IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Fleming Companies, Inc., et al.,	)	Case No. 03-10945 (MFW)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	**Objection Deadline: December 29, 2003 at 4:00 p.m.**
	)	**Hearing Date: January 5, 2004 at 2:00 p.m.**
	)	
	)	**Related Docket No. 5034**

RESPONSE AND OBJECTION OF HERSHEY FOODS CORPORATION TO DEBTORS' MOTION FOR AN ORDER (I)(A) AUTHORIZING DEBTORS TO OBTAIN REPLACMENT POST-PETITION FINANCING UNDER 11 U.S.C. § 364 AND BANKRUPTCY RULE 4001(c) AND DEL. BANKR. LR 4001-2 AND ASSIGN THE EXISTING SECURED LENDERS' LIENS TO THE REPLACEMENT LENDERS, AND (B) AUTHORIZING DEBTORS TO PAY CERTAIN COMMITMENT AND RELATED FEES AND EXPENSES RELATING TO THE REPLACEMENT POST-PETITION FINANCING, (II) GRANTING ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. §§ 361 AND 363; AND (III) AUTHORIZING DEBTORS TO REPAY CERTAIN OUTSTANDING OBLIGATIONS UNDER THE PRE-PETITION CREDIT AGREEMENT AND THE POST-PETITION LOAN AGREEMENT

Hershey Foods Corporation ("Hershey"), by its attorneys, Klehr Harrison Harvey Branzburg & Ellers LLP, hereby objects (the "Objection") to the Debtors' (the "Debtors'") Motion For An Order (I)(A) Authorizing Debtors to Obtain Replacement Post-Petition Financing Under 11 U.S.C. § 364 and Bankruptcy Rule 4001(c) and Del. Bankr. LR 4001-2 and Assign The Existing Secured Lenders' Liens to The Replacement Lenders, and (B) Authorizing Debtors to Pay Certain Commitment and Related Fees and Expenses Relating to The Replacement Post-Petition Financing, (II) Granting Adequate Protection Pursuant to 11 U.S.C.§§ 361 And 363; and (III) Authorizing Debtors to Repay Certain Outstanding Obligations Under The Pre-Petition

Credit Agreement and The Post-Petition Loan Agreement (the "Replacement Financing Motion"), and respectfully represents as follows:

Preliminary Statement

1. At the inception of this case the Court approved procedures for the protection of Reclamation Claims. Since then, the Debtors have attempted to eliminate or eviscerate those claims. At some unspecified time, the Debtors apparently agreed with the Prepetition Lenders to sell Coremark and satisfy their claims with those proceeds,[1] but having failed to eliminate the Reclamation Claims through the Reclamation Determination Motion (defined below), the Debtors now seek to avoid their commitment to conduct a sale and pay the proceeds to the Prepetition Lenders, because compliance with that alleged agreement would effectively eliminate their continued attempts to rid themselves of the Reclamation Claims. Accordingly, at this juncture, instead of following through with an auction sale to which they apparently committed themselves, the Debtors seek to obtain the replacement financing under such terms and conditions that would result in the maintenance of the liens of the Prepetition Lenders, while still paying off their prepetition debt. It is clear that the purpose of this request is to end-run the result obtained in the *PharMor* case, in which the claims of reclamation claimants were determined to have full value, because the secured lenders were fully paid from funds of a replacement lender, and prepetition liens were thereby satisfied and automatically released.

2. Hershey hereby objects to the Replacement Financing Motion on grounds that the Debtors have not demonstrated a need for the Replacement Financing, nor have they

[1] It is unclear from the Replacement Financing Motion where or how the Debtors entered into a binding agreement with the Prepetition Lenders to sell Coremark. Hershey is unaware of any order entered by this court approving such an agreement. If no such binding agreement exists, the premise for the Replacement Financing Motion is flawed.

demonstrated that the Replacement Financing Facility (defined below) has been entered into in good faith, with terms that are fair and reasonable to reclamation claimants. Rather than propose a simple and normal exit financing arrangement under which the Prepetition Lender satisfies its liens when its debt is paid, the Debtors have creatively gerry-rigged the replacement financing in an effort to have the prepetition liens survive, even though the prepetition debt will be satisfied. This financing structure has been customized to attempt to protect the Debtors' recently conceived notion that the more than $250 million of reclamation claims that have been asserted in their cases are valueless.

