(Recess)

THE CLERK: Please rise.

(Pause)

THE CLERK: You may be seated.

THE COURT: The debtor may proceed.

MR. CAPOZZOLA: Yes, Your Honor. Thank you. The debtor calls Kim Hall.

THE CLERK: Place your hand on the Bible. Please state your full name and spell your last name for the Court.

MS. HALL: Kim Natalie Hall, H-a-l-l.

KIM HALL, DEBTOR'S WITNESS, SWORN

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. CAPOZZOLA:

Q Good afternoon, Ms. Hall.

A Hi.

Q Do you have a college degree?

A Yes.

Q What's it in?

A Accounting.

Q When did you get it?

A In 1993.

Q From where?

A Northeastern State University in Talequah, Oklahoma.

Q Do you presently work for --

THE COURT: Could you move the microphone closer to you?

Q Do you presently work for Fleming?

A Yes.

Q And what is your position in Fleming?

A I'm the drop ship supervisor.

Q Briefly, what are the responsibilities of the drop ship supervisor?

A I oversee the day-to-day activities of my staff, and an a point of contact for vendors of retailers when problems arise.

Q Do you communicate with vendors to reconcile issues pertaining to payments or credits, or other delivery-type issues?

A Yes.

Q Have you ever dealt with Miles Farmer's Market in connection with any of those issues?

A No.

Q Have you ever dealt with Farris Produce in connection with any of those issues?

A No.

Q Have you ever dealt with Foster Farms on and DSD issues?

A Some, yes.

Q And with whom at Foster Farms have you dealt?

A Sarah Ortega.

Q Have you had any communications with Ms. Ortega after the

April 1, 2003 filing in this case?
A Once.
Q And briefly, what was the substance of your discussion with Ms. Ortega?
A I just contacted her to see if she was stilling sending drop ship invoices.
Q And did you ever have any communications with Ms. Ortega of Foster Farms prior to April 1, 2003?
A Once that I can think of.
Q And --
THE COURT: I think you've entered it in the wrong place.
MR. CAPOZZOLA: Thank you for that clarification, Your Honor.
Q Again, my question, Ms. Hall, is prior to April 1, 2003, had you ever communicated with Ms. Ortega from Foster Farms?
A Yes.
Q And what was the subject matter of that conversation?
A I had contacted her regarding the termination of the relationship between Fleming and KMart. I was advising her of that so that she did not send any drop ship invoices to us.
Q Was KMart a retailer?
A Yes, it was.
Q And was KMart receiving goods from Foster Farms pursuant to the DSD program?

A Yes.
Q What did you say -- withdrawn. What did she tell you when you so advised her of that?
A Okay.
Q And did you follow up that oral communication?
A Yes. I sent her an e-mail. I sent her a fax. And I sent her a certified letter.
Q Why did you do that?
A Because I wanted to make sure that she was aware of that?
Q And why was that important to you?
A Because KMart had been a very big retailer of ours, and I just wanted her to be sure that she knew that we were not going to process any of the drop ship invoices.
Q Have you ever had any dealings with Lewis Bakeries regarding any drop ship issues?
A Yes, I have.
Q With whom at Lewis Bakeries have you dealt?
A Tim Mallet.
Q Did you have an understanding, when you spoke to Mr. Mallet, where he was located?
A I believe he was in the Evansville, Indiana --
Q Is it your understanding that's the location of their corporate offices?
A Yes.
Q And what were the circumstances which prompted you to call

Mr. Mallet?

A Fleming had acquired a warehouse from C.B. Ragland, and some of the retailers that C.B. Ragland serviced were supposed to become on the Fleming drop ship program. And so, we had put them on the program and started processing invoices for Lewis Bakeries. We were paying Lewis and we were billing the retailer. And later, they decided that they did not want to be on the drop program and refused to pay Fleming, and --

Q When you say "they," you mean the retailers?

A The retailers, yes, refused to pay Fleming. They wanted to pay Lewis Bakeries direct. So I contacted Tim to see if we could reverse the payments that we had made to him, and he --

Q Let me stop you there.

A Okay.

Q So, in this set of circumstances, Fleming had paid Lewis Bakeries without having received money from the retailers? Is that right?

A That is correct.

Q And what did Mr. Mallet tell you when you contacted him?

A His exact words was that he could not help me with that.

Q Has Fleming ever been paid?

A No.

MR. CAPOZZOLA: Nothing further at this time of this witness.

THE COURT: Cross?

MR. WERB: One moment.

CROSS EXAMINATION

BY MR. WERB:

Q Did you -- do I understand your testimony correctly that with regard to Lewis Bakeries, you asked for the money back?

A Yes. We had made payment to Lewis Bakery, and the retailer was refusing to pay us. They said that they wanted to pay Lewis Bakeries direct. So, we asked if we could get our money back from Lewis Bakeries, and if they could bill the retailers direct, like they were asking.

Q Tell me, was all of this documented?

A Yes, it is.

Q And did you produce that as part of the discovery request in this case?

A I have given the information to my lawyers.

Q Okay.

MR. WERB: I'm sorry. I have no further questions of this witness.

THE COURT: All right. Thank you. You may step down.

(Pause)

MR. CAPOZZOLA: Just --

THE COURT: All right. Sorry.

(Pause)

MR. CAPOZZOLA: Your Honor, nothing further.

THE COURT: Thank you. You may step down.

MR. CAPOZZOLA: Your Honor, the debtor calls Leslie Thompson.

THE CLERK: Place your hand on the Bible. Please state your full name and spell your last name for the Court.

MS. THOMPSON: Leslie Diane Thompson, T-h-o-m-p-s-o-n.

LESLIE DIANE THOMPSON, DEBTOR'S WITNESS, SWORN

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. CAPOZZOLA:

Q Good afternoon, Ms. Thompson.

A Hello.

Q Are you currently employed by Fleming?

A Yes.

Q And what is -- when did you start working for Fleming?

A In 2000.

Q What was your position when you started working for Fleming?

A I was a drop ship payor.

Q What are the responsibilities of a drop ship payor?

A We receive invoices, sort them by vendor, place store numbers on them, and then process them to bill the customer and pay the vendor at the same time.

Q For how long were you a drop ship payor?

A One year.
Q At that time, did you take another position within Fleming?
A Yes. I became a research clerk.
Q About when was that?
A April of 2001.
Q And what are the responsibilities of a research clerk?
A We take vendor and retailer calls on skipped invoices, payments that weren't made like they should have been, retailers that have a problem with invoices, and try to solve them.
Q And at any time since then have you assumed another position within Fleming?
A Yes. I'm now a lead clerk.
Q When did you assume that position?
A In about November of 2001.
Q And what are the responsibilities of a lead clerk?
A Basically the same as a research, but I interact more with the payors now on discontinued stores, credit alert stores. I'm responsible for sending out credit alert notices and discontinued letters to vendors when stores are discontinued with Fleming.
Q Okay. Turn in your binder that's in front of you to Debtor's Exhibit 12. Is this -- well, can you identify this document for us?

A Yes. This is a fax cover sheet that I sent to Lewis Bakeries on some discontinued stores.

Q And what was the purpose of sending this document to Lewis Bakeries?

A To let Lewis Bakeries know that this set of Dave's Markets was no longer doing business with Fleming, and they would need to bill them directly.

Q And this an example of a discontinued letter, or a credit alert letter?

A This is a discontinued letter.

Q What's the difference between those two?

A On the credit alert letter, it tells them that the store has been put on credit hold until further notice.

Q As opposed to a discontinued letter, which communicates what?

A It means the store has completely discontinued with Fleming, and probably will not be returning to do business.

Q And turn to Exhibit 13 in the binder, Debtor's 13. You'll see there are three pages there.

A Um-hmm.

Q Can you describe this document for us?

A This is a fax cover sheet. It is the first page to Celeste Farris at Farris Produce, stating that Hanoverton Number 166 has been placed on credit alert.

Q And is the handwriting on the first pages of Debtor's 12

and Debtor's 13 your handwriting?
A Yes, it is.
Q And do you have an understanding as to where Celeste Farris from Farris Produce works from?
A Yes. In Ohio.
Q Have you ever had any dealings with anyone from Miles Farmer's Market on DSD issues?
A Yes.
Q With whom do you deal from Miles Farmer's Market?
A Marge.
Q Do you know her last name?
A No, I don't.
Q Do you know where Marge is located, when you deal with her?
A In Ohio.
Q Has any vendor ever expressed to you a concern about when or if Fleming had collected from the retailer in terms of asking about where their payments were?
A No.
Q Has it been your experience -- let me ask it this way. Based on your experience dealing with the vendors in the DSD program, what has been the vendors' position on the trigger for the clock on Fleming's obligations to make payments on invoices transmitted to Fleming under the DSD program?
A The clock starts when -- the day we receive the invoices,

the date of receipt.

Q Have you ever told Celeste Farris that Fleming would only pay Farris Produce on a DSD delivery if and when Fleming got paid by the retailer?

A No.

MR. CAPOZZOLA: Nothing more at this time.

CROSS EXAMINATION

BY MR. WERB:

Q Good afternoon, Ms. Thompson.

A Hi.

Q Ms. Thompson, I'd like to direct you to Debtor's Exhibit Number 6.

MR. CAPOZZOLA: Your Honor, I object. This is beyond the scope of direct.

THE COURT: Overruled.

Q Can you identify what's been marked as Debtor's Exhibit Number 6?

A It's the Fleming Vendor Partner Manual effective February 17th, 2003.

Q Thank you. And I'd like to direct your attention next to Page 7. Do you have that page?

A Yes.

Q All the way at the top, in the bold print, would you read that sentence, please?

A "The contents of this manual must be shared with

appropriate personnel at all your facilities that service Fleming immediately upon receipt."

Q And then, in the Overview Summary, Part 1.1 --

A Um-hmm.

Q -- the second paragraph, would you read the very first sentence?

A "This manual is effective for all orders placed on or after February 17th, 2003."

Q And what was the date of Fleming's bankruptcy? Do you know?

A April 1st.

Q Subsequent --

A Right.

Q -- to the effectiveness of this document, correct?

A Right.

Q I'd like you to turn to Page 32. And without beating a dead horse, I'd like to once again refer to 8.3, "DSD Invoicing Guidelines," in the second bullet point with the two question marks and have you read that.

A "Fleming does not accept or assume any financial responsibility relating to DSD shipments."

Q And I'd also like you to read the next section.

A "Vendor invoices should be submitted on a weekly basis. Any invoice that is greater than 60 days old will not be processed. Amounts disputed by a retailer and deducted from

Fleming will be deducted from the vendor. It is the vendor's sole responsibility to resolve these disputes directly with the retailer. Any vendor inquiries regarding payment disputes should be submitted within 90 days of the deduction."

Q Do you understand that to be Fleming's policy?

A No.

Q Is it your testimony that this manual has no legal effect?

A Not in what I do.

Q Did you participate in the preparation of the Vendor Partner Manual?

A No.

MR. WERB: No further questions.

MR. CAPOZZOLA: Nothing further, Your Honor.

THE COURT: Okay.

MR. CAPOZZOLA: Your Honor, the debtor calls Debbie Alexander-Burklow.

THE CLERK: Place your hand on the Bible. Please state your full name and spell your last name for the Court.

MS. ALEXANDER-BURKLOW: Debbie Alexander-Burklow, B-u-r-k-l-o-w.

DEBBIE ALEXANDER-BURKLOW, DEBTOR'S WITNESS, SWORN

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. CAPOZZOLA:

Q Ms. Alexander, what is your position?

A I'm the accounts payable manager for the drop ship department.
Q And what are your responsibilities?
A Basically, my responsibilities are to oversee my staff to administer the drop ship programs that we have in place at all the divisions that have been centralized to Oklahoma City.
Q How many employees do you oversee in the drop ship department?
A Currently, I have 25.
Q How long have you worked for Fleming?
A Approximately 24 years.
Q And forgive me for asking you this, but when did you drop the drop ship/AP manager position?
A October of 2000.
Q And prior to assuming that position, did you have any other experience with the drop ship program?
A Yes. I was accounts payable supervisor for drop ships beginning July 1999.
Q Where did you live in June of 1999?
A In Houston, Texas.
Q Where did you live in July of that year?
A Oklahoma City.
Q Why did you move?
A I worked at the Houston division. The division was closing down, and I was offered a position to be a part of the

team to start centralizing our drop ship program from all of our divisions.

Q Can you explain to the Judge a little more about the centralization process that Fleming was undergoing at that time?

A Basically what we wanted to do was move all of our accounting functions to one central location to receive the benefits of using best practices and to reduce the staffing needs that we would receive benefits for having a centralized environment, being able to utilize technology better, processing in one location.

Q Now, through your work in the drop ship program, have you come to have an understanding of the various rights and obligations between the retailers, the vendors, and Fleming in that program?

A Yes.

Q And in a situation where a vendor delivers conforming goods to an approved retailer under the drop ship program, is Fleming obligated to pay the vendor for that delivery even if Fleming does not get paid by the retailer?

A Yes.

Q In such a situation where non-payment was based on credit risk, would Fleming have the right to recover the amount of the retailer non-payment from the vendor?

A No.

Q What efforts, if any, do drop ship employees paying vendors check with accounts receivable to see whether a retailer has paid on a given drop ship delivery before paying the vendor for that same delivery?
A Would they check? Is that the question?
Q Sure. Would they check?
A No.
Q Now, there's been a lot of use of the term drop ship, drop ship delivery, DSD. I want to focus in with some precision now. How many categories of DSD are the, as you understand the drop ship program, as the drop ship AP manager of Fleming?
A We have three basic drop ship programs that we have in place. Do you want me to go ahead and name them?
Q Yes. Why don't you name them, and then we'll take them one at a time.
A Okay. We have the program drops, vendor direct, and cross dock.
Q Okay And can you describe, please, the program drop type of DSD?
A Program drop would be retailers that are on a delivery program set up through a vendor delivering weekly scheduled deliveries from, for example, milk, bread, chips. It is a regularly scheduled delivery.
Q Would it be fair to characterize program drops as systematic, or periodic?

