IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
FLEMING COMPANIES, INC., et al.,[2]	)	Case No. 03-10945 (MFW)
	)	
Debtors.	)	Jointly Administered

Hearing: October 20, 2003 at 2:00 p.m.
Objections due: October 13, 2003 at 4:00 p.m. Prevailing Eastern time

DEBTORS' MOTION FOR ORDER APPROVING COMPROMISE AND SETTLEMENT WITH SUPERIOR DAIRY, INC. AND ALFRED NICKLES BAKERY, INC.

Fleming Companies, Inc. and its affiliates, the debtors and debtors-in-possession (the "Debtors" or "Fleming") in the above-captioned case, hereby move (the "Motion") this Court for entry of an order (the "Order") approving a compromise and settlement with Superior Dairy, Inc. ("Superior") and Alfred Nickles Bakery, Inc. ("Nickles") pursuant to section 363 of title 11 of the United States Code (the "Bankruptcy Code") and Federal Rule of Bankruptcy Procedure 9019(a). In support of this Motion, the Debtors respectfully represent as follows:

[2] The Debtors are the following entities: Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark International, 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. (collectively, the "Debtors").

Jurisdiction

1. The Debtors filed voluntary petitions for relief in this Court under Chapter 11 of the Bankruptcy Code on April 1, 2003 (the "Petition Date"). The Debtors' bankruptcy cases are being jointly administered pursuant to an Order entered by this Court on April 3, 2003.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L).

3. Venue of this case and this Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicate for the relief requested herein is section 363 of the Bankruptcy Code and Fed. R. Bankr. P. 9019(a).

Background

5. Prior to the Petition Date, Superior and Nickles made program drop ships to retailers pursuant to the Debtors' central billing program (also known as direct store delivery or DSD and hereafter the "Central Billing Program"). Pursuant to the Central Billing Program, Superior and Nickles would make programmed drop ships in conjunction with store level weekly billing programs. The goods sold through the Central Billing Program were replenished at the store level on a regular basis by Superior and Nickles. Pursuant to the Central Billing Program, the Debtors paid Superior and Nickles for products which Superior and Nickles delivered directly to Debtors' approved retailer customers, pursuant to an electronic invoice (Nickles) or a hard copy (Superior) transmitted to the Debtors. The Debtors invoiced the retailer for the goods shipped by Superior and Nickles , and the retailer remitted payment to Fleming.

6. On or about April 23, 2003, Superior and Nickles filed complaints ("Complaints") initiating in the Bankruptcy Court adversary proceedings styled Superior Dairy Inc.. v. Fleming Companies, Inc., *et. al.*, Adversary No. 03-53034 and Alfred Nickles Bakery, Inc. v. Fleming Companies, Inc., *et. al.*, Adversary No. 03-53033 (the "Adversary Proceedings") for Declaratory Relief, Injunctive Relief, an Accounting, Constructive Trust and Conversion. In the Complaint, Superior and Nickles allege, *inter alia*, that the Debtors had failed to pay them monies collected from the retailers under the Central Billing Program and that the funds paid to the Debtors by the retailers were held in constructive trust for the benefit of Superior and Nickles. The Debtors have filed answers to the Complaints denying all essential allegations in the Complaints.

7. On May 12, 2003, the Bankruptcy Court entered a Temporary Restraining Orders (the "TRO's") in the Adversary Proceedings. Pursuant to the TRO's, the Debtors paid the amount of $51,497.33 to Superior and $141,763 to Nickles and placed $37,092 and $202,997.82 in segregated accounts for Superior and Nickles respectively, pending the final resolution of the Adversary Proceedings.

8. After thoroughly analyzing their respective positions with respect to the claims alleged in the Complaints, the Debtors on the one hand and Superior and Nickles, on the other hand, have resolved to settle all disputes among the parties arising out of the facts alleged in the Complaints. The specific terms of the settlements are set forth in the Settlement Agreements attached hereto as **Exhibits A** and **B** (the "Settlement Agreements").