Background

3. On April 1, 2003 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors retained possession of their respective assets and are authorized, as debtors-in-possession, to continue the operation and management of their respective businesses.

4. Hershey engages in, *inter alia*, the manufacture and distribution of chocolates and confectionary candy. Immediately prior to the Petition Date, Hershey shipped, and the Debtors received, various goods on credit for use in connection with the Debtors' business, which included goods sold on credit (the "Goods") in the approximate amount of $11,858,953.34, for which Hershey has timely asserted a reclamation claim (the "Reclamation Claim"), pursuant to section 2-702 of the Uniform Commercial Code (the "UCC").

5. Hershey sold the Goods to the Debtors in the ordinary course of its business.

6. The Debtors were insolvent on the dates that they received the Goods from Hershey.

7. Within 10 days after the Debtors' receipt of the aforementioned Goods, Hershey, pursuant to section 2-702(2) of the UCC, made a written demand on the Debtors for the return and reclamation of the Goods (the "Reclamation Demand").

8. The Debtors failed to accede to the Reclamation Demand and return the Goods.

9. As of the date of the Reclamation Demand, the Goods were subject to the security interest of certain pre-petition lenders (the "Prepetition Lenders").

10. As of the Petition Date, the Prepetition Lenders were owed the aggregate principal amount of $604 million, of which $458 million represented funded liabilities, and $146 million represented standby letters of credit (the "LC's") that the Debtors indicated were contingent. See Final DIP Order (defined below), p.6.

11. Upon information and belief, the LC's were never drawn down and, therefore, the Prepetition Lenders have never advanced funds to satisfy the contingent obligations, which the LC's represent.

12. As of and since the Petition Date, Prepetition Lenders were oversecured and continue to be oversecured.

13. No foreclosure action was instituted against the Goods or any of the goods subject to the claims of other reclamation claimants (the "Reclamation Claimants") prior to the Petition Date, nor has any been instituted post-petition. In fact, rather than foreclosing on the reclamation

goods, the Prepetition Lenders permitted the reclamation goods to be utilized in the ordinary course of business. Thus, the reclamation goods have been sold and their proceeds commingled with funds that were used in the ordinary course of business, including but not limited to, purchasing new inventory, paying down the postpetition DIP financing facility, and payment of administrative professional fees, landlords, the U.S.Trustee's office, etc. The goods were used in this fashion so that the Debtors could maintain their going concern value and so that the Prepetition Lenders could maintain the going concern value of its collateral.

14. On the Petition Date, the Debtors filed a motion (the "Reclamation Procedures Motion") for entry of an order establishing uniform procedures in their cases for the treatment of the Reclamation Claims and enjoining the Reclamation Claimants from seeking to exercise their reclamation rights with respect to their respective reclamation goods. In the Reclamation Procedures Motion, the Debtors alleged that the reclamation goods were "essential to the Debtors" and that their "business operations [would] be severely disrupted if vendors [were] allowed to exercise their right to reclaim goods without a uniform procedure that is fair to all parties." Reclamation Procedures Motion, ¶ 7. On April 14, 2003, Hershey filed a Limited Objection to the Reclamation Procedures Motion.