A Yes.
Q And are there specific kinds of vendors who sell products for which the programs drops are especially appealing, and if so, why?
A Yes. Repeat the question?
Q Sure. For example, you had mentioned bread and I believe dairy. Are there specific kinds of vendors who sell, for example, perishable goods who take advantage of program drop type of DSD? Can you explain why that would be --
A Yes. There is certain vendors that are on the program --
Q Let me ask it this way.
A Okay.
Q Is it your understanding that the four plaintiffs who are named class -- potential class representatives are program drop DSD participants?
A Yes, they are.
Q And how about Superior Dairy and Nichols Bakery?
A They are, as well.
Q How about Bernard & Sons?
A Yes.
Q And are those kinds of companies representative of the kinds of companies that would -- withdrawn. Describe the vendor direct portion of the DSD program?
A Vendor direct would be a special one-time arrangement between the retailer and the vendor. They use a P.O. to record

their agreement. It is usually for a large quantity of product, a few items that they've gotten a special deal for. And it would be anywhere from $10,000 to $80,000 for basically a truckload.

Q Is it fair to compare and contrast the program drops with vendor direct by saying that program drops tend to be regular and systematic, whereas vendor directs tend to be one-shot orders?

A That's correct.

Q What kinds of companies usually avail themselves of the vendor direct program?

A Usually it's the larger companies, like Proctor & Gamble, Kraft.

Q Okay. And how about -- let's go back to program drops. Of the total universe of DSD, what percentage of that universe would you characterize as a program drop?

A Probably at least 50 to 60 percent.

Q And what percent of the total DSD universe would you characterize as vendor direct?

A Probably 20 to 25 percent.

Q And now let's talk about the third type of category, and that's cross dock. Can you describe for the Judge, please, the cross dock branch of DSD?

A Cross docks are usually scheduled deliveries from the vendor with the retailer. The difference is that the vendor

selects the order, palletizes it, and brings it to a Fleming division warehouse, where the product is then put on a truck to go to the retailer with their regular scheduled grocery delivery from the Fleming warehouse.

Q So, is it correct to say that vendors availing themselves of cross dock bring their goods to Fleming's warehouse, but those goods never actually go into Fleming's inventory?

A That is correct.

Q What kinds of companies avail themselves of the cross dock program?

A One example would be Bunzl. They have a -- supplies that they have throughout the United States that we handle for them.

Q Now, I believe earlier you mentioned that you have worked for the Houston division. Does the term division have a meaning within Fleming?

A Yes.

Q What is the meaning?

A Each of the divisions are operating warehouses that have a warehouse staff, a base of retail customers specific to that division, and different administrative staff, buyers, merchandisers, at each location.

Q Okay. And how is authority within Fleming broken out prior to the centralization process of the late 1990s?

A It was locally at the division, primarily with the controller.

Q How many divisions did Fleming have as of the bankruptcy?
A Approximately 25 wholesale divisions.
Q Is it possible that a vendor -- to deal with more than one Fleming division?
A Yes, it is.
Q Did that happen with some frequency?
A Yes, it did.
Q What effect did that sometimes have on the consistency of Fleming's negotiated terms with such a vendor?
A One of the things that we had to do when we centralized is to travel to each of the Fleming divisions to find out what type of arrangement had been established with different drop ship vendors. Each division had their own negotiations, arrangements, that they had negotiated over the years. And even if it was the same vendor within different divisions, it could have different programs set up.
Q Based on your experience with the drop ship AP manager, are you familiar with the different divisions which various vendors deal with?
A Yes.
Q Which division did Farris Produce deal with?
A That was Massillon, Ohio.
Q Any others?
A No. No. No other divisions.
Q How about Miles Farmer's Market?

A Only Massillon, Ohio.
Q How about Foster Farms?
A Foster Farms was primarily in the West Coast divisions, Northern California, which is Sacramento, Fresno, Phoenix, and Salt Lake City.
Q How about Lewis Bakeries?
A Lewis Bakeries was in several of the divisions, Kansas City, Lincoln, Massillon, Memphis, Nashville, and Tulsa.
Q How about Memphis?
A I thought I said Memphis. Yes. You should have six.
Q Thank you. Within the DSD program, does the phrase payment terms have any meaning with regard to vendors who participate in that program?
A Yes, it does.
Q What does it mean?
A In our drop ship system, we have payment terms set up that would refer to the date the invoice is received at the drop ship department, and the terms would relate to days from received to days a check was issued.
Q Would it be fair to put that in shorthand by saying that's the window of time you have to turn the check around from the time you received the invoice?
A That's correct.
Q And what were the payment terms applicable to Farris Produce?

A Three days.
Q What were the payments terms applicable to Miles Farmer's Market?
A Five days.
Q What were the payment terms applicable to Foster Farms?
A Eight days. That's Lewis.
Q Okay. What were the payment terms applicable to Bernard & Sons?
A Eight days.
Q What were the payment terms applicable to Lewis Bakeries?
A Eight days for everyone except Memphis, and it was 11 days.
Q How about Nichols Bakery? What were the payment terms applicable to Nichols?
A That would be 13 days.
Q Does the phrase payment terms have a meaning with regard to the retailers who participate in the DSD program?
A Yes.
Q And what does it mean when applied to them?
A Generally, from time of receipt of invoice until bill through our system, actually appear on a statement, and funds remitted from the retailer would be anywhere from seven to ten days.
Q So, is it your testimony that generally speaking, the retailers had seven to ten days to turn their checks around to

you?

A Yes.

Q Now, this -- payment terms applicable to Lewis Bakeries, where the Memphis division had 11 days, is that a holdover from the days before the centralization process?

A It could be. I don't know.

MR. CAPOZZOLA: Nothing further at this time of this witness.

THE COURT: Cross?

MR. WERB: One moment.

CROSS EXAMINATION

BY MR. WERB:

Q Good afternoon, Ms. Burklow.

A Hello.

Q As you will recall during the TRO hearing that we had back in late May, I had inquired of you at that time as to the number of vendors participating in the drop ship delivery program, and I believe your response was 700. Is that correct?

A That's -- approximately 700.

Q Perhaps more than that?

A I think I said approximately.

Q Fair enough. I believe your testimony also was that there were approximately 4,000 independent retailers that were being serviced by these 700 vendors?

A Correct.

Q Now, you testified here today that this -- an attempt was made by Fleming to centralize its operations because of the approximate 25 different divisions that had been functioning?
A That is correct.
Q And this occurred when?
A We started the process July 1999.
Q And you started the process in July of 1999, but when was it actually implemented?
A Our first division was August 1999.
Q Okay. And was the implementation completed during the year 2000?
A No, it wasn't.
Q When was it actually completed?
A Probably the last division would be around February of 2002, maybe.
Q And you've indicated that the purpose in centralizing Fleming's operations was cost efficiency, computerization, better reduction of staff, etcetera? Would you agree?
A Yes.
Q Any other reasons?
A No, not that I can think of.
Q How about the need to establish uniformity with respect to policies and procedures of Fleming?
A When we centralized, we did not change the policies or procedures.

Q Did you implement policies and procedures that would now be applicable to all retailers and to all vendors?
A The only thing that we would have implemented would be the type of processing, such as an EDI invoice versus a paper copy, not anything in relation to procedures or policies.
Q You're obviously aware of the fact that there is approximately five different revisions of what's been referred to as Fleming's Vendor Partner Manual?
A I wasn't aware there were five.
Q Are you aware as to the existence of the Vendor Partner Manual?
A Absolutely.
Q What was the purpose, or rationale, behind the creation of Fleming's Vendor Partner Manual?
A I can't --
MR. CAPOZZOLA: Objection. Speculation and foundation.
THE COURT: Overruled.
A I can't answer that.
Q Did you participate in the creation and preparation of the Fleming Vendor Partner Manual?
A I did have a small part with the DSD, where I offered information to my then boss, who was on the committee for the Vendor Partner Manual.
Q In fact, when you refer to a committee, isn't it true that

there was a task force that had been assembled within Fleming that was delegated with the responsibility of preparing the Fleming Vendor Partner Manual?

A There could have been.

Q You're not aware of that?

A I don't know about a task force.

Q Who was your boss at this time?

A Rick Rowan.

Q Are you aware of the other people who participated in the preparation of and creation of the Vendor Partner Manual?

A Some of them.

Q Who would they be?

A Well, I know Phil Murphy was one of the people in Louisville that was involved in it.

Q Anyone else?

A I believe Charlie Meyers.

Q Okay. How about an Edward James Esterman, Jr.?

A He could have been.

Q Are you familiar with Mr. Esterman?

A I do know Jim. Yes.

Q What's Jim's position with Fleming? Is he still currently employed?

A Yes, he is. He --

Q In what capacity?

A He is a credit manager.

Q And with respect to Charles Meyers, what was his position with Fleming?
A I believe his title is V.P. of Deli/Bakery.
Q And he remains currently employed with Fleming?
A Yes, he is.
Q Now, are you aware as to whether or not either one of these individuals participated in the creation of the Vendor Manual?
A I don't know.
Q What if I were to say to you that the Vendor Partner Manual was created in order to establish policies of Fleming with respect to dealing with all vendors? Would you agree or disagree with me?
A I don't know that I could make a judgment.
Q You're familiar with -- you're obviously in charge of the DSD drop ship delivery program, correct?
A Correct.
Q You obviously -- and again, I don't want to be presumptuous here, so I'll ask you directly. Are you familiar with the most recent version of Fleming's DSD Vendor Partner Manual that was effective February 17th, 2003?
A The first I saw it was last time I was in Court.
Q You had not seen it before that?
A No.
Q And in that document, it specifically states that it

applies to all vendors.
A Okay. I don't know.
Q You're not going to disagree with me on that point, are you?
A I can't answer yes or no.
Q Are you in a position to answer whether or not Fleming bears the responsibility for the payment of drop ship delivery shipments?
A If it's related to program deliveries, yes, and it's approved vendor, and it meets the qualifications for us to bill it through.
Q Turn to Debtor's Exhibit 6, Page 32.
A Okay.
Q Section 8.3, the second bullet point with the two question marks, and read it.
A "Fleming does not accept or assume any financial responsibility relating to DSD shipments."
Q Now, that doesn't qualify in any way and say this only pertains to drop ship, or cross dock, or warehouse payments, now does it?
A In this particular instance, no.
Q Were you aware of whether or not this document was published on the Fleming Internet?
A I don't know.
Q You don't know? Do you have anything else to go by that

suggests that the information in that document is not correct?
A Yes.
Q What is that?
A We have an accounting policy and procedure that has been in place since the early 1990s that we use as our policies.
Q Where is that incorporated into this policy procedures manual with regard to the guidelines for the DSD vendors? Is that found in 8.3?
A Parts of it, yes. This current version has been changed from all of the earlier versions, and this version does not read quite like the others.
Q But you will agree that this was the last Vendor Partner Manual implemented by Fleming effective February 17th, I believe, 2003?
A It appears to be.
Q You're not aware of any subsequent revisions, or other versions to this document?
A I wasn't even aware of this one.
Q Okay. Do you have another policy manual that you go by?
A We have an accounting procedure.
Q Policy manual dealing with your relationship with vendors?
A Other than accounting procedures, how we bill it through the system, no.
Q So, would your answer be no?
A Yes.

Q Now, you've mentioned here, in your testimony, that there were three different types of programs, the drop ship program. Now, do I take it that that relates specifically to independent vendors who deliver their products to the supermarket? Would you agree with me?

A That are on a -- set up on a regular scheduled delivery, yes.

Q Two, three times a week, correct?

A Correct.

Q Lewis Bakery would fall into that category, would it not?

A Yes, they would.

Q Miles Farmer's Market?

A Yes, they would.

Q Farris Produce?

A Yes.

Q Foster Poultry Farms?

A Yes.

Q So, all four of these class representatives would be part of the 700 DSD vendors that are impacted by Fleming's program, correct?

A These four would be part of the 700? Is that correct?

Q Yes.

A Yes, they would.

Q Okay. Now, you have the cross dock program. And let me just clarify something. In the cross dock program, does

Fleming go to the vendor to pick up the product and return it to their facility?

A No. I believe the vendor delivers it to Fleming's warehouse.

Q Okay. Now, what's the difference between that and vendor direct?

A Normally, the cross docks are also a scheduled program weekly delivery. A vendor direct is special one-time arrangement that's made.

Q With respect to the plaintiffs in this litigation, I believe you were in the courtroom earlier, where two of them testified that not only were they participants in the DSD drop ship delivery program, but also provided product directly to Fleming, to their warehouses?

A That's correct.

Q Would that fall into the vendor direct category?

A No.

Q Would that fall into the cross dock category?

A No.

Q What category would that fall into?

A That's our trades payable -- product going directly to the warehouse. That would be out of my area.

Q That's a separate area?

A Yes.

Q Are you aware of whether or not there's a collection fee?

A I believe there's a two percent cash discount, generally.
Q How about cross dock? Is there a collection fee involved in that?
A We get a percentage discount.
Q Okay. And what about vendor direct?
A Yes. We get something on that, as well.
Q Now, you made reference here to the various payment terms for the four plaintiffs in this action here, and you've also referenced others. When you talk about payment terms, is this the date that appears on the Fleming check?
A Yes.
Q So, in other words, when you talk about the eight days' turn -- or turnaround, 11 days, or whatever the case might be, your testimony is not meant to suggest that that's the date that the vendor actually receives the payment?
A That is correct.
Q And you will also agree with me, will you not, that aside from dating the check, that there's going to be a process involved in terms of delivering that check to the vendor, correct?
A Correct.
Q Do you provide payments by overnight mail?
A Not on a normal basis, no.
Q Through what method?
A U.S. mail.

Q Okay. You'll agree with me, then, that there's a period of time that elapses there with regard to sending the payment out and when it's actually received?
A With some vendors, yes.
Q So, in each of these circumstances that you've described, we need to add additional days. So, it's not eight days from the time of receipt, it may be ten days, or 11? Would you agree with me?
A Depending on the mail.
Q Okay. Now, you mentioned -- are these checks certified?
A No, they're not.
Q Any particular reason why not?
A When you mail your bills, do you mail them certified?
Q Well, I'm not asking the question, ma'am.
A No, they're not.
Q Okay. Thank you. What about Century? What was the payment term in relationship between Fleming and the Century Brand Stores?
A Century was not in the centralization process. That was handled at the local division.
Q But you're aware of the fact that Century was a DSD vendor?
A Century was a retailer.
Q A retailer who participated with vendors in the DSD vendor program?

