

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
FLEMING COMPANIES, INC., et al.<sup>1</sup>, ) Case No. 03-10945 (MFW)  
) (Jointly Administered)  
Debtors. )  
**Related to Docket No. 1501**

Hearing Date: August 4, 2003 at 11:30 a.m.  
Objection Deadline: July 21, 2003 at 4:00 p.m.

**DEBTORS' OBJECTION TO THE MOTION OF VENTURA FOODS, LLC FOR AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY**

The captioned debtors and debtors in possession (collectively, the "Debtors") hereby object to the Motion Of Ventura Foods, LLC [the "Movant"] For An Order Granting Relief From The Automatic Stay (the "Motion"). In support of their objection, the Debtors state the following:

**INTRODUCTION**

1. In the Motion, Movant alleges that Fleming Companies, Inc. ("Fleming") owes Movant \$646,168.60<sup>2</sup> (the "Prepetition Accounts Payable") for merchandise Movant sold Fleming prior to the April 1, 2003 petition date (the "Petition Date").

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<sup>1</sup> The Debtors are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., L.L.C., Fleming Foods of Texas, L.P.; Fleming International, Ltd.; Fleming Supermarkets of Florida, Inc.; Fleming Transportation Service, Inc.; Food 4 Less Beverage Company, Inc.; Fuelserv, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; Minter-Weisman Co.; Piggly Wiggly Company; Progressive Realty, Inc.; Rainbow Food Group, Inc.; Retail Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

<sup>2</sup> The Debtors' records indicate that the Prepetition Accounts Payable totals approximately \$408,000.

2. Upon Fleming's sale of Movant's merchandise, Movant owes Fleming certain promotional or rebate monies (the "Accrued Obligations"). As of the Petition Date, Movant alleges that Accrued Obligations total \$85,655<sup>3</sup> (the "Prepetition Accrued Obligations"). Movant seeks to either recoup or offset (the "Offset") the Prepetition Accrued Obligations against the Prepetition Accounts Payable. The Debtors do not object to the Offset.

3. After the Petition Date, Movant alleges that Accrued Obligations total \$93,980<sup>4</sup> (the "Postpetition Accrued Obligations"). Movant seeks to recoup the Postpetition Accrued Obligations against the Prepetition Accounts Payable. This attempt at recoupment is impermissible because the Postpetition Accrued Obligations and the Prepetition Accounts Payable concern different merchandise and arise out of separate transactions.

4. After the Petition Date, Movant alleges that Fleming overpaid Movant \$208,920.78<sup>5</sup> for merchandise Movant sold to Fleming after the Petition Date (the "Postpetition Overpayment"). Movant seeks to recoup the Postpetition Overpayment against the Prepetition Accounts Payable. As the Postpetition Overpayment was a mistaken duplicate payment by Fleming, the overpayment did not represent payment for any transaction. Accordingly, it is impossible for the Postpetition Overpayment and the Prepetition Accounts Payable to have arisen out of the same transaction. Furthermore, even if the Postpetition Overpayment were not a

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<sup>3</sup> The Debtors' records indicate that the Prepetition Accrued Obligations total \$164,985.

<sup>4</sup> The Debtors' records indicate that the Postpetition Accrued Obligations total \$103,277.

<sup>5</sup> The Debtors' records indicate that Fleming's Postpetition Overpayment for April 2003 totals \$322,066.

duplicate payment, the mutual debts would still involve different merchandise and separate transactions. As a result, Movant is again not entitled to recoupment.

### ARGUMENT

#### **A. Movant May Not Recoup Either The Postpetition Accrued Obligations Or The Postpetition Overpayment Against The Prepetition Accounts Payable**

5. The Third Circuit, in a case cited by Movant, has stated that the common law doctrine of recoupment provides an exception to setoff in bankruptcies. Recoupment is the setting up of a demand arising from the same transaction as the plaintiff's claim or cause of action, strictly for the purpose of the abatement or reduction of such claim. The doctrine is justified on the grounds that where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations on setoff in bankruptcy would be inequitable. "Thus, so long as the creditor's claim arises out of the **identical transaction** as the debtor's, that claim may be offset against the debt owed to the debtor without concern for the limitations put on the doctrine of setoff by Code section 553." In re University Medical Center, 973 F.2d 1065, 1079-80 (3<sup>rd</sup> Cir. 1992)(emphasis added).

