

Exhibit "C"

24

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARVEST LOGISTICS, INC., and
ICEWORKS LOGISTICS, INC.,
Plaintiffs and Counterclaim
Defendants,

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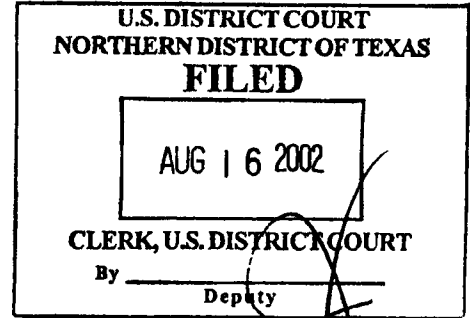
Civil Action No. 3:01-CV-1813-L

FLEMING COMPANIES, INC.,
Defendant and Counterclaim
Plaintiff,

v.

TIBBETT & BRITTEN GROUP
NORTH AMERICA, INC.,
Counterclaim Defendant.

ENTERED
AUG 19 2002
USDC



PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT

Plaintiffs Harvest Logistics, Inc. ("Harvest") and Iceworks Logistics, Inc. ("Iceworks") (collectively, "Plaintiffs"), by their attorneys, Godwin Gruber, P.C. and Pryor Cashman Sherman & Flynn LLP, as and for their complaint against defendant Fleming Companies, Inc. ("Fleming"), respectfully allege as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 in that this dispute is between citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

2. Venue is proper in this District pursuant to 28 U.S.C. §1391(a)(2) in that a substantial part of the events giving rise to the claim occurred in Texas, and the contract between Plaintiffs and Fleming expressly provides for jurisdiction and venue exclusively in Texas.

PARTIES

3. Harvest is a corporation duly organized and existing pursuant to the laws of the State of Delaware, having its principal place of business at 15 Independence Boulevard, Warren, New Jersey 07059. Harvest is engaged in the business of, *inter alia*, providing warehousing, distribution, and related services.

4. Iceworks is a corporation duly organized and existing pursuant to the laws of the State of Delaware, having its principal place of business at 15 Independence Boulevard, Warren, New Jersey 07059. Iceworks is engaged in the business of, *inter alia*, providing warehousing, distribution, and related services.

5. Upon information and belief, Fleming is a corporation duly organized and existing pursuant to the laws of the State of Oklahoma, with a principal place of business at 1945 Lakepointe Drive, Lewisville, Texas 75057. Fleming may be served by serving its registered agent, CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201. Fleming is also engaged in the business of, *inter alia*, providing warehousing, distribution, and related services.

FACTS COMMON TO ALL CLAIMS

6. In or about November 2000, Fleming approached Tibbett & Britten Group North America, Plaintiffs' corporate parent, to discuss Harvest's providing warehousing and routing services for a new facility in Fort Wayne, Indiana that would service Kmart, Fleming's primary customer in the region. Harvest and Fleming subsequently entered into a letter of intent dated March 21, 2001 (the "LOI"), which outlined the operating/budgetary assumptions concerning the Fort Wayne facility.

7. Subsequent to the LOI, the parties agreed that the successful servicing of Kmart's

business would require a separate facility, located in Grand Rapids, Michigan, to support the perishable inventory. It was agreed that Iceworks would provide the services at that facility.

8. On or about April 1, 2001, Harvest entered into a Warehousing and Distribution Agreement with Fleming (the "Agreement"), pursuant to which Harvest agreed to provide comprehensive managed warehouse, distribution and related services (the "Services") at Fleming's Fort Wayne, Indiana facility for a five-year term. The Agreement specifically acknowledges Fleming's intent to hire Iceworks to provide the same Services at Fleming's Grand Rapids facility, and the parties agreed that the terms of the Agreement would apply equally to Iceworks' provision of Services at the Grand Rapids facility. A copy of the Agreement is annexed hereto as Exhibit "A."

9. The Services to be provided by Plaintiffs, as more fully set forth in Schedule 1 to the Agreement, included receipt of products into the warehouses, checking and put away of products, replenishment, checking and loading of shipments, employment and management of employees, transportation services and security/loss prevention.

10. Based upon information provided by Fleming, Plaintiffs developed an operating plan to meet the needs of the business. That plan included a start-up period during which time throughput volumes, manpower, and production would be incrementally increased to reach steady operational levels (the "Start-up Period"). The Agreement specifically defined the Start-up Period as commencing on April 1, 2001 and continuing to and including November 30, 2001. The operating plan also addressed such issues as volume forecasting, staff and shift allocations, and key performance indicators. All components of the operating plan were developed from assumptions supplied by Fleming.

