IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	Case No. 03-10945 (MFW)
Fleming Companies, Inc., et al.,	:	Jointly Administered
	:	
Debtors.	:	Original Sale and Cure Objection Deadline:
	:	07/28/03 at 4:00 p.m.
	:	Original Hearing: 08/04/03 at 11:30 a.m.
	:	Contract Assignment #: 2055
	:	Proposed Cure Amount: $0

Related to Docket Items 1906, 1984 and 2002

OPPOSITION OF KEIL'S FOOD STORES TO DEBTORS' MOTION FOR ORDER (A) APPROVING ASSET PURCHASE AGREEMENT WITH C&S WHOLESALE GROCERS, INC. AND C&S ACQUISITION, LLC, ETC., POTENTIAL ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS, ETC. ON THE GROUNDS THAT IT RECEIVED NO NOTICE OF MOTIONS AND ADDITIONAL GROUNDS AND RESERVATION OF RIGHTS

Keil's Food Stores, a California corporation ("Keil's") by its undersigned counsel, hereby submits its "Opposition of Keil's Food Stores to Debtors' Motion for Order (a) Approving Asset Purchase Agreement with C&S Wholesale Grocers, Inc. and C&S Acquisition, LLC, etc., Potential Assumption and Assignment of Certain Executory Contracts, etc. on the Grounds That No Notice of Motions and Additional Grounds and Reservation of Rights." Keil's files this opposition now due to the fact that Keil's did not receive notice either of the motion for approval of the sale, or of the potential assumption and assignment of certain executory contracts.

Therefore, under the United States Constitution and case law due process grounds, any order purportedly entered adversely affecting Keil's claims and/or interests is void.

Keil's also sets forth in preliminary, abbreviated fashion, its substantive objections to the motions, at least as to the motions for approval of the sale and assumption and assignment of executory contracts which purport to effect Keil's, or any relations between Keil's and Fleming Companies, Inc. et al. (hereinafter collectively "Debtors" or "Fleming"). Keil's is filing these abbreviated objections at this time to give the Court and Debtors notice as soon as reasonably feasible, pending a hearing on a motion directed to: (1) the absence of notice to Keil's; and (2) Keil's substantive objections. Keil's hereby reserves the right to supplement this opposition to further amplify the stated grounds, to add additional grounds to its objection, to supplement its objection with evidentiary matter and legal authority, and to bring such additional pleadings and proceedings as may be necessary to address the state of the record regarding any order entered on the sale and assumption motions.

I. FACTUAL STATEMENT

A. Introductory Statement and Absence of Notice to Keil's.

Keil's has only recently retained counsel in San Diego and in Delaware and has therefore not had a full opportunity to determine all of the facts related to the issue of notice. Counsel addresses the certificates of service regarding the alleged notice the Debtors, their counsel or the noticing agent purport to have given of these motions to Keil's. Declaration of Michael E. Busch dated August 14, 2003 ("Busch Declaration") filed concurrently. Regardless of whether the Debtors and their agents believe that they have given notice, the fact is that Keil's received no notice of any of these motions, or, for that matter, of any other proceeding in this case until

receipt of the Claims Bar Date Notice dated July 28, 2003 (the date on which opposition to the sale motion and to the proposed cure amounts was due). See Declaration of Rick Keil dated August 13, 2003 ("Keil Declaration") filed concurrently.

As set forth in the Keil Declaration, Keil's operates two stores in San Diego, California and receives mail from a hundred or more vendors and other parties per week. To handle that volume, Keil's has a centralized system for opening, tracking and responding to any and all mail at its headquarters at 3015 Clairemont Drive, San Diego, California 92117. Thus, whether mail is sent to Keil's stores at 7403 Jackson Drive in San Diego or at 3015 Clairemont Drive in San Diego, all mail is brought to the Clairemont Drive location and processed through the corporate office. Mr. Keil's two assistants are in charge of monitoring the mail, which is processed five days per week. (Keil Decl. ¶3).

