

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re:

FLEMING COMPANIES, INC., et al.,

Debtors.

) Chapter 11

) Case No. 03-10945 9 (MFW)

) (Jointly administered)

**DEBTORS' OBJECTION TO THE MOTION OF PRICE CHOPPER  
FOODS, LLC, GEOFF STICKLER, GAIL STICKLER, RICHARD GUEST AND  
MAGGIE BLOHM FOR AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY  
TO COMMENCE AN ACTION BASED ON FRAUD AGAINST THE DEBTORS AND TO  
DECLARE CERTAIN DEMAND NOTES AND DOCUMENTS VOID**

The captioned Debtors and Debtors in possession ("Debtors") hereby object to the Motion of Price Chopper Foods, LLC, Geoff Stickler, Gail Stickler, Richard Guest and Maggie Blohm ("Price Choppers") for an Order Granting Relief from the Stay to Commence an Action Based on Fraud.

**INTRODUCTION**

1. Fleming supplied food, grocery and related products to Price Choppers pursuant to a Facility Standby Agreement ("FSA") and related notes and guarantees. Price Choppers asks this Court to lift the stay so that it may commence a fraud case in Arizona state court and there

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<sup>1</sup> The "Debtors" are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCD Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; CIM Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., LLC.; Fleming Foods of Texas, LP.; 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.

assert a \$2.9 Million dollar claim that would have to be paid from the Debtors' estate. Price Choppers' Motion fails for two primary reasons.

2. First, Price Choppers cannot show "cause" to lift the stay as a matter of law because Price Choppers is seeking to lift the stay in order to *commence* state court litigation designed to *obtain possession of property in the Debtors' estate*. In such a situation, "cause" to lift the stay cannot exist, and Price Choppers' motion should be rejected on this ground alone.

3. Second, Price Choppers cannot meet its burden under *Rexene Products* to show cause to lift the stay. To prevail under *Rexene Products*, Price Choppers must show (1) Fleming will not be prejudiced by lifting the stay; (2) that the balance of harms favors Price Choppers; and (3) that Price Choppers has a reasonable chance of prevailing on the merits of its claim. See *In re Rexene Prods., Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992). Price Choppers fails on all three.

4. Price Choppers doesn't even try to show that the Debtors will not be prejudiced by this Motion, conceding that the first prong favors Debtors. Indeed, any argument that Debtors will not be prejudiced must fail, for Price Choppers seeks to void its notes and guarantees, worth approximately 2.9 million dollars. Prejudice to the Debtors is clearly established. As to the second prong, Price Choppers' principal argument that it may have to pursue multiple parties if the stay is not lifted is wholly inadequate to tip the balance of harms in its favor.

5. The last prong favors Fleming as well because the conclusory allegations Price Choppers makes on its fraud allegations are not adequate to carry its burden of showing cause.<sup>2</sup> Additionally, Fleming contends that Price Choppers does not have a reasonable chance of prevailing on the merits of the claim.

6. Price Choppers and Fleming had an arms-length business relationship that involved neither fiduciary relationships nor any misrepresentations on the part of Fleming; tort

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<sup>2</sup> Debtors have filed contemporaneously herewith a Motion for a Continuance so that Debtors be permitted discovery into the numerous unsupported and conclusory factual allegations that underlie this motion.

remedies, of course, are frowned upon in that context, and Price Choppers' motion is a transparent attempt to use tort law to forestall Debtors from collecting on \$2.9 Million worth of contractual obligations based on notes and guarantees validly executed by the parties. Price Choppers has little chance to prevail on the merits.

#### Discussion

A. **This court should reject Price Choppers' motion because Price Choppers seeks to commence an action in state court in order to obtain property of the Debtors' estate.**

7. Price Choppers moves this Court to lift the automatic stay so that Price Choppers may commence an action seeking a declaration that the FSA, notes and guarantees are "void and awarding Movants damages relating thereto." (Price Choppers' Motion ("PC Motion") at ¶ 5). Despite the fact that these notes and guarantees are assets of the estate, which Price Choppers seeks to remove from the estate, Price Choppers asserts, without citation, that the underlying motion involves "non-core matters" that bear "only a limited connection to the Debtors' cases." (PC Motion at ¶ 14). Price Choppers' argument falls flat when faced with the clear language of the Bankruptcy Code, which states that "Core proceedings include, but are not limited to -- . . . (O) other proceedings affecting the liquidation of the assets of the estates or the adjustment of the debtor-creditor or the equity security holder relationship." 28 U.S.C. § 157(b)(2)(O). *See also e.g.*, 28 U.S.C. § (b)(2)(E). Price Choppers unequivocally seeks to "adjust" the debtor-creditor relationship, to the detriment of the Debtors and all of the Debtors' creditors, and to the sole benefit of Price Choppers.

8. Not only does Price Choppers seek to lift the stay so that a state court may hear a core bankruptcy matter, but further Price Choppers seeks to lift the stay so that it may *begin* such an action. Courts faced with motions to "commence" actions in state court -- as opposed to motions to allow matters pending in state court to proceed -- have routinely denied such motions. *See e.g., In re Cook*, 232 B.R. 554, 557-58 (Bankr. D. Conn. 1999) (noting that balancing standards for lifting the stay apply only to litigation pending prior to the bankruptcy filing and holding that "hardship inflicted on the debtor to defend in another state, in an action

not yet commenced, the issue of his liability or nonliability to the movant outweighs the movants' understandable desire to litigate in one forum with all potentially liable parties."); *In re Television Studio School*, 77 B.R. 411, 411-12 (Bankr. S.D.N.Y. 1987) (finding that no modification of the stay is warranted when the underlying action was not commenced prior to bankruptcy).