9. The essential terms of the proposed compromises are as follows:

(a) Upon approval of the Motion by this Court, the Debtors shall pay Superior the sum of $8,991 in good funds and the Debtors shall pay to Nickles the sum of $12,246 in good funds. Superior and Nickles shall be entitled to retain the remainder of the funds paid to them by the Debtors pursuant to the TRO's, which amounts shall not be the subject of any future claim or avoidance action. In addition, Superior shall have an allowed unsecured claim in the amount of $28,101 and Nickles shall have an allowed secured claim in the amount of $190,751.

(b) Additional amounts of roughly $49,800.00 remains disputed ("Disputed Funds"). Nickles and Superior contend that they have delivered goods worth approximately $43,000 and $6,800 respectively, to retailers and have not been paid for such goods. The Debtors contend that Nickles and Superior did not properly invoice the Debtors for these deliveries pursuant to the requirements of the Central Billing Program and that the Debtors have not billed the retailers for these goods or collected any portion of the Disputed Funds from them. The Debtors will segregate $39,800 representing 80% of the Disputed Funds (hereafter the "Segregated Funds"), pending efforts of Nickles and Superior to contact the appropriate retailers to determine whether the retailers have paid the Debtors for the goods at issue and the timing of the alleged payments. In the event that a retailer contends that it has paid the Debtors for the goods at issue, Nickles and Superior shall use their best efforts to obtain documentary evidence

of such payment and the timing of said payment from the retailer and provide such evidence to the Debtors as part of the parties efforts to consensually determine the disposition of the Segregated Funds. To the extent the parties agree that the Debtors have collected some or all of the funds at issue from retailers, and whether the funds were received prepetition or postpetition, the Debtors will pay to Nickles or Superior (as appropriate) 80% of the amounts it received postpetition and Nickles and Superior shall have allowed supplemental unsecured claims for the remaining 20%. The Debtors shall pay Nickles and Superior 20% of the amounts it received prepetition and Nickles and Superior shall have allowed supplemental unsecured claims for the remaining 80%. In the event the parties are unable to agree upon the disposition of the Segregated Funds, Nickles and Superior shall have until the September 15, 2003 bar date for filing unsecured claims in these Chapter 11 cases to file a motion with the Bankruptcy Court for a determination of its rights, if any, to the Segregated Funds. If a timely motion for a determination of the parties' rights to the Segregated Funds is not filed by September 15, 2003, any and all rights Nickles and/or Superior may have to the Segregated Funds shall be deemed waived and relinquished and the Debtors shall be relieved of any obligation to segregate the Segregated Funds.

(c) Upon approval of the Motion by this Court, the Debtors and Superior and Nickles shall file a stipulations pursuant to which the TRO's shall be vacated and the Debtors, Superior and Nickles shall be relieved of their

obligations under the TRO, including the Debtors' obligation to segregate funds for the benefit of Superior and Nickles, except to the extent provided above;

(d) As soon as practical after the parties have either agreed upon the disposition of the Segregated Funds or Court has entered a final order with respect to the disposition of the Segregated Funds, the parties shall execute a stipulation dismissing the Adversary Proceedings, with prejudice, each party to bear its own costs and attorneys' fees;

(e) The parties shall mutually release claims arising out of the facts alleged in the Complaints and related matters as set forth in detail in the Settlement Agreements; and

(f) The Debtors release shall not constitute a release or waiver of any of the Debtors' claims or causes of action arising out of or relating to amounts paid to Superior or Nickles outside of the Central Billing Program and the releases of Nickles and Superior shall not constitute a release or waiver of: their unsecured claims as allowed pursuant to the Settlement Agreements.

Relief Requested

10. By this Motion, the Debtors seek entry of an order, pursuant to section 363 of the Bankruptcy Code[3] and Bankruptcy Rule 9019(a), approving the Settlement Agreements.

[3] In relevant part, section 363 provides "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1).