Keil's has experienced no problems with its mail handling system in the period from April 1, 2003, when this case was filed, to date. Keil's has no record of receiving any notice in this case prior to the bar date notices. Had any notice been received, it is Keil's practice to attend to it promptly. Mr. Keil instructed that a thorough search be made to locate any prior notices in this case that might have been received, and he was informed that none were located. Based on its procedures for the handling of its mail, and this search, Keil's believes that it did not receive notices in this bankruptcy case prior to the bar date notices, copies of which are attached as Exhibit "A" to the Keil Declaration. (Keil Decl. ¶3). Keil's received multiple copies of the Notice and Proof of Claim form, sent to two addresses. This contrasts with the earlier notices, which were not received at all. (Keil Decl. ¶ 3 and Ex. "A")

Keil's does not know why it did not receive the notices, because it is not privy to how the Debtors, Debtors' counsel, or the outside noticing agent, Bankruptcy Management Corporation ("BMC"), prepared and served the notices. Based upon counsel's preliminary review of the motions and affidavits of service, there are certain inconsistencies in the way Keil's was listed that may have contributed to the Debtors' failure to provide actual notice to Keil's in connection with these motions. As set forth in the Busch Declaration, it appears that the Debtors scheduled Keil's as having a Facility Standby Agreement in the Cure Amount Schedule, then at some point, in a pleading not even purportedly served on Keil's, changed the listing to a Supply Agreement (Busch Decl. ¶ 6). Keil's did not receive any of those notices. (Keil Decl. ¶¶ 2 and 3). The first notices received were copies of the bar date notice. (Keil's Decl. ¶¶ 2 and 3).

As will be set forth below, Keil's in fact had a Supply Agreement (not a Facility Standby Agreement) with the Debtor, as well as other agreements, which are relevant to the substance of Keil's objections to the motions. However, the inconsistency of the scheduling of Keil's suggests that, notwithstanding that Keil's is listed on schedules attached to affidavits of service filed on behalf of the Debtor for these motions, Keil's name and address may in fact have been omitted or deleted in the system that generated the mailing labels. In any event, these inconsistencies raise a doubt about the accuracy of the affidavits of service and support Keil's position that it did not receive notice.[1]

---

1 On all of the documents filed with the Court reviewed by Keil's counsel to date, that list Keil's with an address, Keil's is listed at the 3015 Clairemont Drive address. The only notices that Keil's did actually receive were multiple copies of the notice of the bar date with the proof of claim form. Half of those multiple notices were addressed to the 3015 Clairemont Drive address and the other half were addressed to the Jackson Drive address. The Jackson Drive address, so far as Keil's has been able to identify, did not appear in any of the prior pleadings filed with the Court. Thus, it appears that the notices of the claims bar date came from a different generation of the mailing lists. Keil's receipt of the bar date notice does not suggest that Keil's received the earlier notices, but rather supports the view that something was altered, edited or changed in the mailing lists, or a different list was used to generate the bar date notice addresses.

B. Background of Keil's Relationship with The Debtor

As set forth in the Keil Declaration beginning at paragraph 4, Keil's and Fleming entered into a series of agreements which constituted one transaction dated as of February 1, 1996. Under the agreements, Fleming made a loan evidenced by three promissory notes, which was used to pay off a prior indebtedness to third parties and to fund the acquisition by Keil's from Fleming of the store located at 7403 Jackson Drive, San Diego. The parties contemporaneously entered into a Supply Agreement. (Keil Decl. ¶4). The acquisition is the subject of a purchase and sale agreement between Keil's and Fleming, which has, as a condition precedent, the execution of the Loan Agreement and the Supply Agreement. That these agreements constitute one single transaction is demonstrated by the following facts, among others:

(1) the loan documents and Supply Agreement reference each other;

(2) the execution of the Supply Agreement (in the form of an exhibit attached to the Loan Agreement) was expressly made a condition precedent to the making of the loan (Keil Dec., Exhibit "B" Loan Agreement, ¶ 4.1(d) at 4);

(3) Keil's covenanted in the Loan Agreement to "comply in all respects with the Supply Agreement" (id., Loan Agreement at ¶ 6.21 at 12);