A Yes, they did.
Q Okay. Approximately how many vendors were involved in the Century settlement that took place in this Court back in April?
A I have no idea.
Q Would it be safe to say more than 20?
A I have no idea.
Q Again, you were present in the courtroom this morning when Suzanne Koch of Foster Poultry Farms took the stand?
A Yes, I was.
Q During the course of Ms. Koch's direct testimony, she indicated that she became familiar, or her staff became familiar with the Vendor Partner Manual during conversations that her staff was having with people within your department, and the reference to policies and procedures.
A I don't think she said my department.
Q Well, which department would that have been?
A I think she said Fleming. And I don't know.
Q When you say Fleming, what do you mean by that?
A Fleming is a big company. Fleming is Louisville, Fleming is Oklahoma City. I don't know who she was talking to.
Q Oklahoma City is a centralized location for the receipt and payment of DSD vendor shipments, correct?
A That's correct.
Q What other facilities do you have that deal with the processing and payment for DSD vendors who participate in the

program?
A No. We only process DSD out of Oklahoma City for our centralized --
Q Okay.
A -- environment.
Q So, in a centralized environment, you are the supervisor in charge of the overall DSD program for Fleming, correct?
A I'm the manager. I have three other supervisors.
Q And it would have been someone within the realm of your organization that would have had this contact with Foster Farms?
A No. I don't believe so.
Q Where else could it have been?
A None of my people have the Vendor Partner Manual. I do. And I don't remember talking to Suzanne.
Q Well, I'm not asking you if you personally did. But anything dealing with drop ship delivery programs and payments would have been dealing with the Oklahoma City location, correct?
A If it was DSD, yes.
Q And you're responsible for DSD?
A I believe she said she called someone and asked about the Vendor Partner Manual overall, not specifically for DSD.
Q Is there another program within Fleming dealing with DSD as it relates to the Vendor Partner Manual?

A She did testify that she had deliveries to the warehouse. That would not be in my area.
Q I'm not talking about the warehouse. I'm specifically talking about DSD vendor shipments.
A Okay.
Q It could only be your department, correct?
A No one from my department sent the Vendor Partner Manual.
Q My --
A They do not have it.
Q No. My question is this. Listen, please, to the question. Bear with me. Any inquiry regarding DSD vendor matters would be directed to your department in Oklahoma City?
A For the centralized divisions, yes.
Q And the centralized divisions formally represented the 25 divisions that Fleming had prior to the year 2000, prior to centralization?
A No.
Q Explain?
A We have five divisions that are on a different system that have never been centralized.
Q Do they include DSD vendor shipments?
A The other five?
Q Yes.
A Well, we know Milwaukee does. I don't know about the others.

Q So, if I understand your testimony here, you're only aware of parts of this DSD vendor program that are applicable to your department?

A I represent about 20 divisions out of the 25 wholesale.

Q And the policies and the procedures, you're not aware of the policies and the procedures in the Vendor Partner Manual?

A Not in this particular version. In the earlier versions, yes, pertaining to drop ship.

Q And what's your understanding with respect to prior versions of the vendor manual?

A Well, prior versions, this sentence number two is worded differently.

Q Slightly differently. We'll agree on that point.

A Differently enough that it changes the meaning.

Q So, are you telling me that the prior -- this is the 2002 version of the Vendor Partner Manual is one that covers the sum totality of all vendor shipments, and that the 2003 doesn't?

A In this, the 2003 that we're reading from, yes. 2002 has different terminology. 2001, which I participated in input, is different from this version.

Q And is it your testimony that with regard to 2002 Vendor Partner Manual, that that does not incorporate all the policies and procedures relative to DSD shipments?

A No, I believe it does.

Q Let me direct your attention to -- I'm going to direct

your attention to what appears to be --

THE COURT: Plaintiff's 1.

MR. WERB: One moment, Your Honor.

(Pause)

MR. WERB: It appears that -- have you marked, as one of your exhibits, 2002 --

(Pause)

THE COURT: The 2002 is Plaintiff's 1.

MR. WERB: 2002, Plaintiff's 1?

THE COURT: Yes.

MR. WERB: That's the document -- unfortunately, I don't have a copy of right now.

THE COURT: Do you have Plaintiff's 1 up there? She should have it.

MR. WERB: Forgive me, Your Honor.

THE COURT: That's all right.

Q Directing your attention to what's been marked as Plaintiff's 1, can you identify what that is?

A It's a Fleming Vendor Partner Manual.

Q Effective what date?

A January 15th, 2002.

Q And if we go to the section entitled 8.3, which would be on Page 31, the relevant portion on Page 31, would you turn to that?

A Um-hmm.

Q All right. Now, you indicate, in your testimony, that there was a difference in the language between the 2002 and 2003 version, correct?

A Yes.

Q All right. Directing your attention to the second bullet point, read that, for 2002.

A "Fleming does not accept financial responsibility for DSD shipments unless specific acceptance has been obtained from the facility's operational controller."

Q Now, that was what was included in 2002, and we turn to 2003, and 2003 says what?

A Fleming does not -- does not accept financial responsibility for DSD shipments. I think it cuts it right there.

Q So basically, the change, if you will, indicates that there was no longer any type of authorization that would be required; that in the year 2003, effective February 17th, under no circumstances would there be any guarantee for any type of DSD shipment?

A That wasn't true.

Q That's what the policy states, does it not?

A That's what it says. That's not what it means.

Q And your company, prior to filing bankruptcy, was a $12 billion company, wasn't it?

A I don't know.

Q You don't know? But you wanted to develop procedures here that would be uniform with regard to all vendors?

A What we wanted to do, in at least the DSD part of the manual, is to establish guidelines for the vendors so that we would expedite payment and billing, and reduce problems.

Q Going back to even 2001, which would be Debtor's Exhibit Number 4, would you please refer to Page 6?

A Page 6?

Q Yes. And at the very top, the bold print, read that?

A "The contents of this manual must be shared with appropriate personnel at all your facilities that service Fleming immediately upon receipt.

Q So, it doesn't say "may." It says "must be shared." Isn't that true?

A That's what it says.

Q All right. So, there's very little latitude here. This -- and if you go to the second paragraph, under 1.1 Summary, read that first sentence.

A "The policies and procedures within the Vendor Partner Manual will apply to all vendors and all Fleming distribution facilities unless otherwise noted."

Q All facilities, all vendors, correct?

A That's what it says.

Q Not selective. It means everyone. Do you agree with me?

A That's what it says. I will agree with that.

Q But your testimony is you disagree? Is that correct?

A I'm saying, what is in this version is not the policy that we maintained in my department.

MR. WERB: Your Honor, I'd like to have a document marked. I believe it will be Plaintiff's 3.

THE COURT: Please speak into the microphone.

MR. WERB: I'm sorry. I'm going to request that this next document be marked as Plaintiff's 3.

(Pause)

Q Ms. Burklow, I hand you what's been identified as Plaintiff's Exhibit 3. It states that this is a deposition of Edward James Esterman, Jr. I believe you've previously testified that he is the regional credit manager for Fleming? Is that correct?

A That's correct.

Q Okay. I'd like to direct your attention to Page 18. Now, there are four pages that appear on each page.

MR. CAPOZZOLA: Your Honor, I'd like to object. This is absolutely improper. You're not allowed to confront a witness with someone else's testimony. If he wants to designate deposition testimony from Mr. Esterman, that's the proper way to proceed. But he's not allowed to confront this --

THE COURT: Why not?

MR. CAPOZZOLA: It's improper.

THE COURT: Why is it improper?

MR. CAPOZZOLA: Well, Mr. Esterman is not here to -- to confront these questions. If he wants to designate the questions that were asked and answered, you know --

THE COURT: Overruled. He can ask a question of this witness about what somebody else may have testified to.

Q Ms. Burklow, I'd like to direct your attention to Page 18. Do you see that --

A Um-hmm.

Q -- on the minuscript?

A I do.

Q On the upper left-hand corner? And I want you to go down to question -- or, Line 19, and read that question and answer.

"Q Is February 17th, 2003 version of the Vendor Partner Manual which was marked as Deposition Exhibit 10 at the deposition of Debbie Alexander-Burklow yesterday, how are you familiar with that?

"A I was exposed to this back when I was a division controller, about two years ago -- about two years ago."

Q I'm going to ask you to continue until you get to Line 18.

A Page 19?

Q No. Line -- I'm going to ask that you continue --

THE COURT: On Page 19.

Q -- on Page 19, until Line 18.

A Okay.

"Q When you say exposed to it, was it distributed throughout the company, or --

"A About two years ago, it was, yes.

"Q How was it distributed, electronically or did they send out copies to everyone?

"A I received mine electronically.

"Q At the time you received it, was there a cover e-mail that explained what it was?

"A I do not recall specifically what would have come with it.

"Q What was the purpose of the manual?

"A My understanding of the purpose was to establish the process by which we would deal with our vendors.

"Q Did you understand the manual to be company policy?

"A Yes, I did.

"Q Are you --"

Q That's fine.

A Okay.

Q Thank you. All right. I would next like to have --

MR. CAPOZZOLA: Your Honor? In the interest of completeness, if we're going to allow --

THE COURT: You can cross examine.

MR. CAPOZZOLA: Thank you, Your Honor.

MR. WERB: I'd like to have this marked, Your Honor.

(Pause)

MR. WERB: May I approach the witness for a moment?

(Pause)

MR. LIEBELER: Your Honor, under Federal Rule 32(a)(1), a deposition is permissible to impeach for the deponent. 32(a)(1) does not permit a deposition to be used to impeach someone else. And absent a separate rule of the Federal Rules, I don't believe this is a proper use of a deposition for impeachment. Mr. Werb is trying to impeach Ms. Burklow with someone else's deposition. That is not --

THE COURT: And it's a deposition of a representative of the debtor.

MR. LIEBELER: That may be, but that is not the deponent. 32(a)(1) permits a deposition to be used to impeach the deponent on the stand.

THE COURT: He's not using it to impeach her. He's using it -- this is a statement of -- against interest by the debtor.

MR. LIEBELER: I understand that it may be separately admissible, and I'm not quarreling with that. But then the proper result is for him to get it admitted into Evidence and argue it. It's not proper impeachment for this witness --

THE COURT: He can have her read it.

MR. WERB: Thank you, Your Honor.

Q I'd like to direct your attention on the minuscript to Page 4, all the way at the bottom, Lines 22 through 25. And this would be the deposition of Charles Meyers, who I believe

you're familiar with, correct?
A I know who he is, yes.
Q Okay. Please read that.
"Q What is your current position with Fleming?
"A Vice President of Merchandising, with responsibility for grocery, frozen, dairy, health and beauty care, general merchandise, and specialty foods."
Q Thank you. I'd like to direct your attention to Page 8. Specifically, Line 8 through 19. Would you read that, please?
A "Deposition Exhibit 10, at the Burklow deposition, is the Fleming Vendor Partner Manual effective February 17th, 2003. Deposition Exhibit 11 is the Vendor Partner Manual effective January 15th, 2002. Deposition Exhibit 12 is the Vendor Partner Manual effective September 1, 2001. Deposition Exhibit 13 is the Vendor Partner Manual effective May 1st, 2001. Finally, Deposition Exhibit 14 is a one-page document not dated, called Vendor Partner Manual task force team."
Q Thank you. Now, based upon what you've just read, I guess we can clarify and agree that there were four different versions of the Fleming Vendor Partner Manual? Would you agree with me?
A Yes.
Q Okay. Going to -- and I should now, taking it out of order, forgive me, directing your attention to Page 7, which is at the top.

A Okay.
Q Upper right-hand corner, Line 3, would you read that, please?
"Q You also mentioned that as part of your job responsibilities, you work on policies and procedures and operating guidelines. What types of policies and procedures and guidelines have you worked on?"
A Read the answer?
Q Yes, please, and just continue.
A The whole page?
Q Yes.
"A With regard to the things I mentioned earlier, development of ad programs, slotting those same examples that I previously mentioned."
"Q Understood. When Fleming sets out to establish policies and procedures, does it try to reduce those to written form? For example, a manual form? Or, are most policies and procedures just a function of, you know, the way things work at a company and nobody takes the time or trouble to reduce them to writing?
"A Written form to provide clarity?
"Q So that is the preferred method at Fleming?
"A Yes.
"Q Has that been the case since you've been with the company?
"A Yes, it has.

"Q Are there advantages to providing them in written form? You mentioned clarity, for example.

"A It does provide clarity across a large organization, so, yes."

Q And I'd like you to now direct your attention to Page 9 in the lower right-hand corner, beginning with Line 7, and ask you to read down to 25.

"Q Can you describe for me how the task force was put together, whether meetings occurred, how the process evolved of identifying the task force?

"A There were two leaders, as you can see from this document, two project leaders that had the ultimate responsibility, being Bill Marrigan and Phil Murphy. And two of those individuals led the task force in the development of the manual, and utilized different individuals across this route that's identified here, through that process, to develop the manual, review it, and make sure the people were in concurrence with the policies and guidelines that had been stated and used these individuals as, for sake of a better word, the experts in their specific areas of the business, to make sure that the guideline or policy was -- that was being written was in line with what should be administered through the system."

A Read the next question?

Q Yes, please.

"Q And once the manual was finalized, was it to -- was it to

be governing policy at Fleming?"

Q And please, I direct your attention to the top of Page 10, and read the answer to that, on Line 1?

"A With regard to vendor management."

Q And I direct your attention to that same page, Line 20 through 25.

"Q Was this a priority to Fleming, to reduce this to writing, and get it out in manual form?

"A Yes, it was.

"Q Why?

"A We had centralized the business, and in centralizing the business, the executive committee of the company felt it was very important to have clarity of policy, and guidelines across the system, in a written form, so that it was easy for people to see, read, and understand."

Q And continue to Line 13.

"Q When you say you centralized the business, what do you mean by that?

"A We operated, prior to 2000, in a decentralized environment where we basically acted as a holding company from a corporate standpoint. The divisions has much anonymity on how they operated these -- their businesses. And we centralized the business in 2000, the early part of 2000, with regards to merchandising and procurement activities."

Q Thank you. Now, I'd like to direct your attention to

Page 15, Line 22, and I'd like you to continue onto Page 16, through Line 18. Again, 15, Line 22.

"Q Do you believe paper copies were sent simply to the task force members, or were they sent to division heads, or do you know?

"MR. BROWN: I'm going to object to the extent it calls for the witness to speculate. If you know, you can answer the question.

"THE WITNESS: I believe I can answer that.

"Q By Mr. Kobe. Okay.

