

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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

**OBJECTION OF H.J. HEINZ COMPANY L.P. TO DEBTORS' MOTION FOR ENTRY  
OF AN ORDER WITH RESPECT TO THE RECLAMATION CLAIMS  
FILED IN THE DEBTORS' CASES**

H.J. Heinz Company L.P. ("H.J. Heinz") objects to the Debtors' Motion for Entry of An Order With Respect to the Reclamation Claims Filed in the Debtors' Cases (the "Reclamation Determination Motion") and states as follows:

**BACKGROUND**

1. On April 1, 2003 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").
2. Prior to the Petition Date, H.J. Heinz shipped certain product to the Debtors.
3. H.J. Heinz made a timely reclamation demand upon the Debtors (the "Reclamation Demand"). H.J. Heinz reclaimed all goods received by the Debtors during the period set forth in UCC Section 2-702 and Bankruptcy Code Section 546(c).
4. The amount of the Reclamation Demand is \$1,747,981.42.<sup>1</sup>

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<sup>1</sup> In addition to the Reclamation Demand, H.J. Heinz, by and through its PortionPac division, filed reclamation demands totaling \$48,860.83. As the Debtors are not seeking to reduce that portion of H.J. Heinz's reclamation claim, the \$48,860.83 is not discussed further herein.

5. In the schedule attached to the Reclamation Demand, H.J. Heinz listed the (i) invoice number, (ii) purchase order number, (iii) value, and (iv) date. The Reclamation Demand was dispatched on March 28, 2003.

6. On the Petition Date, the Debtors filed a Motion for Entry of an Order, Under 11 U.S.C. §§ 105(a), 503(b), and 546(c): (A) Establishing Procedure for Treatment of Reclamation Claims and (B) Prohibiting Third Parties From Interfering With Delivery of Debtors' Goods (Docket No. 8, the "Reclamation Procedures Motion"). On April 22, 2003, upon consideration of many objections and after much negotiation, this Court entered an Order granting the Reclamation Procedures Motion (Docket No. 510, the "Reclamation Procedures Order").

7. The Reclamation Procedures Order required the Debtors to do the following:

- File a report (the "Report"), within 90 days of the Court's entry of the Reclamation Procedures Order, listing the valid reclamation claims; and
- Provide to each reclamation claimant a comprehensive, detailed and customized information packet that sets forth the basis for the reconciled reclamation amount set forth in the Report.

8. The Debtors have not filed a final Report pursuant to the Reclamation Procedures Order.

9. On September 11, 2003, the Debtors filed a Motion for Entry of An Order to Establish Procedures to (i) Disallow Reclamation Claims for Which Supporting Documentation is Not Provided and (ii) Bar the Filing of New Reclamation Claims (the "Latest Reclamation Motion"). In Exhibit A to the Latest Reclamation Motion, the Debtors listed the Reclamation Demand as follows:

<u>Claimant</u>	<u>Total Asserted Reclamation Claim</u>	<u>Total Supporting Electronic Data Provided</u>	<u>Electronic Data Not Provided</u>
Heinz North America	\$1,747,981.42	\$1,312,792.17	\$435,189.25

10. The Debtors seek to have the Reclamation Demand limited to the amount of “total supporting electronic data provided” to the Debtors. The Debtors cite no legal authority for such relief.

11. For the following reasons, H.J. Heinz objects to the relief sought by the Debtors in the Latest Reclamation Motion.

### **OBJECTIONS**

A. H.J. Heinz’s Reclamation Demand Was Proper And Legally Sufficient.

12. To establish a valid reclamation claim under Section 2-702(2) of the Uniform Commercial Code and Section 546(c) of the Bankruptcy Code, H.J. Heinz must prove the following four elements: (1) the debtor was insolvent when the goods were delivered; (2) a written demand was made within ten days after receipt of the goods (as may be extended by Section 546(c)); (3) the goods were identifiable at the time of the demand; and (4) the goods were in possession of the debtor at the time of the dispatch and receipt of the demand. In re Hechinger Investment Co. of Delaware, Inc., 274 B.R. 402, 405 (Bankr. D. Del 2001); In re Continental Airlines, Inc., 125 B.R. 415, 417 (Bankr. D. Del. 1991); In re Bill's Dollar Stores, Inc., 164 B.R. 471, 474-76 (Bankr. D.Del. 1994) (regarding "receipt" of goods). Section 546(c)(1), which was amended pursuant to the Bankruptcy Reform Act of 1994, extends the time for providing a written demand to 20 days after receipt of the goods in the event the 10 day period expires after the commencement of the case.

