

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

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC., <i>et al.</i> ,)	Case No. 03-10945 (MFW)
)	
Debtors.)	(Jointly Administered)
)	
)	Hearing Date: August 4, 2003 @ 11:30 am
)	Objection Deadline: July 28, 2003

**MOTION OF THE PICTSWEET COMPANY FOR RELIEF FROM THE AUTOMATIC
STAY OR ALTERNATIVELY TO COMPEL THE ASSUMPTION OR REJECTION OF
EXECUTORY CONTRACT AND DEMAND FOR ADEQUATE ASSURANCES**

The Pictsweet Company (“Pictsweet”), by and through its attorneys, hereby moves for relief from the automatic stay to terminate that certain Military Distribution Agreement dated June 14, 2000 between Pictsweet and Fleming Companies, Inc. (“Fleming” or “the Debtor”) wherein the parties agreed to the appointment of the Debtor as a Pictsweet distributor with respect to certain military bases located in Hawaii (the “Hawaii Agreement”) and in support thereof states as follows:

Preliminary Statement

1. By this Motion, Pictsweet seeks relief from the automatic stay to exercise its right to terminate the Hawaii Agreement pursuant to the express terms of that agreement which allows either party to terminate the agreement upon thirty days written notice. Pictsweet requests that this Motion serve as and be deemed the date on which written notice to terminate was provided to Fleming. Alternatively, Pictsweet requests that Fleming be compelled to immediately assume or reject the Hawaii Agreement. Any assumption of the Hawaii Agreement should require that Fleming immediately cure all its defaults under that agreement including maintaining an adequate stock of Pictsweet products. Additionally, for any period of time where

Fleming remains a Pictsweet distributor under the Hawaii Agreement, Fleming should be compelled to provide Pictsweet with adequate assurance, including maintaining an adequate stock of Pictsweet products, providing Pictsweet with an immediate accounting of the Hawaii Agreement including an updated fill-rate report, and allowing Pictsweet to utilize additional distributors so that Pictsweet's standing with the military will not be jeopardized. Due to the imminent and irreparable harm to which Pictsweet has been exposed, Pictsweet further requests that the preliminary and final hearings to which a lift stay motion may be subject pursuant to Local Rule 4001-1 be consolidated at the August 4, 2003 hearing.

Background

2. Pictsweet is in the business of selling frozen vegetables and has a contract with the United States military to provide all military bases throughout the world with its frozen vegetables. Pictsweet's annual sales to the military exceed \$10 million. In order to sell its frozen vegetables to the military, Pictsweet must maintain a "K rating" which requires, among other things, that Pictsweet maintain an adequate stock or "fill-rate" of certain mandatory items that have been designated as "K-1 Items". (See Affidavit of James Strait (¶ 4), a copy of which is attached hereto as Exhibit A.)

3. On April 1, 2003, (the "Petition Date") the Debtor filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§101 *et seq.* (the "Code"). The Debtor continues to operate its businesses and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Code.

4. Prior to the Petition Date, Pictsweet and the Debtor had entered into four Military Distribution Agreements. Pursuant to one of the agreements, the Debtor was appointed a distributor for Pictsweet for military bases in or around Geneva, Alabama (the "Alabama Agreement"). Pursuant to another agreement, the Debtor was appointed a distributor for

Pictsweet for military bases in or around Salt Lake City, Utah (the “Utah Agreement”). Pursuant to a third agreement, the Debtor was appointed a distributor for Pictsweet for military bases in or around Garland, Texas (the “Texas Agreement”). Finally, pursuant to a fourth agreement, the Debtor was appointed a distributor for Pictsweet for military bases in or around Hawaii (the “Hawaii Agreement”). The Hawaii Agreement is the subject of this Motion. Copies of all four Military Distribution Agreements are attached as Exhibits 1 through 4 to the Affidavit of James Strait.

5. Each of the Military Distribution Agreements was similar with respect to their basic terms in that none of the agreements designated the Debtor as the exclusive distributor of Pictsweet products.¹ Also, all of the agreements gave both parties the unilateral right to cancel the agreement upon thirty days written notice. (See Exhibits 1 through 4 to the Affidavit of James Strait.)