"A Copies were sent out to members of the committee. Electronic copies were sent internally to people that needed to see it and review it. And I believe copies were sent to the suppliers for their review and the -- each department that had responsibility for interfacing with the suppliers, individuals that had the day-to-day responsibility for interfacing with the supplier had the responsibility for seeing that the supplier received it and had received it and understood the guidelines that were inside the policy.

"Q So, when you say it was sent electronically to the people who needed to see it, I assume those would be the folks who actually dealt with the vendors?

"A Yes.

"Q Were the vendors --"

Q That's fine. That's fine. And then, finally, on Page 17,

I'd like you to read Lines 7 through 14.

"Q Were these instructions given by management to the people who worked with the vendors as to what was expected of them in communicating the manual to the vendors?

"A My recollection is that they were to make sure the supplier that they were responsible for interfacing with had received it, reviewed it, and understood the guidelines inside the manual."

A And I'm sorry. How far?

Q That's it. Thank you.

MR. WERB: No further questions at this time.

THE COURT: Cross examination?

MR. CAPOZZOLA: Very briefly. Actually, it's our witness, Your Honor. I think it's redirect.

THE COURT: Redirect. Sorry.

MR. CAPOZZOLA: The last time this witness was up here, I called her an apple, so --

REDIRECT EXAMINATION

BY MR. CAPOZZOLA:

Q First I want to clear something up, Ms. Alexander. In the deposition you were just reading, turn back to Page 11 and look at Line 10.

A This is the one of Charlie Meyers?

Q Yes.

A And I'm sorry. What page?

Q Page 11, Line 10.
A Okay.
Q Now, maybe I misheard you. But I believe that you used the word anonymity. Can you read Page 11, Lines 9 and 10 again, please?
A Just lines 9 and 10?
Q Yes, ma'am, starting with "The divisions ..." I believe you said anonymity instead of autonomy. I just want to be sure the record is clear, so please read 9 and 10.
"A "... company from a corporate standpoint. The divisions had much autonomy on how they operated their businesses."
Q Thank you. Now, let's look at some interesting portions of these transcripts that Mr. Werb didn't ask you to read. In Mr. Meyers' transcript, why don't you turn, please, to Page 19, and read Lines 11 through 20?
"Q By Mr. Kobe, under the heading DSD invoice guidelines, the second section states, 'Fleming does not accept or assume any financial responsibility relating to DSD shipments.' Do you have any familiarity with this particular provision of the manual?
"A Only as part of the proceedings.
"Q Do you know if this statement is consistent or inconsistent with Fleming's current policy?
"A I can't answer that."
Q Okay. And let's look at another excerpt that Mr. Werb

chose not to have you read. Turn to Page 20 of Mr. Esterman's deposition. I'm sorry. Page 19 of Mr. Esterman's deposition. It's on the same actual piece of paper. And please read Page 19, Line 23, through Page 20, Line 13.

"Q Well, let me direct your attention to Paragraph 8.3 on Page 32.

"A Witness complied. Okay.

"Q And in particular, I'm going to read from the second section of 8.3, which states 'Fleming does not accept or assume any financial responsibility relating to DSD shipments. Isn't that contrary to the way you've described it for me, which is that Fleming is going to be obligated to pay the DSD vendor even in situations where Fleming doesn't get paid by the retailers?

"A It is contrary, yes.

"Q Do you have any explanation for that?

"A I was not familiar with this phrase of this until recently, and our practice has always been that we did bear that responsibility."

Q Now, let's turn to Debtor's Exhibit 4 in the black binder. And again, this is the May 1, 2001 edition. And turn to Page 36. And I'll focus you on the second bullet point. And do you see the phrase "Specific acceptance has been obtained from the facility operations controller?"

A Yes.

Q What do you understand that to mean with regard to signing up a retailer?

A When -- to the -- in relation to DSD? Or --

Q Sure.

A -- or originally signing up a retailer?

Q Let me just ask it this way. What do you understand the clause "Specific acceptance has been obtained from the facility operations controller" to mean within the context of DSD?

A When a retailer wants to become a part of a program that -- for a certain vendor, they call and get acceptance from Fleming to allow them to go on the Fleming program. What my department does, when they call and ask for approval is to go to the AR manager, or credit manager, and make sure that they are creditworthy. And then they are part of our drop ship program until such time as we notify the vendor that we're no longer responsible for payment.

Q And this clause that reads, "Specific acceptance has been obtained from the facility operations controller," is that, itself, carried forward from the era in which Fleming was not centralized?

A Yes, it is.

Q Now, turn to Debtor's 5, which is an accounting procedure. Can you describe what this document is?

A This is our accounting procedure 1402 that is for program drop shipment sales.

Q And can you read the second sentence under the "Purpose" heading, please?

THE COURT: Where are you again?

MR. CAPOZZOLA: Debtor's 5, Your Honor.

A And I'm sorry. What do you want me to read?

Q Please read the second sentence under the "Purpose" heading.

A "Product is billed to the retailer, and payment is made to vendor, with income generated to cover costs."

Q Does that sentence correctly convey your intentions in running the DSD program?

A Yes. And again, do the account receivable and account payable systems coordinate with one another with regard to verifying whether or not retailer payment has come in on a delivery before payment is made to vendors?

A No, we never look at that.

MR. CAPOZZOLA: Nothing further at this time.

MR. WERB: Two brief questions, Your Honor.

RECROSS EXAMINATION

BY MR. WERB:

Q Number one, in reference to Debtor's Exhibit Number 5, what's the date that we see at the bottom of that accounting procedure sheet?

A December 23rd, 1997.

Q That was prior to centralization, was it not?

A Yes, it was.

Q Prior to the creation and development of the Vendor Partner Manual?

A Yes.

Q And in the Vendor Partner Manual dated February 17th, 2003, it does in fact state that it affects all transactions effective as of February 17th, 2003, does it not?

A Yes, it says that.

MR. WERB: Nothing further.

FURTHER REDIRECT EXAMINATION

BY MR. CAPOZZOLA:

Q Ms. Alexander, does your department follow Debtor's 5?

A Yes, we do.

MR. CAPOZZOLA: Nothing further.

THE COURT: All right. Thank you. You may step down. Are we done?

MR. LIEBELER: Oh. Mr. Scott is the only remaining witness. The direct is about five minutes. I know your 3:00 calendar is here.

THE COURT: All right. Go ahead.

MR. LIEBELER: Would you like us to call Mr. Scott? Okay. The debtor will call Mike Scott.

THE CLERK: Please state your full name and spell your last name.

MR. SCOTT: Michael Kenneth Scott, S-c-o-t-t.

MICHAEL KENNETH SCOTT, DEBTOR'S WITNESS, SWORN

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. LIEBELER:

Q Mr. Scott, you're employed by Alix Partners, is that right?

A That is correct.

Q And what is your current engagement?

A Fleming Companies.

Q And what do you do for Fleming Companies?

A I am the interim treasurer.

Q Now, we were here at the last hearing, and you gave us some testimony. I want to look at one small piece of that, briefly. Let me just ask you, first, did you examine the extent to which individual plaintiffs received payment under DSD shipments before Fleming got paid?

A Yes, I looked at a sampling of transactions to determine that.

Q For which plaintiffs did you do -- well, what plaintiffs did you do that for? Excuse me.

A For the May 27th hearing, I did an analysis of six plaintiffs, the four that are here today plus American Greetings and Gibson Greetings.

Q And in addition to that, you've also done Sara Lee, Superior, and Nichols? Is that right?

A Yes, I have.
Q And just very briefly describe what you did as a process for each of those nine?
A What I did is I looked at a period of time, generally the February and March time frame, and looked to see the timing of when the vendor was paid compared to the timing of when -- when the vendor was paid by Fleming compared to the timing of when Fleming received payment from the retailer for the related product.
Q And then you put that together into a number of spreadsheets? Is that right?
A That's correct.
Q And from your recall, what was the percentages of time, the range of percentages, the highest and lowest on which Fleming was paid before it got money from the -- before it paid money out?
A Of the nine vendors I looked at, there were several examples where, in 100 percent of the transactions I looked at, the -- Fleming made payment to the vendor prior to receiving payment from the retailer. So, that would be at one extreme, 100 percent.
Q How about the low end?
A At the low end, it would be 15 percent in one of the examples I looked at. One, five.
Q Now, also for purposes of your analysis in this case, I

think you've calculated the overall amount of funds owed by Fleming on the DSD program? Is that right?

A As of the petition date I've calculated that, yes.

Q Correct. Now, you were here for Ms. Alexander's testimony, and you heard her describe program drops, vendor directs, and cross docking. You heard that, right?

A That's correct.

Q Did your analysis include just one of those, or all three?

A It included all three.

MR. LIEBELER: No further questions, Your Honor.

THE COURT: Cross?

CROSS EXAMINATION

BY MR. WERB:

Q When you talk about this high and low reference here with regard to payment, can you be -- can you elaborate on that in terms of what your analysis revealed? I don't quite follow it.

A Certainly. First of all, to look at the high scenario, in several of the examples that were presented at the May 27th hearing, I provided analysis that demonstrated that in 100 percent of the transactions that we looked at, where Fleming made payment to the vendor, that payment to the vendor was made prior to receipt of funds from the retailer.

Q Let me ask you this question. When you say when Fleming made payment to the vendor, what is that predicated upon? What is the basis for that?

A I'm sorry. What do you mean by "the basis?"
Q Are you basing it upon the date that's printed on the check?
A Yes, I am.
Q So, that's not the date that it's actually received by the vendor, now is it?
A I don't have information on when the check was received by the vendor.
Q And you've heard the testimony of Debbie Alexander-Burklow, that checks were not sent out by overnight mail, that they used regular first-class mail?
A My -- I did hear that testimony, yes.
Q So, did you factor in the time expended from when the check was actually printed to the time that it was actually received by the vendor?
A No, that wasn't relevant to my analysis.
Q In your analysis it wasn't relevant? Is that your understanding?
A It's not relevant to the day that I make payment, no.
Q Do you remember when I cross examined you during the last hearing, and I went into the detail with regard to how you compiled this information? And I asked you, is it rather voluminous? Is it, you know, just small documents with regard to how you reached your calculations?
A I vaguely remember that, yes.

Q Okay. And you originally -- your testimony during the Sara Lee hearing was that it was approximately $30 million worth of unpaid DSD vendor invoices which you subsequently changed and downgraded to $25 million during our TRO hearing. Do you recall that?

A I recall that.

Q What was the reason that would result in that fluctuation from 30 million to 25 million?

A There were multiple reasons, and I believe I described this in my -- in the hearing on May 27th.

MR. LIEBELER: Objection. Relevance, Your Honor.

THE COURT: Overruled.

A First of all, in the accumulation of the data for the $30 million payment, we picked out certain transactions that would have been inter-company transactions, or an inter-company payable, so we stripped those out of the transactions to get down to just amounts that we owed to third parties and the $25 million number.

Q Do you remember I asked you if you'd provide me with copies of those documents?

A I believe you said, Mr. Scott, do you have copies of the documents in this courtroom? And I answered, no. And then, I believe you asked if I had them back at the office. And when we took a break, if I would go look. And I agreed to that. And I went back, and did not have them with me. And so, I did

not provide you copies.

Q But you never provided us with copies?

A I haven't provided you with copies, no.

Q Tell us about the day of the week that Fleming would sweep independent retailers' accounts.

A Typically that would be on Tuesday.

Q Okay. And I believe that when you were deposed a few weeks ago, or last week, that you indicated that -- a question by Mr. Kobe. "What I'd like to do is focus on the second page of the table, in particular, the date of the bankruptcy filing. I want to make sure I'm understanding the information in the table. Is this to say that on April 1st, 2003, the date of the bankruptcy filing, these particular listed accounts had a total of $97,000,438 and change?" Your answer, "That's correct." any reason to change that answer today?

A Could you read back the question?

Q "What I'd like to do is focus on the second page of the table, in particular ..."

MR. LIEBELER: Can we have Mr. Werb give the witness a copy of the deposition?

MR. WERB: Sure. We can do that. Your Honor, with the Court's permission, I'm just going to have him read this section. Since I don't have a copy, just for the record, I'm going to be requesting that Mr. Scott read from Page 34 of his deposition, Line 23, through Page 35, Line 20.

"Q What I'd like to focus on, the second page of the table, and in particular, the date of the bankruptcy filing. I want to make sure I'm understanding the information in the table. Is this to say that on April 1st, 2003, the date of the bankruptcy filing, these particular listed accounts had a total of $97,438,000 and change?

"A That's correct.

"Q Why is it that only two days later there's $154 million in those accounts? Why is there such a significant spike?

"A Well, this company is a very large company on a receipts basis, a revenue basis. At the time of the filing, their level of business was probably in excess of $12 billion, and so you have a lot of cash that runs through the system. And on any one day, the cash can fluctuate very materially for two reasons. One is that your receipt of cash can be much larger on some days than other days. For example, on Tuesdays, the company receives very high amounts of cash from retailers that pushes our cash balances up. And then, of course, on the flip side, the disbursement levels can also be very volatile."

Q Date of filing, April 1st, 2003, was a Tuesday, was it not?

A That's correct.

Q And we went from 97 million up to $154 million? Is that correct?

A I believe that's what the table reflected, yes.

Q And that's based upon the infusion of large amounts of cash from retailers that -- accounts which you swept?

A That's generally where we get our cash, yes.

MR. WERB: No further questions.

MR. LIEBELER: Nothing further from the debtor, Your Honor.

THE COURT: All right. Thank you. You may step down.

THE WITNESS: Thank you.

THE COURT: I assume the parties wish to move the admission of their exhibits?

MR. LIEBELER: One other thing, Your Honor. Very simple. I just want to take judicial notice of the fact that Mr. Werb submitted a declaration of Dennis Bernard in conjunction with the TRO in this case, and Mr. Bernard is the CEO of Bernard, who is the company we have a contract on. I have copies of that, but they're the ones that submitted it for the TRO.

MR. WERB: Your Honor, we did submit it, and I recall that because of the untimeliness of the filing, that Your Honor decided not to include that as part of the ruling on the TRO. So, since we intended to have it introduced prior, we have no objection to having it introduced today.

THE COURT: All right.

MR. LIEBELER: Would you like a copy of that, Your

Honor?

THE COURT: Yes. I don't know that I have it in the book. Any other exhibits or submissions?

MR. LIEBELER: No, Your Honor, other than the exhibits that we have -- that we have used today.

THE COURT: Anybody object to any of the exhibits identified today?

MR. LIEBELER: We have no objection to the plaintiffs' exhibits, Your Honor.

