

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

<p>In re:</p> <p>FLEMING COMPANIES, INC, et al.</p> <p style="text-align:center">Debtors.</p>	<p>Chapter 11</p> <p>Case No. 03-10945 (MFW), (Jointly Administered)</p> <p>Related Docket Nos. 4232 and 4299</p> <p>Objection Deadline: Nov. 18, 2003 at 4:00 p.m.</p> <p>Hearing Date: November 25, 2003 at 9:30 a.m.</p>
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**OBJECTION TO DEBTORS' MOTION FOR AN ORDER AUTHORIZING
AND APPROVING ARBITRATION OF CLAIMS AND CAUSES OF ACTION HELD
BY OR ASSERTED AGAINST THE DEBTORS [DOCKET NO. 4232 and 4299]**

Gorman Foods, LLC, Davis/Burkett Food Corporation, H.N.A., Inc., H.N.A. of Utah, Inc., Sentker Food Corporation, HBP, LC, Kanab Food Corporation, J, J & J, Inc. d/b/a Dave's Jubilee, Montpelier Food Corporation, Idaho Falls Food Corporation, Crisp Grocery, Inc., Evergreen Supermarkets, Inc., South Cache Market, Inc., Ridley's Food Corporation, and Z, Inc. d/b/a Paul's Markets (collectively, the "**Objecting Parties**"), through counsel, respectfully file this Objection to the Debtors' *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*, dated October 28, 2003 [docket no. 4232], and the Debtors' amended motion, dated October 31, 2003 [docket no. 4299] (collectively, the "**Motion**").

The bases for this objection are: (i) whether a particular matter can and should be referred to arbitration must be decided on a case-by-case basis based upon *evidence* of the parties' intent, and cannot be decided in the abstract as is sought in the Debtor's motion, (ii) to the extent arbitration may be appropriate in some circumstances, it is not appropriate (a) absent the specific written agreement of the non-debtor party to arbitrate the specific matter in dispute, and (b) if such a written agreement exists, only where the Debtor first has assumed the executory contract or lease pursuant to an Order of this Court entered under section 365(a) of the Code and has paid

any and all cure amounts necessary for such assumption, and the Debtor has not assigned the contract (and its rights thereunder) to a third party pursuant to section 365(f) of the Code, and (iii) the Court should not restrict the remedies available to parties beyond the limits and restrictions already imposed by the automatic stay and the Code.

In further support of its objection to the Motion, the Objecting Parties respectfully state as follows.

I. Whether a particular matter can and should be referred to arbitration must be decided on a case-by-case basis based upon *evidence* of the parties' intent, and cannot be decided in the abstract as is sought in the Debtor's motion.

1. In the Motion, the Debtors seek authority to arbitrate any and all claims by or against the Debtor, ostensibly including claims by and against the Objecting Parties. In doing so, the Debtors fail to reference any specific agreement by the Objecting Parties to arbitrate their claims, and instead seek blanket authority in an effort to resolve the Objecting Parties' claims "as inexpensively and expeditiously as possible" As set forth below, the Debtors' request for blanket authority to arbitrate claims is improper, and the Motion should be denied.

2. Under the Federal Arbitration Act (the "FAA"), a court may order arbitration only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" under an arbitration agreement. 9 U.S.C. § 3. Thus, although courts have recognized that the FAA evidences a federal policy in favor of arbitration, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927 (1983), the law does not require parties to arbitrate where they have not agreed to do so. Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt, 489 U.S. at 478. Consequently, a court may only order arbitration based on the agreement to arbitrate itself. John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998).

3. The analysis concerning whether a party has agreed to arbitrate a dispute “includes, as a matter of course, an exploration into whether the parties entered into a valid arbitration agreement in the first instance, and whether the specific dispute raised falls within the scope of that agreement.” Olick, 151 F.3d at 137. See also Pritzker v. Merrill Lynch, Pierce, Finner & Smith, Inc., 7 F.3d 1110, 1114 (3d Cir. 1993) (holding that “before it compels arbitration, a court must determine “that a valid agreement to arbitrate exists, between the parties and that the specific dispute [comes] within the substantive scope of the agreement.’ ”) (quoting PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990)).

4. The language of the FAA itself, and the cases interpreting the statute, indicate that it would be improper for this Court to order arbitration of any and all claims involving the Objecting Parties, without first performing a case-by-case analysis of each of the contracts between the Debtors and the Objecting Parties, and each of the disputes between the Debtors and the Objecting Parties. The FAA requires that the Debtors demonstrate (i) that a binding arbitration agreement exists, and (ii) that the disputes that the Debtors seek to arbitrate are within the scope of that agreement. Because the Debtors have failed to do so, the Motion must be denied.

