

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Fleming Companies, Inc., <u>et al.</u> , <sup>1</sup>	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
Debtors.	)	
	)	<b>Related Docket No. 3498</b>
		<b>Objection Deadline: TBD</b>
		<b>Hearing Date: TBD</b>

**OBJECTION TO MOTION OF GEORGIA-  
PACIFIC CORPORATION FOR AN ORDER RESOLVING  
ITS RECLAMATION CLAIMS FILED IN THE DEBTORS' CASES**

Deutsche Bank Trust Company Americas, in its capacity as Administrative Agent, and JPMorgan Chase Bank, in its capacity as Collateral Agent and Syndication Agent (together, the “Agents”), on behalf of themselves and on behalf of those certain prepetition and postpetition secured lenders (collectively, the “Lenders”), by and through their undersigned counsel, hereby file this objection to the motion of Georgia-Pacific Corporation (“Georgia Pacific”) for an Order Resolving Its Reclamation Claims Filed in the Debtors’ Cases (the “Motion”) and respectfully represent as follows:

---

<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.

1. Pursuant to that certain Credit Agreement, dated as of June 18, 2002, the Debtors are indebted to the Lenders in the aggregate principal sum of not less than \$604 million, together with interest accrued thereon, plus costs, fees and expenses (the ‘Pre-Petition Debt’). The Pre-Petition Debt is secured by, among other things, duly perfected, legal, valid, binding and enforceable first-priority liens and security interests on all of the Debtors’ existing and after acquired inventory.

2. On May 7, 2003, this Court entered a final order (the ‘DIP Order’) approving that certain Credit Agreement (the ‘DIP Credit Agreement’), dated as of May 6, 2003, between and among the Debtors, the Agents and those Lenders party thereto (the ‘DIP Lenders’). Pursuant to Section 364(d)(1) of the Bankruptcy Code, the DIP Order grants the Agents and the DIP Lenders a post-petition security interest in substantially all of the Debtors’ assets, including enforceable first-priority liens and security interests in all of the Debtors existing and after acquired inventory. The DIP Order also provides the Agents and the pre-petition Lenders with valid replacement liens in substantially all of the Debtors’ assets, including enforceable liens and security interests in all of the Debtors existing and after acquired inventory.

3. While the Agents have no objection to the Motion to the extent that it is seeking nothing more than a Court approved process for determining the amount of any valid reclamation claim that Georgia Pacific may possess, the Agents do object to the Motion to the extent that Georgia Pacific is seeking either an administrative claim or a lien on account of any such reclamation claim that it may validly establish.

4. As is well established, this Court cannot determine the amount of any administrative claim or lien to be granted to Georgia Pacific under section 546(c) of the Bankruptcy Code until it first establishes the right of a seller to reclaim goods and the value of

any such right. See In re Primary Health Systems, Inc., 258 B.R. 111, 117-18 (Bankr. D. Del. 2001); Pester Ref. Co. v. Ethyl Corp. (In re Pester Ref. Co.), 964 F.2d 842, 846-47 (8th Cir. 1992); Toshiba America, Inc. v. Video King of Illinois, Inc. (In re Video King of Illinois, Inc.), 100 B.R. 1008, 1016 (Bankr. N.D. Ill. 1989). However, in order to establish the value of such rights, the Court must first determine what would have happened to the seller of goods had it sought to exercise its reclamation rights outside of bankruptcy. Video King, 100 B.R. at 1016. In this regard, the existence of secured creditors with valid superior security interests, such as a blanket lien on all inventory and other assets, is crucial to the analysis. Id. at 1016-17.

5. Section 2-702(3) of the UCC as codified and adopted in most states provides that a “seller’s right to reclaim under subdivision (2) is *subject to* the rights of a buyer in ordinary course or other good faith purchaser under this subdivision.” U.C.C. § 2-702(3) (emphasis added). It is well settled law, including holdings by this Court, that a secured creditor with a floating blanket lien constitutes a “good faith purchaser” under Section 2-702(3). See Primary Health, 258 B.R. at 114-15 (noting that “it is well-established that . . . a creditor with a prior perfected security interest in inventory which contains an after-acquired property clause is a good faith purchaser under the UCC”); In re Victory Markets Inc., 212 B.R. 738, 742 (Bankr. N.D.N.Y. 1997) (absent a “showing of bad faith, a holder of a prior perfected, floating lien on inventory will be treated as a good faith purchaser with rights superior to those of a reclaiming seller.”); In re Leeds Building Products, Inc., 141 B.R. 265, 268 (Bankr. N.D. Ga. 1992). Thus, as the Lenders here hold valid, prepetition floating liens on all of the Debtors’ inventory, such liens clearly have priority over any reclamation rights that Georgia Pacific may have pursuant to Section 2-702(3), regardless of whether the Lenders are ultimately determined to be oversecured or undersecured.

