

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

In re:) Chapter 11
)
FLEMING COMPANIES, INC., *et al.*,¹) Case No. 03-10945 (MFW)
) (Jointly Administered)
Debtors.)
) **Hearing Date: August 19, 2003 @ 11:30 a.m.**
) **Obj. Deadline: August 12, 2003**
) **Related Docket Item: 2050**

**OBJECTION OF THE KROGER CO. TO MOTION
FOR ENTRY OF AN ORDER WITH RESPECT TO THE
RECLAMATION CLAIMS FILED IN DEBTORS' CASES**

The Kroger Co. (“Kroger”), by and through its undersigned attorneys, hereby objects (the “Objection”) to the Motion for Entry of an Order With Respect to the Reclamation Claims Filed in Debtors’ Cases (D.I. 2050) (the “Motion”). In support of its Objection, Kroger respectfully states as follows:

1. On April 1, 2003 (the “Petition Date”), the above-captioned debtors (the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

2. Prior to the Petition Date, Kroger, through certain of its wholly-owned subsidiaries, including Pace Dairy Foods Company (“Pace”), sold food product to the Debtors on credit (the “Goods”).

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

3. On April 2, 2003, Kroger demanded in writing that the Debtors return the Goods pursuant to section 2-702(2) of the Uniform Commercial Code and section 546(c) of the Bankruptcy Code (the “Demand, a true and correct copy of which is attached hereto as **Exhibit A**). Kroger enclosed a listing of the Goods, by invoice and purchase order number, delivered to the Debtors in the reclamation period.

4. On April 14, 2003, Kroger filed a verified complaint seeking an order compelling the Debtors to return the Goods, or alternatively an allowed administrative claim in the amount of the aggregate invoice price of the Goods in the Debtors’ possession as of April 2, 2003.

5. Instead of returning the Goods, the Debtors filed their Reclamation Procedures Motion,² seeking to prohibit reclamation claimants such as Kroger from attempting to reclaim their goods and setting up procedures to deal with the Debtors’ reclamation claims.

6. On April 22, 2003, the Court entered the Reclamation Order, pursuant to which, the Debtors were to file a report (the “Report”) listing what the Debtors believed to be valid reclamation claims. (*See* Reclamation Order, ¶ b.) The Debtors were further required to provide to Kroger and each reclamation claimant a “comprehensive, detailed, and customized information packet that sets forth the basis for the reconciled reclamation amount set forth in the Report.” (*See* Reclamation Order, ¶ c.)

7. The Reclamation Order also provided that reclamation claimants are prohibited from seeking to reclaim their goods. (*See* Reclamation Order, p. 5.) Kroger therefore agreed to temporarily forego prosecution of the adversary proceeding pending the Debtors’ determination of Kroger’s claim in accordance with the Reclamation Order.

² All capitalized terms not otherwise defined herein shall have the meanings given those terms in the Motion.

8. On May 6, 2003, Kroger received a request from the Debtors for additional information regarding Kroger's reclamation claim, preferably by way of an e-mail with an attached spreadsheet in Microsoft Excel format. A true and correct copy of the Debtors' request is attached hereto as **Exhibit B**.

9. In compliance with the Debtors request, on May 30, 2003, Kroger sent an e-mail to the Debtors with the requested information formatted in Microsoft Excel. (*See Exhibit C*). The Excel spreadsheet again listed the invoice numbers and corresponding purchase order numbers representing the Goods entitled to reclamation.³

10. On July 21, 2003, the Debtors filed the Motion. The Debtors also mailed to Kroger a letter, dated July 21, 2003 (the "Letter," a true and correct copy of which is attached hereto as **Exhibit D**), which purports to explain the basis for the Debtors' reconciliation of Kroger's reclamation claim. The Letter provides the results of the Debtors' calculation of what it claims is Kroger's "Maximum Valid Reclamation Claim." The Debtors calculated Kroger's Maximum Valid Reclamation Claim at \$442,872.95. The Debtors arrive at this number by reducing Kroger's claim by \$414,599.29 for "Purchase Orders Not Identified" and \$162,428.94 for "Receipts Consumed by Letter Date" for a total reduction of \$577,028.32.

