

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC. <i>et al.</i> ¹ ,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Hearing Date: Nov. 25, 2003 at 9:30 a.m.
)	Objection Deadline: Nov. 10, 2003 at 4:00 p.m.

**MOTION OF THE ST. PAUL PIONEER PRESS FOR
ALLOWANCE OF ADMINISTRATIVE PRIORITY CLAIM**

The St. Paul Pioneer Press (“Pioneer”), by its attorneys, Neal, Gerber & Eisenberg LLP and Connolly Bove Lodge & Hutz LLP, respectfully requests the entry of an order pursuant to Section 503(b) of Title 11 of the United States Code (the “Bankruptcy Code”), allowing Pioneer’s administrative priority claim in the amount of \$459,473.95 against Rainbow Food Group, Inc. (“Rainbow”). In support of this motion, Pioneer respectfully states as follows:

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. § 1408. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The statutory predicate for the relief requested herein is Section 503(b) of the Bankruptcy Code.

2. On April 1, 2003, (the “Petition Date”), the Debtors, including Rainbow, filed 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

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. (collectively, the “Debtors”).

Sections 1107(a) and 1108 of the Bankruptcy Code. No trustee has been appointed in these cases.

3. By order entered on April 3, 2003, the Court consolidated the Debtors' cases for administrative purposes only.

4. On June 4, 2003 (the "Sale Date"), the Court entered an order approving the sale of the majority of Rainbow's assets (the "Sale Order"), including, on information and belief, all grocery stores within the markets served by Pioneer's publications.

BACKGROUND

5. Pioneer is engaged in the business of publishing a daily newspaper. Pioneer and Rainbow were parties to an annual revenue volume contract (the "Pioneer/Rainbow Agreement"). *See* Pioneer/Rainbow Agreement attached hereto as Exhibit A.

6. The Pioneer/Rainbow Agreement provided a discounted pricing structure for Rainbow on the condition that Rainbow purchase at least \$2.5 million of advertising annually from Pioneer and its affiliated entities. The term of the Pioneer/Rainbow Agreement is from February 3, 2003 through February 2, 2004.

7. Under the terms of the Pioneer/Rainbow Agreement, if Rainbow fails to purchase \$2.5 million in advertising during the one-year term, Rainbow will be retroactively billed at a higher rate (the "Short Rate") to be determined from Pioneer's 2002 Retail Advertising Rate Card. The Pioneer/Rainbow Agreement provides that if Rainbow fails to meet its minimum revenue commitment during the term of its contract, a bill is calculated applying the Short Rate to all of the advertising placed during the term of the contract and Rainbow is to pay the amount necessary to make up the difference between the Short Rate total and the amount already paid for the advertising at the lower rate conditioned upon Rainbow's satisfaction of its \$2.5 million revenue commitment. *See* Pioneer/Rainbow Agreement (Exhibit A) at Section V.

8. The Sale Order authorized the Debtors to assume and assign certain contracts. The Sale Order did not authorize the Debtors to assume and assign the Pioneer/Rainbow Agreement.

9. Rainbow has failed to purchase any advertising from Pioneer since the Sale Date and, on information and belief, Rainbow no longer operates a business that could utilize advertising in Pioneer's publications. On information and belief, all Rainbow stores in the market served by Pioneer's publications have been sold.

10. Because the Pioneer/Rainbow Agreement was not assumed and assigned pursuant to the Sale Order, Rainbow cannot meet the \$2.5 million revenue commitment required to qualify for discounted advertising rates pursuant to the Pioneer/Rainbow Agreement. Consequently, Rainbow is obligated to pay Pioneer additional amounts that will bring the rate paid by Rainbow for advertising up to the Short Rate.

11. Between the Petition Date and the Sale Date, Pioneer provided advertising to Rainbow for which Rainbow owes Pioneer \$459,473.95 based on Rainbow's obligation to pay the Short Rate pursuant to the Pioneer/Rainbow Agreement. The advertising provided for the benefit of Rainbow is set forth on the invoice for post-petition advertising attached hereto as Exhibit B and made a part hereof.

PIONEER'S ADMINISTRATIVE PRIORITY CLAIM

12. Section 503(b)(1)(A) of the Bankruptcy Code provides for the allowance of administrative expenses, including "the actual necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case."

13. Administrative expenses are entitled to a first priority distribution pursuant to Section 507(a)(1) of the Bankruptcy Code.

14. Generally, an obligation qualifies as an actual and necessary administrative expense when the obligation arose from a transaction with the estate, which benefited the estate in some demonstrable way. *In re Megafood Stores, Inc.*, 163 F. 3d. 1063 (9th Cir. 1998); *In re White Motor Corp.*, 831 F.2d 106 (6th Cir. 1987).

15. With respect to post-petition obligations incurred by a debtor, the Supreme Court has held that:

If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for those services, which, depending on the circumstances of a particular contract, may be what is specified in the contract.

N.L.R.B v. Bildisco and Bildisco, 465 U.S. 513, 531, 104 S.Ct. 1188, 1199 (1984); *see also U.S. v. Dewey Freight System, Inc.*, 31 F.3d 620, 624-625 (8th Cir. 1994) (same); *In re Chateaugay Corp.*, 156 B.R. 391, 399 (Bankr. S.D.N.Y. 1993) (“the Bankruptcy Code confers an administrative priority when a debtor, by electing post-petition not to disaffirm an executory contract or unexpired lease, induces a creditor to confer a post-petition benefit upon the estate.”); *In re A.H. Robins Co., Inc.*, 68 B.R. 705, 710 (Bankr.E.D.Va.1986) (“[a] passive acceptance of benefits from a creditor during the post-petition period merely converts that creditor’s claim for post-petition services into one entitled to an administrative priority.”); *In re Broadus Hospital Ass’n*, 159 B.R. 763, 770-772 (Bankr. N.D.W.Va. 1993) (same).

16. Rainbow has received the full benefit of all of the advertising that it elected to place with Pioneer post-petition. The advertising provided by Pioneer enabled the Debtors to preserve the value of Rainbow as a going concern until it was sold pursuant to the Sale Order. All of the post-petition advertising provided by Pioneer to Rainbow has a recognized market value based upon the Pioneer/Rainbow Agreement, the Pioneer 2002 Retail Advertising Rate Card and the amounts paid by other parties for the same or substantially similar advertising.

17. As of the date of this Motion, the accrued value of the post-petition advertising provided by Pioneer and for which Pioneer has not been paid is \$459,473.95, which amount is due and payable by Rainbow to Pioneer as an administrative expense. This amount is based on Pioneer's Short Rate calculation for post-petition advertising placed by Rainbow pursuant to the Pioneer/Rainbow Agreement, in light of Rainbow's failure to meet its \$2.5 revenue commitment under the Pioneer/Rainbow Agreement.

WHEREFORE, Pioneer respectfully requests that this Court enter an order in the form of the proposed order attached hereto as Exhibit C, granting Pioneer an administrative priority claim against Rainbow in the amount of \$459,473.95 pursuant to Sections 503(b) and 507(a) of the Bankruptcy Code, directing Rainbow to immediately pay such administrative expense and granting such other relief as is just.

Dated: October 22, 2003
Wilmington, Delaware

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