

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)
Debtor.)	

Objection Deadline: November 18, 2003
Hearing Date: November 25, 2003 at 9:30 a.m. (Eastern Time)

**AMENDED MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER
AUTHORIZING AND APPROVING ARBITRATION OF
CERTAIN CLAIMS AND CAUSES OF ACTION
ASSERTED BY OR AGAINST THE DEBTORS**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby move the Court (the “Motion”) for entry of an order pursuant to sections 362(d) and 553 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) authorizing and approving binding final arbitration of certain claims and causes of action held by or asserted against the Debtors. In support of this Motion, the Debtors respectfully state as follows:

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.; Favarr 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.

Jurisdiction

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

2. Venue in these proceedings and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are sections 362(d) and 553 of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules.

Background

4. On April 1, 2003 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code ("Chapter 11 Cases"). 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.

5. The Debtors hold various claims against third parties (collectively, the "Third Parties" and individually, a "Third Party") for amounts owed for products purchased from the Debtors, related fees and charges, miscellaneous billings, rent and all other lease related charges accrued and unpaid under leases and subleases, amortized note payments that were billed to Third Parties on the normal statement (amortized and due prior to August 23, 2003, but not including any non-amortized portion of notes sold to C&S Acquisition LLC (including any assignee or designee of such company as provided in the Order of this Court dated August 15, 2003 approving such sale)) and all other items that are normally billed to third parties on a

periodic basis as part of the regular statement (collectively, the “Debtors’ Claims” and individually, a “Debtors’ Claim”) that arose both prepetition and postpetition against numerous Third Parties consisting primarily of accounts receivable owed by customers of the Debtors.

6. Many of the Third Parties have asserted or may assert counter-claims or defenses against the Debtors (collectively, the “Counter-Claims” and individually, a “Counter-Claim”). The automatic stay created pursuant to section 365 (a) of the Bankruptcy Code currently prevents the assertion or pursuit of any Counter-Claim by any of the Third Parties.

7. In most cases, the applicable contract between the Debtors and their customers or the Debtors’ “selling plan” that describes the terms of the sale of products by the Debtors provide that all disputes between the Debtors and these customers, including related Counter-Claims, if they exist, be resolved by final and binding arbitration. A sample of such a provision is highlighted in the contract attached hereto as Exhibit 1 and in the selling plan attached hereto as Exhibit 2.

8. As set forth in the sample attached, the arbitrators are selected from the national roster of arbitrators of the American Arbitration Association (the “AAA”). The pertinent rules and procedures for commercial arbitration conducted by the AAA are attached hereto as Exhibit 3.

9. In any instances in which the Debtors’ Claims are not governed by a contractual provision requiring binding arbitration, the Debtors believe that entering into an agreement with the party against whom the Debtors’ Claims are asserted to submit the Debtors’ Claims and any Counter-Claims to final and binding arbitration will be the fastest, least

expensive method to resolve the disputes that cannot be resolved consensually. Any such agreement would be similar to the terms of the agreement attached hereto and would provide that the AAA rules would apply and the AAA arbitrators would be utilized.

10. Prior to the Petition Date, the Debtors utilized arbitration as a primary method of resolving collection of disputes with their customers. As of the Petition Date, **six** arbitration proceedings to collect the Debtors' Claims were pending (the "Pending Arbitrations"). A list of the proceedings is attached hereto as **Amended Exhibit 4**. **Four** of these Pending Arbitrations were initiated by the Debtors and the Debtors have asserted substantial counter-claims in the **other two**.

11. The Debtors had deposited, prior to the Petition Date, approximately \$40,000 (the "Deposits") with the AAA for payment of the arbitrators' fees in the Pending Arbitrations. As of the Petition Date, some fees that were to be paid from the deposits had been incurred but were unpaid and remain unpaid. The fee arrangements with the arbitrators in the Pending Arbitrations are attached hereto as Exhibit 5. These fee arrangements are typical of the fee arrangements for AAA arbitrators.