II. If an otherwise enforceable arbitration provision exists and governs the particular matter in dispute, the Debtor should be allowed to enforce the provision only if (a) the Debtor has assumed (or elects to assume) the contract or lease containing the arbitration provision pursuant to an Order under section 365(a) of the Code, (b) the Debtor has satisfied the requirements of section 365(b) of the Code, and (c) the Debtor has not assigned its rights under the contract to a third party under section 365(f) of the Code.

5. Even if the Debtor meets its initial burden of proof with respect to the existence and enforceability of an arbitration provision, as discussed in the preceding section, the Debtor has no right to compel arbitration unless and until (i) it has assumed the contract or lease containing the provision pursuant to Order of this Court and section 365(a) of the Code, (ii) it has “cured” its defaults under the contract or lease, see 11 U.S.C. §365(b)(1)(A), and “compensated” the non-debtor party to the contract for “any actual pecuniary loss to such party resulting from

such default,” 11 U.S.C. §365(b)(1)(B), and (iii) has not assigned the contract to a third party pursuant to section 365(f) of the Code.

6. To enforce the terms of an executory contract, a debtor first must assume the contract and satisfy the requirements of section 365(b) of the Code. See Thomas Cos. v. United Fire & Cas. Co., 166 B.R. 677, 680 (Bankr. C.D.Ill. 1994) (holding that an executory contract is unenforceable against a non-debtor party prior to assumption or rejection of the contract); but c.f. Goldin v. Putnam Lovell, Inc. (In re Monarch Capital Corp.), 163 B.R. 899, 907 (Bankr. D. Mass. 1994) (“The bankruptcy estate, on the other hand, can require the nondebtor to continue performance, so long as the estate performs.”).

7. The Objecting Parties are mindful that there is some authority to suggest that section 365 and 362 of the Code work in tandem to allow a debtor to avoid all of its obligations under an executory contract while at the same time permitting the debtor to enforce the terms of the contract against the non-debtor party, until such time as the debtor decides to assume or reject the contract. To the extent the Court adopts this view and extends the rule to these circumstances, the Objecting Parties hereby move the Court, pursuant to 11 U.S.C. § 365(d)(2), to order the Debtor to determine whether to assume or reject the executory contract(s) which it will seek to rely upon in order to compel arbitration before it may seek to exercise its right, if any, to compel arbitration.

8. Further, to the extent the Debtor determines to assume the applicable contract, it should not be allowed to enforce the arbitration provision unless and until it satisfied the requirements of section 365(b) of the Code.

9. Finally, to the extent the Debtor has assigned the applicable contract to a third party, pursuant to section 365(f) of the Code, the Debtor no longer has any rights under the contract to enforce.

II. The Court should not restrict the remedies available to parties beyond the limits and restrictions already imposed by the automatic stay and the Code.

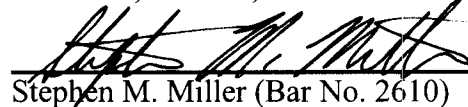
10. The automatic stay and the terms of the Code already restrict the ability of non-debtor parties to enforce claims against the estate. The Court need not enter an Order which would further restrict the rights of non-debtor parties. The debtor's concerns would be better addressed by carefully drafting the order, if any, granting the Motion to state that the automatic stay is not lifted with respect to enforcement of claims against the Debtor except as specifically provided in the order, e.g., right to offset.

WHEREFORE, the Group respectfully prays that the Court will deny the Motion or, at least, include language in its order to appropriately limit the scope of the Order so that parties not otherwise subject to an enforceable arbitration provision, contained in a contract assumed and cured by the Debtor, will not be unfairly compelled to arbitration.

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DATED this 18th day of November, 2003.

MORRIS, JAMES, HITCHENS & WILLIAMS LLP



Stephen M. Miller (Bar No. 2610)
222 Delaware Avenue, 10th Floor
P.O. Box 2306

Wilmington, DE 19899-2306

Telephone: (302) 888-6800

Facsimile: (302) 571-1750

E-mail: smiller@morrisjames.com

and

SNELL & WILMER

Matthew M. Boley (UT Bar No. 8536)

15 West South Temple, Suite 1200

Salt Lake City, UT 84101

Telephone: (801) 257-1900

Facsimile: (801) 257-1800

E-mail: mboley@swlaw.com

Attorneys for Gorman Foods, LLC, Davis/Burkett Food Corporation, H.N.A., Inc., H.N.A. of Utah, Inc., Sentker Food Corporation, HBP, LC, Kanab Food Corporation, J, J & J, Inc. d/b/a Dave's Jubilee, Montpelier Food Corporation, Idaho Falls Food Corporation, Crisp Grocery, Inc., Evergreen Supermarkets, Inc., South Cache Market, Inc., Ridley's Food Corporation and Z, Inc. d/b/a Paul's Markets