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.	)	

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER MODIFYING THE AUTOMATIC STAY IN CONNECTION WITH THE DISMISSAL OF CORE-MARK INTERNATIONAL, INC. AS A THIRD-PARTY DEFENDANT IN CERTAIN LITIGATION

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), hereby submit this motion (the "Motion") for entry of an order modifying the automatic stay for the specific and limited purpose of dismissing one of the Debtors, Core-Mark International, Inc., as a third-party defendant in connection with certain litigation between Lorillard Tobacco Company as plaintiff, and N and M Liquor and Hank Ngor as defendants. In support of this Motion, the Debtors respectfully state as follows:

Jurisdiction

1. This Court has jurisdiction over the Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

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[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.

2. Venue of this proceeding and the Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory basis for the relief requested herein is section 362(d) of Title 11 of the United States Code as amended from time to time (the "Bankruptcy Code").

Background

4. On October 14, 2002, Lorillard Tobacco Company ("Lorillard") filed a complaint with the United States District Court Central District of California captioned as *Lorillard Tobacco Company, Plaintiff(s) vs. N and M Liquor, Hank Ngor, Defendant(s)*, Case Number CV-02-07997 (the "Action"). The Action is for damages and injunctive relief against N and M Liquor ("N&M") and Hank Ngor ("Ngor"). In the Action, Lorillard alleged that N&M and Ngor sold and offered for sale counterfeit Newport® cigarettes which infringed upon Lorillard's registered trademarks. On December 12, 2002, N&M and Ngor filed a joint third-party complaint (the "Third-Party Complaint") against Core-Mark International, Inc. ("Core-Mark").[2]

5. On April 1, 2003, the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases. An official committee of unsecured creditors was appointed on April 14, 2003.

6. Upon the Debtors' bankruptcy filing, action on the Third-Party Complaint was automatically stayed pursuant to section 362 of the Bankruptcy Code. The Debtors recently

[2] In the Third-Party Complaint, it is stated that the Lorillard action is against (1) Sarun, Inc., a California Corporation erroneously sued as N and M Liquor and (2) Emrith W. Ngor, erroneously sued as Hank Ngor. For purposes of this Motion, the Debtors will refer to the parties as named in the Action.

have learned that Lorillard, N&M, and Ngor are entering into a settlement regarding the underlying litigation and are prepared to dismiss the Third-Party Complaint.

Request for Relief

7. By this Motion, the Debtors seek entry of an order modifying the automatic stay for the sole and limited purpose of allowing the dismissal of the Third-Party Complaint against Core-Mark.

Basis for Relief

8. Section 362(d) of the Bankruptcy Code provides that a party in interest may seek modification of the automatic stay for cause. Section 362 reads in part, "(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning, such stay . . . for cause . . ." 11 U.S.C. § 362(d)(1). The legislative history of Section 362 clearly contemplates "cause" to include permitting litigation to be concluded in another forum. H.R. Rep. No. 95-595, 95th Cong., 1st Sess., 343-344 (1977) ("[A] desire to permit an action to proceed to completion in another tribunal may provide another cause") (quoted in In re Fowler, 259 B.R. 856, 858 (Bankr. E.D. Tex. 2001)). "Some courts have developed a balancing test to determine whether 'cause' exists. In determining whether or not cause exists, the bankruptcy court must balance the inherent hardships on all parties and base its decision on the degree of hardship and the overall goals of the Bankruptcy Code." In re Opelika Mfg. Corp., 66 B.R. 444, 449 (Bankr. N.D. Ill. 1986), In re C & S Grain Co., Inc., 47 F.3d 233, 238 (7th Cir. 1995).

9. In the present instance, no hardship will be placed on the Debtors or any other party by a modification of the automatic stay. Indeed, in this instance, a modification of the automatic stay will benefit the Debtors by allowing the dismissal of an action against one of

the Debtors, Core-Mark. Therefore, the Debtors believe that their request is appropriate under the circumstances and constitutes cause for the modification of the automatic stay.

WHEREFORE, the Debtors respectfully request that the Court (a) enter an order modifying the automatic stay for the sole and limited purpose of allowing the dismissal of the Third-Party Complaint against Core-Mark and (b) grant such other and further relief as is just and proper.

Dated: September 3, 2003

Respectfully submitted,

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