(4) one of the events of default under the Loan Agreement is "Termination of Supply Agreement Thirty (30) days after the Supply Agreement with any Retailer or an Affiliate of Retailer and Lender is terminated for any reason other than through a breach by Lender, or there is an uncured default by Retailer under the Supply Agreement" (id., Loan Agreement ¶ 7.1(s) at 14);

(5) the Supply Agreement recites "that Fleming has made certain loans to Retailer" (id., Exhibit "C" Supply Agreement ¶ iv at 1);

(6) the term of the Supply Agreement states that "Retailer cannot terminate this Agreement until all indebtedness due and owing to Fleming by Retailer has been paid in full and there are no defaults by Retailer under any agreements between Retailer and Fleming" (id., Supply Agreement ¶ 4 at 3);

(7) the default provision for the Supply Agreement expressly references that disputes "are to be resolved by arbitration as provided in the Loan Agreement..." (id., Supply Agreement ¶ 7 at 3);

(8) the Loan Agreement states that "this Agreement and all of the Loan Documents shall be governed by, and construed in accordance with, the internal laws of the State of California" (id., Loan Agreement ¶ 8.7 at 17);

(9) the Supply Agreement expressly provides that it is governed by California Law (id., Supply Agreement ¶ 10 at 4); and

(10) California Civil Code §1642 provides that, "(s)everal contracts related to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

As a result, Keil's believes that the entire relationship between Keil's and Debtors, including the Supply Agreement, Loan Agreement, the security interest in the leaseholds contained in the deeds of trust, the promissory notes and all other related documents are one transaction. As discussed below, this is a significant issue, both for determining what can be sold, assumed and assigned and for purposes of determining whether certain claims asserted by Keil's are properly considered as matters of set-off or of recoupment. The Debtors' sale motion specifically refers to, or is intended to effect, rights of set-off, if not also rights of recoupment.

Subsequent to the initial transaction and documents executed as of February 1, 1996, the parties entered into a number of amendment modification documents, including five amendments and modifications to the Loan Agreement. (Keil Decl. ¶5).

The Supply Agreement expressly provides that Fleming shall meet certain specified service levels. If Fleming falls below "the average service level of at least 94% for the immediate past 4-week period," and the service level does not exceed 94% in the subsequent 4-week period, it is "deemed a default by Fleming hereunder." (Keil Decl., Supply Agreement ¶ 6).

Fleming is in material breach of the Supply Agreement for a period of time prior to and during the bankruptcy. Keil's position is that Fleming's material breach was a total, incurable breach of contract which, under basic California contract law, excuses further performance by

Keil's. In addition to excusing Keil's from further performance, this incurable default gave Keil's the right to obtain its supply requirements elsewhere. That breach also created a claim for damages in favor of Keil's against the Debtors arising out of the Debtors' total breach which, under the doctrine of recoupment, reduces and perhaps eliminates or generates a net affirmative claim in favor of Keil's, against the remaining balance of the loan portion of the transaction.

Keil's anticipates that the Debtors, or the purchaser under the motion, may contest some of these facts, including the assertion that the breach by the Debtors were material breaches sufficient to be a total breach and thereby terminate Keil's obligations. Under the Agreements, any such dispute is subject to the arbitration clause contained in the Loan Agreement and expressly made part of the Supply Agreement. Any such issues are not appropriate for resolution as part of this motion. The Debtor may also claim that the modification agreements and certain releases given in connection with those modifications, release or otherwise reduce Keil's claims. The breaches by Fleming come after the modifications, and, in any event any such disputes are to be resolved within the arbitration provision of the documents, or perhaps in other proceedings in this Court. Certainly, resolution of those disputes is beyond the scope of the sale, assumption and cure aspects of the motion.[2]

C. <u>Issues Before This Court Affecting Keil's.</u>

The issues before the Court raised by Keil's objections include: (1) Whether Keil's is to be denied the opportunity to object to the motions and actions taken against it when it did not in fact receive notice; and (2) Assuming the answer to the first question is no, the resolution of the substantive objections asserted by Keil's.

---

[2] Keil's understands that in the hearings on the motions, based upon objections of other parties, the Court decided that the issue of assumption of each individual contract is deferred until a specific notice is given of intention to assume that contract. Keil's does not appear on the notice re initial assumption and assignment dated August 4, 2003.

