott, what is debtors' 15?

5 A Debtors' 15 is a similar analysis for Farris Produce and
6 yields similar results to the other analyses, demonstrating that
7 in all cases Farris Produce was paid in advance of Fleming
8 receiving payment from the retailer.

9 Q All right. Mr. Scott, based on your analysis of the payment
10 timing for these six vendors what if anything do you conclude
11 about whether or not Fleming is merely a conduit for monies
12 coming from retailers and going out to vendors?

13 A SPEAKER: Objection.

14 A SPEAKER: Objection.

15 MR. KOBBE: Your Honor, this goes to the ultimate
16 conclusion in the case. I think what we've heard from this
17 witness, and I'm not even sure if he's testifying as an expert or
18 as a fact witness today, is that he has done a preliminary
19 analysis of select invoices with respect to select vendors, and I
20 think it's premature for him to reach this conclusion that he's
21 being asked to reach.

22 MR. LIEBELER: May I respond, Your Honor? The
23 affidavits that we have gotten in this case from the plaintiffs,
24 every one of them except one that I can think of, uses the
25 language, Fleming is a mere conduit. Their fact witnesses have

1 seen fit to opine that Fleming is a mere conduit. Our witness
2 should be entitled to do the same thing. It's simply sauce for
3 the goose is sauce for the gander. The fact that he's appearing
4 on the stand doesn't make a difference. Those affidavits have
5 come in, and they're arguing on the basis of those affidavits.

6 THE COURT: I'm not sure based on what he has done he
7 can opine at all.

8 MR. LIEBELER: Well, he can certainly opine with
9 respect to the payment timing and say, look, a conduit would
10 require --

11 THE COURT: Well, that -- save it for argument. It's a
12 legal conclusion, and I'll sustain the objection on that basis.

13 (Pause)

14 BY MR. LIEBELER:

15 Q Now, Mr. Scott, if you wanted to trace funds coming in from
16 a retailer and going out to a vendor for a particular shipment
17 that a retailer received, is it possible to do so as you
18 understand the situation?

19 A For the transactions that I've detailed here I would say it
20 would not be possible to trace funds because to trace funds you'd
21 have to first of all see the cash coming in to our cash system,
22 flow it through and then seeing it exit our cash system, and
23 instead in these examples, since the cash went out to the vendors
24 in most cases prior to the receipt in the tracing would basically
25 show that cash, when it comes into the retailers, just stops.

1 It's a dead end because the payments have already been made to
2 vendors.

3 (Pause)

4 Q Now, let's turn now to the second area of the DSD program
5 that you looked at. Please refresh us, please. What was that
6 area?

7 A I looked at our accounts receivable to determine if there
8 were circumstances whereby we made payment to vendors for product
9 that was shipped through the DSD program but for which we have --
10 Fleming has not received payments from the retailer.

11 Q And what did you do specifically in order to try to figure
12 that out?

13 A To do that I looked at our open accounts receivable, which
14 we can identify for the DSD program, and for those open accounts
15 receivable on which we've not received payment from the retailer
16 I searched to see on those which ones we had made payment to the
17 vendor.

18 Q And how did you determine on which of those you made a
19 payment to the vendor?

20 A We -- again, starting with the summary of all open accounts
21 receivable we're able to look at the invoice number in the
22 accounts receivable for the DSD product and tie that to our
23 accounts payable system where it reflected a payment for that
24 invoice number.

25 Q And in order to conduct that analysis did you actually look

1 at the screen prints of what the open accounts receivable were
2 and what payments Fleming had made?

3 A Yes.

4 Q And did you compile that data together into a chart?

5 A Yes, I did.

6 (Pause)

7 Q Mr. Scott, I've just given you debtors' 16. Can you tell us
8 what debtors' 16 is, please?

9 A Debtors' 16 is a listing of all the accounts receivable that
10 currently are shown in our system as unpaid by the retailer but
11 for which Fleming has made payment to the vendor that drop
12 shipped product through the DSD program.

13 Q And walk us through the chart. For example, what does the
14 AR date column on the chart mean?

15 A The AR date is the date by which we invoiced the retailer
16 for the product that was shipped.

17 Q And in layman's terms that means essentially the date that
18 the payment was due from the retailer to Fleming?

19 A That's not the due date, it's the -- it's the bill date, and
20 so the due date would be in most cases about a week later.

21 Q Okay. And so how far back are the -- are the dates on which
22 monies were due to Fleming from the retailers on debtors' 16?

23 A Many of these examples are from 2002, and there are some
24 that flow through to 2003. I believe all the examples in here
25 are at least 21 days past as --

1 Q And so what were the results of the analysis that you
2 conducted on debtors' 16?

3 A The result shows, and I apologize, I don't have a total on
4 here, the result shows that there's approximately \$780,000 that
5 is -- that is outstanding due from retailers for which Fleming
6 has already made payment to the vendor.

7 Q And how far are these amounts past due from the retailers?

8 A At least 21 days, and in many cases more than a year past
9 due.

10 Q From your analysis, Mr. Scott -- you conclude about whether
11 or not Fleming does or does not bear a credit risk with respect
12 to the DSD program?