6. Post-petition, the Debtor cancelled the Alabama Agreement and provided Pictsweet with sufficient notice. (See ¶ 11 of the Affidavit of James Strait.)

7. Post-petition, the Debtor also cancelled the Utah Agreement but did not give the requisite thirty-day notice. As a result, Pictsweet had to obtain new distributors for the bases covered by the Utah Agreements within a very short time frame. This, in turn, resulted in Pictsweet agreeing with the new distributors to terms less favorable than those to which it had agreed with the Debtor. The Debtor’s failure to give adequate notice in the cancellation of the

¹ If Fleming wished to be appointed the exclusive distributor of Pictsweet products, it could have insisted that it be so designated in the agreements. Pictsweet notes that presently pending before the Court is the Motion of Dial Corporation for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d) to Terminate Military Contract [D.I. 1851] in which the distribution agreement between Fleming and Dial Corporation is attached and where Fleming is identified as Dial Corporation’s “exclusive distributor.”

Utah Agreement has damaged Pictsweet, thereby exposing the estate to administrative liability. (See ¶ 10 of the Affidavit of James Strait.)

8. With respect to the Texas Agreement, Pictsweet became alarmed when it discovered that the Debtor had not sufficiently stocked Pictsweet's vegetables. Because the Debtor was failing to maintain a proper stock, Pictsweet advised the Debtor that it intended to use another distributor to supply the bases that were subject to the Texas Agreement. The Debtor did not object to Pictsweet's proposed actions. Indeed, in response to Pictsweet's statement of intent to use a different distributor, a Fleming representative initially indicated that he understood Pictsweet's need to use a different distributor. (See ¶ 12 of the Affidavit of James Strait.)

9. Several weeks after Pictsweet began using a different distributor in Texas, the Debtor, by an e-mail letter dated June 20, 2003, notified Pictsweet that it viewed Pictsweet's actions to be in violation of the automatic stay and then proposed a modification of the automatic stay to allow for the retroactive termination of all of the Military Distribution Agreements with the exception of the Hawaii Agreement.² (See ¶ 13 of the Affidavit of James Strait.) Pictsweet disputes the notion that it has violated the automatic stay and certainly disputes that any purported violation was either knowing or willful.

The Hawaii Agreement

² Section 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Since the Military Distribution Agreements do not appoint Fleming as Pictsweet's exclusive distributor, it is Pictsweet's position that Fleming does not have a "property" interest in remaining a Pictsweet military distributor. *Cf. Golden Books Family Entertainment Inc*, 269 B.R. 311, 314 (Bankr. Del. 2001) (A nonexclusive licensee has only a personal interest and not a property interest in the license.) Moreover, pursuant to all the agreements, Pictsweet had an absolute right, irrespective of whether the agreement was terminated, to use a different distributor. Therefore, Pictsweet's use of a different distributor could not violate the automatic stay. *See In re R.E.B. & B., Inc.*, 200 B.R. 262, 265 (Bankr. M.D. Fla. 1996) (holding that the automatic stay only applies to prohibit a non-debtor's contract rights which are exercised pursuant to a termination provision.) Pictsweet's present Motion is not an admission that the automatic stay

10. In 2002, the Debtor distributed approximately \$286,000.00 of Pictsweet's frozen vegetables to bases in Hawaii. (See ¶ 8 of the Affidavit of James Strait.) Pursuant to the Hawaii Agreement, the Debtor was entitled to a twelve- percent service fee (or less then \$35,000.00) for distributing Pictsweet's product to the Hawaiian military bases.

11. The Debtor has breached the Hawaii Agreement post-petition by failing to “[m]aintain adequate inventory levels necessary to fill all military orders in full and on time.” See ¶ 1 of the Distributor's obligations on page 2 of the Hawaii Agreement attached to the Affidavit of James Strait as Exhibit 4.

12. As more fully set out in the Affidavit of James Strait at ¶ 17, Fleming's fill-rate with respect to the Hawaii bases had dropped to a low of twenty-four percent (24%) despite the fact that military requires that its suppliers maintain fill-rate of ninety-eight percent (98%). Moreover, Fleming has deviated from its standard practice of providing Pictsweet with monthly fill-rate reports and has failed to provide a fill-rate report since May of 2003. Fleming has also failed to transport the vegetables that Pictsweet provided to it in June of 2003 in a timely manner. On July 17, 2003, the Debtor placed four orders, the first orders with Pictsweet since May of 2003. These orders are not timely and do not appear sufficient to adequately stock the Hawaii bases. (See ¶¶ 15-18 of the Affidavit of James Strait.)