UNIDENTIFIED SPEAKER: One moment, Your Honor.

MR. WERB: No, Your Honor. No objection.

THE COURT: Then they're all admitted.

MR. WERB: And I just want to make sure that everything that we had previously admitted as part of the original memorandum of law and our Exhibits A through J are herewith admitted, as well.

MR. LIEBELER: No. I haven't looked at those. Those haven't been used at the hearing. The fact that they're attached to a motion doesn't make them admissible into Evidence. And I haven't looked at them with an eye to admissibility, so I can't stipulate to that.

MR. WERB: Well, Your Honor, our motion seeking class certification and the memorandum of law was submitted on or about May 15th.

THE COURT: That doesn't make it evidence. Why are

they otherwise admissible?

MR. WERB: It's in support of our motion seeking class certification. What it contains are the declarations of the four class action representatives, as well as the bios for the respective law firms involved, and excerpts of transcripts of the cash management hearing, the Sara Lee hearing, and the TRO.

THE COURT: Well, go through them, because some of them there may not be admissible. But --

MR. LIEBELER: Mr. Werb, do you have copies I can look at?

THE COURT: It's in the first binder.

MR. WERB: It was previously filed with the Court.

THE COURT: Do you have your binder?

MR. WERB: You must have these.

MR. LIEBELER: Why don't we do this on our break and see if we can come to agreement on it? Does that make sense, rather -- I mean, we can do it now.

THE COURT: I'm hoping we're ended, and you can submit the briefs, or something, on this.

MR. LIEBELER: Or we can stay over and argue this afternoon. It's --

THE COURT: I have -- I have a confirmation hearing now, and I have another hearing --

MR. LIEBELER: If it's the Court's pleasure to take

briefs on it, we can write an essentially closing argument brief. When would you like it due?

MR. WERB: No, Your Honor. We are operating under exigent circumstances here. There is a sale which is forthcoming that's being proposed by this debtor. We do not have time --

THE COURT: Why is class certification relevant?

MR. WERB: Because they're not -- there may not be any funds left here to allocate, assuming that we're certified as a class. We've waited almost two months for this process. We need to have a decision as soon as possible here. There are 700 vendors out there, and their rights are going to be prejudiced. And with all the barriers and obstacles that this debtor has put in the way of going through a systematic Chapter 11 liquidation of all assets, there's really not going to be anything left. You've got a bar date of September 15th. What are we going to do here? The rights of our clients in the punitive class are being prejudiced.

THE COURT: Well, I don't know what to tell you. I've given you all day.

MR. WERB: I know you have, Your Honor, but I mean, we're ready to go into closing arguments here. We don't need to brief an argument. I mean, we'll stay --

THE COURT: Well, there are others behind you.

MR. WERB: I understand that.

THE COURT: And you've taken, now, six hours.

MR. WERB: Your Honor, there was a lot to cover.

THE COURT: I understand.

MR. LIEBELER: Your Honor, I'm at the Court's pleasure. I mean, we did as best as we could to skin down our presentation as far as we could. If the Court wants briefs, we'll do briefs. If the Court would like us to stay for argument, we can stay for argument. We are at the Court's pleasure.

MR. WERB: And we would likewise stay for argument, and with the idea that we'll keep it brief.

THE COURT: Well, I will give you a choice. You can have 10:30 tomorrow, or 3:00 tomorrow. One hour for arguments.

MR. WERB: So, that's a half hour each?

THE COURT: Yes. Well, you've had a little bit more. I'll hear the debtor for 40 minutes, and you reply for 20.

MR. WERB: That's fair enough, Your Honor. Thank you.

THE COURT: Which time --

MR. WERB: I'm not trying to push the Court's buttons here, but it really means a lot to us. And thank you.

MR. LIEBELER: Your Honor, I have a preference for the 10:30, so I can make a plane home and see my kids tomorrow night.

MR. WERB: Your Honor, I'll accede to that request,

as well.

THE COURT: All right.

MR. WERB: I know I'm going to be -- I'm supposed to be in, I believe, another courtroom at 9:30, for a major hearing, but I can't clone myself. I'll be here at 10:30.

THE COURT: 10:30.

MR. LIEBELER: Thank you, Mr. Werb.

THE COURT: All right. And just let me know if the parties can agree to admissibility of your exhibits A through J I think you said.

MR. WERB: Yes. That's correct, Your Honor.

THE COURT: All right. We'll stand adjourned, then.

MR. LIEBELER: Thank you, Your Honor.

(Recess)

THE COURT: I'll hear from the debtor --

MR. WERB: I understand, Your Honor, but do you want to deal with the issue regarding --

THE COURT: Exhibits?

MR. WERB: -- the exhibits.

THE COURT: Yes.

MR. WERB: Okay. Well, we've attempted to, through dialogue, to resolve some of these, but unfortunately we have a few objections. Now, I just wanted to direct the Court's attention to the fact that these were exhibits that were attached to the original memorandum of law and the motion

seeking class certification. Exhibit A consisted of the portions of the transcript from the April 3rd cash management order hearing.

THE COURT: Okay.

MR. WERB: Where the --

THE COURT: Which ones are we -- you're only going to talk about the ones we're fighting over?

MR. WERB: Yes.

THE COURT: Okay.

MR. LIEBELER: Yes. My argument on that is, Your Honor, he has snippets from the transcript. It's going to be in Evidence. The rule of completeness says that the entire transcript should be there. And you know what? You were here. If we're going to argue about what was said at the cash management order, I just don't want Mr. Werb saying, hey, you know, the only thing that's in Evidence is my piece of the transcript. So, it should either all come in or none of it should.

THE COURT: All of it.

MR. LIEBELER: Thank you.

MR. WERB: Okay.

MR. LIEBELER: We don't have a copy of that, but the Court, I would think, can take judicial notice of that, since you were here.

THE COURT: Yes.

MR. WERB: Okay. Now, with respect to B, B is --

MR. LIEBELER: The same issue.

MR. WERB: Same -- this is the April 10th portion of the transcript involving the Century settlement.

THE COURT: Yes.

MR. LIEBELER: Same issue.

THE COURT: All or none. All.

MR. WERB: What we did was, we confined it to the information involving, that's what's there. Now, the entire relevant portion of that proceeding, or colloquy that took place has been incorporated into Exhibit B.

THE COURT: Well, I'll incorporate, just for the record, so the record is clear, all the portions of that hearing dealing with the issue we're talking about. For example -- I think that he's saying is he doesn't want the --

MR. LIEBELER: It was omnibus. I think it was an omnibus, and there were several other issues.

THE COURT: -- transcript dealing with all the other issues, but --

MR. WERB: Okay. And then, Exhibit C is the transcript from the May 1st Sara Lee TRO hearing, which deals with the topic of Michael Scott's testimony regarding the $30 million. Okay?

MR. LIEBELER: He testified as to that in the courtroom today. I think it's cumulative. But I don't care.

If the whole transcript comes in, that's fine. It doesn't make a --

THE COURT: All right.

MR. LIEBELER: -- hill of beans worth of difference to me, as long as it all comes in.

THE COURT: It all comes in, for purposes of the record.

MR. WERB: All right. So then, we need to file with this Court, then, a complete --

THE COURT: I think I have copies of the complete transcripts.

MR. WERB: I think you do, as well. Yes.

THE COURT: To the extent they were ordered by you, and these are the official transcripts --

MR. WERB: Yes.

THE COURT: -- the copy is already of record.

MR. WERB: That should be the case. Yes, Your Honor. And then, Exhibit D, E, F and G are the declarations of Celeste Farris, Frank Cangemi, Suzanne Koch, and Christopher Frano.

MR. LIEBELER: We objected -- we filed evidentiary objections on those at the time of the TRO. They contained admissible opinion and inadmissible hearsay infractions, and they're cumulative because all of those witnesses testified today, so --

THE COURT: Why are they admissible?

MR. WERB: Well, I mean, we can -- they did testify today. If the Court is predisposed to believe that they're not relevant, but our position is they are.

THE COURT: Well, I'll exclude them. I think that you've put on your case in live testimony, and they're not necessary.

MR. WERB: All right.

MR. LIEBELER: H, I and J are fine. Those are the bios of the respective law firms. I'm not going to force us put Mr. Werb on the stand to talk about his qualifications, as entertaining as that might be.

MR. WERB: Quite frankly, I'm surprised that you're not. Getting to K, K is the deposition of Suzanne Koch that was taken by the debtor. And in the words of Mr. Liebeler, it is complete. So, this rule of completeness that I hear about, I think we've met that.

MR. LIEBELER: Your Honor, I don't know why we would want to put a deposition transcript into Evidence. No one offered designations from it. She testified live.

THE COURT: Which exhibit is it?

MR. WERB: This would be now -- this is attached to the plaintiffs' reply. Everything from A through J --

THE COURT: Okay.

MR. WERB: -- related to the original memo. So, plaintiffs' reply is K through U.

THE COURT: And what do you think it is?

MR. WERB: It is the deposition of Suzanne Koch.

THE COURT: All right. And what is the --

MR. LIEBELER: Your Honor, I haven't read the entire deposition, but if it's the entire deposition, it almost certainly contains hearsay. The fact of the deposition taken doesn't make it admissible. If we used portions of it during the examination, that becomes part of the record. But I don't believe that other parts of the deposition, without giving us an adequate opportunity to object to them, come into Evidence.

MR. WERB: Well, I take a contrary position, because it was Kirkland & Ellis who conducted these depositions of each of these witnesses, lasting in excess of six hours each. They have chosen, as part of their argument, to take excerpts of that testimony. And we believe, under the rule of completeness, that the entire deposition should be included.

THE COURT: Well --

MR. LIEBELER: Your Honor, that I take a deposition --

MR. WERB: You can't have it both ways.

MR. LIEBELER: -- in discovery doesn't make it admissible. I certainly can on a deposition.

THE COURT: He did not use -- he did not introduce portions of it. He used it --

MR. WERB: Your Honor --

THE COURT: -- as part of his cross examination.

MR. WERB: Cross examination. That's correct. Excerpts. Portions. So, is it the Court's position that the entire thing should not be included, since it was referenced --

THE COURT: It's not admissible in and of itself.

MR. WERB: But the fact that they questioned our witnesses and they relied upon excerpts from the deposition transcripts, I believe would make it consistent that the entire deposition should be admitted.

MR. LIEBELER: Those excerpts are certainly admissible. They're part of the record. If Mr. Werb had a portion of the deposition he felt should have been read, under the rule of completeness he had the opportunity to redirect his witness to do it. A deposition transcript is not admissible, per se.

MR. WERB: Our position is, in this case it should be, and it would apply to Mr. Frano, Cangemi, and Celeste Farris, as well.

MR. LIEBELER: Well, I agree to the extent that argument on one applies to all four. That much is correct.

THE COURT: Well, I'm not going to allow them in. I don't think they're admissible by --

MR. WERB: I'm sure the Court doesn't want to read them is part of the --

THE COURT: Well, I don't know that they're

admissible by you to the extent that they're an admission against interest. They would be, but --

MR. LIEBELER: It's a question for me and testimony from their witness.

THE COURT: Yes.

MR. LIEBELER: It can't be an admission against my interest, Your Honor.

THE COURT: Against his -- his offering --

MR. LIEBELER: I could get them in.

THE COURT: Right. But he's -- he can't.

MR. LIEBELER: Right. He can't make an admission against him.

THE COURT: Right.

MR. LIEBELER: I can. He can't.

THE COURT: Right. That's what I mean. So, I don't think they're admissible at the plaintiffs' insistence.

MR. WERB: And then we have the -- Exhibit O is the 5/27/03 transcript of Debbie Burklow, and --

MR. LIEBELER: That was a hearing transcript from the testimony here.

MR. WERB: And that was the -- where she testified regarding the 700 vendors and the 4,000 independent retailers.

THE COURT: We'll put her entire testimony in. Is that --

MR. LIEBELER: Yes. If that's all he's going to use

it for. If you'll stipulate --

MR. WERB: Yes.

MR. LIEBELER: -- that that's all he's going to use it for, I don't care.

MR. WERB: That's it. That's -- we have no problem with that.

MR. LIEBELER: Okay.

THE COURT: All right.

MR. WERB: All right. And then there is -- on 5/27/03, we likewise had Mr. Liebeler, who attempted to move the admission of Exhibit 16, which we had objected to. And now we're permitting its introduction.

MR. LIEBELER: I haven't moved it today, Your Honor.

MR. WERB: Well, we're moving it today.

MR. LIEBELER: You know what? I'll cut this Gordian knot. I will let this one in.

THE COURT: Okay.

MR. WERB: Good. As to Q, Mr. Liebeler has --

MR. LIEBELER: But it's in for all future proceedings.

MR. WERB: Sure.

MR. LIEBELER: Okay.

MR. WERB: Q, Your Honor, we've agreed to. It's acceptable.

MR. LIEBELER: That's correct. That's correct.

THE COURT: The responses? All right.

MR. WERB: Okay.

MR. LIEBELER: I have no objection to R. I don't think I have a valid objection to a response for request for admissions. That's fair.

MR. WERB: So, R? And then the vendor -- Fleming Vendor Partner Manual from 2/17/03, I believe you admitted that as part of Debtor's 6.

MR. LIEBELER: That's -- I have no objection --

MR. WERB: No objection to that. And then, the -- we've moved the admission of the depositions of Charles Meyers and also Edward Esterman. That was T and U. And that, I believe, was Plaintiffs' 3 and --

THE COURT: All right. What was with respect to S?

MR. LIEBELER: S was the February 17th Vendor Partner Manual. Isn't that exhibit -- isn't that my Exhibit 6?

MR. WERB: That's your Exhibit 6. Yes, Debtor's Exhibit 6. And that would be --

THE COURT: I have a different S.

MR. WERB: Your Honor, can we inquire what you have?

THE COURT: I have the PACA invoice list.

MR. WERB: No, that's the debtor's.

MR. LIEBELER: That might be from our opposition.

THE COURT: I'm sorry.

MR. WERB: As plaintiffs' exhibits, it would be S,

Debtor's Exhibit 6.

THE COURT: Well, do I even have yours?

MR. WERB: Your Honor, ours?

THE COURT: It's mixed in here. I don't have your S.

MR. LIEBELER: Your Honor, I think S is irrelevant, because it's duplicative of Debtor's 6, which is the --

THE COURT: All right.