13. H.J. Heinz can satisfy all of those requirements for a valid reclamation claim. There is absolutely no basis for the additional “electronic data” requirement that the

Debtors seek to impose upon reclamation claimants. The Debtors cannot create an additional administrative “procedure” that would effectively deny H.J. Heinz a portion of its valid Reclamation Demand.

B. This Court May Deny The Valid Reclamation Demand “Only If”  
This Court Grants H.J. Heinz A Lien Or Administrative  
Expense Claim Under Section 546(c)(2)

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14. As indicated above, the Reclamation Demand was proper and valid under UCC Section 2-702(2) and Section 546(c) of the Bankruptcy Code. This Court may not simply deny a proper and valid Reclamation Demand on the grounds that “electronic data not provided” and then relegate that claim to a general unsecured, non-priority claim.

15. The language of Section 546(c)(2) is plain and unambiguous regarding the limited circumstances in which a bankruptcy court may deny a right of reclamation – only if the court grants the seller a lien or an administrative expense claim. See 11 U.S.C. § 546(c)(2)(A)-(B) (court may deny reclamation claim to seller with a right of reclamation “only if” court grants a lien or administrative claim to reclaiming creditor). See generally Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 252 (1992) (“When the words of a statute are unambiguous, then . . . judicial inquiry is complete.”) (citing United States v. Ron Pair Enterp., Inc., 489 U.S. 235, 241-242 (1989)); Patterson v. Shumate, 112 S.Ct. 2242, 2248 (1992) (“Although courts appropriately may refer to a statute’s legislative history to resolve statutory ambiguity, the clarity of the statutory language at issue in this case obviates the need for any such inquiry.”).

16. Accordingly, this Court may not deny the valid Reclamation Demand on the basis of alleged “electronic data not provided” unless this Court grants a lien or administrative expense claim to H.J. Heinz.

C. Section 105(a) Of The Bankruptcy Code Provides No Basis For The Relief Requested In The Latest Reclamation Motion.

17. In the Latest Reclamation Motion, the Debtors rely upon Section 105(a) of the Bankruptcy Code as support for the proposed “procedure” that would result in the disallowance of valid reclamation claims. Section 105(a) provides no basis for such relief.

18. Section 105 of the Bankruptcy Code provides, in part, that the “court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105, however, does not authorize a bankruptcy court to take any action that is contrary to, or not authorized by, the Bankruptcy Code. See In re Morristown & Erie R.R. Co., 885 F.2d 98, 100 (3d Cir. 1989) (Section 105(a) power must be exercised in manner “consistent with the Bankruptcy Code”); see In re Quanta Resources Corp., 739 F.2d 912, 921 (3d Cir. 1984), aff’d sub nom. Midlantic Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986). Section 105(a) does not authorize a bankruptcy court to create “substantive rights that would otherwise be unavailable under the Code”, U.S. v. Pepperman, 976 F.2d 123, 131 (3d Cir. 1992), or “rights not otherwise available under applicable law”, Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (3d Cir. 1985).

19. The Debtors seek to utilize Section 105(a) to (i) rewrite Section 546(c) of the Bankruptcy Code by creating an additional administrative hurdle to a valid reclamation claim and (ii) create a substantive right in the Debtors’ favor to deny valid reclamation claims, contrary to the provisions of UCC Section 2-2702(2) and Section 546(c) and the applicable case law.

20. Accordingly, Section 105(a), however, does not provide any basis for the relief requested by the Debtors.

WHEREFORE, H.J. Heinz respectfully requests that this Court enter an Order

(i) denying the Motion and (ii) granting such further relief to H.J. Heinz as is appropriate.

Dated: September 25, 2003  
Wilmington, Delaware

Respectfully submitted,

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	:	(Jointly Administered)
Debtors.	:	
	:	

**CERTIFICATE OF SERVICE**

I, Kurt F. Gwynne, certify that I am over 18 years of age and that on this 25<sup>th</sup> day of September 2003, I caused a true and correct copy of the foregoing Objection Of H.J. Heinz Company L.P. To Debtors' Motion For Entry Of An Order With Respect To The Reclamation Claims Filed In The Debtors' Cases to be served upon the following individuals via facsimile:

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