

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)
Debtors.)
)
) **Objection Deadline: November 18, 2003 @ 4:00 p.m.**
) **Hearing Date: November 25, 2003 at 2:00 p.m.**
) **Relates to Docket No. 4304**

**LIMITED OBJECTION OF LENDERS TO LOCAL 881
UNITED FOOD AND COMMERCIAL WORKERS UNION'S
REQUEST FOR PAYMENT OF ADMINISTRATIVE EXPENSES**

Deutsche Bank Trust Company Americas, in its capacity as Administrative Agent and JPMorgan Chase Bank, in its capacity as Collateral Agent, Provider of Treasury Services and Syndication Agent (together, the "**Agents**") on behalf of themselves and on behalf of those certain prepetition and postpetition secured lenders (collectively, the "**Lenders**") of the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") hereby submit this Limited Objection (the "**Objection**") to Local 881 United Food and Commercial Workers Union's ("**Local 881**") Request for Payment of Administrative Expenses (the "**Motion**") and respectfully represent 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.; 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.

BACKGROUND

1. The Lenders are party to that certain Credit Agreement, dated as of June 18, 2002, among, Fleming Companies, Inc., a Debtor ("**Fleming**"), Deutsche Bank, as Administrative Agent, JPMorgan Chase and Citicorp North America, Inc., as Syndication Agents, Lehman Commercial Paper Inc. and Wachovia Bank, National Association, as Documentation Agents, Deutsche Bank and JPMorgan Chase, as Joint Book Managers, Deutsche Bank, JPMorgan and Solomon Smith Barney Inc., as Joint Lead Arrangers, and the lenders party thereto (the "**Pre-Petition Credit Agreement**" and, collectively with all ancillary documents executed in connection therewith, the "**Pre-Petition Loan Documents**"), pursuant to which the lenders, *inter alia*, made loans and advances to Fleming and issued or caused to be issued letters of credit on Fleming's behalf (collectively, the "**Pre-Petition Loans**"). All of the Debtors, other than Fleming, executed guarantees of the Pre-Petition Loans in favor of the Pre-Petition Lenders.

2. The Pre-Petition Loans were secured by first-priority security interests and liens (the "**Pre-Petition Financing Liens**") on all or substantially all of the Debtors' then existing and after-acquired assets set forth in Section 1.1 of the Security Agreement (as defined in the Pre-Petition Credit Agreement) and Section 3.1 of the Pledge Agreement (as defined in the Pre-Petition Credit Agreement)² and all proceeds and products of any and all such assets (the "**Pre-Petition Collateral**").

² Pursuant to Section 1.1 of the Security Agreement and Section 3.1 of the Pledge Agreement, such assets included accounts receivable, inventory, instruments and chattel paper evidencing accounts receivable or into which any accounts receivable have been, or thereafter were, converted, securities, limited liability company interests, partnership interests, security entitlements, financial assets and investment property, and all proceeds and products of any all of the foregoing. The Pre-Petition Financing Liens did not cover the Debtors' real estate assets.

3. As of the Petition Date, Fleming was indebted to the Pre-Petition Lenders under the Pre-Petition Credit Agreement in the aggregate principal amount of \$604 million (including outstanding letters of credit and fees associated therewith of approximately \$146 million), in addition to pre-petition interest accrued thereon, plus costs, fees and expenses pursuant to Section 9.03 of the Pre-Petition Credit Agreement, as well as obligations incurred in connection with Treasury Services not to exceed \$50 million (collectively, the “**Pre-Petition Indebtedness**”). Furthermore, there was an automatic \$5 million step-up in one of the pre-petition letters of credit such that the overall exposure of the Pre-Petition Lenders has grown to \$609 million.