13. As previously stated, the Hawaii Agreement provides that either party may cancel the agreement upon a thirty (30) day written notice. (See Exhibit 4 to the Affidavit of James Strait.)

prohibits Pictsweet from utilizing another distributor without first seeking relief from the stay and Pictsweet reserves all rights to defend itself against any allegations that it has violated the automatic stay.

Argument

Pictsweet is Entitled to Relief from the Automatic Stay

14. Section 363(d)(1) provides that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

15. “Cause” is not defined by the Bankruptcy Code. Consequently, a Bankruptcy Court must decide what constitutes “cause” to lift the automatic stay on a case by case basis. *In re Rexene Products Company*, 141 B.R. 574, 476 (Bankr. D. Del. 1992), *citing In re Fernstrom Storage and Van Co.*, 938 F.2d 731, 735 (7th Cir. 1991).

16. “Cause” has been found to exist to allow a non-debtor to exercise an unconditional right to terminate a contract. “[W]hen a debtor-lessee and a lessor have entered into a tenancy at will relationship, and the landlord desires to terminate the tenancy under applicable state law, ‘cause’ exists to modify the stay to permit the lessor to exercise its rights.” *In re Schewe*, 94 B.R. 938, 950 (Bankr. W.D. Mich. 1989). In *Schewe*, the landlord had a right under state law to terminate the lease upon one month’s notice to the debtor-lessee. The court in *Schewe* rejected the debtor’s invitation to “freeze” the tenancy and to use the automatic stay to prohibit the landlord from terminating the tenancy pursuant to state law. *Id.* at 949.

17. The *Schewe* court granted relief from the stay to terminate the lease under state law, noting that a “bankruptcy court should not create additional property rights or remedies in favor of a debtor (or other party in interest) where such rights do not exist outside of bankruptcy law *unless* such rights and remedies are statutorily authorized under the Bankruptcy Code.” *Id.* at

949-950. This holding is fully in accord with Third Circuit authority precluding a bankruptcy court from using its equitable powers to create new substantive rights. *See also In re Morristown & Erie Railroad Company*, 885 F.2d 98, 100 (3rd Cir. 1990) (A bankruptcy court's equitable powers do not extend to creation of substantive rights); *In re Kaplan*, 104 F.3d 589, 597 (3rd Cir. 1997) (a bankruptcy court does not have equitable power to create substantive rights). In this case, the Debtor's interest, if any, to distribute Pictsweet's products to the military is expressly limited by the broad termination provisions contained in the agreement.³ This Court, like the court in *Schewe*, may not and should not use its equitable powers to modify and expand the Debtor's limited contract rights.

18. Even if this Court were inclined to find that the unilateral right to terminate the Hawaii Agreement, standing alone, was not sufficient cause under § 362 to warrant relief from the automatic stay, cause nevertheless exists due to Fleming's continued failure to meet its obligations under the Hawaii Agreement.

19. The Debtor has failed to maintain adequate inventory levels necessary to fill all military orders under the Hawaii Agreement. The fill-rate throughout the entire month of June has been below the level that the military requires. The fill rate for the second half of June has only been at one-quarter of that which the military requires.

20. Under the Hawaii Agreement, Fleming has historically only grossed approximately \$35,000.00 per annum. Nevertheless, the potential harm to Pictsweet and potential administratively liability to the Debtor is enormous should the military determine that Pictsweet would lose its K-Rating as a result of the Debtor's failure to adequately stock and supply the Hawaii bases. As has been previously noted, Pictsweet sells over \$10 million worth of

³ The termination provision is mutual, and could equally well have been invoked by the Debtor.

frozen vegetables to the military on an annual basis. The Debtor's inability to perform under the Hawaii Agreement coupled with Pictsweet's unilateral right to terminate all but mandate that Pictsweet's request for relief be granted. *See In re M.J. & K. Co., Inc.*, 161 B.R. 586 (Bankr. S.D.N.Y. 1993) (law school entitled to relief from stay when agreement with bookstore operator was terminable at will and the operator was unable to provide adequate assurance of its ability to provide books for the following semester.)