II.
SUMMARY STATEMENT OF OBJECTIONS

A. Failure to Give Actual Notice of the Motions Makes Any Orders on the Motions Void and Ineffective as to Keil's.

The Third Circuit has recognized that under Supreme Court authority, "(d)ue process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Folger Adam Security, Inc. v. Dematteis/MacGregor, J.D., 209 F. 3d 252, 265 (3d Cir. 2000), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 94 L.N. 865, 70 S.Ct. 652 (1950) (citations omitted).

An order entered under Bankruptcy Code Section 363 cannot affect a party unless that party is accorded proper advance notice and an opportunity to be heard. As the court stated in Western Auto Supply Co. vs. Savage-Arms (In re Savage Industries), 43 F.3d 714, 720 (1st Cir. 1994), "[n]otice is the cornerstone underpinning Bankruptcy Code procedure . . . . Under the Code, therefore, the debtor-in-possession or trustee must ensure "parties-in-interest" adequate notice and opportunity to be heard before their interests may be adversely affected." See also In re Times Sales Finance Corp., 445 F.2d 385 (3rd Cir. 1971). "If the notice requirement of the due process clause is not satisfied, the order is void." Citicorp Mortgage vs. Brooks (In re Ex-Cel Concrete Co.), 178 Bankr. 198, 203 (9th Cir. BAP 1995) (citations omitted).

As the facts contained herein and in the Keil and Busch Declarations set forth, it is clear that the Debtors seek to "adversely affect" Keil's interest and claims, and that the "notice" which the Debtors purported to give Keil's was not, in fact, "reasonably calculated. . . . to apprize [it] of the pendency of the action and afford [Keil's] an opportunity to present [its] objections." Folger Adam Security, Inc. v. Dematteis/MacGregor, J.D., 209 F. 3d at 265. As a result, Keil's should

be permitted to voice and have heard each of its substantive objections to the sale, assumption and assignment proposed by the Debtor.

B. Brief Summary of Substantive Objections.

Keil's has filed this objection to give the Debtors and other interested parties notice of the problems with notice to it and to attempt to get Keil's objections on track with other issues related to these motions raised by other parties. Keil's is aware that many other parties similarly situated have raised most, if not all, of the same objections set forth herein, and for good reason: there are many other grocers that the Debtors intend to effect in the same manner. Keil's has focused this opposition on the notice issues (set forth in detail above), which may be unique to Keil's, and on the factual background specific to Keil's relationship with the Debtors. Keil's will now briefly outline substantive grounds of its objection, but reserves the right to add to or amplify those grounds by supplemental pleadings and proceedings.

Briefly, Keil's objections include the following:

1. To the extent that the motions attempt to separate the benefits and burdens of the single transaction and assign only the notes, the motions violate the requirement that executory contracts be assumed (and assigned) in total, including all burdens and obligations. A debtor's rights under an executory contract cannot be sold under Section 363 unless or until the contract is assumed and assigned. In re Access Beyond Technologies, Inc., 232 B.R. 32, 47 (Bankr. D. Del. 1999). A debtor is not free to assume and assign only part of a single integrated transaction; it must assume and assign the entirety, if at all. Folger Adam, 209 F. 3d at 264 ("bankruptcy law generally does not permit a debtor or an estate to assume the benefits of a contract and reject the unfavorable aspects of the same contract.") See also In re Phillips Services, Inc., 284 B.R. 541, 546-47 (Bankr. D. Del. 2002) (merger agreement and promissory notes togther constituted an

integrated agreement, were interrelated and hence inseparable, and had to be assumed and assigned together); In re Foxmeyer, 286 B.R. 546, 575 (Bankr. D. Del. 2002) (if a series of closely-related steps in a transaction are merely the means to reach a particular result, the court will treat all of the steps as part of a single integrated transaction). Moreover, a Section 363 sale can not be free and clear of recoupment rights, which constitute a defense. See Folger Adam, 209 F. 3d at 261-62.