4. On May 7, 2003, this Court entered its Final Order Authorizing (i) Post-Petition Financing Pursuant to 11 U.S.C. § 364 and Bankruptcy Rule 4001(c); (ii) Use of Cash Collateral Pursuant to 11 U.S.C. § 363 and Bankruptcy Rule 4001(b) and (d); (iii) Grant of Adequate Protection Pursuant to 11 U.S.C. §§ 361 and 363; and (iv) Approving Secured Inventory Trade Credit Program and Granting of Subordinate Liens, Pursuant to 11 U.S.C. §§ 105 and 364(c)(3) and Rule 4001(c) (the “**Final DIP Order**”),³ pursuant to which, *inter alia*, this Court authorized the Debtors to use the Pre-Petition Lenders’ Cash Collateral, on the terms and subject to the conditions set forth therein and in the Post-Petition Loan Documents. See Final DIP Order ¶ 3. One of the conditions of the use of Cash Collateral is that it be used in strict compliance with an approved budget. Another condition to the use of Cash Collateral is that there must be sufficient availability

³ All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Final DIP Order.

under the Borrowing Base as more fully set forth in the Post-Petition Loan Documents. See Post-Petition Loan Agreement § 4.03.

5. Pursuant to paragraph 48 of the Final DIP Order, the deadline by which parties may challenge the Pre-Petition Lenders' liens and claims has passed. Other than a challenge by a so-called "Unofficial Committee of Unsecured Creditors of Dunigan Fuels, Inc.", which should not affect the relief requested herein, no parties challenged the Pre-Petition Lenders' liens and claims. Accordingly, such liens and claims are now valid and unavoidable.

6. Furthermore, under the Final DIP Order, the Pre-Petition Lenders and Pre-Petition Agents were provided with adequate protection against any diminution in value of the Pre-Petition Lenders' and the Pre-Petition Agents' interest in the Pre-Petition Collateral "resulting from, inter alia, the granting of the Liens and the carve-out provided for in the Bridge Financing Order, the priming of the Pre-Petition Financing Liens, the imposition of the automatic stay, and the use, sale or lease or other disposition of the Pre-Petition Collateral". Final DIP Order ¶ I.

7. Among other things, the Pre-Petition Lenders and Pre-Petition Agents were granted first priority liens and security interests on substantially all unencumbered assets of the Debtors (whether acquired prior thereto or thereafter) and junior liens on all assets encumbered by Senior Liens (subject to the Carve-Out and the Post-Petition Financing Liens) (collectively, the "**Pre-Petition Lender Replacement Liens**"). See Final DIP Order ¶ 8. The Pre-Petition Lender Replacement Liens are

deemed perfected as of the Petition Date and may not be subject to or pari passu with any lien or security interest existing as of the Petition Date, other than the Senior Liens. See Final DIP Order ¶ 9. In addition, to the extent of any Diminution Claim, the Pre-Petition Agents and the Pre-Petition Lenders were also granted, effective as of the Petition Date, allowed super-priority administrative expense claims pursuant to Section 507(b) of the Bankruptcy Code (the “**Pre-Petition Lender Superpriority Claims**”), subject only to the Carve-Out and the Post-Petition Lender Superpriority Claims. See Final DIP Order ¶ 10.

8. Pursuant to sections 2.07(b) and 2.09(e) of the Post-Petition Loan Agreement, respectively, by virtue of asset sales undertaken by the Debtors subsequent to the Petition Date, there is no availability under the DIP Facility and all outstanding post-petition letters of credit will be cash collateralized.⁴

9. For the reasons set forth below, until the Lenders are paid in full, Local 881’s Motion should be denied as it relates to the immediate payment of its alleged administrative expense claim.

LIMITED OBJECTION

10. In the Motion, Local 881 requests that this Court enter an order directing Fleming to pay to Local 881 an administrative expense, pursuant to section 503 of the Bankruptcy Code, in the amount of \$9,213.75 for contributions to the health insurance plan covering its employees, and \$6,283.13 for accrued but unpaid vacation pay.

⁴ The post-petition letters of credit are in the amount of \$18.3 million.