15. On April 22, 2003, this Court entered an Order (the "Reclamation Procedures 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. Pursuant to the Reclamation Procedures Order, the Debtors were, *inter alia*, required to file a report (the "Report") within 90 days of the entry of the order with respect to the Reclamation Claims. Reclamation Procedures Order, p. 3. The order further

provided that, upon the request of the Debtors, each Reclamation Claimant provide such additional documentation that may be in its possession as would be reasonably needed to assist the Debtors in their evaluation of such claimant's claim. *Id*. The order also provided the following with respect to the substantive rights of the Reclamation Claimants:

> h. Debtors agree to waive all defenses based [sic] the sale or commingling of goods, to the extent that such a defense is based on a sale or commingling of goods which occurred on or after the date of the Demand Date, or any other defense arising due to the passage of time or the delay resulting from the procedures adopted herein.

Id. at 3.

16. Following the entry of the Reclamation Procedures Order, the Debtors filed two motions seeking to implement additional procedures with respect to reconciliation of the Reclamation Claims, both of which motions were denied by this Court. Following these denials, pursuant to the Reclamation Procedures Order, the Debtors requested from Hershey numerous documents and information with respect to their evaluation of its Reclamation Claim, and Hershey expended significant time, money and effort complying with the Debtors' requests. Correspondingly, the Debtors must have spent numerous hours and expended substantial administrative expenses reconciling the Reclamation Claims and preparing the Report. The Debtor reportedly had teams of people working long hours to reconcile these claims; all at a huge expense to the estate. It was the understanding of Hershey that the purpose of the Reclamation Procedures Order and the preparation of the Report was to enable the Debtors to reconcile the specific amounts of those Reclamation Claims which would be ultimately determined to be validly asserted under the UCC.

17. At around the same time the Reclamation Procedures Order was entered, the Debtors negotiated a Trade Credit Program with the Prepetition Lenders and the Creditor Committee (the "Committee") described as follows: "In a further effort to induce the extension of post-petition trade credit, reclamation claimants who extend post-petition trade credit will be granted the Trade Lien to secure such extension of credit and, in addition, be granted a lien under Section 546(c)(2)(B) (the 'Reclamation Lien') to secure the lesser of (i) their total reclamation claims and (ii) the amounts of post-petition trade credit extended. The Trade Lien and the Reclamation Lien are junior in priority to the Prepetition Lenders' pre- and post-petition liens, and are *pari passu* with each other. . . . The Reclamation Lien, having been arduously negotiated among the Debtors, Prepetition Lenders and Committee, is available to reclamation claimants extending qualifying post-petition credit irrespective of whether it is ultimately determined that the Prepetition Lenders' 'floating lien on all of a debtor's inventory and its claim exceeds the value of the inventory. . . .' *In re Primary Health Systems, Inc.*, 258 B.R. 111, 118 (Bankr. D. Del. 2001)." Response of the Committee to Objections by Certain Reclamation Claimants to the Emergency Motion Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 Fed. R. Bankr. P. 4001(b) and 9014, and Del. Bankr. LR 4001-2, (A) for Interim and Final Order Authorizing the Use of Cash Collateral and Grant of Adequate Protection Nunc Pro Tunc to the Petition Date, and (B) Approving Post-Petition Financing and Related Relief, ¶ 4.

18. In addition, the Trade Credit Program further protects the unliened balance of the valid claims of Reclamation Claimants, with an administrative expense claim under section 503(b) of the Bankruptcy Code, as follows:

> To the extent that any valid reclamation claim held by an Approved Trade Creditor and as set forth on such Approved Trade

> Creditor's Trade Credit Program Letter Agreement is not covered fully by such Approved Trade Creditor's Trade Creditors Lien, then the balance of such valid reclamation claim shall constitute an administrative expense under Section 503(b) of the Bankruptcy Code . . . .