9. This Court should reject Price Choppers' attempt to lift stay as a matter of law.

**B. This Court Should reject Price Choppers' Motion because Price Choppers has not shown good cause to lift the stay.**

10. Price Choppers, as movant, has the burden of proving a prima facie case of "cause" to lift stay. *See In re Pursuit Athletic Footwear, Inc.*, 193 B.R. 713, 718 (Bankr. D. Del. 1996). To carry this burden, Price Choppers must show (1) the Fleming will not be prejudiced by lifting the stay; (2) that the balance of harms favors Price Choppers; and (3) that Price Choppers has a reasonable chance of prevailing on the merits of its claim. *See In re Rexene Prods. Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992). Price Choppers has failed to carry its burden.

11. First, as discussed in Section A, Price Choppers cannot show that Debtors will not be prejudiced by lifting the stay, as Price Choppers seeks to move a core bankruptcy matter involving almost three million dollars of the Debtors assets away from the bankruptcy court, where the Debtors and its creditors are already prepared to address issues concerning creditor-debtor relationships, to a state court that has heard no evidence, received no motions, and in which no discovery has been taken. Prejudice to the Debtors in this matter is manifest.

12. Second, Price Choppers cannot show that the balance of harms tips in favor of Price Choppers. Although Price Choppers eschews discussion of the *Rexene Products* test in its motion -- apparently recognizing the problems it has in prevailing under this standard Third Circuit test for lifting stays -- Price Choppers does raise arguments tangentially related to its possible prejudice. These arguments fail to tip the scales in its favor.

13. Price Choppers' initial argument is that, due to the "proposed" sale to C&S, Price Choppers FSA, notes and guarantees may be split between C&S and Debtors, causing an "extreme waste of judicial resources" because Price Choppers may need to litigate against both C&S and Debtors. (PC Motion at § 12). As this Court is aware, the sale to C&S has already occurred, and so any argument by Price Choppers that lifting the stay will forestall any splitting of ownership of the underlying contracts and documents is simply moot. Additionally, Price Choppers alleges that its cause of action accrued prior to the commencement of Debtors' bankruptcy case. Thus, any potential prejudice raised by Fleming's sale to C&S should not work to the harm of Fleming, as it was Price Choppers who decided to sit on its rights and wait four and one half months after Fleming's bankruptcy filing before asserting this cause of action.

14. Price Choppers' next argument is that the transactions at issue all occurred in Arizona and involve Arizona law. (PC Motion at ¶ 13). Assuming *arguendo* that these arguments are true, the issues of the Debtors' assets, its creditors, and its reorganization are all being discussed and planned in this court room. Any prejudice to movants in this matter is negligible compared to the prejudice of Debtors in having to litigate its liability or non-liability in relation to its assets in a different state.

15. Finally, Price Choppers argues that this Court does not have jurisdiction to hear its action because Price Choppers will demand a jury trial, "which this Court cannot conduct." (PC Motion at ¶ 14). Wrong again. Price Choppers provides no citation for this argument, and once again Price Choppers' argument falls flat in the face of the Bankruptcy Code, which clearly states that the Bankruptcy Court "may conduct" jury trials if designated by the District Court, and if all parties consent. 28 U.S.C. § 157(e). Price Choppers' potential harms are small in relation to the potential harm to the Debtors, and thus Price Choppers fails to carry its burden on prong two of the *Rexene Products* test.

16. As to the third prong, Price Choppers simply asserts that its likelihood of success on the merits is high because Debtors committed fraud. (PC Motion at ¶¶ 16, 17). Such unsupported assertions are wholly inadequate to carry Price Choppers' burden on this prong.

17. Although Debtors contend that Price Choppers can not show that cause exists when it seeks to commence an action in state court to remove property from the Debtors' estate, and further that Price Choppers has not shown "cause" to lift the stay in this matter because it has not carried its burden under the *Rexene Products* test, Debtors contend in the alternative that the issue of likelihood of success on the merits can not be decided without discovery. Accordingly, Debtors have filed a concurrent motion for a continuance of this matter to allow for discovery.

**Conclusion**

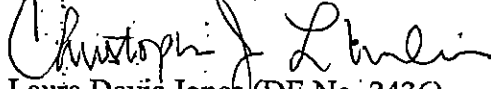
Price Choppers has failed to meet its burden. This Court should refuse its request to lift the stay, and should accordingly deny Price Choppers' motion.

Dated: September 2, 2003

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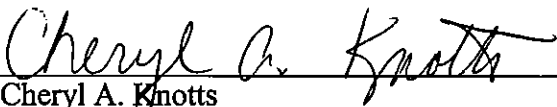
IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: ) Chapter 11  
)  
Fleming Companies, Inc., et al.,<sup>1</sup> ) Case No. 03-10945 (MFW)  
) (Jointly Administered)  
Debtors. )

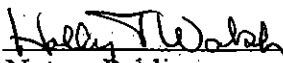
**AFFIDAVIT OF SERVICE**

Cheryl A. Knotts being duly sworn according to law, deposes and says that she is employed by the law firm of Pachulski, Stang, Ziehl, Young, Jones & Weintraub P.C. and that on the 2<sup>nd</sup> day of September 2003 she caused a copy of the following documents to be served upon the following service list(s) in the manner indicated:

1. Debtors' Objection to the Motion of Price Chopper Foods, LLC, Geoff Stickler, Gail Stickler, Richard Guest and Maggie Blohm for an Order Granting Relief from the Automatic Stay to Commence an Action Based on Fraud Against the Debtors and to Declare Certain Demand Notes and Documents Void.

  
Cheryl A. Knotts

Sworn to and subscribed before  
me this 2 of September 03

  
Notary Public

My Commission Expires: 02/11/04

<sup>1</sup> 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.

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