2. To the extent that Fleming is already in material total breach of the Supply Agreement (a) the breach can not be cured and (b) there is no executory contract remaining to be assumed and assigned and/or the Agreements can not be assumed and assigned. As other creditors have also argued to this Court, and which applies equally to Keil's, the Debtor is not in a position to assume and assign under Section 365 the Supply Agreement, given the Debtor's continued material defaults, which have, and continue to cause, substantial economic detriment to Keil's. See In re Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1033-35 (9th Cir. 1997); In re New Breed Enterprises, Inc., 278 B.R. 314, 320-21 (Bankr. S.D. N.Y. 2002). Here, the Debtors have materially breached the Supply Agreement by reason of the failure to perform Fleming's obligation to maintain a continuous supply of product to Keil's at the contracted service level. As a result of this breach, and to avoid damage to its business, Keil's was forced to replace Fleming as a supplier of goods. The Debtors' breach, in addition to being material, is incurable, and results in a termination of the Supply Agreement. Such termination renders it incapable of being assumed and assigned. Claremont Acquisitions, 113 F. 3d at 1033-35.

3. To the extent that Fleming attempts to split the transaction and sell the notes or any other part of the benefits or burdens of the relationship between Fleming and Keil's "free and clear," the Debtor is improperly attempting to deny Keil's its rights to recoupment. A debtor

may not strip an amount due to it under an executory contract from the rest of the contract and transfer the amount due to it free of the rest of the contract. Folger Adam, 209 F. 3d at 264 n. 13 (lead opinion), 266-68 (concurrence).

4. To the extent that Fleming is attempting to split the transaction and sell the notes or any other part of the benefits or burdens of the relationship between Fleming and Keil's "free and clear", and to the extent that Fleming and/or the purchaser argues that there was more than one transaction at issue, the motions improperly attempt to deprive Keil's of its rights of offset under Section 553 and applicable nonbankruptcy law. There is no basis in the Bankruptcy Code to support the Debtors' contention (as it has contended vis-a-vis other creditors' claims on this related matter) that a creditor's right to setoff or recoupment may be automatically extinguished by a mere sale of property of the estate. Recoupment requires claims which arise under a common contract: "[it] is an equitable remedy which permits the offset of mutual debts when the respective obligations are based on the same transaction or occurrence." In re HQ Global Holdings, Inc., 290 B.R. 78, 80 (Bankr. D. Del. 2003). Recoupment rights may not be divested by a sale free and clear. Folger Adam, 209 F.3d at 261. Setoff rights may not be defeated by a §363 sale, certainly not a sale done without proper notice. Id. at 262-64.

5. To the extent that the motions attempt to fix a cure amount ahead of approval of any assumption, without adequate notice, and without a determination whether there is an executory contract that can be assumed and what constitutes part of the executory contract, the motion attempts to improperly deprive Keil's of the opportunity to have the Court individually determine the Debtors' right and ability to assume and assign, the cure amount and Keil's rights to contest that cure amount. Keil's affirmatively asserts that it has a substantial claim which would constitute a cure amount and which it is presently determining. The motions can not

properly deprive Keil's of the opportunity to assert that cure amount. In addition, and although the Debtors have taken the position (with other creditors) that it need not cure the default if the default is non-monetary, the Debtor is wrong: as the Ninth Circuit Court stated in Claremont Acquisition, Section 365(b)(2)(D) only excuses cure of penalty rates, not all damages arising out of breaches of non-monetary obligations. 113 F. 3d at 1033-35.

6. To the extent that there are binding arbitration provisions in the Loan Agreement and in the Supply Agreement, the motions attempt to improperly deprive Keil's of the right to arbitrate. Court have generally illustrated a strong preference for allowing an arbitration, pursuant to a clause in an agreement between the debtor and the non-debtor, to proceed. See Hays & Co. vs. Merrill Lynch Pierce Fenner & Smith, Inc., 885 F.2d 1149 (3rd Cir. 1989) (an arbitration provision in a contract is enforceable in a bankruptcy case); see also Crysen/Montenay Energy Co.v. Shell Oil Co. (In re Crysen/Montenay Energy Co.), 226 F.3d 160 (2d Cir. 2000), cert. den., 2001 U.S. LEXIS 2203 (2001) (affirming stay of adversary proceeding so arbitration could go forward in non-core matter and reading U.S. Lines (infra)case as implying that bankruptcy courts have no discretion to decline to stay non-core proceedings so that arbitration can go forward); United States Lines, Inc. v. American Steamship Owners Mutual, etc. (In re United States Lines, Inc.), 197 F.3d 631 (2d Cir. 1999), cert. den., 2000 U.S. LEXIS 2221 (2000) (reinstating bankruptcy court's refusal to stay adversary proceeding in favor of arbitration where matter was core involving insurance coverage and mass tort claims; court recognizes that bankruptcy court must still consider, even as to core matters, whether to defer to arbitration).