Final Order (the "Final DIP 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 Rules 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), ¶ 18.[2]

19. Pursuant to the Final DIP Order, the Debtors entered into a postpetition credit facility (the "DIP Facility") with the Prepetition Lenders, which provided the Prepetition Lenders with a post-petition security interest in all of the remaining assets of the Debtors. The Final DIP Order provides for the general protection of the rights of the Reclamation Claimants as follows:

> The Reclamation Claimants reserve any reclamation rights with respect to any goods delivered by them to the Debtors prior to the Petition Date.
>
> The protections afforded by this Order shall not be deemed a limitation, waiver, relinquishment or election of rights or remedies against the Debtors or any non-Debtor third parties which are otherwise available to the Reclamation Claimants under applicable law.

Id. at ¶¶ 59-60.

[2] In an apparent conflict with this treatment, the plan proposed by the Debtors and the Committee seeks to relegate such claims to subordinated liens on the proceeds of "Litigation Claims" (as defined therein). Debtors' and Official Committee of Unsecured Creditors' Joint Plan of Reorganization of Fleming Companies, Inc. and Its Filing Subsidiaries Under Chapter 11 of the United States Bankruptcy Code (the "Plan"), p. 5.

20. On November 22, 2003, the Debtors filed the Combined Amended Reclamation Report and Motion to Determine that Reclamation Claims are Valueless (the "Reclamation Determination Motion"), both setting forth the Report and seeking, *inter alia*, this Court's determination that the Reclamation Claims are valueless and, should, therefore be accorded the status of general unsecured claims. The filing of this motion came as a complete surprise to Hershey and other Reclamation Claimants in that they had just spent countless hours and substantial monies exchanging information with the Debtors as to the Report, let alone the time and monies spent by the Debtors on the preparation of the Report.

21. On December 5, 2003, this Court entered an order (the "Paydown Order"), permitting the Prepetition Lenders to be paid $325 million from funds in the Debtors' possession in partial satisfaction of the Prepetition Lenders' prepetition secured claims. Paydown Order, p. 2. The Paydown Order provides for the following protections to be accorded the holders of Reclamation Claims:

> Neither the fact of the Court's approval herein of the payment of $325 million to the Pre-Petition Lenders nor the payment pursuant to such approval shall have any adverse effect on the reclamation claims asserted by various reclamation claimants. This Order shall not in any way modify the prior Orders of this Court, including, without limitation the provisions of the Final DIP Order and the Reclamation Procedures Order.

Id. at ¶ 5.

22. On December 8, 2003, certain reclamation claimants filed both a (I) Motion (the "Deferral Motion") to Defer Response Date, Direct that Bankruptcy Rule 7016 Shall Apply to this Matter, Re-Designate Proposed Hearing Date as Scheduling Conference, and for Other Relief on the Reclamation Determination Motion, and (II) Motion for Expedited Hearing

Thereon (the "Expedited Hearing Motion"). On December 9, 2003, Hershey filed its Response and Joinder to the Deferral Motion and the Expedited Hearing Motion. On December 9, 2003, this Court granted the Expedited Hearing Motion, and set December 12, 2003, as the hearing date on the Deferral Motion.

23. On December 12, 2003, this Court entered an order (the "Deferral Order") denying the Debtors the right to proceed by motion with the relief requested in the Reclamation Determination Motion, and permitting the Debtors to file separate adversary proceedings against each Reclamation Claimant with respect to such relief. In the Replacement Financing Motion, the Debtors allege that they intend to file six hundred and sixteen (616) adversary proceedings. Replacement Financing Motion at ¶ 4.

24. On December 12, 2003, the Debtors filed the Plan together with the Committee. The Debtors state that the Plan contemplates confirmation in the second quarter of 2004 and a distribution to unsecured creditors in the form of equity in the reorganized entity. *Id*. at ¶ 1. With respect to Reclamation Claims, the Plan does not provide for the payment of such claims on the Effective Date. Instead, Reclamation Claimants who have a Reclamation Lien are relegated to a payout of undetermined duration, secured by a first lien on Litigation Proceeds, while Reclamation Claimants who did not participate in the Trade Credit Program are relegated to a second lien on these same Litigation Claims, also with an undetermined payout. Plan at 5. None of the Reclamation Claims are treated as administrative expense claims to be paid on the Effective Date, contrary to the provisions of the Final DIP Order. *See id*. The Plan does not deal with the potential consequence of this Court determining that reclamation claims have value and should be deemed administrative claims.