MR. LIEBELER: -- February 17th Vendor Partner Manual. That's clearly fair game, so --

THE COURT: All right.

MR. LIEBELER: -- I think I can short circuit that, as well.

MR. WERB: Okay. And then T is the deposition --

THE COURT: Right.

MR. WERB: -- the testimony of Edward Esterman, and U, the deposition testimony of Charles Meyers.

MR. LIEBELER: If those are the sections that were actually read in the Court, I have no objection. If it's other than that, I may have an objection.

MR. WERB: No.

MR. LIEBELER: That's it?

MR. WERB: That's it.

MR. LIEBELER: I can't object to that.

THE COURT: All right. I will hear argument so you can get home to your children. You'll limit it to a half an

hour?

MR. LIEBELER: Thank you, Your Honor.

MR. WERB: We're still bound -- excuse me -- by the time constraints?

THE COURT: Yes.

MR. LIEBELER: Do I have a half an hour, or 40 minutes? I think it was 40/20, given the --

THE COURT: I think I'm going to give you a half an hour, and you 15. How's that?

MR. WERB: You've got it.

MR. LIEBELER: That works for me. Your Honor, to achieve class certification, what the plaintiffs have got to do in this proceeding is they have to meet all four prongs of Rule 23(a), and then at least one under 23(b). And we know that the commonality provision in 23(a) is similar to 23(b)(3). 23(b) inquiry is much more demanding than commonality under 23(a)(2). And for purposes of this hearing, I don't know which one we're going to argue, because it may be somewhere between the two. Suffice it to say that they've got to meet the 23(b)(3) rule, or else they don't get a class, unless they can prove (b)(2), and I'll address (b)(2) in a few minutes.

The existence of a -- now, this is all in the context, of course, of the underlying merits test. And the existence of a constructive trust on the merits is governed by Columbia Gas, the Third Circuit case that we argued about at

some length at the TRO hearing. And that is dependent, it seems to the debtor, on the individual facts and circumstances, and Columbia Gas says so almost perfectly. Here's a quote from that case. "Absent a document definitively establishing a trust relationship, we look to the language of the parties, their conduct, and other circumstances surrounding the transaction, probative of their intent." That's language straight out of the Third Circuit's Columbia Gas case, which is controlling here. And that language is 997 F.2d at 1060. Intent is uniquely a fact-driven inquiry. Here, that intent is particularly difficult to ascertain on a class basis. What you have, for example, on a class basis, if you have a contract with Bernard & Sons, who is a party that fits the definition of this class. There was a declaration submitted by --

THE COURT: Well, you have a written document that you say is a contract.

MR. LIEBELER: That's correct. That's right. That, in fact, the debtor's witness, Mr. Clemens, said was a contract.

THE COURT: Um-hmm.

MR. LIEBELER: I mean, he testified to such on the stand. So, there is a written document that looks like it's a contract, signed by both parties, reflecting a deal, okay, for adequate consideration. There has been no challenge to the fact that that's a contract by the plaintiffs. I think it's

fair to say that it is a contract. And that contract says that Fleming guarantees payment. If Fleming guarantees payment, that can't be a constructive trust under Columbia Gas. That's -- I mean, if it's a guarantee of payment, Fleming bears the loss, and in a constructive trust they can't bear the loss. So, you have a situation in which that is one example of the parties' intent, with a party that is within the definition of the class found in the first amended complaint, Paragraph 18.

THE COURT: Well, the --

MR. LIEBELER: Bernard & Sons is a -- they are not a named party, okay, but they fit within the definition of the class as the plaintiffs' complaint defines it. Okay? They were a DSD vendor, and the declaration of Bernard that Mr. Werb himself submitted said that they had unpaid invoices as of the petition date.

THE COURT: Well, the fact that the issue was framed by them is common as to all. That is, was there a constructive trust? The answer may be different as to all.

MR. LIEBELER: Well, that's correct. I mean, sure. The question certainly is is there a constructive trust with respect to the individual claimants? To determine that, you have to go to the individual facts and circumstances surrounding each plaintiff.

THE COURT: Um-hmm.

MR. LIEBELER: And that you cannot do under 23(b)(3).

I mean, I'll get to the class cases in a moment, but Your Honor's decision in United Companies and the Third Circuit decision in Johnston v. HBO both say that. And just, you know, cutting right to the chase, in the Johnston case --

THE COURT: Well, except that -- and I remember the facts. But except with respect to Bernard or others, where there is an actual contract, different from everybody else's. I'm excluding -- there's a form contract somewhere that everybody signed. But excluding that, is it not possible that the others were governed by -- and I -- accepting their allegations both as presented in testimony and as in the complaint at face value, their assertion is that the terms of our relationship were as set forth in the vendor manual.

MR. LIEBELER: Well, certainly the Vendor Partner Manual isn't mentioned in their complaint. So, if you look at what's in their complaint, it doesn't mention that. So, as a technical matter, I don't think that's correct. But that's a technical point --

THE COURT: Well, they do -- that's only a technical point. They do state that there was a constructive trust. That's what their complaint alleges, and as proof thereof, assuming your correct and we have to look at the intent, well, if they're saying the intent is reflected in the policies --

MR. LIEBELER: Well, sure. But --

THE COURT: -- or at least Fleming's intent is

reflected in the policy.

MR. LIEBELER: Yes. I was about to get to that point. I mean, with respect to the Vendor Partner Manual specifically, I mean, I can jump to that and address that, because I -- I mean, that was going to be a little later in my argument, but I can do it now. I think, for our purposes, it is a fair statement to say that the Vendor Partner Manual is probative of Fleming's intent at a certain time. Now, the contractual relationships between the parties -- the parties, and that's plural, okay?

THE COURT: Um-hmm.

MR. LIEBELER: Will establish, long before the Vendor Partner Manual came out, that we saw -- I can put up the chart, with respect to -- well, there are two. The first one is, just with respect to the Vendor Partner Manual, okay, and in terms of what the parties did with it, as I recall, I didn't put them in the chart during the exam, and I think Farris didn't see it. I think she said she never saw it, and heard about it for the first time on May 1st. Mr. Miles -- I'm sorry -- Mr. Cangemi, he never saw it until counsel showed it to him, and testified that the critical section, 8.3, was not consistently followed by the parties. Mr. Horne got that on cross examination, when Mr. Cangemi had admitted, in his deposition, that 8.3 wasn't followed by the parties.

THE COURT: Well, he did not believe that it applied

to him because he did not believe he was a DSD.

MR. LIEBELER: Fine.

THE COURT: He had a different term for it.

MR. LIEBELER: But as far as he was concerned, the Vendor Partner Manual didn't guide the parties relationship. And to the extent that the Court is arguing that the Vendor Partner Manual controls the parties relationship --

THE COURT: No. I'm suggesting that the vendor manual is a suggestion of what the intent of the parties was. All of the plaintiffs' witnesses testified this is the way it worked in our relationship.

MR. LIEBELER: Fair. Bernard certainly didn't say that. And then there's a conflict on the testimony with respect to the Foster Farms issue, because with Foster Farms, Mr. Clemens, who was our witness, who was the one that signed that particular party up, he said that he gave them the guarantee, and it hadn't changed in the intervening 20 years.

THE COURT: Um-hmm.

MR. LIEBELER: So that there's a conflict in the testimony on that point.

THE COURT: Right.

MR. LIEBELER: But, you know, I don't know -- there's -- you're the trier of fact. There no jury trial. I mean, normally I would say, look, in a class action case, the jury would make that determination. But the fact of the matter is,

there are material differences between the parties. I don't think you can except Bernard. I don't think that Bernard is just a carve out because they're not standing in the courtroom today. There is a clear factual difference on the critical term of the parties' agreement between Mr. Bernard and the other members of this class. And if that's true, you've got to do an individual determination to see how many of the 700 are Bernard. We don't know the answer to that. It might be -- and we have four in front of us. Okay? And we know about Bernard, so that's sort of four to one against me. It may be the other 695 all have these form contracts. I don't know the answer to that. It may be one. But it seems to me, in order to determine whether or not a constructive trust exists with respect to each of those individual parties, that necessitates a look at the individual facts and circumstances of that relationship.

You know, the Court's United Companies decision is real similar to that. Here Your Honor dealt with -- in that situation, the Court dealt with an issue where there were a number of loans being made, and the argument was that the person who was borrowing money said, hey, give me "X," and then the bank would only lend more than that. And there was, as I recall, you know, a ruling that said you have to look at the oral course of dealing between the two. Who asked for what, who said what, how much was at issue. That's exactly what we

have here, except that I think this situation provides a much greater degree of variation.

Here you have a contractual relationship that spans potentially 20 years. I mean, in the Bernard case, he signed up in '92. Ms. Farris said, in her deposition, at least, that the DSD relationship was already extant when she arrived at Farris in 1979, and was explained to her by someone named Judy. You know, there's no evidence of how the relationship sprang up. There's no competent evidence of that. And I don't know how they could prove what the contract said. And without that --

THE COURT: Well, but there was a course of dealing. And isn't what is relevant what the relationship was at the time of the bankruptcy?

MR. LIEBELER: Well, sure, but -- well, no. There are disputes about that over the course of -- there are disputes about the course of dealing. Okay?

THE COURT: I mean, I do not need to know what the relationship was in 1979.

MR. LIEBELER: Doesn't that depend on what the parties said to each other then? I mean --

THE COURT: No.

MR. LIEBELER: Sure it does. Let me posit an example to you. Let's suppose the parties got together, and Fleming said, hey, we're going to give you a guarantee. And you know

what? From time to time our company may put out manuals. And you know what? Those manuals don't apply to you. All you have to do is call me up and say hey, I've got this manual. It doesn't apply to me. And I'll make sure that will stick. That's a perfectly valid contract, Your Honor. There's no reason that the parties couldn't have done that.

THE COURT: Yes.

MR. LIEBELER: Okay? And if they did --

THE COURT: But --

MR. LIEBELER: If they --

THE COURT: But, don't I need to know what their relationship was this year?

MR. LIEBELER: You have to know what their relationship was this year in the context of what their relationship was from the beginning. For example, in the example --

THE COURT: That may be relevant, but it may not be relevant.

MR. LIEBELER: In the case of someone like Bernard & Sons, Your Honor, the debtor contends that that is determinative, that if there is a written contract, as that one appears to be, I don't see how the Vendor Partner Manual can change the terms of a written contract.

THE COURT: Oh, I understand. But if there's another writing in 2001 between them, that's determinative. I do not

have to --

MR. LIEBELER: But that --

THE COURT: I do not have to go back to the beginning of time to determine what the relationship is today.

MR. LIEBELER: In the case of Bernard & Sons, you have to -- you have to look at when the contract was first initiated in 1992, and then you have to make an individual factual determination as to whether or not there were additional writings all the way between 1992 and today.

THE COURT: No, I don't.

MR. LIEBELER: That is an -- why not?

THE COURT: Because there's nothing in that contract that says its integrated, and modifications must be in writing only. I mean, why am I only looking at written changes?

MR. LIEBELER: It's not necessarily written. You have to look at the individual facts and circumstances as to whether the parties orally modified that contract.

THE COURT: Right.

MR. LIEBELER: That makes it even more complex and more individual, and even less suited for class certification. So, I agree with that point. I mean, I'll open it up to all modifications. But that is -- that particular case is demonstrative of the situation that we have here. Okay? You have to look at the individual facts and circumstances with respect to each of the individual class members. The Johnston

Courts simply said it best. Class certification is inappropriate in cases that present individual issues of liability. And here, there are individual cases of liability because it depends on what the intent of the parties was. And that intent is variable. I understand that the Vendor Partner Manual is an element that is common to many of those. But that's very similar to the Johnston case in which there were uniform marketing materials that were sent out to each and every one of the individual plaintiffs that said Michael Douglas is going to be, you know, part of these films. And the Court said, that's not enough. What you have to determine in that case, individually, is what oral representations were made to the individual plaintiffs, because that's part of the calculus of whether or not there's liability here. And the same is true with respect to our case. If you have an oral contract that says, hey, you can ignore all future manuals, then the manual is not determinative of both parties' intent. It's as though I have a contract with you, Your Honor, and then I write a note to myself that I never show to you, you don't know about, and when you look at it, you said it didn't have any impact on the relationship.

THE COURT: Well --

MR. LIEBELER: That document can't control the relationship necessarily.

THE COURT: No.

MR. LIEBELER: Is it Probative? Yes.

THE COURT: No.

MR. LIEBELER: Is it determinative? No.

THE COURT: No. But when the document says A, and the other parties to your oral contract said I never saw that, but that is exactly what our relationship was --

MR. LIEBELER: Well, but you have an intent contest question because --

THE COURT: You have intent by both.

MR. LIEBELER: Well, hang on a second, though. Okay? With respect to the Fleming side, you had -- the Fleming witnesses, okay, both the ones that were read by deposition and Ms. Alexander who appeared in the courtroom today, you say, you know what, we know the manual was there, but that didn't reflect the way things operated in the real world. It didn't.

THE COURT: I'm not sure that's what Mr. Esterman said.

MR. LIEBELER: Esterman's quote, I believe I have it, is that the text of the manual was contrary to the way we did things. Meyers wouldn't commit either way. He said, "I can't say one way or the other." There's no evidence that anyone at Fleming actually viewed that document as a realistic policy that was applied across the board to all the vendors.

THE COURT: Well, they both said that's what it was supposed to be.

MR. LIEBELER: Whether it's supposed to be doesn't determine whether or not it's that way, in fact. You know, if it had been, Your Honor, you would expect that the plaintiffs would be able to come up with some evidence that one of their parties had seen it before at Fleming's initiative. Fleming never sent it to everybody. The only plaintiff that had ever seen it asked Fleming for it specifically. There was no --

THE COURT: But with respect to the commonality, Ms. Alexander did testify that, you know, we had a centralized billing system, we had a centralized -- we dealt with the DSD and bill through on a centralized basis to get rid of the everybody dealing with it --

MR. LIEBELER: For 20 of the 25 divisions of Fleming, and the other five remained autonomous.

THE COURT: Um-hmm.

MR. LIEBELER: So there's a factual question with respect to each of the plaintiffs as to which of the divisions they were in. That's an individual inquiry.

THE COURT: And if I limit it to the 20 divisions, isn't there enough for some basis for a class?

MR. LIEBELER: I don't believe so, because we don't know how many people out there there are, like Mr. Bernard, who have contracts that materially contradict the Vendor Partner Manual. I don't see how you can square the two. The Vendor Partner Manual says no guarantee, and the contract says there's

a guarantee.