7. To the extent that Fleming and/or the purchaser may argue that there was some limitation on consequential damages arising out of language in the documents (Keil's does not

believe that this issue exists with respect to Keil's documents), Keil's asserts that there are no such limits and if those limits exist, they are unenforceable.

8. To the extent that Fleming and/or the purchaser assert that the effect of the motions would be to make a determination that the documents constitute more than one transaction, and/or that they are not integrated and/or that the notes can be separated from the other obligations, Keil's is entitled to a specific and individualized determination based upon its documents and transactions of those issues before any decision can be made on an assignment of any executory contract and a determination whether it is assumable and/or whether the notes can be sold.

III
CONCLUSION

Keil's understands that, although there has been a failure of notice as it relates to Keil's, the Court has already held the hearing on August 4, 2003, received supplemental briefing and had a further hearing on August 7, 2003. Moreover, Keil's understands that other parties continue to file pleadings related to the objections. However, Keil's respectfully submits that it can not be deprived of its due process rights to have its objections heard and that it is entitled to receive this Court's rulings on those objections as an objecting party. Thus, for example, the form of order marked to show changes submitted by Debtors' counsel on August 6, 2003 purports to list Keil's as a party making no response. To the extent that an order is entered purporting to made any determination of Keil's rights based on that order, the order is and should be ineffective and invalid as to Keil's. The Court needs to consider and rule on Keil's objections after allowing it full and proper briefing.

Debtors and perhaps the purchaser and the committees that may support the transaction may argue that Keil's objections should not hold up the determination of motions that are

purportedly critical and time sensitive for the benefit of the overall estate. It is respectfully submitted that this is not so and overstates the issue. The motions address numerous assets that are being offered for purchase, and contacts to be assigned, including numerous other notes. The Court can and need only carve out Keil's notes, Supply Agreement and relationship with Fleming from the overall C&S transaction. Doing so will not prevent the rest of the C&S transaction from going forward on whatever terms this Court may approve. The motions provide a six month period to assume and assign contracts. Keil's Supply Agreement is not on the list for hearing on initial assumption and assignment set for August 14, 2003. There is no reason that the Court cannot protect all parties by allowing the rest of the transaction to go forward, if it so chooses, while carving out Keil's relationship and agreements until Keil's receives proper notice, an opportunity to object and an appropriate hearing on its objections.

Keil's understands that this Court has already deferred ruling, pending a future hearing on the assumability of certain facility standby agreements held by other creditors in this case (e.g., Puckett Grocery Company, Inc., GLN, Inc. and its subsidiaries, Dale's Food Store, Inc., Price

Chopper Foods, Inc., MAL Enterprises, Inc., K3rd, Inc. and Fiver Rivers Food Group, to name a few). At a minimum, this Court must do the same for Keil's.

Dated: August 14, 2003

Respectfully Submitted,

McCARTER & ENGLISH
919 North Market Street, Suite 1800
P.O. Box 111
Wilmington, DE 19899
Ph: (302) 984-6308
Fax: (302) 984-6399

By: /s/ Thomas Walsh
Thomas Walsh, Esq.

-and-

PYLE SIMS DUNCAN & STEVENSON
Michael E. Busch, Esq., (CSBN 89549)
Kathleen A. Cashman-Kramer., Esq. (CSBN 128861)
401 B Street, Suite 1500
San Diego, CA 92101
Ph: (619) 687-5200
Fax: (619) 687-5210

Attorneys for Creditor and party in interest
Keil's Food Stores, a California corporation