25. On December 16, 2003, the Debtors filed the Replacement Financing Motion, pursuant to which the Debtors seek an order: (a) authorizing them to obtain replacement post-petition financing (the "Replacement Financing") under section 364 of the Bankruptcy Code, pursuant to a replacement DIP facility (the "Replacement DIP Facility") in the aggregate principal amount of $250 million, consisting of $240 million under a revolving credit facility with a Letter of Credit Subfacility, and a $10 million Tranche B facility, (b) authorizing them to assign to the replacement DIP lenders (the "Replacement DIP Lenders") the liens of the Prepetition Lenders, (c) authorizing the Debtors to pay to GE Capital fees in the amount of $2,400,000 and reimburse expenses in the amount of $100,000 under the Replacement DIP Facility, (d) granting adequate protection to the Prepetition Lenders, (e) authorizing the Debtors to repay the prepetition claims of the Prepetition Lenders in the amount of $300.6 million, (inclusive of unfunded LC's of $146 million) and postpetition claims of the Prepetition Lenders in the amount of $18.5 million, and (f) authorizing the Debtors to cash collateralize certain letter of credit obligations under the prepetition loan agreement with the Prepetition Lenders.

26. In the Replacement Financing Motion, the Debtors allege that the Prepetition Lenders are currently owed approximately $300.6 million, with respect to both their prepetition claims, and their claims under the DIP Facility. Replacement Financing Motion at ¶ 2. The Debtors further state that the obligations owed under the DIP Facility include $18.5 million in outstanding letters of credit. *Id*. at ¶ 16. The outstanding amount of the prepetition claims owed the Prepetition Lenders totals $282.1 million, inclusive of the unfunded LC's of $146 million. *Id*. at ¶ 26. The Debtors seek to both repay the amounts outstanding and to cash collateralize the LC's.

27. In the Replacement Financing Motion, the Debtors allege that the Prepetition Lenders "will not wait" to be paid down through the Plan confirmation process and, instead, "have required" that the Debtors sell Coremark in order to be promptly paid. *Id*. No evidence is presented in the Replacement Financing Motion of any written agreement setting forth the requirement that the Debtors sell Coremark. Similarly, no legal or contractual basis is provided for the alleged need of the Debtors to repay the Prepetition Lenders at this juncture. Rather, the Debtors seek to "accommodate" the Prepetition Lenders (or perhaps, pursue their own litigation strategy in connection with the claims of the Reclamation Claimants). *Id*. at ¶ 3.

28. The Debtors allege that, at the request of the Prepetition Lenders, they have obtained bids for the sale of Coremark. *Id*. Further, the Debtors allege that, pursuant to their agreement with the Prepetition Lenders, they were required to file a bid procedures motion by January 5, 2004. *Id*. at ¶ 27. If the Debtors were to comply with the agreement to sell Coremark, the consequence to the Debtors' litigation strategy against reclamation claimants is obvious. The Prepetition Lenders would have their claims satisfied from the proceeds of sale and would satisfy their prepetition liens. Those liens then would not be available to the Debtors to use as a sword against reclamation claimants. Therefore, the sale of Coremark at this time is inconsistent with the Debtors' litigation strategy against reclamation claimants.

29. The Debtors state in the Replacement Financing Motion that they and the Committee have concluded that an expedited sale process will not benefit the Debtors' unsecured creditors (but presumably it would benefit reclamation claimants), and that greater value can be provided through the Plan. *Id*. No evidence is provided to support this statement. The motion does not set forth the terms or amounts of any of the bids. In fact, a well-run sale of Coremark

might very well produce greater value than can be provided through the Plan. The auction process under section 363 of the Bankruptcy Code is designed to determine the market value of the subject assets. At this point, while the Debtors may be able to determine the amount of a stalking horse bid, they cannot determine the value to be achieved after the auction process has concluded. Therefore, it is speculative to state that the Plan process will generate a greater benefit to the estate than a sale process. Furthermore, given the ability of these Debtors to dissipate rather than create value, any claim of value being generated from operations should be viewed with a healthy dose of skepticism.