If Stay Relief is not Granted, This Court Should Compel the Debtor to Either Assume or Reject the Hawaii Agreement

21. Pictsweet requests that the Court enter an order, pursuant to section 365(d)(2) of the Bankruptcy Code, compelling the Debtor to assume or reject the Hawaii Agreement immediately and to immediately cure its default including its failure to adequately stock Pictsweet products.

22. Section 365(d)(2) of the Bankruptcy Code provides in pertinent part that "the court, on request of any party to [an executory contract], may order the [debtor in possession] to determine within a specified period of time whether to assume or reject such contract." "Congress intended this provision to 'prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate.'" *University Medical Center v. Sullivan (In re University Medical Center)*, 973 F.2d 1065, 1079 (3d Cir. 1992) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5845). Accordingly, under section 365(d)(2), a debtor "is allowed a reasonable time to decide whether to assume or reject." *Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 105 (2d Cir. 1982).

23. When deciding what is to be deemed as a reasonable period for determining whether to assume or reject a contract, the courts consider the following factors; "the nature of

the interests at stake, the balance of hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is . . . in derogation of Congress' scheme[.]" *In re Beker Industries Corp.*, 64 B.R. 890, 896 (Bankr. S.D.N.Y. 1986) (ordering debtor to assume or reject executory contract); *see also In re Charrington Worldwide Enterprises Inc.*, 98 B.R. 65, 70 (Bankr. M.D. Fla. 1989) (directing debtor to file motion within seven days to assume executory contract), *aff'd*, 110 B.R. 973 (M.D. Fla. 1990).

24. This Court should order the Debtor to immediately assume or reject the Hawaii Agreement. The Debtor has accused Pictsweet of violating the automatic stay, presumably for using another distributor for those bases encompassed in the Texas Agreement. With the imminent sale of substantially all of the Debtor's assets and the recent efforts to dissuade Pictsweet from utilizing another distributor in Hawaii, it appears that the Debtor views the Hawaii Agreement as important to the sale and its plan of re-organization even though the Debtor only grosses approximately \$35,000.00 under this agreement. Therefore, any argument that it is "premature" to determine whether the Hawaii Agreement is necessary is without merit. Also, in light of the fact that the Debtor is failing to fulfill its obligations post-petition, the debtor should be compelled to assume or reject the Hawaii Agreement at this time. The Debtor's failure in this regard exposes it to an enormous administrative liability.

25. Denying the Motion will cause great harm to Pictsweet, which is in jeopardy of losing a \$10 million contract with the military while it continues in good faith to conduct business with the Debtor, even though the Debtor has already breached a the Utah Agreement by its early termination and failed to meets its obligations under the Hawaii Agreement for the entire month of June.

WHEREFORE, The Pictsweet Company respectfully requests that this Court hold a final hearing on the request for relief from stay on August 4, 2003 and enter an Order (1) granting relief from the automatic stay to terminate the Hawaii Agreement; (2) allowing Pictsweet to immediately terminate the Hawaii Agreement or alternatively allowing that this Motion serve as and be deemed the date on which written notice to terminate was provided to the Debtor to terminate the Hawaii Agreement; or alternatively, (3) compelling the Debtor to immediately assume or reject the Hawaii Agreement; (4) requiring that the Debtor immediately cure any defaults under the Hawaii Agreement including the failure to maintain an adequate stock of Pictsweet products; (5) compelling the Debtor to provide Pictsweet with an immediate accounting of the Hawaii Agreement including an updated fill-rate report; (6) allowing Pictsweet to utilize additional distributors while the Hawaii Agreement remains in effect; and (7) granting The Pictsweet Company such other and further relief as this Court deems just and appropriate.

Date: July 18, 2003

ELZUFON AUSTIN REARDON
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CERTIFICATE OF SERVICE

I, Charles J. Brown, III, hereby certify that I caused a copy of the foregoing to be served upon the 2002 Service List and the following parties via hand delivery and/or overnight mail.

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Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: July 18, 2003

/s/ Charles J. Brown, III
CHARLES J. BROWN, III