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IN THE UNITED STATES BANKRUTPCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
FLEMING COMPANIES, INC., et al.,	)	Case No. 03-10945 (MFW)
	)	(Jointly administered)
	)	
Debtors.	)	

FLEMING'S OBJECTION TO ALBERTSON'S MOTION FOR AN ORDER: (A) LIFTING THE AUTOMATIC STAY TO ALLOW ALBERTSON'S TO TERMINATE THE FACILITY STANDBY AGREEMENTS; OR ALTERNATIVELY (B) COMPELLING FLEMING TO REJECT SUCH AGREEMENTS IMMEDIATELY

I. Introduction

1. Albertson's motion fails for three reasons. First, Albertson's motion to lift the stay so that it may terminate its Facilities Standby Agreements ("FSA") with Fleming is a procedurally improper attempt to circumvent the Bankruptcy Code's mandate that a debtor must be given protected time to decide whether to assume or reject an executory contract. It should be rejected as a matter of law on this ground alone.

2. Second, even if Albertson's attempt to lift the stay were proper, Albertson's cannot meet its burden to show cause to lift the stay or to compel the immediate rejection of the FSA contracts. To prevail under the *Rexene Products* test, Albertson's must show: (1) that Fleming will not be prejudiced by lifting the stay; (2) that the balance of harms favors Albertson's; and (3) that Albertson's has a reasonable chance of prevailing on the merits of its claim. *See In re Rexene Prods. Co.*, 141 B.R. 574 (Bankr. D. Del. 1992). Albertson's

cannot make such a showing.

3. Albertson's fails the first prong under *Rexene Products* because Fleming's ability to reorganize will be greatly prejudiced by the loss REDACTED the stay is lifted. The second prong, the balance of harms, favors Fleming for similar reasons. On the one hand, Fleming's entire ability to reorganize will be placed in jeopardy by the loss of the Albertson's FSA contracts, while on the other, Albertson's has been able to cover shortfalls from its own warehouses REDACTED *See* Alb. Mot. at 6-7, ¶ 12; Nicholson Aff., ¶ 6. Thus, while Albertson's can and has mitigated its short-term harm, Fleming cannot.

4. The last prong favors Fleming as well because Albertson's does not have a reasonable chance of prevailing on the merits of its claim. Indeed, Albertson's bases its motion on an incorrect premise -- that Fleming has materially breached its FSAs with Albertson's. That is not the case. The two FSA contracts Albertson's and Fleming carefully negotiated just a year ago are quite explicit -- REDACTED *See* FSAs at ¶ 5 (Exs. A and B to Alb. Mot.). Fleming is not in material breach by the unambiguous terms of the agreements because no such REDACTED *See* Nicholson Aff., ¶¶ 1-4. For these reasons, and because Albertson's cannot satisfy the *Rexene Products* test, Albertson's motion should be denied.

5. Third, Fleming should not be compelled to prematurely reject the FSA contracts. Section 365(d)(2) of the Bankruptcy Code allows the trustee or debtor-in-possession a reasonable time within which to determine whether assumption or rejection of an executory contract would be beneficial to an effective reorganization. Here, the Fleming bankruptcy is

large and complex. There are hundreds of leases and contracts to be evaluated. Moreover, the Albertson's FSA contracts are very important to Fleming's reorganization effort, which is still in its beginning stages. Under these circumstances, two and a-half months after the petition date does not constitute "reasonable time" for Fleming to decide whether to assume or reject the Albertson's FSA contracts. The automatic stay exists to protect debtors, like Fleming, in these circumstances. It should be honored here.

6. Fleming believes that Albertson's motion is without merit and should be denied forthwith. In the alternative, however, Fleming requests that it be permitted discovery into the numerous unsupported and conclusory factual allegations that underlie this motion. Given the consequences to Fleming and its creditors of lifting the stay, equity demands that Fleming be permitted the opportunity to discover the facts necessary to refute Albertson's claims.