30. In the Replacement Financing Motion, the Debtors state that they are able to use cash collateral of the Prepetition Lenders under the terms of the Final DIP Order and have letters of credit issued. *Id.* at ¶ 20. Immediately after the paydown of the $325 million (the "Paydown") pursuant to the Paydown Motion, $282 million in cash remained in the Debtors' possession. *Id*. at 10, n. 4. The Debtors do not state, in the Replacement Financing Motion, how much cash is currently on hand.

31. Because the Debtors are able to utilize their cash collateral and draw upon the LC's, there appears to be no current operational need for the Replacement Financing; rather, the Debtors are seeking to obtain such financing for the sole purpose of paying down the Prepetition Lenders' debt (which payment is to be supplemented by the Debtor's available cash on hand), while avoiding a sale of Coremark. *Id*. at ¶ 3.

32. The Debtors allege, that while they have apparently been working diligently on a replacement financing facility, the Replacement DIP Facility for which they seek approval has not been finalized, and the Replacement DIP Lenders have not yet completed their due diligence.

Id. at ¶ 33. Accordingly, the terms of the Replacement DIP Facility are still subject to modification. *Id*.

33. Despite the failure of the Debtors to have entered into a final agreement with the Replacement DIP Lenders, they, nevertheless, seek authority to pay significant commitment fees, totaling $2.5 million, to the Replacement DIP Lenders, on or before January 7, 2004, which monies are not refundable if the Replacement DIP Facility does not ultimately close. *Id*. at ¶ 34.

34. Pursuant to the terms of the Replacement DIP Facility, the following constitutes an event of default: "any granting or imposition of liens other than purchase money and other liens permitted pursuant to the Replacement DIP Credit Facility Loan Documents". Replacement Financing Motion, P. 23. The Debtors further state that, the Trade Credit Program will not be affected by the terms of the Replacement DIP Facility. *Id*. at ¶ 38. Accordingly, the Reclamation Liens will remain unaffected. However, as to the balance of any Reclamation Claims that are not protected by the Reclamation Liens, were this Court to grant replacement liens under section 546(c) of the Bankruptcy Code, this would constitute an event of default on the part of the Debtors under the Replacement DIP Facility.

Argument

35. Contrary to the allegations of the Debtors, they have not demonstrated that either (a) the incurrence of the Replacement Financing debt is necessary and in the best interests of their estates, (b) they are exercising prudent business judgment in incurring such debt, (c) they are acting within their fiduciary duties in incurring such debt, (d) that the terms of the Replacement DIP Facility are fair and reasonable, (e) that they are entering into the Replacement

DIP Facility in good faith, or (f) that there is a need for the assignment of liens to the Replacement DIP Lenders. *See* 11 U.S.C. § 364(d). Rather, the Debtors are seeking to gerrymander the status quo and end-run the results of the *Phar-Mor* decision which would be favorable to reclamation claimants if the prepetition lender were to satisfy its liens when its debt is satisfied.

36. Pursuant to section 364(d) of the Bankruptcy Code, the Debtors are required to show that "they are unable to obtain such credit otherwise." 11 U.S.C. § 364(d)(1). It appears from the Replacement Financing Motion that the Debtors are not currently in need of any new financing for the purposes of operating as a going concern, in that they are permitted to use available cash collateral of the Prepetition Lenders under the terms of the Final DIP Order. It also appears that the Prepetition Lenders are adequately protected to the extent cash collateral is used. Rather, it appears that the need for the Replacement Financing is merely to pay down the claims of the Prepetition Lenders in order to avoid the consequence of complying with their alleged deal to sell Coremark. The Debtors have offered no proof to demonstrate that they are legally, whether contractually, by order of a court, or otherwise, required to pay the Prepetition Lenders at this juncture. Rather, they merely state that the Prepetition Lenders have requested that they be paid, and that the Debtors seek to accommodate such request. Accordingly, the Debtors have not demonstrated the need for the Replacement Financing, and should be denied such financing under section 364(d) of the Bankruptcy Code.