11. By the Motion, the Debtors seek, among other things, an order, which would disallow the difference between Kroger's valid reclamation demand and the Maximum Valid Reclamation Claim, thus capping Kroger's maximum reclamation claim at \$442,872.95. The Motion provides that the amount will be so capped unless a timely objection is filed.

³ In the April 2, 2003 letter, Kroger originally demanded the return goods with an aggregate invoice price of \$1,061,442.27. After April 2 and in preparing the response to the Debtors' May 6, 2003 request, Kroger noted that a small percentage of those goods were outside of the reclamation period. Thus, the May 22 e-mail adjusts Kroger's claim to \$1,049,381.01.

OBJECTION

12. Kroger objects to any reduction of its valid and timely reclamation demands. The Debtors asserted bases for reducing Kroger's claim are without any factual or legal basis.

13. The Debtors' first purported basis for reducing Kroger's claim is that Kroger's "reclamation assertions ... for which record of the receipt for purchase orders provided by the claimant was not found in Debtors' receiving data." (See Motion, 4; Letter.) Kroger is at a loss as to how the Debtors can seek to reduce Kroger's valid reclamation claim by \$414,599.29 by claiming that they cannot identify the purchase order numbers for the Goods. Kroger has twice provided the Debtors with a listing of their purchase order numbers, which they provide to Kroger. (See **Exhibits A and B**.) This anomaly is no doubt attributable to the Debtors' admitted inability to deal with their own informational systems. (See Motion, ¶ 20.) Kroger's claim should not be reduced on this basis.

14. The Debtors also seek a reduction in Kroger's reclamation claim for "Receipts Consumed by Letter Date," which, according to the Debtors, "represents reclamation assertions . . . for which record of the receipt date for purchase orders provided by the claimant was during the Sell Through Period,⁴ adjusted to reflect consumption of associated items through the assertion letter date." Although not entirely clear, the Debtors seem to be claiming in this reduction category that it consumed or re-sold certain goods prior to receiving the associated reclamation demand for the return of those goods. This assertion is based not on actual facts, but rather on estimates that Debtors prepared by product type. As stated above, the Debtors seek to reduce Kroger's claim by \$162,428.94 on this basis.

⁴ The Debtors define the "Sell Through Period" as the period of time between the start of the reclamation period and the date of the reclamation demand.

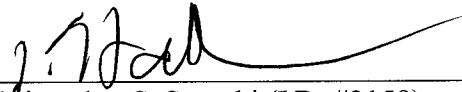
15. Even assuming *arguendo* that this is a valid legal basis by which to reduce a reclamation claim, it is highly unlikely that the Debtors re-sold or consumed any of the Goods for which Kroger sought reclamation. By the Debtors' own admission, the weighted average days to consumption of Kroger's Goods (mostly cheese) is 20.6 days. (See Fleming Companies, Inc. Reclamation Claim Detail by Claim (final page of the Letter at **Exhibit C**)). The "Sell Through Period" for Kroger, as calculated by the Debtors, is March 22, 2003 through April 2, 2003, a period of 11 days. If the Debtors do not consume Kroger's food product until, on average, 20.6 days after receipt, how did they consume \$162,428.94 worth of the Goods in only 11 days? Kroger's claim should not be reduced on this basis.

16. At the very least, the hearing on the Motion, as it pertains to Kroger, should be continued indefinitely to allow the adversary proceeding to resume.

CONCLUSION

17. Kroger objects to any reduction of its reclamation claim. Because the Debtors brought this Motion, it is their burden to prove that Kroger's otherwise facially valid and timely reclamation claim should be disallowed in any amount. At the very least, the hearing on the Motion, as it pertains to Kroger, should be continued indefinitely to allow the adversary proceeding to resume. Accordingly, Kroger respectfully requests that the Court deny the Motion as it pertains to Kroger.

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