IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

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

JOINT RESPONSE TO THE DEBTOR'S REQUEST FOR A PRELINIMARY RULING ON CONSEQUENTIAL DAMAGES

The following parties join in this supplemental response: WAF Marketing, Inc. (D.I. 2358); K & S Foods (2379); J. Missler's, Inc. (2399); Tripple V, Inc. (2393); Smillie's Markets (2314); R.J. Turner & Sons (2294); No Frills (2245); R & M Foods, Inc. (2394); Sooner Foods (2395); Sonoran Investments (2386); Holly Hills Market Place and Columbia Center Market Place (2400). Each of these parties operates one or more grocery stores and has a Facility Standby Agreement or related agreement with Fleming. The number listed after each party is the docket number of their original objection. These parties object to the Debtor's request for a preliminary ruling on the issue of consequential damages and in support thereof, state as follows:

PRELIMINARY STATEMENT

The Debtors request a ruling that, but for the defense of unconscionability, the consequential damages waiver that appeared in the typical Facility Standby Agreement (FSA) is valid and enforceable, asserting that the Court can make this threshold determination as a matter of law. Section 2-719(2) of the Uniform Commercial Code[1]

[1] Section 2-719(2) of the UCC provides: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title."

("UCC"), however, provides that when circumstances cause a limited remedy to fail of its essential purpose, the other remedies available pursuant to the UCC, including consequential damages, will be available. Factors that may be considered in determining whether there is a failure of a limited remedy's essential purpose include (1) the extent to which the limited remedy fails to make a party whole and (2) the extent to which one is unable to reap the full benefits of a remedy for which one bargained. The grocers who are counter-parties to the FSA's have not been made whole and are unable to reap the full benefit of their bargains. In any event, the determination is a factual issue, not a legal issue, and it is not susceptible to summary determination.

THE CONSEQUENTIAL DAMAGES WAIVER IS A LIMITED REMEDY SUBJECT TO THE CONSTRAINTS OF SECTION 2-719(2) OF THE UCC

As a preliminary matter, it is important to note that, at least with respect to the jurisdictions where these grocers operate, a waiver of consequential damages is itself a limited remedy that is subject to challenge as having failed in its essential purpose. 5 Anderson, Uniform Commercial Code at 2-719:145 provides:

> "When the limitation of remedy and the exclusion of consequential damages are regarded as an integrated provision, the failure of the limited remedy causes the exclusion of consequential damages to fail and therefore such damages may be recovered.
>
> **Rationale:** This view is supported by the logical consideration that the exclusion of consequential damages itself is a limitation of remedy and merely serves to emphasize that the only remedy of the buyer is the limited remedy already stated."

The FSA's that each grocer filing this objection entered into with Fleming are governed by the laws of Missouri, Oklahoma, Ohio and Iowa. All these jurisdictions have subscribed to the notion that a consequential damages waiver can be invalidated if the

other remedies fail in their essential purpose. See Hibbs v. Jeep Corporation, 666 S.W.2d 792 (Mo. App. 1984); Collins Radio Co. of Dallas, Tex. V. Bell, 623 P.2d 1039 (Ok. App. 1980) ("When a seller limits a buyer's remedies, he takes the chance that the remedy will fail of its essential purpose."); Goddard v. General Motors Corp., 396 N.E. 2d 761 (Ohio 1979); Brunsman v. DeKalb Swine Breeders, Inc., 952 F. Supp. 628 (N.D. Iowa 1996).

The waiver provision is standard in all of the FSA's and reads:

> "If Fleming fails to perform in any material respect any of its obligations under the Agreement, then Fleming shall be in default and ***Retailer shall have the right to immediately terminate this Agreement*** by written notice and pursue all remedies available under this Agreement by written notice and pursue all remedies available under this Agreement or law by reason of such default … All such remedies shall be cumulative, and the resort to one remedy shall not be deemed an election of remedies…. In no event whatsoever shall Fleming be liable to Retailer for, and Retailer waives, releases, covenants not to sue or make demands for any consequential damages … unless such limitation, under the circumstances, is unconscionable or violates public policy."

The consequential damages waiver provision, being included in the same clause that provides the grocers with the right to terminate, is clearly integrated with the right to terminate. Therefore, this situation is unlike that which the court considered in Chatlos Systems, Inc. v. National Cash Register Corp., 635 F.2d 1081 (3rd Cir. 1980) where the court, applying New Jersey law, held that a consequential damages waiver set forth in a separate provision from a limited remedy of repair was independent of the limited remedy and should only be subject to a challenge of unconscionability. In any event, Chatlos was decided under New Jersey law and all of the objecting grocers have FSAs or other type of agreements that are governed by the laws of states that hold a consequential damages waiver will be invalid if the remaining remedies fail in their essential purpose.