7. Many of the facts alleged herein are in the possession of Albertson's or third parties and are not known to Fleming. For example, *Rexene Products* requires the court to balance the harms to the parties. This makes Albertson's ability and efforts to cover any shortfall from its own resources or secondary suppliers a highly relevant question. Albertson's, not Fleming, controls that information. The same is true with respect to Albertson's sales and profits during the last several months. Fleming intends to work with Albertson's counsel to arrange an acceptable discovery schedule leading up to the hearing on the merits.[1]

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[1] Fleming has been unable to take discovery in the short time since Albertson's brief was filed. Albertson's filed its brief two days after the deadline for noticing motions for the June 25 hearing. Albertson's moved to shorten time. Fleming opposed. The Court granted Albertson's motion to shorten time on June 13; however, the Court's order was not entered in the docket until Friday afternoon, June 20th (a full week after the Court signed the order) nor was Fleming notified informally by the clerk's office or Albertson's that the motion had been granted. Up until last Friday, Fleming had assumed that this motion would not be heard on June 25 (as is reflected in Fleming's supplemental objection to the Albertson's motions, filed June 19). Upon receipt of the order shortening time,

II. Discussion

A. Albertson's attempt to lift the stay in order to terminate the FSA contracts is impermissible and should be rejected as a matter of law.

8. Albertson's motion to lift the stay seeks to circumvent the Bankruptcy Code's mandate that a debtor must be given protected time to decide whether to assume or reject an executory contract. *In re El Paso Refinery, L.P.*, 220 B.R. 37 (Bankr. W.D. Tx. 1998) analyzes this strategy at length. In so doing, the bankruptcy court held that once under Chapter 11 protection, "the estate enjoys a rather privileged position. From the moment of filing to the moment of assumption or rejection, the non-debtor party [to the executory contract] is held to be barred from enforcing the contract and its terms." *Id.* at 43 (citations omitted); *see also In re FBI Distribution Corp.* 330 F.3d 36, 43 (1st Cir. 2003) (same, citing *El Paso*). The reason for this is that the non-debtor party "would enjoy a privileged position *vis-à-vis* other creditors, able to use the estate's need for the contract to extract special treatment, even though the contract might ultimately be rejected and the creditor would thereafter have no priority over other unsecured creditors." *El Paso*, 220 B.R. at 43. Once the petition is filed, "[w]hether the debtor performs or not, the non-debtor must perform until assumption or rejection." *Id.* at 44 (quoting from *Krafsur v. UOP (In re El Paso Refinery, L.P.)*, 196 B.R. 58, 72 (Bankr. W.D.Tex. 1996). The Court went on to hold that the non-debtor party was limited to the Section 365 remedies and should not be permitted to lift the stay and terminate an agreement:

> By limiting the non-debtor party to the Section 365 remedies, the value of the executory contract can be preserved for the estate, while allowing an appropriate period of time to evaluate its

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Fleming began preparing this objection, but the extremely tight schedule has precluded a thorough investigation of all of the facts at issue and has likewise precluded any discovery whatsoever from Albertson's.

> options. If the contract is terminated at the request (or behest) of the non-debtor party, then the estate's options are literally foreclosed, undermining the structure and intent of the Code. A party to an executory contract has no more right to 'relief from stay' to 'terminate' a contract with the estate than does any other unsecured creditor whose contract (executory or not) has been breached.' *Id.* at 44.

9. Just so here. This Court should reject Albertson's attempts to lift the stay in order to terminate the FSAs. Albertson's is barred by Section 365 from seeking to lift the stay to that it may invoke the termination procedures of the contract, regardless of any breach by Fleming (which has not occurred, as we discuss elsewhere). *See id.* at 43 ("the rights of a party to an executory contract with the debtor are rendered temporarily unenforceable by section 365.") As the *El Paso* Court explains, "the more elegant procedure for addressing the debtor's prepetition contracts will be found under 11 U.S.C. § 365 and the proper role for this court in such matters will be in overseeing the 'breathing space' afforded by Section 365 and its relevant caselaw, a space in which the debtor enjoys a decisively privileged position, and not in policing a hybrid process that involves flanking maneuvers against executory contracts via a Section 362 motion to modify the stay." *Id.* at 50 n.30. (Fleming addresses Albertson's efforts to compel rejection of the contract in Part C, below.)

B. Albertson's has not shown good cause to lift the stay.

10. Albertson's bears the burden of making a prima facie showing of cause to lift the stay. *See In re Sonnax Indus. Inc.*, 907 F.2d 1280 (2d Cir. 1990) (if party seeking relief from automatic stay on grounds of cause fails to make an initial of showing of cause, court should deny relief without requiring any showing from debtor that it is entitled to continued protection). As Albertson's recognizes in its motion, the three-prong test to lift the automatic stay is set out in *In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992). *See* Alb.