11. The Agreement contemplated that Plaintiffs would advance, on Fleming's behalf, all costs involved in operating the warehousing and distribution centers, such as direct and indirect labor costs, equipment rentals, facility rents and utilities, insurance, and communications/IT systems (the

“Costs”). The Agreement provides that Fleming was to reimburse Plaintiffs for all Costs, and the parties specifically budgeted for the Costs expected to be incurred during the time period at issue herein.

12. With respect to budgeted Costs, the Agreement specifically obligates Fleming to reimburse Plaintiffs for all said Costs within 15 days of the commencement of each Fiscal Accounting Period, as that term is defined in the Agreement.

13. For all non-budgeted Costs incurred by Plaintiffs in providing the Services, the Agreement provides that Fleming must reimburse Plaintiffs for all said Costs within 10 days of receiving from Plaintiffs a report detailing those costs.

14. The Agreement specifically provides that “all Costs shall be paid to Harvest without off-set or reduction of any kind,” except that disputed non-budgeted Costs are subject to a withholding, “provided that such amount does not exceed \$200,000 at any given time and that Fleming may not withhold more than \$100,000 per invoice.”

15. As compensation for Plaintiffs’ providing the Services under the Agreement, the Agreement obligates Fleming to pay Plaintiffs a Base Management Fee of \$2,000,000 per year for the five-year term. In addition to the Base Management Fee, Plaintiffs are entitled to receive an Incentive Management Fee, as that additional fee is defined and calculated in the Agreement.

16. From the Commencement Date, as that term is defined in the Agreement, until and including August 24, 2001, Plaintiffs continuously and faithfully rendered all of the required Services to Fleming, and incurred substantial Costs in the course of providing such Services.

17. Commencing in or about July, 2001, despite due demand therefor, Fleming refused to reimburse Plaintiffs for the Costs that Plaintiffs had incurred and were incurring on Fleming’s behalf, notwithstanding Fleming’s contractual obligation to do so and in direct contravention of the provisions of the Agreement limiting any withholding of disputed amounts. Additionally, despite

due demand therefor, Fleming also refused to pay Plaintiffs the Management Fees required under the Agreement.

18. On August 14, 2001, following numerous demands for reimbursement of Costs that they had incurred on Fleming's behalf and for reasonable assurances of future performance, and following Fleming's refusal to provide either, Plaintiffs provided notice of its intent to terminate the Agreement for non-payment pursuant to Paragraph 2 of Schedule 5 of the Agreement (the "Termination Notice").

19. On or about August 16, 2001, the parties hereto entered into an agreement pursuant to which Fleming agreed to pay to Plaintiffs a portion of the outstanding Costs in the amount of \$4,000,000, Plaintiffs agreed to assist in transitioning control of the two warehouse and distribution centers back to Fleming or its designee, the parties agreed to terminate the Agreement as of August 24, 2001, and the parties further agreed to reserve all claims and defenses arising thereunder (the "Termination Agreement").

**AS AND FOR A FIRST
CLAIM FOR RELIEF
(Breach of Contract)**

20. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 19 hereof as if more fully set forth herein.

21. Between April 2001 and August 24, 2001, Plaintiffs rendered all of the required Services under the Agreement to Fleming, and incurred substantial Costs in the course thereof in the approximate amount of \$10,976,013.41, for which Fleming paid the sum of \$972,385, leaving an approximate balance due of \$10,003,628.41.

22. By virtue of the Termination Agreement, Fleming paid \$4,000,000, leaving an approximate balance due of \$6,003,628.41. Additional costs and expenses continued to accrue after that date, for which Fleming is liable.

23. Defendant Fleming has failed and refused to pay the aforesaid overdue amount, despite due demand therefor.

24. By reason of the foregoing, Fleming has materially breached the Agreement.

25. As a result of Fleming's breach of contract, Plaintiffs have suffered damages in an amount to be determined at trial, which amount is not less than \$6,003,628.41, which amount, according to the Agreement, continues to accrue interest at a rate per annum equal to the Prime Rate plus two (2%) percent.

**AS AND FOR A SECOND
CLAIM FOR RELIEF
(Anticipatory Repudiation)**

26. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 25 hereof as if more fully set forth herein.

27. As a result of Fleming's failure and refusal to make payments as and when due, Fleming has repudiated the Agreement.

28. As a result of Fleming's refusal to give adequate assurances of future performance, Fleming has repudiated the contract.

