

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

In re:	:	Chapter 11
	:	
Fleming Companies, Inc., et al.,	:	Case No. 03-10945 (MFW)
	:	(Jointly Administered)
Debtors	:	Related Docket No. 12

**Objection Deadline: July 28, 2003 at 4:00 p.m. prevailing Eastern time
Hearing Date: August 4, 2003 at 11:30 a.m. prevailing Eastern time**

**LIMITED OBJECTION OF THE AKEA FARMS GROUP OF PACA TRUST
CREDITORS TO DEBTORS' MOTION FOR ORDER APPROVING ASSET
PURCHASE AGREEMENT WITH C&S WHOLESALE GROCERS, INC., ETC.**

COME NOW Certain PACA Trust Creditors¹ (the "Akea Farms Group"), by and through their undersigned counsel, and file this limited objection to Fleming Companies, Inc. and six (6) other affiliated debtors and debtors-in-possession (collectively, the "Debtors") Motion for an Order (A) Approving Asset Purchase Agreement With C&S Wholesale Grocers, Inc. and C&S Acquisition LLC, (B) Authorizing (I) Sale of Substantially All of Selling Debtors' Assets Relating to the Wholesale Distribution Business to Purchaser or Its

¹ The Akea Farms Group of PACA Trust Beneficiaries represented by the undersigned counsel with claims totaling in excess of \$6,000,000.00 consists of: Akea Farms, Inc., Wm. Bolthouse Farms, Inc., Brings Co., Inc., Calavo Growers, Inc., CDS Distributing, Inc., Keith Connell, Inc., Davalan Sales, Inc., Denice & Filice Packing Co., Inc., DNE World Fruit Sales (a d/b/a of Bernard Egan & Company), A. Duda & Sons, Inc., Evans Fruit Co., Inc., Frieda's, Inc., Fresh Express Incorporated, Fresh Kist Produce, LLC, Fresh Start Produce Sales, Inc., Giumarra International Marketing, Inc., Global Berry Farms, LLC, Grimmway Enterprises, Inc. d/b/a Grimmway Farms, Hintz-Reiman d/b/a River City Produce, Hollar & Greene Produce Co. Inc., C.M. Holtzinger Fruit Co., Inc., Grant J. Hunt Company, Malat Produce, Inc., Mazzei-Franconi Co., LLC, Monterey Mushrooms Tennessee, Inc., Monterey Mushrooms Texas, Inc., Natural Selection Foods, LLC, The Oppenheimer Group, Potandon Produce, L.L.C., Rio Vista Limited, d/b/a Giumarra Companies, River Ranch Salinas, Inc., Roland Marketing, Inc., Seald Sweet Growers, Inc., Sierra Produce, Southern Specialties, Inc., Sugar Land Distributors, Inc., Sun Belle, Inc., Sun Pacific Marketing Cooperative, Inc., Taylor Farms California, Inc., and Wholesale Produce Supply Co.

Designee(s) or Other Successful Bidder(s) at Auction, Free and Clear of All Liens, Claims, Encumbrances and Interests and (II) Assumption and Assignment of Certain Executory Contracts, License Agreements and Unexpired Leases, and (C) Granting Related Relief (“Sale Motion”).

I. BACKGROUND

The Debtors’ Sale Motion indicates that the assets it contemplates selling to C&S or the successful bidder include “substantially all of the Wholesale Distribution assets.” See Sale Motion, ¶17. Debtors’ “Wholesale Distribution” business is defined as its “wholesale grocery distribution” line of business. Sale Motion, ¶6. These include, *inter alia*, inventory, equipment, real property, supplies, insurance proceeds, goodwill and corporate officers. Asset Purchase Agreement (“APA”), ¶2.1A.

The Akea Group objects to the sale of Debtors’ Wholesale Distribution Business to C&S Wholesale Grocers, Inc. and C&S Acquisition, LLC, (collectively, “C&S”) on the limited basis that the proposed sale includes assets subject to the Akea Group and other PACA trust creditors’ rights under the trust provisions of the Perishable Agricultural Commodities Act of 1930, as Amended, 7 U.S.C. § 499e(c) (“PACA”) for both pre-petition and post-petition sales. The Sale Motion for the sale of the Debtors’ remaining assets subject to the PACA trust may well irreparably prejudice the rights of such PACA creditors to receive full payment for their claims. The Debtors can most easily satisfy the Akea Groups’ concerns by supplementing the amount of the Segregated Trust established by this court’s

May 6, 2003 Order Requiring Segregation of Funds to Cover Certain PACA Claims and Authorizing Procedure for Reconciliation and Payment of Valid Claims Under the Perishable Agricultural Commodities Act and the Packers and Stockyards Act (“PACA Order”) to a level sufficient to fully satisfy all unpaid pre-petition PACA trust claims, as well as all post-petition PACA trust claims.

II. STATUTORY ANALYSIS OF THE PACA TRUST

The PACA trust requires a receiver of produce to hold its produce-related assets, such as the produce itself, products derived therefrom, as well as any receivables or proceeds from the sale thereof, as a fiduciary until full payment is made to the seller. See 7 U.S.C. § 499e(c)(2); Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197 (3d Cir. 1998); Tom Lange Co. v. Kornblum & Co (In re Kornblum & Co.), 81 F.3d 280 (2d Cir. 1996) (cited with approval by this Court in In re Long John Silver’s Restaurants, Inc., 230 B.R. 29, 32 (Bankr. D. Del. 1999)); Sanzone-Palmisano Co. v. M. Seaman Enters., Inc., 986 F.2d 1010 (6th Cir. 1993); Frio Ice, 918 F.2d at 156. The establishment of the trust is an unequivocal declaration that produce-derived assets are distinct and must be used to pay produce suppliers.