Mot. at 10-11, ¶¶ 22-23. Albertson's must show (but has not) that:

a) Fleming will not be greatly prejudiced;

b)The hardship to Albertson's of maintaining the stay "considerably outweighs" the hardship to Fleming of lifting the stay; and

c) Albertson's has a reasonable chance of prevailing on the merits of its termination claim.

See id.; Rexene, 141 B.R. at 576.

11. While Albertson's gives short shrift to these factors, a careful examination reveals that each element favors Fleming.

1. **Fleming will be greatly prejudiced if the FSA contracts are terminated.**

12. Albertson's bases its conclusion that Fleming will not be seriously prejudiced on its erroneous contention that Fleming cannot cure the alleged defaults and that therefore the contract is now subject to termination. *See* Alb. Mot. at 10, ¶ 21. But Fleming is not in material default of the FSA contracts. And any service level decline to date is curable. Fleming thus retains an interest in these agreements.

13. Fleming will, in fact, be greatly prejudiced if Albertson's is allowed to terminate the FSA contracts. These REDACTED *See* Alb. Mot., Ex. A at ¶ 3(a) and Ex. B at ¶ 3(b). REDACTED *Id.* If these contracts are prematurely terminated in the midst of the Chapter 11 proceedings, the loss of revenue will jeopardize the reorganization efforts and reduce the likelihood and value of any potential sale of the company.

14. The latter prospect is very real. As the Court is aware, Fleming is exploring the possible sale of its grocery wholesale business. Fleming believes that the estate

will be greatly prejudiced if Albertson's is allowed to terminate, because the loss would assuredly affect the amount any potential buyer would be willing to pay for Fleming's wholesale operations. *See In re New York Medical Group, P.C.*, 265 B.R. 408, 414 (Bankr. S.D.N.Y. 2001) (bankruptcy court may deny relief from stay where lifting the stay will seriously threaten the debtor's reorganization).

15. Setting aside the potential sale, the loss of this relationship would be the

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16. Finally, allowing Albertson's to terminate now will only encourage still more Fleming customers to seek early termination of their FSAs. Fleming has hundreds of customers, many of which have FSAs. The bankruptcy has been disruptive to Fleming's service levels throughout the Wholesale Division and many customers could make claims similar to those pled by Albertson's. Fleming would be prejudiced by the snowball effect that could be caused by allowing one of the largest Fleming customers to terminate prematurely. The Court could be inundated with motions to lift the automatic stay. Under the circumstances, where Fleming is not in material breach of the Albertson's agreement, the Court should leave the stay in place until Fleming completes its reorganization or sells its wholesale operations.

2. <u>The harm to Fleming of lifting the stay will far outweigh the harm to Albertson's of maintaining it.</u>

17. As shown above, Fleming will be seriously harmed by lifting the stay, by

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the decrease in value of any sale of the wholesale business, and the potential loss of other customers as the precedent set by this motion

snowballs into dozens or hundreds of "me too" motions from Fleming's other customers.

18. On the other hand, Fleming has worked with Albertson's to assist it in making up shortfalls by shipping goods from Albertson's own Ft. Worth distribution center. Nicholson Aff., ¶ 6. Indeed, Albertson's admits that it has been covering Fleming's shortfalls with inventory from its in Ft. Worth warehouse and from other third parties. *See* Alb. Mot. at 4-6, ¶ 12; *see also id.* Although Albertson's has had to bear some increased labor and freight costs to transport the goods from Ft. Worth to the store sites,

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Albertson's thus exaggerates the harm it has suffered.

3. **Albertson's cannot prevail on the merits of its termination claim because Fleming is not in material breach.**

19. REDACTED Consequently, Albertson's cannot make the required showing that it has a reasonable chance of prevailing on the merits of its termination claim. This prong thus weighs in favor of Fleming.

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Alb. Mot., Exs. A & B, FSAs at ¶ 5 (emphasis added). A "Period" is four weeks, and 13 Periods constitute a year. Nicholson Aff., ¶ 4. Service level is a percentage measurement of the amount of orders Fleming is able to fill, subject to adjustments for specific factors. *See* Alb. Mot., Ex. A & B, FSAs at ¶ 5. To prove a material breach -- one that justifies

termination under Paragraph 6(b)[2] --

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21. In sum, Albertson's has not and cannot satisfy the three prong *Rexene Products* test, as it must, to lift the stay. Albertson's motion should therefore be denied.