11. Section 503 of the Bankruptcy Code does not specify when allowed administrative expense claim must be paid.⁵ Rather, section 1129(a)(9) of the Bankruptcy Code, which establishes the requirements for confirmation of a plan of reorganization, designates the time for payment of administrative claims. Accordingly, the starting point for analysis of any right to immediate payment of an administrative claim is section 1129 of the Bankruptcy Code.

12. Section 1129(a)(9) of the Bankruptcy Code mandates that the time for payment of an administrative claim (once allowed) as contemplated by the Bankruptcy Code is the effective date of a plan. For example, in In re Grant Broadcasting, Inc., 71 B.R. 891, 899 (Bankr. E.D. Pa. 1987), the court denied immediate payment of administrative claims to suppliers of programming to the debtor television stations and stated that "there is no authority whatsoever for the principle that administrative claims should generally be paid immediately." Id. The court further found that, when read together, sections 1129(a)(9), 507(a)(1) and 503(b)(2)(A) of the Bankruptcy Code clearly contemplate that the effective date of a plan is the normal time

⁵ One should contrast section 503 with section 365(d)(3) of the Bankruptcy Code which provides that a debtor must "timely perform" all of its obligations under a non-residential real property lease, including payment provided therein. 11 U.S.C. §365(d)(3). Unlike section 365(d)(3) of the Bankruptcy Code, there is no mandate under section 503(b)(1)(A) as to the timing of payment. Rather, the mandate for paying administrative claims is contained in section 1129(a)(9) of the Bankruptcy Code. See, e.g., In re Provident Hospital & Training Association, 1988 WL 525008 at *2 (Bankr. N.D. Ill. 1988) ("While Congress did make some provision as to how nonresidential leases and collective bargaining agreements were to be handled during this gap period [before the debtor has assumed or rejected the contract], see 11 U.S.C. §§ 365(d)(3) and 1113, Congress did not address the problem for ordinary commercial contracts...."). Moreover, as directed by the Supreme Court, when 'the statute's language is plain the sole function of the courts -at least where the disposition required by the text is not absurd-' "is to enforce it according to its terms.' See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

when administrative claims must be paid. Id.; see also In re Budget Uniform Center, Inc., 71 B.R. 652, 654 (Bankr. E.D. Pa. 1987) (holding that an administrative claimant must wait for confirmation of a plan before becoming entitled to payment).

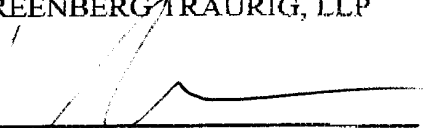
13. The Lenders' pre-petition liens are now valid and unavoidable. Moreover, pursuant to the Final DIP Order, the Lenders were granted valid, perfected and fully enforceable Pre-Petition Lender Replacement Liens and Pre-Petition Lender Superpriority Claims in the Post-Petition Replacement Collateral. Local 881's alleged claim, under section 503(b)(1)(A) of the Bankruptcy Code, even if allowed in full, is junior in priority to the Lenders' pre-petition liens as well as the liens and claims granted to the Lenders pursuant to the Final DIP Order. Accordingly, even if Local 881's administrative claim is ultimately allowed, until the Lenders are paid in full, the Debtors cannot pay Local 881. To do so would obliterate the absolute priority rule.

14. Furthermore, because there is no availability under the DIP Facility and the Final DIP Order conditions the use of Cash Collateral in strict compliance with the approved budget, Local 881 cannot be paid at this time but must wait until the effective date of a plan to be entitled to payment. Moreover, any order granting such administrative claim should be clear that such claim is subject to the rights of the Lenders in the Post-Petition Replacement Collateral.

WHEREFORE, the Agents reserve all of their rights, and respectfully request that this Court deny the Motion with regard to Local 881's request to be paid until the Debtors have paid the Lenders in full.

November 18, 2003

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