The PACA trust provides unpaid suppliers with priority over secured lenders with regard to PACA trust assets held in trust by produce purchasers. It effectively vitiates a lender’s security interest in trust assets held by produce purchasers vis a vis unpaid produce suppliers.” Consumers Produce Co. v. Volante Wholesale Produce, 16 F.3d 1374, 1379 (3d Cir. 1994); see also C.H.

Robinson Co. v. Trust Co. Bank, N.A., 952 F.2d 1311 (11th Cir. 1992); E. Armata, Inc. v. Platinum Funding Corp., 887 F. Supp. 590 (S.D.N.Y. 1995); A & J Produce Corp. v. CIT Group/Factoring, Inc., 829 F. Supp. 651 (S.D.N.Y. 1993).

PACA trust assets are not property of the bankrupt's estate and must be set aside for distribution to trust beneficiaries. See In re Long John Silver's Restaurants, Inc., 230 B.R. 29, 32 (Bankr. D. Del. 1999); In re Kelly Food Products, Inc., 204 B.R. 18 (Bankr. C.D. Ill. 1997); In re Southland & Keystone, 132 B.R. 632 (9th Cir. BAP 1991); In re Asinelli, Inc., 93 B.R. 433 (M.D.N.C. 1988); In re Carolina Produce Distributors, Inc., 110 B.R. 207 (W.D.N.C. 1990); In re Fresh Approach, Inc., 48 B.R. 926 (Bankr. N.D. Tex. 1985); In re Milton Poulos, Inc., 94 B.R. 648 (Bankr. C.D. Cal. 1988). These cases, and many others with identical holdings, are consistent with the purpose of PACA: "If a buyer or receiver declares bankruptcy . . . , trust assets are not to be considered part of the estate to be distributed to other creditors or sold unless all trust beneficiaries have been paid." 49 Fed. Reg. at 45738 (emphasis added).

As a result, when the trust assets are being dissipated or threatened with dissipation, the PACA trust beneficiaries are entitled to adequate protection in the form of **immediate** segregation of trust assets and an accounting of all trust assets. See Frio Ice, 918 F.2d at 159 ("Upon a showing that the trust is being dissipated or threatened with dissipation, a district court should require the PACA debtor to escrow its proceeds from produce sales, identify its receivables,

and inventory its assets. It should then require the PACA debtor to separate and maintain these produce-related assets as the PACA trust for the benefit of all unpaid sellers having a bona fide claim.”) (footnote omitted); see also In re Kelly Food Products, Inc., supra (debtor ordered by Bankruptcy Court to immediately pay trust assets to trust creditors); In re W.L. Bradley Co., Inc., 75 B.R. 505 (Bankr. E.D. Pa. 1987) (automatic stay lifted and immediate payment of trust proceeds required to the PACA Trust Beneficiaries); In re Monterey House, Inc., 71 B.R. 244, 249 (S.D. Tex. 1986) (PACA defendant ordered to disburse unpaid amounts held in trust, and retain remainder in segregated, interest-bearing account to be used to pay the PACA trust beneficiaries’ interest and attorneys’ fees); In re Fresh Approach, 51 B.R. 412 (Bankr. N.D. Tex. 1985).

III. THE PROPOSED SALE WILL DISSIPATE PACA TRUST ASSETS

Pursuant to the PACA Order, on June 16, 2003, the Debtors filed their Initial Report regarding PACA claims (“Initial PACA Report”) listing asserted PACA claims totaling \$51,077,230. In the First Supplemental Report, Exhibit 1, Debtors itemize 310 PACA trust creditors who have asserted claims in this case to the extent of \$54,838,551.03. At this time it is unknown how much of these claims will in the final analysis be deemed valid PACA trust claims. Debtors also report payments to the extent of \$19,396,350.81. In addition, the Debtors’ have a substantial amount of post-petition PACA trust claims that are not quantified.

The proposed sale to C&S will end the Debtors wholesale grocery business and no other monies from the sale of produce will be generated.

Until the Akea Group and other similarly situated pre and post petition PACA trust creditors are paid, or sufficient funds must be deposited from the sales proceeds into the Segregated Account to satisfy the PACA trust claims, Debtors must be prohibited from diverting PACA trust assets. Otherwise, the statute has no force and the rights of the PACA Trust creditors are hollow.

IV. CONCLUSION

For the foregoing reasons, the Akea Group of PACA trust beneficiaries respectfully object to the Debtors' Sale Motion, absent a provision that the debtors be required segregate funds from the sales proceeds if its Wholesale Distribution Business in a sufficient amount to fully satisfy all of its pre and post petition PACA trust claims.

Respectfully submitted,

WERB & SULLIVAN
300 Delaware Avenue, Tenth Floor
Wilmington, DE 19801
Tel: (302) 652-1100
Fax: (302) 652-1111
E-mail: dwerb@werbsullivan.com

Dated: 7-28-03

By:



Duane Werb, Esq.

And

Lawrence H. Meuers, Esq.
Meuers Law Firm, P.L.
5395 Park Central Court
Naples, FL 34109
Tel: (239) 513-9191
Fax: (239) 513-9677

Attorneys for PACA trust beneficiaries
Akea Farms, Inc., et al.