12. In the Pending Arbitrations, rulings by the case managers or arbitrators effectively require the Debtors to obtain authority from the Court for the AAA to resort to the Deposits for payment of fees and expenses and to obtain clarification of how the automatic stay impacts both the pursuit of the Debtors' Claims and the adjudication of pending or unasserted Counter-Claims before they will proceed with the Pending Arbitrations or other Arbitration Proceedings.

13. Further, the Debtors realize that the resolution of the Debtors Claims in the Pending Arbitrations and the Arbitration Proceedings would be substantially delayed, the Debtors and the Third Parties would be faced with additional expenses and the limited time resources of this Court would necessarily be expended by motions for relief from stay filed by the Third Parties seeking the right to assert the Counter-Claims in the Pending Arbitrations and the Arbitration Proceedings. The Debtors, therefore, are requesting the relief as outlined below.

14. This Motion is without prejudice to the Debtors' right to assert that any asserted Counter-Claim is not entitled to be treated as a valid and enforceable right of setoff, recoupment or defense and it is further without prejudice to the non-Debtors' right to assert the validity of such rights.

Relief Requested

15. In an effort to resolve the Debtors' Claims and any Counter-Claims as inexpensively and expeditiously as possible, the Debtors seek an Order of this Court:

- (a) authorizing the Debtors and, to the extent necessary, modifying, pursuant to section 362(d) of the Bankruptcy Code, the automatic stay to allow the Third Parties and the Debtors to continue and complete the Pending Arbitrations;
- (b) authorizing the Debtors (or any of them) to enter into a postpetition agreement with any Third Party, substantially in the form of the arbitration provision contained in Exhibit 1 hereto or in a similar form of agreement promulgated by the AAA (containing no terms inconsistent with the relief

requested in this Motion) to submit any Debtors' Claims against such Third Party and any Counter-Claims asserted by such Third Party to final and binding arbitration;

- (c) authorizing the Debtors (or any of them) to institute an arbitration proceeding (the " Arbitration Proceeding") against a Third Party in order to resolve any Debtor's Claim;
- (d) authorizing arbitrators selected from the national roster of the AAA arbitrators to proceed with the Pending Arbitrations and any other Arbitration Proceedings commenced by any of the Debtors;
- (e) pursuant to section 362(d) of the Bankruptcy Code, modifying the automatic stay to allow the Third Parties that become parties to an Arbitration Proceeding commenced by the Debtors to assert and pursue any Counter-Claims in the Arbitration Proceeding to which they are a party without any presumption as to the validity or enforceability of such Counter-Claims;
- (f) pursuant to sections 362(d) and 553 of the Bankruptcy Code, authorizing any Third Party that is a party to an Arbitration Proceeding to offset any amount the arbitrator or arbitrators determine it owes to a Debtor against any amount the arbitrators determine that same Debtor owes the same Third Party so long as the amounts owed to the Debtor party and by the

Debtor party are both debts that arose prepetition or are both debts that arose postpetition;

- (g) prohibiting the enforcement of any award or the collection of any amount awarded to a Third Party in any Arbitration Proceeding except by set off as stated above or by the filing of a Proof of Claim as required by the *Order Pursuant to Sections 105(a), 501, 502, and 1111(a) of the Bankruptcy Code and Bankruptcy Rules 2002(a)(7), 3003(c)(3) and 5005(a) Establishing a Bar Date for Filing Proofs of Claim and Proofs of Interest and Approving Form and Manner of Notice Thereof* entered on June 25, 2003 by this Court;
- (h) authorizing the Debtors to pay their portion of the (i) administrative fees and expenses incurred in the Pending Arbitrations and other Arbitration Proceedings, (ii) the arbitrators' fees and expenses and (iii) any other fees and costs (including any witness' expenses) incurred in any Arbitration Proceeding and any Pending Arbitration and authorizing the AAA and the arbitrators to apply the payments in satisfaction of the fees and expenses incurred in the Arbitration Proceedings and Pending Arbitrations; and
- (i) authorizing the AAA to apply the Deposits to the arbitration expenses and the arbitrators' fees and expenses already incurred but not paid in the Pending Arbitrations.