THE COURT: Well -- in whose possession would those contracts be? Not the debtor's? You've produced one contract.

MR. LIEBELER: Correct. And we actually got that from Mr. Bernard. I mean, the fact is it's a contract from 11 years ago, and it's a company that's gone through all kinds of acquisitions. I don't know how many of those documents are out there. But the fact is, you know, that's the individual -- there's no question about the fact that if -- well, there's no question about the fact that the existence of such a contract vis-a-vis any individual plaintiff is an individualized inquiry. And that's just the sort of individualized inquiry that Your Honor's United Companies case says you can't do, and Johnston said you can't do it. It's not a class.

THE COURT: Well, if you -- no. If you made the inquiry and found we have one of the 700 have a written contract, that would still form the basis to consider whether a class should be formed of the 699.

MR. LIEBELER: Well, if you can carve it out. But that's not how the -- that's not the class definition that the plaintiffs have offered. The plaintiffs have offered a class that says it's every vendor whose invoices are not paid. They don't have a carve out. And they haven't proposed one with respect to those people with written contracts. Because you know what? They don't know how many have written contracts.

Neither do we, because it would necessitate an identification of every single one of the 700-plus members of the class, and an individualized inquiry into that issue.

THE COURT: Well, wait a minute. Who has all the centralized billing information? You do.

MR. LIEBELER: Centralized billing doesn't have to do with the existence -- doesn't mean that a contract would be in the same file in the same place. There's no reason to think, in a company of that magnitude, that that would be the case. And there is certainly no evidence to that effect, Your Honor.

THE COURT: Well, you would know whether that were the case, and you presented no evidence to the fact that it isn't --

MR. LIEBELER: Then you're declaring an adverse inference against me on a discovery issue. But the fact is that if there are plaintiffs out there with Bernard type of contracts, that's an individual inquiry with respect to the plaintiffs. You can put that as my burden in discovery, but that doesn't change its nature as an individualized inquiry. I mean, it's still an individual inquiry no matter which way you slice it. You may believe that there's one contract out there, but to the extent that they exist, that's an individual inquiry. And, Your Honor, if the parties have an oral agreement that has the same terms, the Vendor Partner Manual doesn't necessarily change that. I don't see how the Vendor

Partner Manual, as a reflection of my intent, okay, necessarily changes the terms of a contract. If you and I have an oral contract, and then I write a note to myself in the Judge Policy Contract Manual that says I'm no longer going to abide that, or I'm going to change the terms of that, unless I tell you about it, and you acquiesce to it, that doesn't change the terms of the contract as a matter of law. It can't.

THE COURT: No. But what the testimony presented was, that your policy, your stated intent in your policy is what, in fact, the intent of both parties was.

MR. LIEBELER: That is some of the testimony. There is other testimony, for example, Mr. Clemens who came in and said the guarantee with Foster Farms was the same guarantee that was given Mr. Bernard. And that's the way we've operated for the past 11 years, when I've been the guy at Fleming who is the closest to that company. Okay? So, there's a conflict in the testimony on that, and if you believe Mr. Clemens, and maybe you don't. I don't know. But if you believe him, then the Vendor Partner Manual doesn't control that relationship either. And the fact of the matter is it's a question of, for each one of the individual vendors, whether or not you, as the Court, believe that that is true against whatever evidence I can muster on the opposite side of the coin that says that it isn't. That's exactly the sort of individualized inquiry that the cases do not permit.

Now, I think we've been around the horn on (b)(3). I want to just -- and I don't know whether the plaintiffs are contending seriously that (b)(2) is a legitimate --

THE COURT: I think they are.

MR. LIEBELER: Okay. In that case, let me address (b)(2) certification at least briefly. The advisory committee notes suggest that it's -- that the prime motivation for that is for civil rights cases in which we're seeking some sort of injunction. We got the witnesses to admit, on the stand today, that what they are seeking individually for their companies is money. That's monetary relief that is not an injunction. Mr. Martyn stood up in opening and said, we want two things. We want an accounting and we want the funds turned over. The accounting there is only adjunct to the actual turnover of the funds. That's monetary relief. (b)(2) is not an appropriate vehicle for monetary relief. It's just not used for that purpose. You've got to use (b)(3) for that purpose. And there are cases that say so, including In Re Jackson National Life Insurance, at 183 F.R.D. 217. That's a case that's not cited in our brief, Just because of the way the briefing -- the (b)(2) argument was not well articulated until Mr. Werb's reply. That's no harm, no foul. But that case addresses the issue. And what it says is when you've got both injunctive relief and monetary restitution -- not necessarily damage, but restitution, or monetary relief in some form, then (b)(2) is

not an appropriate class vehicle. Nothing else, Your Honor, unless you have further questions.

THE COURT: Well -- no, I have no further questions.

MR. LIEBELER: Thank you, Your Honor.

MR. WERB: Your Honor, I promise to keep my comments short. You've been most accommodating today. Thank you. And I'm going to start off by telling the Court that there's a reference by my four old daughters tell me on a regular basis, ages 18 to 23, and they refer to something that's called the "K.I.S.S. method." And the first time I heard I said, you know, what are you talking about? They said, "Dad, the K.I.S.S. method -- keep it simple, stupid." And I'm reminded of that little phrase --

THE COURT: I'm surprised you don't say that to them, though --

MR. WERB: Well, no I'm not, because we're in a professional context here. However --

THE COURT: No. To your daughters, I meant.

MR. WERB: Well, I do that, as well. But I -- there's great application of that thought here, because this is a very, very simple situation. It's not complex. The debtors have endeavored to transform this into a very complicated process when, in effect, it's extremely simple. You've heard the testimony of four prospective class members here who are geographically disbursed. You heard from Suzanne Koch, from

Turlock, California, with Foster Farms, from Ms. Farris, from Farris Produce, Frank Cangemi, from Miles Farmer's Market, both of whom are from the Cleveland area. And then you heard from Chris Frano, in Indiana. Prior to this litigation, none of the four knew each other, but yet they came together with a common bond as it related to Fleming. And that is their participation in this DSD vendor program.

You heard testimony from these witnesses today that there were different references to what the program was called. It could have been a central billing. It could have been bill through. But the fact of the matter is that irrespective of the name, or reference, the course of dealings in its relationship with Fleming was consistent. And we've established here a pattern of consistency with regard to the relationship of each of these vendor plaintiffs, with regard to Fleming and to the independent grocery retailers. We're not seeking a recovery here with regard to products that were directly shipped to the debtor. We're strictly confining ourselves to these independent retailers in which at all relevant times were viewed by these plaintiffs as the ultimate customer. You further heard testimony that in many cases a lot of these vendors had dealings with these independent retailers long before Fleming even came to town. And it was because of Fleming's desire to be the exclusive distributor and wholesaler of grocery products that it was Fleming that imposed conditions

upon these independent retailers with respect to future dealings as it relates to the plaintiffs. The difference simply related to the fact that the final invoice would be paid by Fleming as opposed to the prior course of conduct in dealings between these vendors and the customers that they would be paid directly upon provision of goods.

THE COURT: But didn't we just spend six-plus hours going through the facts, and doesn't that suggest what the debtor is asserting, that is that that each individual case requires individual inquiry as to exactly what the relationship was between the parties?

MR. WERB: Absolutely not. And that's what the debtor would make you believe.

THE COURT: Why?

MR. WERB: Why? It's because, as Your Honor pointed out, what happened back in 1992, or any other time prior to this year is not relevant. It's simply not relevant. It's the relationship that existed in 2003, as evidenced by the documentation in effect. The most recent Vendor Partner Manual specifically states that effective February 17th, 2003, that that manual shall apply to all vendors. It can't be any more explicit than that, Judge.

THE COURT: Well, except that their witnesses testified that it wasn't sent to the suppliers, and you didn't contradict that. And they also stated that they didn't apply

it. Regardless of what it says, they said they didn't apply it.

MR. WERB: You heard the testimony of Suzanne Koch of Foster Farms, who indicated that they requested a copy of this manual because they were constantly being told about --

THE COURT: Yes, but --

MR. WERB: -- policies, policies. Well, what policies?

THE COURT: But they got P-1, which was the 2002.

MR. WERB: Correct.

THE COURT: Not the '03.

MR. WERB: That's fine. But I don't see the relevance in that, because it's --

THE COURT: Well, which --

MR. WERB: -- it's the same process. I mean --

THE COURT: Well, no. Don't I have to inquire as to exactly which policy is applicable?

MR. WERB: Well, what the Court should inquire is the most recent one in effect. And the only material difference with regard to --

THE COURT: Well, it's the in effect that I've heard differing, or not clear evidence on.

MR. WERB: There is much talk here about contractual relations, oral representations --

THE COURT: Yes.

MR. WERB: -- negotiations. But yet, consistent with the witness testimony, there were no oral discussions. There were no negotiations. There were no written contracts. Instead, we have an extended period of course of dealings. That's what we have here.

THE COURT: That's the problem. Don't I have to inquire into that as to all 700 prospective members of the class before I can even determine that they are -- have any commonality?

MR. WERB: No, Your Honor, because the Court -- we know, in terms of numerosity, there are 700.

THE COURT: We know that.

MR. WERB: And this group that we've collected here, you know, is consistent with regard to the process involved in terms of the service they provided to their -- to customers.

THE COURT: But how do I know that?

MR. WERB: Well, Judge, the best way to find that out is through certifying the class so that we receive that information, which is in the possession of the debtor. You know, they talk about this Bernard & Sons contract from 1992. Now, don't you think, for a minute, that if they are hell-bent on contracts, negotiation, that they would be waving 700 different contracts and agreements before the Court? The best that they could muster was something from 11 years ago, which doesn't even relate to our four class action plaintiffs.

That's absurd. I'd be waving it, if we're going to talk about contracts. But nothing. They -- this class action is to be presumed valid unless proven otherwise. And the burden shifts to the debtor. And the debtor has not refuted the numerosity requirement. Their own witnesses have demonstrated 700 vendors out there. We didn't come up with that number. Commonality? The efforts here of all the plaintiffs are common. Typicality? They've all been aggrieved in the same fashion here. They've all had funds that belonged to them that have now been fraudulently converted to the debtor's own use to finance its operations in this bankruptcy. There's no debtor-creditor relationship here. The only nexus that we have between these vendors and Fleming is that Fleming served as a collection agent to collect the funds from the supermarket retailer and to remit those funds to the vendors absent and with the deduction of a two or three percent collection fee, a processing fee. There was no other established relationship contractually between the parties. That was the sole function. And that's where the Court's attention should be directed here. Focus on that. Because what we have here, you can't see the forest for the trees. We're talking about negotiations that never took place, oral agreements that there's been no documentation or reference to, written agreements that simply don't exist other than this one thing that's pulled out of a hat regarding Bernard & Sons.

We've heard testimony here regarding the fact that, you know, that in certain cases with regard to Suzanne Koch, and Foster Poultry Farms, in the Fedco bankruptcy, that you know, this company that went bankrupt, they had to go after and collect the funds because Fleming wasn't going to pay. So, this issue about who bears the risk of loss is absurd. And it's even documented in writing in the Vendor Partner Manual, both in 2002 as well as 2003, that Fleming is not going to bear the financial responsibility for any of these DSD shipments here.

But if the Court focuses instead on the relationship between the parties, and let's get back to Columbia Gas now, here, as Mr. Liebeler started out with his argument here, he indicated here that when we talk about a constructive trust, it's the language of the parties, the conduct of the parties which is probative of their intent. Well, what have we seen demonstrated in this Court today? We've seen a situation where each of these vendors received requests for product. They processed those requests. They delivered that product to the supermarket locations. They handed an invoice to the supermarket retailer. They sent a duplicate copy, either EDI or by -- via facsimile, or first-class mail, whatever the case might be, to Fleming. There was a consistent course of conduct that was established not only over weeks or months, but years. But it wasn't in the form of a contractual relationship. So,

we look at the conduct of both Fleming and these plaintiffs, and we look at what actually took place. And their conduct is probative of their intent. And in the case of Fleming, their fate is sealed because they've taken it to a higher level when they decided to centralize their operations. And you heard the testimony that was elicited from the deposition of Charles Meyers. Charles Meyers indicated that there was a task force that was assembled with a $12 billion company, and the fact that they wanted to centralize the procedures, that it was necessary for a company of that size to have uniform policies and procedures.

So, it was Fleming that took the next step here to document, in some fashion, what would be considered a policy. A policy is to be distinguished from a contractual relationship. A policy is what manifests the course of conduct between the parties. And if you focus on that, policies and procedures of Fleming, although three of the four witnesses did not actually see those Vendor Partner Manuals, they all indicated that prior to their testimony today, they had an opportunity to review the specific provisions dealing with the DSD invoicing guidelines. And in each case, they were consistent with regard to their testimony that in reviewing these different guidelines, although they were not exact in nature, that it was consistent with their understanding of the long-established course of dealings between each of their

respective companies and Fleming.

We qualify, under 23(b)(3). That has been, I think -- the argument has been well advanced by my colleague, Iden Martyn, this morning, as part of his argument. With respect to 23(b)(2), we're seeking injunctive relief. The form of the injunctive relief is to have these funds segregated, you know, that are in the possession of the debtor, property of which belongs to our customers, our clients, and is not property of the debtor's estate, because it is trust fund monies to which they maintained a fiduciary responsibility to our clients to see that they got paid. And they haven't done that. So, the injunctive relief is to segregate and to turn over property belonging to our clients. And the cases hold, you know, that when you're seeking injunctive relief of that nature, there are incidental amounts of monetary damages, that it's perfectly acceptable. But it's the turnover of property. So therefore, we qualify as well, under 23(b)(2), as well as 23(b)(3). Obviously, 23(b)(3), the predominance of common facts and law, I don't think could be more eloquently illustrated --

THE COURT: Well, tell me again why you think injunctive relief really is what you're seeking here. You're seeking money. I mean, whether you call it a turnover or not, I mean, I inquire when debtors say that they're filing a 542 turnover, and it's really an account receivable collection action governed by state law. I mean, don't I have to look at

the substance of what you're really looking for?

MR. WERB: Well, I'm just reminded of Your Honor's comments in one of our prior hearings in which I think it was Mr. Capozzola who raised the argument where it was, perhaps -- it may have been Matt Morris, one or the other, who made that argument to you during the Sara Lee TRO hearing. Your Honor, they're seeking injunctive relief. It's in the form of money. And your response was, as I recall, no, they're seeking the turnover of property. So, Your Honor, I'll defer back to you on that one.