37. In fact, as admitted by the Debtors themselves, there is an alternative source of funding available to them, namely, the sale of Coremark, which the Debtors are allegedly required to effectuate pursuant to an agreement entered into with the Prepetition Lenders. If such

a binding agreement exists, the Debtors should abide by the terms of this agreement and proceed with the sale. In fact, the Debtors stated that they have already pursued this agreement to the point that they have obtained bids. It is assumed that very substantial administrative fees and expenses have been incurred in the sales process, all of which will have been wasted if the Debtors now abandon that process. Were the Debtors to follow through with the sale, they would achieve their stated goal of paying down the Prepetition Lenders. This would be accomplished without harming the interests of the Reclamation Claimants.[3]

38. However, because the Debtors have recently decided that they would like to rid themselves of the Reclamation Claims and relegate them to unsecured status, and having failed to succeed in such endeavor through the Reclamation Determination Motion, the Debtors now state that they prefer not to conduct the sale, on the basis of mere speculation -- that a sale might not result in as favorable a distribution to unsecured creditors as would the Plan. Again, no proof has been presented in support of the Debtors' allegations.

39. Moreover, contrary to the allegations of the Debtors, the terms of the Replacement DIP Facility are not "fair and reasonable" to the Reclamation Claimants (Replacement Financing Motion at ¶ 54) and such terms do "tilt the conduct of these cases" against the Reclamation Claimants and "prejudice the powers and rights that the Bankruptcy Code confers for the benefit of" such claimants (*Id*. at ¶ 58). In the ordinary financing

[3] Pursuant to the terms of the Deferral Order, this Court ordered that the relief sought by the Debtors in the Reclamation Determination Motion be sought through the commencement of separate adversary proceedings against the Reclamation Claimants and that all arguments with respect thereto be presented in the context of such proceedings. Accordingly, Hershey intends to present its arguments with respect to the continuing validity and value of its Reclamation Claim in the context of such proceedings and reserves its right to do so. While the Debtors incorporate the Reclamation Determination Motion by reference into the Motion and set forth certain arguments from such motion in the Motion, Hershey will respond only briefly, if at all, to these arguments in this Objection, reserving its rights to respond more fully in the context of any adversary proceeding that might be commenced against it.

transaction, the prepetition lender would satisfy its liens when its debts were paid and the replacement lender would take new first lien on all assets. In this case, by seeking to maintain and assign the liens of the Prepetition Lenders to the DIP Facility Lenders even though the underlying debt has been paid, the Debtors are seeking to specifically implement a litigation strategy to harm the interests of the Reclamation Claimants. Because the Debtors are fully paying down the claims of the Prepetition Lenders, there is no reason to maintain and assign the prepetition liens other than to potentially prejudice and eviscerate the rights of the Reclamation Claimants.

40. Similarly, the terms of the Replacement DIP Facility are further tilted against the Reclamation Claimants by providing that any grant of any liens (aside from certain protected liens such as the Trade Credit or Reclamation Liens) as to the collateral under the Replacement DIP Facility would constitute an event of default under the agreement. Accordingly, such term prevents the Debtors from granting any liens to Reclamation Claimants under section 546(c) of the Bankruptcy Code. Were such liens to be granted by this Court, the Debtors would be in default under the Replacement DIP Facility.[4]