C. Fleming should not be compelled to reject the FSA contracts immediately.

22. In the alternative to lifting the automatic stay, Albertson's asks the Court to compel Fleming to reject the FSAs. *See* Alb. Mot., ¶ 24. Albertson's request is premature. Section 365(d)(2) of the Bankruptcy Code allows the trustee or debtor-in-possession a reasonable time within which to determine whether assumption or rejection of an executory contract would be beneficial to an effective reorganization. *See In re Beker Industries Corp.*, 64 B.R. 890, 897 (Bankr. S.D.N.Y. 1986) (relied upon by Albertson's at Paragraph 25 of its Motion). The clear policy of the Bankruptcy Code is to "provide the debtor with breathing space following the filing

[2] "If Fleming fails to perform in any material respect any of its obligations under this Agreement, then Fleming shall be in default. Albertson's may issue a notice of default to Fleming, identify the nature of the default. Subject to Section 5 of this Agreement, Fleming shall have fifteen (15) days from receipt of such notice to cure the default to the reasonable satisfaction of Albertson's. Failing such a cure, Albertson's shall have the right to immediately terminate this Agreement by written notice." Alb. Mot., Exs. A & B, FSAs at ¶ 6(b) (emphasis added).

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of a bankruptcy petition, continuing until the confirmation of a plan, in which to assume or reject an executory contract." *In re Enron Corp.*, 279 B.R. 695, 702 (Bankr. S.D.N.Y. 2002); *In re Adelphia Communications Corp.*, 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003).

23. In deciding whether the debtor should be compelled to assume or reject its pipeline transportation service agreements prior to the plan confirmation, *In re Enron Corp.* considered the following factors: (1) the damage that other parties to contracts would suffer, beyond compensation available under the Bankruptcy Code; (2) the importance of contracts to debtor's business and reorganization; (3) whether debtor had sufficient time to appraise its financial situation and potential value of its assets in formulating plan; (4) whether the exclusivity period had terminated; (5) the complexity of case; and (6) the number of contracts debtor had to evaluate. In concluding that Enron required more time to decide whether to assume or reject these agreements, the court noted that the Enron bankruptcy was large and complex, involving thousands of executory contracts and that the debtors were reviewing these contracts and had made determination whether to assume or reject a substantial number of the contracts. *Enron,* 279 B.R. at 703. Furthermore, the court indicated that gas transportation contracts were very important to Enron's business and reorganization and they might prove very profitable to Enron. *Id.*

24. *Enron* demonstrates that Albertson's motion to compel rejection of the FSAs should be denied. Similar to the facts in *Enron*, the case at hand is large and complex, involving hundreds of executory contracts and unexpired leases. The FSAs are critical to Fleming's business and reorganization. Fleming is actively reviewing the Albertson's contracts to decide whether to assume or reject them and is now exploring the possible sale of its grocery wholesale business. Furthermore, Albertson's has failed to show harm beyond compensation

available under the Bankruptcy Code if the stay is not lifted.

25. And finally, Fleming has had only two and a half months from its petition date to review these contracts. Fleming's reorganization is just getting underway. Where, as here, the bankruptcy is large and complex, it is unreasonable to expect the debtor to assume or reject very large executory contracts at the early stages of the bankruptcy, when it is unclear whether the business at issue in the contracts will even remain with the company. *See In re Enron*, 297 B.R. at 699 and 704 (concluding that 10 months after the petition date was the reasonable time for Enron to decide whether to assume or assign its pipeline transportation service agreements); *In re Adelphia Communications*, 291 B.R. at 291 and 301 (holding that one year after the petition date was reasonable time to decide whether to assume or reject certain executory contracts); *In re Service Merchandise Co.*, 256 B.R. 744, at 746 and 749 (Bankr. M.D. Tenn. 2001) (granting two extensions to assume or reject certain leases, setting the deadline almost two years after the petition date because the case was large and complex and there were many leases to be assessed).

26. Similar to *Enron*, *Adelphia Communications*, and *Service Merchandise Co.*, the Fleming bankruptcy is large and complex. There are hundreds of leases and contracts to be evaluated. Moreover, the Albertson's FSA contracts are very important to Fleming's reorganization effort, and the damage suffered by Albertson's can be compensated under the Code. Under these circumstances, two and a-half months after the petition date does not constitute "reasonable time" to decide whether to assume or reject the Albertson's FSA contracts. For these reasons, this Court, like the *Enron* court, should allow Fleming more time to evaluate whether to assume the FSA contracts.

Conclusion

27. For the reasons stated above, this Court should deny Albertson's motion in its entirety.

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