29. As a result of Fleming's anticipatory repudiation of the Agreement, Plaintiffs have suffered damages in an amount to be determined at trial, which amount is not less than \$10,000,000.

**AS AND FOR A THIRD
CLAIM FOR RELIEF
(Unjust Enrichment)**

30. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 29 hereof as if more fully set forth herein.

31. Pursuant to the terms of the Agreement, Plaintiffs provided the Services to Fleming and incurred expenses on behalf of, for the benefit of and at the specific request of Fleming, the

agreed upon value of which was \$10,976,013.4, and certain Costs have continued to accrue, for which Fleming is liable.

32. Fleming has reimbursed Plaintiffs for only part of its services and disbursements in the amount of \$4,972,385.

33. By having such Services rendered and expenses incurred on its behalf and for its benefit, Fleming has been enriched unjustly in an amount equal to Plaintiffs' loss.

34. Accordingly, Fleming is indebted to Plaintiffs in an amount to be determined at trial, which amount is not less than \$6,003,628.41.

**AS AND FOR A FOURTH
CLAIM FOR RELIEF
(Quantum Meruit)**

35. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 34 hereof as if more fully set forth herein.

36. Pursuant to the terms of the Agreement, Plaintiffs performed the Services and incurred Costs as defined therein on behalf of, for the benefit of and at the specific request of Fleming, the agreed upon value of which was \$10,976,013.41, and certain Costs have continued to accrue, for which Fleming is liable.

37. By having such services rendered and expenses incurred on its behalf and for its benefit, Fleming is liable to Plaintiffs in quantum meruit in an amount to be determined at trial, which amount is not less than \$6,003,628.41

**AS AND FOR A FIFTH
CLAIM FOR RELIEF
(Promissory Estoppel)**

38. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 37 of as if more fully set forth herein.

39. Fleming made certain promises and representations regarding both its reimbursement of Costs and its compensation for the Services rendered by Iceworks at the Grand Rapids, Michigan facility.

40. It was foreseeable that Iceworks would rely upon those representations made by Fleming.

41. Iceworks substantially and justifiably relied on the promises made by Fleming to its detriment, providing the requisite Services and extending substantial credit to cover the Costs.

42. In breach of its promises and representations, Fleming has failed and refused to reimburse Iceworks for the Costs expended on its behalf, and has further failed and refused to compensate Iceworks for providing the Services at the Grand Rapids, Michigan facility.

43. Injustice under the circumstances can only be avoided by the enforcement of the promises and representations made by Fleming to Iceworks.

44. Accordingly, Fleming is indebted to Iceworks in an amount to be determined at trial.

WHEREFORE, Plaintiffs Harvest Logistics, Inc. and Iceworks Logistics, Inc. respectfully demand judgment in their favor and against defendant Fleming Companies, Inc. as follows:

(a) On its first claim, in an amount to be determined at trial, which amount is not less than \$6,003,628.41, together with interest thereon from the due date of each invoice at a rate per annum equal to the Prime Rate plus two (2%) percent;

(b) On its second claim, in an amount to be determined at trial, which amount is not less than \$10,000,000;

(c) On its third claim, in an amount to be determined at trial, which amount is not less than \$6,003,628.41;

(d) On its fourth claim, in an amount to be determined at trial, which amount is not less than \$6,003,628.41;

(e) On its fifth claim, in an amount to be determined at trial, which, amount is not less than \$6,003,628.41;

all with interest thereon from the date of judgment, for costs and fees, including reasonable attorneys' fees, and for such other, further and different relief as to this Court may seem fair and just.

Respectfully submitted,

GODWIN GRUBER, P.C.

By: 

Christopher L. Kurzner
State Bar No. 11769100
Todd W. Shadle
State Bar No. 00797413

1201 Elm Street, Suite 1700
Dallas, Texas 75270
(214) 939-4400
(214) 760-7332 (Facsimile)

James S. O'Brien, Jr.
PRYOR CASHMAN SHERMAN &
FLYNN LLP
410 Park Avenue
New York, New York 10022
(212) 421-4100
(212) 326-0806

ATTORNEYS FOR PLAINTIFFS,
HARVEST LOGISTICS, INC. and
ICEWORKS LOGISTICS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed, via certified mail, return receipt requested to the following, this 17th day of July, 2002 to:

Cole B. Ramey
Amy Nettle
CROUCH & INABNETT, L.L.P.
2300 Fountain Place
1445 Ross Avenue
Dallas, Texas 75202

Reid E. Robison
M. Richard Mullins
Shawn E. Harrell
MCAFEE & TAFT
Tenth Floor, Two Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102-7103



Todd W. Shadle