THE COURT: Okay.

MR. WERB: It's a situation here where, from our perspective, and of course we know the Court has to take everything into consideration here. But if there was a case that ever called for class certification, based upon the commonality of the facts, and the issues of law, the nature of the class that we seek to be certified in this particular matter, I don't think you can find a better set of circumstances and fact. Of course, that's from our position. But we think the testimony, we think the evidence that has been proffered, support that position.

Your Honor, we've received dozens of calls from counsel around the country inquiring about this particular case. And one way or another, this Court is going to be confronted with this situation, either through the deluge of

individual adversary complaints, or through a process which is superior to that in the form of a class action certification in which we can engage in efficiency, judicial economy, not waste this Court's time, and move forward with a successful resolution. We can't lose sight of the little people out there, Your Honor. We can't lose sight of these vendors, many of whom the funds that have been withheld by Fleming can result in financial disaster to their companies. They're entitled to a day in Court. They're entitled to be adequately represented. This is the only effective mechanism available that will permit them to have their day in Court and to see that justice be served. Thank you.

MR. LIEBELER: Your Honor?

THE COURT: Yes?

MR. LIEBELER: Can you put me on a chess block, and at the end of two minutes I'm done. The last point first. There hasn't been any evidence in today's hearing of financial disaster vis-a-vis any of these plaintiffs, unlike in the EZ Mark hearing last week, and so that's just past the evidence. With respect to the risk of loss point, Mr. Werb contended that there were basically -- it's all the same for everybody. The testimony in Court as it came in was that Ms. Burklow said that sometimes Fleming bears the risk of loss. Ms. Koch said that certainly her company did with respect to the Fedco case, and we accept the bona fides of that testimony. We didn't

contradict it in Court today. But all that establishes is that sometimes the plaintiffs bear it, other times Fleming bears it. That establishes a difference, for purposes of this case, and that's why class certification is not appropriate. The Vendor Partner Manual is just like the common materials in the Johnston case --

THE COURT: Well, but --

MR. LIEBELER: -- the prospectus, whatever it might have been --

THE COURT: But the debtor's testimony was not specific on that.

MR. LIEBELER: Sure. Mr. Scott's testimony at the TRO hearing was that $700,000 in current receivables that they're going to bear. There's no question that Fleming bears it sometimes, and we did adduce evidence of that. I mean, quite frankly, we shortened that testimony in response to the Court indicating time pressure. We can articulate many specific instances in which Fleming bears losses. Are they large? Small? I mean, they do exist, and Fleming does bear losses. There's no question about that fact, and these guys really haven't contradicted that. They certainly have put on evidence that there are circumstances in which they do bear the loss, and accepting the bona fides of that testimony for today's purposes, all that yields is the conclusion is that there are material differences between the plaintiffs.

On the (b)(2) point, one last point, and that is we got Ms. Farris to admit on cross examination that she wants her invoices paid, and that's all. The injunctive relief is incidental to the monetary relief that's being sought here. Thank you, Your Honor.

THE COURT: Well, to the extent that they're seeking first and foremost to prohibit you from using their money, and that's injunctive.

MR. LIEBELER: Well, the cash management order already establishes that order. They don't need -- you know, we've been around the cash management horn so many times I don't want to revisit that. But there's no question that order exists and can be enforced against us. So, they don't need injunctive relief because that order already provides it.

THE COURT: Don't even need a TRO.

MR. LIEBELER: Now, they do have to make a proof that they are the claimant. Well --

THE COURT: Right.

MR. LIEBELER: They have to prove that they're a proper claimant under that order. But we're already under order of this Court not to spend other people's money. So, that voids that part of the injunction. And the witnesses testified that what they want is they want their invoices paid. I'm not going to characterize that as damages, because I don't want to get into colloquy between Mr. Morris and yourself. But

the fact is it's monetary relief that's being sought and that's how the (b)(2) cases look at it. It's not necessarily a damage issue. It's if there's monetary relief and that predominates, then there is no (b)(2) certification that is appropriate.

THE COURT: Well, let's talk about practicality, though. How is it best to resolve these issues? Through 700 adversary proceedings?

MR. LIEBELER: If 700 people file complaints, then the answer is yes, because it necessitates an individual review of the facts and circumstances. As we've talked about in the (b)(3) argument --

THE COURT: But the Courts have said that the commonality just need be with respect to, you know, the central legal issue, etcetera. There may be factual differences regarding the amount of the claim, or how that central issue results in relief for each of the claimants. Isn't that what's true here?

MR. LIEBELER: Your Honor, look, I mean certainly there are differences with respect to every claimant on the amount of the damages. Okay? And that's the point that you just raised. That's true.

THE COURT: But it's true with respect to every class plaintiff.

MR. LIEBELER: Of course. But I haven't argued that. Okay? I agree. I agree that if it were just a damage with

respect to each individual plaintiff, you could certify the class. But that's not the issue here. The issue goes to liability. The cases say that if liability is an individualized determination, you can't certify the class. The factual questions over the course of a 20-year relationship -- potentially a 20-plus year relationship with each plaintiff go to the intent of the parties, which is what determines the liability. The Johnston case, it's not a class. I mean, I read Johnston this morning, and I believe that case, in that language, and I can point you to the specific page, controls that issue.

THE COURT: But --

MR. LIEBELER: What I really would ask is that you take it under submission, read Johnston again with an eye to that language, and see if you think that controls this case, because we contend that it does.

THE COURT: Well, I read it in connection with the United Financial, but let me posit this. Even your witness seemed to suggest that there was a program in place for the drop ship that basically treated -- everybody in that program she treated the same. She didn't suggest that, oh, we have a different relationship with every single one of the people in there. She described the program.

MR. LIEBELER: She wasn't asked that question. I mean, in fact, she wasn't. And there -- Your Honor, there's no

evidence on that point. I mean, they didn't do it on cross. We didn't do it on direct. I mean, you know, trials are an imperfect thing. Okay? But the fact of the matter is, I would submit to you that if she said hey, we don't do this on a particular issue, and then someone faxed her the Bernard contract, her response might well be different. And that's the point. I mean, the only answer I heard from Mr. Werb on the Bernard point is, hey, there are numerous members of this class, and that's an old contract. Okay? That's not a sufficient answer to -- to the point that that establishes differences between the class members.

THE COURT: Well, there are always going to be differences. The only question is --

MR. LIEBELER: Differences that go to intent, which is the touchstone under Columbia Gas. Without intent --

THE COURT: Well, that --

MR. LIEBELER: -- you can't have a constructive trust.

THE COURT: Well, that may exclude Mr. Bernard from the class, but that does not mean that it isn't appropriate to have a class.

MR. LIEBELER: Your Honor, you know, that's an individualized determination that you have to make with respect to each individual class member. I mean, any time --

THE COURT: Well, don't you need to note that any

time you have a class?

MR. LIEBELER: Any time there's -- but any time there's bad evidence with respect to some members of the class, you can't say, well, I'm going -- you know, we define the class to exclude those people. That's not the class that Mr. Werb has sought. He hasn't excluded everyone with a written contract.

THE COURT: No, but he's defined the class as those operating under the drop ship where the debtor acted as a collection agency and collected the money and held it in constructive trust for the parties.

MR. LIEBELER: Well, his definition was, people in the DSD program who haven't been paid. That includes Mr. Bernard.

THE COURT: Well, I think in his --

MR. LIEBELER: In fact, he submitted a declaration from Mr. Bernard --

THE COURT: In his --

MR. LIEBELER: -- as a potential claimant.

THE COURT: In his brief, he defined it as those for which the debtor acted as a collection agency, and the money collected was held in constructive trust for the vendors.

MR. LIEBELER: Your Honor, in Mr. -- Mr. Werb has himself submitted a declaration from Mr. Bernard saying, essentially -- he doesn't quite say it, but it establishes all

of the elements of the class. He can't carve him out, now, at his convenience.

THE COURT: Well, if one of the plaintiffs has determined to not itself fit within the class, that doesn't eliminate the class.

MR. LIEBELER: I'm not saying that it does. If Mr. Bernard, in his declaration, said hey, Fleming owes me money, he didn't make an assertion as to whether or not he wants to opt out of the class.

THE COURT: It's not an opt out. It's I have to determine if he fits in the class in the first place.

MR. LIEBELER: And he's -- and as the class is defined in the complaint, which is what we move against, he is within the class.

THE COURT: Well --

MR. LIEBELER: There's no question about that. He's within the DSD program, and he wasn't paid. That's the definition of the class found in the first amended complaint, Paragraph 18. Now, I've gone way over two minutes. It was in response to the first questions. But I mean, I did try to quit after two minutes, Your Honor.

MR. WERB: Do I have a minute?

THE COURT: You have one minute.

MR. WERB: One minute. Okay.

THE COURT: Because I'm leaving in three.

MR. WERB: Please focus in on the four -- the fact that there were four Fleming Vendor Partner Manuals, and the fact that they needed -- the genesis for the creation of those documents was the fact to establish uniform policies consistent in dealing with all of its vendors. I can assure you that if that policy manual said that Fleming guarantees payment for DSD vendors, that counsel would be waving that, as well. But it doesn't state that. It's an affirmative position that it will not. As far as the class is concerned here, you know, you've read, on Page 4 of our reply, all persons who participate in the drop ship delivery and/or central billing, also known as bill through pass through program. And we're collectively referring to it as the DSD program of the debtors, who provided goods for non -- to non-debtor entities prior to April 1, and for which remittances have been collected by the debtors but not turned over to those persons. It can't be any clearer than that. If -- and this notion about Mr. Bernard, if Mr. Bernard doesn't fit into this situation, so what? But you -- we have proven the elements necessary to establish the formation of a class here. We have met the obligations of the four-prong test. We believe that we can conveniently fit into either 23(b)(2) or 23(b)(3), whichever the Court determines.

If there are -- and Your Honor has also pointed out that the facts don't need to be exact with regard to each party, that if they're -- you know factual differences will not

preclude the certification of the class. And if it's necessary and we find that there are other categories, this Court has the power to create subclasses, as well. But what we hear from Mr. Liebeler now is based upon speculation, what if we have this, or that? We're not going to know until we're granted class certification. Then, as these issues arise, they can be dealt with by the Court.

THE COURT: All right. Thank you. Let me make my ruling. I think we all know the factors, and I think there's been little dispute regarding the Rule 23(a) factors or numerosity. There's a potential 700 vendors who may fit within the proposed class, and those numbers come from the debtor, itself.

While there was some argument in the briefs whether or not the individual plaintiffs are representative of others, and whether or not they're -- one or more of the named plaintiffs' potential status is a PACA claimant, would mean a conflict of interest. I didn't hear the debtor to press that. And it's disputed in the reply brief, that there is, in fact, an actual conflict given the debtor's cash situation. But it's clear, from the testimony, that at least one of the named plaintiffs, one or more of the named plaintiffs is representative of the others. And it appears as though there's no question that they would otherwise adequately represent the class.

The issue really comes down to the commonality identity of issues, legal or factual, among the class plaintiffs that would make the class action mechanism of benefit both to the parties and to the Court, rather than having 700 separate actions.

There was a lot of testimony and evidence adduced on this. But if I focus specifically on the evidence presented by the debtor, I think that the answer has to be that a class is appropriate in this instance. The evidence adduced by the plaintiffs' witnesses were that there was a DSD program, a bill through program. It was defined generally. It was applicable generally to some 700 vendors. And while there may be instances where specific vendors had written contracts that were different from the vendor program as generally defined by Ms. Alexander, and by the plaintiffs themselves, I think that is simply a question of whether or not that specific vendor fits within the class, not whether the class itself can be certified.

I think the common issue, legal issue, is whether, by participation in the program, the vendor had the debtor act as its collection agency, and the debtor, whether the debtor collected funds and held those funds in constructive trust for the vendor. I realize that this issue is hotly contested, and I need not make a finding that, in fact, the '03, or the '02, or the '01 manual was what governed the program. I think it

was clear from Ms. Alexander's testimony that she felt that there was a program, and that it was, after the centralization of that department, that it was to be administered evenly. She, in fact, testified she thought the '01 or '02 manual was what governed how she treated vendors in that program, that she had participated, I think, in preparing the '01 manual. But I think the dispute is not whether or not there was a group of vendors, all of whom were treated the same way. The only question really is how they were treated, and what the effect of that is, i.e., was there a constructive trust? So, given that, I'm convinced that there is sufficient common issues of fact and law as to the legal effect of the direct -- I won't use any of the terms bill through or DSD -- of the debtor's program, I'll use it generically, to justify a class certification.

I think, with respect to whether this is -- I think, therefore, the 23(a) are met. With respect to whether or not this is a 23(b)(2) or (b)(3), I'll accept my prior ruling as law of the case, that the injunctive relief sought here is no different from that sought in Sara Lee and the other cases, and that it is an appropriate injunctive action. Alternatively, (b)(3) as stated, I think that the common issues really predominate what will be trial of this case, and that really the issues as to whether or not there's a written contract that differs with respect to a specific vendor or two are not going

to be the predominate issues that I have to address, and in fact may exclude an individual from participation in the class, if there is, in fact, a different written contract or relationship between it and the debtor than was generally applicable to all vendors in this program. So, I'll grant the motion for class certification. Do I have a form of order?

MR. WERB: Your Honor, I believe we do. But if not, in the interest of time, can we have it submitted to chambers tomorrow?

THE COURT: That's fine. All right? And thank you.

MR. CAPOZZOLA: Thank you, Your Honor. Before we adjourn, can I remind you that in the Superior Dairy and Albert Ingles Bakery matters, there's a stipulation pending before the Court to extend time for various filings? And I've been asked by counsel --

THE COURT: There is?

MR. CAPOZZOLA: -- other counsel in that case to remind you of that, because we're coming up on the date when we have to do things.

THE COURT: Well, I will say that I was here late last night signing every order. I think it was presented during my vacation. Other than those that didn't have documents. But I frankly can't tell you whether I signed that or not. But check the docket tomorrow morning and see.

MR. CAPOZZOLA: Thank you, Your Honor.

THE COURT: All right. We'll stand adjourned. Thank you.

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CERTIFICATION

I, TAMMY DeRISI, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

Tammy DeRisi Date: August 4, 2003

TAMMY DeRISI

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