Basis For Relief Requested

11. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides that "on motion by the trustee and after a hearing, the bankruptcy court may approve a compromise or settlement." Settlements are favored in the bankruptcy context "[t]o minimize litigation and expedite the administration of a bankruptcy estate." Martin v. Myers, 91 F.3d 389, 393 (3d Cir. 1996); In re Genesis Health Ventures Inc., 266 B.R. 591 (Bankr. D. Del. 2001). The Supreme Court has recognized that "in administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims in which there are substantial and reasonable doubts." In re Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

12. The U.S. Supreme Court has stated that in determining the fairness of a compromise, the court should:

> form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968). The Third Circuit, applying TMT Trailer in the context of a settlement pursuant to Bankruptcy Rule 9019(a), has set forth four factors to be considered:

I. the probability of success in litigation;

II. the likely difficulties of collection;

III. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and

IV. the paramount interest of the creditors.

Martin v. Myers, 91 F.3d at 393.

13. Approval of a proposed settlement is within the "sound discretion" of the bankruptcy court. Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995). Thus, the bankruptcy court must determine whether the proposed settlement is in the "best interests of the estate." See In Re Martin, 91 F.3d at 393; see also In re Genesis Health Ventures Inc., 266 B.R. at 620; In the Matter of Energy Coop., Inc., 886 F.2d 921, 927 (7th Cir. 1989). Notwithstanding the foregoing, the bankruptcy court should not substitute its judgment for that of a trustee or debtor in possession. Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1311 (5th Cir. 1985); In re Curlew Valley Assocs., 14 B.R. 506, 511-13 (Bankr. D. Utah 1981). In particular, the bankruptcy court must not decide the numerous questions of law or fact raised in the litigation, but rather should canvass the issues to see whether the settlement falls below the lowest point in the range of reasonableness. See In re Penn Trans. Co., 596 F.2d 1102, 1114 (3d Cir. 1979); Cosoff v. Rodman, 699 F.2d 599, 608 (2d Cir. 1983), cert. denied, 464 U.S. 822 (1983).

14. Based upon the foregoing standards, the Debtors submit that the Settlement Agreements and compromises with Superior and Nickles should be approved because they are in the best interests of the estates. Simply put, litigating the issues raised by the Complaints poses a significant risk to the estates.

15. As a preliminary matter, the Settlement Agreements will allow the Debtors to avoid costly and time-consuming litigation. The Debtors have already incurred substantial

expenses relating to discovery and pre-trial motions, and the Debtors expect to incur even greater expenses if the litigation proceeds.

16. Moreover, there are significant risks associated with the substance of the disputes with Superior and Nickles. Without prejudice to any potential defenses or positions that may be asserted by the Debtors, there is a reasonable chance that Superior and Nickles will prevail on their claim that the funds the Debtors received from the retailers are held in constructive trust for their benefit. In fact, at the hearing on motions for temporary restraining orders, this Court concluded that Superior and Nickles, have a reasonable likelihood of prevailing on the merits of its constructive trust claim. The discovery conducted date has demonstrated that the parties have conflicting views on who bore the risk of loss in the event of the failure of a retailer to pay for the goods delivered by Nickles and Superior and there is no guarantee that a trial would result in a favorable decision for the Debtors, yet the Debtors will continue to face significant litigation expenses.

17. Accordingly, the Debtors respectfully submit that approval of the Settlement Agreements is in the best interests of the Debtors' estates, and that the Settlement Agreements falls within the range of reasonableness and otherwise satisfies the factors identified herein.

Notice

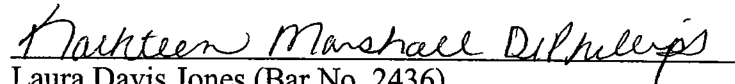
18. Notice of this Motion has been given to: (i) the Office of the United States Trustee; (ii) Counsel to the Official Committee of Unsecured Creditors; (iii) Counsel to Superior and Nickles and (iv) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of

the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

WHEREFORE, the Debtors respectfully request the entry orders, substantially in the forms attached to the Settlement Agreements and granting the relief requested herein and such other and further relief as this Court deems just and proper.

Dated: September 18, 2003

PACHULSKI, STANG, ZIEHL, YOUNG,
JONES & WEINTRAUB P.C.



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