6. Accordingly, the Agents submit that, to the extent that Georgia Pacific is seeking such relief (and establishes a valid reclamation claim), it should not, at this time, be granted either an administrative claim or a lien pursuant to Section 546(c).<sup>2</sup> This is especially true since, to the extent that it is determined that the Pre-Petition Debt exceeds the value of the floating liens on all of the Debtors' inventory, Georgia Pacific cannot establish that its reclamation claim is something other than valueless. See Primary Health, 258 B.R. at 117 (holding that a reclamation creditor is not entitled to receive an administrative or secured claim under section 546(c)(2) where a creditor's reclamation right is valueless because a secured creditor has a floating lien on all of a debtor's inventory and its claim exceeds the value of the inventory).<sup>3</sup> In such an instance, to grant the reclaiming creditors an administrative claim or lien under section 546(c) would provide such creditors a "windfall". Id. See also Pester Oil, 964 F.2d at 847 (the "bankruptcy court does not 'deny reclamation' in recognizing that the reclamation right no longer has value; therefore, the alternative remedies of § 546(c)(2) do not come into play."); Victory Markets, 212 B.R. at 743; Leeds Building, 141 B.R. at 270 ("in order to be entitled to a lien or administrative priority claim, pursuant to § 546(c)(2) of the Bankruptcy Code, a seller must show that its right to reclaim has some value outside of the bankruptcy context"); cf. Sandoz Pharm. Corp. v. Blinn

---

<sup>2</sup> Furthermore, the Agents submit that to the extent that Georgia Pacific may ultimately be granted an administrative claim such claim should not be paid until after the Lenders are paid in full and to the extent that Georgia Pacific may ultimately be granted a lien such lien should be junior in all respects to the liens of the Lenders.

<sup>3</sup> If an undersecured secured creditor forecloses on goods to be reclaimed outside of bankruptcy and uses the entire proceeds to pay down its Pre-Petition Debt, the reclamation claim would be valueless. Pester Oil, 964 F.2d at 847; Video King, 100 B.R. at 1017. If the reclamation claim would be valueless outside of bankruptcy, then that claim is "equally valueless in the bankruptcy context, and the claimants would be entitled to no administrative claim or lien for the denial of the change to exercise this valueless right." Video King, 100 B.R. at 1017. See also Victory Markets, 212 B.R. at 743 (where valueless, "the remedies of an administrative priority claim or lien under Code § 546(c)(2) are unavailable to the seller").

Wholesale Drug Co., 164 B.R. 440, 443 (Bankr. E.D.N.Y. 1994) (finding that, even if a reclaiming seller were granted an administrative claim or lien, that it would be valued at zero).

7. Finally, any order which is ultimately entered granting Georgia Pacific an administrative claim or lien under Section 546(c) should state explicitly that such claims are subject to the rights of the Lenders in the Debtors' inventory. See Video King, 100 B.R. at 1017 (holding that reclamation rights cannot be sustained absent determination of secured creditor's rights in goods to be reclaimed); Pester Oil, 964 F.2d at 8457 (“[s]ince most secured creditors are good faith purchasers under the UCC, [section 2-702] has the effect, in priority terms, of placing the reclaiming seller behind the insolvent buyer's secured creditors who have security interests in the goods ...”). Thus, to the extent that Georgia Pacific may ultimately be granted an administrative claim such claim should not be paid until the Pre-Petition Debt is paid in full and to the extent that Georgia Pacific may ultimately be granted a lien such lien should be junior in all respects to the liens of the Lenders. See Primary Health, 258 B.R. at 116 n.5; Victory Markets, 212 B.R. at 743.

### Conclusion

WHEREFORE, the Agents respectfully request that this Court (a) deny the Motion as to any request by Georgia Pacific for either an administrative claim or a lien under Section 546(c) of the Bankruptcy Code on account of any reclamation claim established by Georgia Pacific and (b) grant such other and further relief as this Court deems just and proper.

Dated: September 10, 2003

GREENBERG TRAURIG, LLP

/s/ William E. Chipman, Jr.  
Scott D. Cousins (No. 3079)  
William E. Chipman, Jr. (No. 3818)  
The Brandywine Building  
1000 West Street, Suite 1540  
Wilmington, DE 19801  
(302) 661-7000

and

WHITE & CASE, LLP  
Andrew P. DeNatale  
Daniel P. Ginsberg  
1155 Avenue of the Americas  
New York, New York 10036-2787  
(212) 819-8200

Counsel for Deutsche Bank Trust Company  
Americas, as Administrative Agent and  
JPMorgan Chase Bank, as Collateral Agent  
and Syndication Agent