THE QUESTION AS TO WHETHER A REMEDY LIMITED BY AN EXCLUSION OF CONSEQUENTIAL DAMGES HAS FAILED IN ITS ESSENTIAL PURPOSE AND IS THEREFORE UNENFORCEABLE PURSUANT TO SECTION 2-719 OF THE UCC IS A QUESTION OF FACT THAT CANNOT BE SUMMARILY DECIDED

Each of the FSA's at issue here is governed by laws of the state where the grocer operates. All of those jurisdictions, Iowa, Oklahoma, Ohio and Missouri, hold that a consequential damages waiver is subject to challenge should the remaining remedies fail in their essential purpose, and it is well established that this issue cannot be summarily decided. 5 Anderson, Uniform Commercial Code at § 2-719:147 notes:

> "[T]he effect of a failure of the essential purpose of a limited remedy upon an exclusion of consequential damages requires an examination of the circumstances that can not be made as a question of law on a motion for summary judgment.
>
> Whether an exclusion of consequential damages is effective although a limited remedy has failed of its essential purpose, or whether it is to be deemed unconscionable under such circumstances should not be determined on summary judgment motion because that decision should 'await trial so that the court can consider all the evidence related to whether the clause is unconscionable and the effect the clause may have on the defendants."

Anderson also noted:

> "The reasonableness of a limitation of remedy is a question of to be determined by the trier of fact."
>
> …..
>
> The effect of a failure of a limited remedy upon an exclusion of consequential damages requires an examination of the circumstances that cannot be made as a question of law on a motion for summary judgment." Id. at 2-719:48.

"Whether a limited remedy has failed of its essential purpose is a question of fact." Id. at § 2-719:49.

Therefore, the grocers object to the Debtor's request that the Court summarily rule on this issue as a matter.

THE REMEDIES OF CANCELLATION AND TERMINATION, WHICH OPERATES TO RELIEVE THE GROCERS OF THEIR OBLIGATIONS TO FLEMING ARE REMDIES WHICH THE FSA ALLOWED BUT WHICH WERE NOT AVAILABLE AFTER THE PETITION DUE TO 11 U.S.C. § 362 AND WILL NOT BE AVAILABLE UPON 'CURE'

Paragraph 5(b) of the FSA provides a grocer with the right to "terminate" the FSA. Section 2-106(3) of the UCC provides: "'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' all obligations which are still executory on both sides are discharged but any right based prior to breach or performance survives." The executory obligations which a grocer would be able to discharge upon termination include: its obligations under the notes (that the Debtor now refers to as "Forgiveness Notes"), its obligations to pay a Facility Standby Fee for failing to meet its teamwork score, and the obligations of a grocer's principals to personally guaranty the performance of the grocer.

In addition to being expressly set forth in the FSA, the right to cancel and/or terminate the FSA is a standard remedy available under the UCC. Section 2-711(1) of the UCC provides:

> "Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, **and with respect to the whole if the breach goes to the whole contract (Section 2-612),[2] the buyer may cancel** …."

Section 2-106(4) of the UCC, in turn, provides:

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[2] Section 2-612 of the UCC provides:

> "(1) An 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause 'each delivery is a separate contract' or its equivalent.
>
> ….
>
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole."

> "'Cancellation occurs when either party puts and end to the contract for breach by the other and its effect is the same as that of 'termination' except that that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance."

As noted above, a "termination" pursuant to § 2-106(3) discharges executory obligations.

In other words, due to Fleming's defaults, the grocers had the right to cancel and terminate the FSA and to be relieved of any executory obligations including the obligations to meet their teamwork score or face a penalty, as well as the obligation to repay a note subject to a forgiveness contingency. These are rights set forth in both the FSA and the UCC. These are rights for which the grocers bargained but which they have been unable to exercise solely to the effect of the stay provisions of 11 U.S.C. § 362. The Debtor, having deprived the grocers of these rights due to its bankruptcy filing, now attempts to continue to hold the grocers to these obligations without making the grocers whole for the damages that they have suffered due to the Debtor's defaults.

BECAUSE THE REMEDIES OF CANCELLATION AND TERMINATION ARE NOT AVAILABLE, THEY HAVE FAILED IN THEIR ESSENTIAL PURPOSE THEREBY ALLOWING THE GROCERS TO PURSUE CONSEQUENTIAL DAMAGES

On the issue of a remedy failing in its essential purpose, Anderson writes:

> "Whether an exclusive remedy has failed of its essential purpose is controlled by whether there has been such a change of circumstances subsequent to the making of the contract as to cause such failure. That is, 'the word "circumstances" in § 2-719(2) would seem to refer to circumstances not within the contemplation of the parties at the time of contracting and circumstances not within the control of the complaining party.'" 5 Anderson, Uniform Commercial Code § 2-719:125.