6. The Third Circuit further stated that for the purposes of recoupment, a mere logical relationship is not enough: the fact that the same two parties are involved, and that a similar subject matter gave rise to both claims does not mean that the two arose from the 'same transaction. Rather, both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of the transaction without also meeting its

obligations. The “typical situation in which equitable recoupment can be invoked involves a credit and debt arising out of a transaction for the **same goods or services.**” Id. at 1081 (3<sup>rd</sup> Cir. 1992)(emphasis added). The use of this stricter standard for delineating the bounds of a transaction in the context of recoupment is in accord with the principle that this doctrine, as a nonstatutory equitable exception to the automatic stay that in effect elevates the priority of a prepetition unsecured claim, should be narrowly construed. Id.

7. In University Medical Center the issue was whether a government agency could recoup its 1985 Medicare overpayments against reimbursements the agency owed the debtor in 1988. The Third Circuit held that the 1988 payments were due for services distinct from those reimbursed through the 1985 payment. As a result, the mutual debts were not for the same services and, therefore, did not arise out of the identical transaction. Accordingly, recoupment by the creditor was improper.

8. The Court in In re Telephone Warehouse, Inc., 259 B.R. 64 (Bankr. D.Del. 2001), another case cited by Movant, applied the same principal as in University Medical Center. In Telephone Warehouse, the movants sold cellular phones to the debtors, which resold the phones to the public. When the debtors sold a phone, they also sold cellular service provided by the movants by activating the same phones. The debtors earned commissions based on each activation. The movants sought to recoup the commissions movants owed to the debtors on the phone activations against the amounts the debtors owed the movants for the phone purchases. The Court held that recoupment was appropriate because the amounts owing each party related to the very same phones, and therefore were part of one integrated transaction.

9. In re California Cannery And Growers, 62 B.R. 18 (Bankr. 9<sup>th</sup> Cir. BAP 1986) has similar facts to the present case. In California Cannery, the course of dealing between the debtor and creditor was governed by a distributor agreement, which contemplated that the parties would enter into transactions for the sale and purchase of goods, and provided that the parties would exchange purchase orders and invoices for particular items and quantities thereof. The Panel ruled that each invoice involved different goods and gave rise to a debt in a specific amount; accordingly, each invoice represented a separate transaction in a series of single transactions. Thus, the creditor could not recoup the amounts owing under the debtor's prepetition invoice against amounts owing under the creditor's postpetition invoice because the invoices did not involve the same goods and did not represent identical transactions.

1. Movant is not entitled to recoup the Postpetition Accrued Obligations against the Prepetition Accounts Payable

10. In the present case, as in California Cannery, there is a general (though unwritten) understanding between the parties to do business together. Actual sales occur when Fleming issues to Movant a purchase order specifying the details of a desired purchase. In response to the purchase order, Movant subsequently ships the requested merchandise to Fleming along with an invoice. Thus, as in California Cannery, each invoice involves different goods and represents separate transactions.

11. As admitted by Movant, the Postpetition Accrued Obligations are the result of postpetition invoices and sales, and the Prepetition Accounts Payable are the result of prepetition invoices and sales of completely different goods. Consequently, the Prepetition Accounts

Payable and the Postpetition Accrued Obligations are not, and cannot, arise from an identical transaction. Accordingly, Movant is not entitled to recoup the Postpetition Accrued Obligation against the Prepetition Accounts Payable.

2. Movant is not entitled to recoup the Postpetition Overpayment against the Prepetition Accounts Payable

12. Movant admits that the Postpetition Overpayment is a duplicate payment made by Fleming for merchandise sold and delivered after the Petition Date. A corollary of this admission is that the Postpetition Overpayment, as a mistakenly made duplicate payment, does not involve any actual transaction. Consequently, it is impossible for the Postpetition Overpayment and Prepetition Accounts Payable to arise out of the identical transaction.

13. Furthermore, even if the Postpetition Overpayment were not a duplicate payment, the result still would be the same. Movant has admitted that the merchandise involved was sold and delivered to Movant after the Petition Date pursuant to postpetition invoices. By contrast, the merchandise that is the subject of the Prepetition Accounts Payable was different merchandise sold to Fleming before the Petition Date pursuant to separate prepetition invoices. Accordingly, as with the Postpetition Credits, the mutual debts arise out of separate transactions and Movant is not entitled to recoupment.

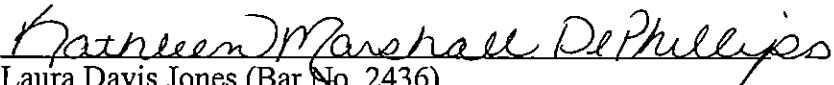
WHEREFORE, the Debtors respectfully request, for the reasons set forth herein, that the Court approve the Offset and otherwise deny the Motion, and grant such other relief as may be fair and equitable.

Dated: July 21, 2003

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