13 MR. KOBBE: Objection, Your Honor.

14 MR. WICK: Objection, Your Honor.

15 THE COURT: Sustained.

16 MR. LIEBELER: It's a symphony over here.

17 Q In your experience how likely is it that Fleming will be
18 able to collect amounts that are past due by as much as a year?

19 MR. WICK: Objection, Your Honor.

20 MR. LIEBELER: That's a purely factual question, Your
21 Honor.

22 MR. KOBBE: Your Honor, relevance and foundation. He
23 doesn't have expertise on accounts receivable collections, and he
24 certainly doesn't have expertise with respect to collections from
25 these particular account debtors.

1 THE COURT: Well, from the retailers, sure. Rephrase.
2 Sustained. Rephrase.

3 MR. LIEBELER: Sure. Let me see if I can lay the
4 foundation.

5 BY MR. LIEBELER:

6 Q You are currently the treasurer of Fleming, are you not?

7 A I am.

8 Q And what is your -- and you've been with Alex Partners for
9 how long?

10 A Approximately a year and a half.

11 Q And in the context of your overall career, not just Fleming
12 and Alex Partners but before that, had you had experience with
13 running the finances of a company?

14 A In a consulting capacity I've worked with companies often on
15 their finances, yes.

16 Q And have you from time to time looked at the extent to which
17 companies are able to collect amounts that are past due?

18 A Yes, I have, both from a company perspective as well as in
19 representing lenders in evaluating their collateral, including
20 accounts receivable.

21 Q And have you, after you began work on this particular
22 reorganization and started to work with Fleming, have you looked
23 at Fleming's past history of collecting past due amounts from
24 retailers?

25 A Yes, I have.

1 Q And what did you find in so doing?

2 A In so doing it's my experience that once a receivable ages
3 out more than 21 days that it shows -- it flags a high risk of
4 collection, and in our experience we have very poor results in
5 collecting receivables once they age out that much.

6 Q And based on that experience what did you conclude in
7 debtors' 16 about how likely it is that Fleming is going to be
8 able to recover some or all of the \$780,000 that is there
9 indicated?

10 MR. KOBBE: Objection, Your Honor. May I be heard on
11 this?

12 THE COURT: Yes.

13 MR. KOBBE: Two grounds for the objection. The first
14 is that there's no foundation here. This gentleman does have
15 experience I'm sure in his job with Alex in collection of
16 receivables, but he's only been with this debtor for less than a
17 month. But the other grounds for the objection is relevance.
18 Even if all this is true and even if these receivables are bad
19 receivables, it doesn't have any bearing on the issue of risk of
20 a loss, and I think that that's what that conclusion is being
21 held out to be, that because these receivables are not
22 collectible that its Fleming and not the vendors who are bearing
23 the risk of loss here. And I don't see the connection.

24 THE COURT: Well, I won't reach that conclusion, but I
25 think it may be relevant, so I'll overrule it.

1 MR. KOBBE: Thank you, Your Honor.

2 MR. LIEBELER: On the relevance, that's argument, and
3 we can argue that in closing.

4 THE COURT: All right. He can answer.

5 BY MR. LIEBELER:

6 Q All right. Go ahead.

7 A Could you ask the question --

8 Q Sure. Based on your experience what have you concluded
9 about how likely it is that Fleming is going to be able to
10 collect none, some or all of the 700 aught thousand dollars that
11 you've listed on debtors' 16?

12 A I think that based on the age of these receivables and the
13 debtors' history in collecting on receivables that are this old
14 that it's unlikely that it will collect on these receivables.

15 Q In your experience at Fleming have you become familiar with
16 Fleming's computer systems?

17 A Generally, yes.

18 Q And is the accounts receivable system linked to the accounts
19 payable system?

20 A No, it's not. They're separate systems.

21 Q And if you were in a so-called pay if paid relationship what
22 is it that you would do with the computer systems to make that
23 happen?

24 A We would structure the payment to the vendors such that the
25 payment would not go out until our records reflected the

1 collection of the related receivable from the retailer.

2 Q Are Fleming's computer systems currently set up to do that?

3 A No, they're not.

4 MR. LIEBELER: No further questions, Your Honor.

5 THE COURT: Cross?

6 CROSS EXAMINATION

7 BY MR. WICK:

8 Q Mr. Scott, you testified, I believe, and I'll focus on
9 debtors' 10 and 11 since they relate to my client specifically,
10 American or Gibson Greetings Corporation, you testified that
11 debtors' 10 and 11 are summaries that accurately reflect the
12 invoices from American or Gibson Greetings to Fleming and from
13 Fleming to the retailer, is that correct?

14 A That's correct.

15 Q If I could turn your attention to debtors' 10, under the
16 column that states, invoice amount, it appears that approximately
17 -- well, let me -- as I understand it, this is the amount of the
18 invoice from whom to whom?

19 A That should be the amount of the invoice from Fleming to the
20 vendor.

21 Q It appears to be from debtors' 10 that approximately half of
22 those invoices amounts are negative numbers. Can you explain
23 that?

24 A Yes, I can. I went back to look at that because it did
25 surprise me by the number of them that were negative compared to