41. In addition, contrary to the allegations of the Debtors, the fees to be paid the Replacement DIP Lenders are not "reasonable and appropriate under the circumstances." Replacement Financing Motion at ¶ 60. The Debtors are required to pay non-refundable fees totaling $2.5 million to the Replacement DIP Lenders, without even the assurance that the deal will close, in view of the fact that it is still subject to the Replacement DIP Lenders' due

[4] In the proper procedural posture, this Court could grant liens or administrative status to Reclamation Claimants. By this Replacement Financing Motion, the Debtors are seeking to limit, for all practical purposes, the kind of relief that this Court could grant when it determines the relative rights of Reclamation Claimants.

diligence. These fees are substantial and significant and should not be approved, especially in view of the fact that the Debtors do not appear to need additional financing, other than for the purpose of paying down the Prepetition Lenders at their request, and in lieu of a sale of Coremark, which sale they could easily and efficiently conduct and for which they have already received bids.

42. Similarly, the Debtors seek to cash collateralize the LC's, in the amount of $146 million. The Replacement Financing Motion is not clear as to how the LC's will be treated other than to say that they will be cash collateralized. Does this mean that the Debtors will have to segregate $146 million of cash that would otherwise be available for use in operations? Does this mean that the Debtors' interest expense will increase since the cash collateral will be drawn from the credit facility? The cost of this cash collateralization is not identified.

43. The Debtors present this Replacement Financing Motion as one that falls purely under section 364 of the Bankruptcy Code, yet they intend thereby to do more than obtain financing and pay out fees. In anticipation of the objections of the Reclamation Claimants to the Replacement Financing Motion, the Debtors present various arguments that they submit might be made by the Reclamation Claimants. They submit that the Reclamation Claimants will argue that the Prepetition Lenders should be denied payment on their claims, because of the existence of or impact on any reclamation right. Replacement Financing Motion at ¶ 62. On the contrary, Hershey encourages the repayment of the debt of the Prepetition Lenders so long as the prepetition liens are thereby satisfied. The Prepetition Lenders can be paid from the proceeds of a sale of Coremark, as was purportedly planned or required, or they can be paid through other forms of financing. Once paid, their liens should be released. It is not to the payment of the

Prepetition Lenders' debt that Hershey objects; rather it is to the needless and deliberately prejudicial assignment of the Prepetition Lenders' liens to the Replacement DIP Lenders that Hershey objects.

44. Finally, the Debtors state in the Replacement Financing Motion that the currently available cash includes the remaining proceeds of the Prepetition Lenders' collateral, and a portion of such cash will be used to repay the Prepetition Lenders together with the proceeds of the Replacement DIP Facility. Replacement Financing Motion at ¶ 68. The Debtors further argue that it is necessary to use such cash to pay the claims of the Prepetition Lenders, without any support or explanation. *Id*. The Debtors, apparently alleging that the cash collateral includes traceable proceeds of the inventory that have not been commingled, conclude that "any result other than granting the Replacement Financing Motion would be, in effect, to either require marshalling or to effectively grant the Reclamation Creditors a new form of relief …." *Id*. This conclusion is flawed. First, it is not necessary to pay the Prepetition Lenders from cash collateral. To the contrary, the Prepetition Lenders could be paid from the proceeds of the sale of Coremark. Second, the cash collateral currently held by the Debtors constitutes monies that have been commingled and are not traceable to the reclamation goods. These goods were actually sold in the ordinary course of the Debtors' business and were never foreclosed upon. In addition, the Debtors have waived any arguments based on commingling of the goods with the Debtors' cash. Accordingly, while Hershey disagrees with the Debtors' position regarding the status in bankruptcy of the Reclamation Claims and submits that either marshalling or a similar remedy could be applied in this case, the Debtors' marshalling arguments are essentially moot.

Conclusion

WHEREFORE, Hershey respectfully requests that this Court enter an Order:

(a) denying the Replacement Financing Motion; and

(b) granting such other and further relief as this Court deems just and proper.

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Dated: December 29, 2003

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