Basis for Relief

A. Compliance with Rule 9019

16. Rule 9019(c) of the Bankruptcy Rules states that

“On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.”

17. The requirements of Rule 9019(c) are met in this instance. A controversy over claims the Debtors hold against Third Parties and the Counter-Claims such parties assert against the Debtors without question affects the estates.

18. As discussed above, in most cases the Debtors already have contracts with many of the Third Parties that require final and binding arbitration or, during the time the Third Parties purchased products from the Debtors, they did so pursuant to the terms of the Debtors' selling plan. By signing those contracts or performing in accordance with the terms of the selling plan that require final and binding arbitration of disputes, the parties have already agreed to submit disputes to arbitration. In all other instances, the Debtors propose to enter into postpetition agreements with the Third Parties concerning the submission of the Debtors' Claims and any Counter-Claims to final and binding arbitration.

19. Authorizing the use of final and binding arbitration without further notice or Court approval in these circumstances surely fulfills the purpose of Rule 9019(c). Such arbitration will expedite the resolution of the disputes and the payment by the Third Parties of amounts owed the Debtors and will reduce the cost of litigation for the estates. It will also result

in a more efficient use of this Court's and other state courts' judicial resources. The Debtors hold claims against several hundred Third Parties arising from the sale of products prior to the recent sale of the Debtors' wholesale business. The cost of litigating each of several hundred claims would unnecessarily burden the estates and the courts that would otherwise be required to resolve the disputes.

B. Cause to Modify Stay

20. In order to fully utilize the advantages of arbitration of the Debtors' Claims, to prevent further delay in the Debtors' ability to collect amounts owed it, and to relieve the Third Parties of the need to file and this Court from the burden of hearing the many motions requesting relief from the automatic stay that would result from the Debtors commencing Arbitration Proceedings, the Debtors are also requesting that the Court enter an Order modifying the automatic stay for cause pursuant to section 362(d)(1) of the Bankruptcy Code to allow a Third Party that is a party to an Arbitration Proceeding without further notice or Court order (i) to assert in that same Arbitration Proceeding any Counter-Claims it may have against the Debtor or Debtors that are parties to that proceeding, and (ii) if the requirements of mutuality of section 553 of the Bankruptcy Code are met, to offset any amounts it is determined in the same Arbitration Proceeding are owed by the Debtor party or parties to the Third-Party against amounts it is determined in the Arbitration Proceeding are owed by the Third-Party to the Debtor party or parties. This modification of the automatic stay would not allow any Third Party to seek

enforcement of any award on a Counter-Claim except through setoff, recoupment or filing a Proof of Claim as required by previous order of this Court.

21. In this manner, when the Arbitration is complete, the parties will know, without further need of judicial action, where they stand. The Debtors will be able to collect amounts owed them without further delay.

Notice

22. Notice of this Motion has been given to: (i) the Office of the United States Trustee; (ii) counsel to the Senior Secured Lenders; (iii) counsel to the Official Committee of Unsecured Creditors, (iv) the Third Parties to the Pending Arbitrations; and (v) those persons who have requested notice pursuant to Rule 2002 of the Bankruptcy Rules.

No Prior Request

23. No prior motion for the relief requested herein has been made to this or any other court.

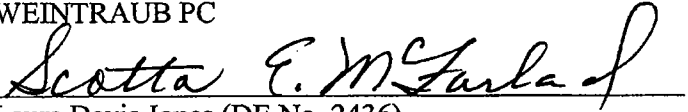
24. WHEREFORE, the Debtors request that the Court enter the attached Order granting the relief requested herein and such other and further relief as the Court deems just.

Dated: October 31, 2003

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