The Official Comment of Section 2-719 provides:

> "[I]t is the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale

> within this Article they must accept the legal consequences that there be at least fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article."

At the time that the grocers entered into the FSA's, the circumstances were such that if Fleming defaulted in its obligations, the grocers could immediately terminate the FSA and be relieved of their obligations. The bankruptcy filing prevented this. The automatic stay hindered the grocers' ability to terminate the FSA and any attempt of the grocers to move for relief from stay prior the sale hearing would have been contested.

THE LIMITED REMEDIES HAVE FAILED TO MAKE THE GROCERS WHOLE, THEREBY FAILING IN THEIR ESSENTIAL PURPOSE

In determining whether a limited remedy fails in its essential purpose, some courts have also considered the extent to which the otherwise available limited remedies fail to make a party whole. In Elite Professionals, Inc. v. Carrier Corp., 827 P.2d 1195 (Kan. App. 1992), the court held:

> "We conclude the fact that the seller is first given the opportunity to repair or replace after the harmful occurrence does not, standing alone, bar recovery for failure of essential purpose at least in those instances where the outcome of the repair or replacement leaves the user in the position of one who has been afforded an unconscionably inadequate remedy, that is, where the user has not been afforded a reasonably "fair quantum of remedy." Whether the remedy failed in this case is a question of fact and should not have been decided on summary judgment. See 5 Anderson, Uniform Commercial Code § 2-719:29"

In Phillips Petroleum Company v. Bucyrus-Erie Company, 388 N.W.2d 584 (Wis. 1986), the court observed:

> "The essential purpose of any damage award is to make the injured party whole. *McCormick on Damages,* sec. 137, p. 560 (West, 1935). The replacement or the supply of new conforming adapters at Erie, Pennsylvania, only minusculely compensated the purchaser. The circumstances here require that the compensation fulfill the essential purpose of all damage awards--to make the innocent party whole. It is understandable that the boilerplate limit on damages may be appropriate in most cases. In most cases, the timely supplying of the deficient part will make a party whole. Not so in this case. …. [I]t is apparent that the remedy offered by Bucyrus-Erie's contract (concealed or masked in the warranty section) provides damages that are, in the circumstances, unconscionably low.
> ….
> The damage clause is unreasonable…. [I]t is our conclusion that the philosophy of damage awards expressed by this court … leads to … a conclusion consistent with the underlying philosophy of the Uniform Commercial Code that there be at least a fair quantum of remedy for breach of obligations. *See,* official comment (1), sec. 2-719 U.C.C. Accordingly, in accordance with the code, the damage remedy is not that purportedly provided in the documents, but 'remedy may be had as provided in [the code]'"

In the instant case, the grocers will clearly not be made whole by a scenario whereby the Debtor and Purchaser are excused from compensating the grocers for their consequential damages while the grocers remain liable for obligations that were subject to discharge but for the effect of the automatic stay.

CONCLUSION

For the reasons stated above, the objecting grocers request that the Court deny the Debtor's request to issue an advisory opinion that the consequential damages waiver provision are valid enforceable subject only to an unconscionability challenge.

Dated: August 6, 2003

ELZUFON AUSTIN REARDON
TARLOV & MONDELL, P.A.

/s/ Charles J. Brown, III
William D. Sullivan (No. 2820)
Charles J. Brown, III (No. 3368)
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by electronic notice, facsimile, hand delivery and/or United States Mail, First Class postage prepaid, this 6th day of August, 2003, to:

Fleming Companies, Inc.
Attn: Contracts Department
1945 Lakepointe Drive
Lewisville, TX 75057

Richard Wynne
Shirley S. Cho
Kirkland & Ellis LLP
777 South Figueroa Street
Los Angeles, CA 90017

Geoffrey Richards
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, IL 60601

Laura Davis Jones
Pachulski, Stang, Ziehl, Young, Jones & Weintraub P.C.
919 North Market Street, 16th Floor
Wilmington, DE 19801

Andrew DeNatale
White & Case
1155 Avenue of the Americas
New York, NY 10036

Dennis Dunne
Milbank, Tweed, Hadley & McCloy LLP
One Chase Manhattan Plaza
New York, NY 10005

Robert S. Hertzberg
Pepper Hamilton LLP
36th Floor, 100 Renaissance Center
Detroit, MI 48243-1157

Richard Grossman
Skadden, Arpes, Slate,
Meagher and Flome, LLP
Four Times Square
New York, NY 10036

Kenneth S. Ziman
Simpson Thacher & Barlett LLP
425 Lexington Avenue
New York, NY 10017

Joseph McMahon
United States Trustee
Office of the United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19801

I certify the foregoing to be true and correct under the penalty of perjury.

Dated: August 6, 2003

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