IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	**Chapter 11**
	)	
Fleming Companies, Inc., et al.,[1]	)	
	)	**Case No. 03-109459 (MFW)**
Debtors.	)	
	)	**(Jointly Administered)**
	)	

FLEMING'S OPPOSITION TO LORIN STEWART'S MOTION FOR RELIEF FROM THE STAY

The above-captioned debtors and debtors in possession (collectively, "Debtors" or "Fleming") file this opposition to Lorin Stewart's Motion Requesting Relief From the Automatic Stay ("Motion"). In support of this opposition, the Debtors state as follows:

PRELIMINARY STATEMENT

1. In its two-page Motion, Stewart offers nothing more than a request for relief. Stewart demonstrates no prejudice or likelihood of success to support a modification of the automatic stay to allow Stewart to pursue his lawsuit (the "Action"). Stewart also ignores the prejudice to Fleming. Indeed, Stewart presents no argument or evidence to support a lift stay motion. While Fleming may have insurance proceeds to cover any judgment on the Action, Fleming would still have to pay up to a $500,000.00 insurance deductible and legal fees to defend the Action. If the stay were lifted so that the Action could proceed, Fleming would have

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.; Favor Concepts, Ltd.; Fleming Foods Management Co., O.K., 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, Inc; Marquise Venture 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.

to spend administrative dollars to defend this pre-petition claim. As Courts have acknowledged, this is precisely the type of prejudice against which the automatic stay is designed to protect. Lifting the stay may also open the floodgates to other similar motions. For these reasons, cause does not exist to lift the stay.

STEWART HAS NOT DEMONSTRATED CAUSE TO LIFT THE STAY

2. Stewart has not even attempted to meet his burden to establish that cause exists to grant the Motion. See In re Ward, 837 F.2d 124, 128 (3d Cir. 1988) (movant bears burden of proof). Indeed, the Motion is nothing more than a request for relief, with no discussion of its burden of proof, any relevant law, or a legal basis for lifting the stay. Tellingly, it does not even attach the underlying complaint. On that basis alone, the Motion should be denied.

The automatic stay is one of the most fundamental protections afforded a debtor. Midlantic Nat'l Bank v. New Jersey Dep't of Envir. Prot., 474 U.S. 494, 503 (1986). The purpose of the automatic stay is to:

> prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor.

Borman v. Raymark Industries, Inc., 946 F.2d 1031, 1036 (3d Cir. 1991) (internal citation omitted). The stay should "'give the debtor a breathing spell from his creditors.'" Id.

3. Unsecured creditors, such as Stewart, are not entitled to relief from the automatic stay unless they "can establish extraordinary circumstances." In re Tristar Auto. Group, Inc., 141 B.R. 41, 44 (Bankr. S.D.N.Y. 1992). Under 11 U.S.C. § 362(d)(1), a court may find such extraordinary circumstances only if it determines that "cause" exists for such relief. See In re Kerns, 111 B.R. 777, 787 (S.D. Ind. 1990) ("[I]t makes little sense to conclude that Congress

intended the powerful and important automatic stay of § 362(a) to be subject to dissolution at the whim of an interested party.").

4. Delaware courts consider the following three factors in balancing the competing interests of the parties:

(i) the prejudice to the debtor should the stay be lifted;

(ii) the balance of the hardships to the parties should the stay be lifted; and

(iii) the probable success on the merits if the stay is lifted.

In re Continental Airlines, 152 B.R. 420, 424 (D. Del. 1993).

5. An examination of these factors demonstrates that sufficient cause does not exist to warrant lifting the automatic stay in this case.

A. Allowing the Stay Be Lifted Would Cause Great Prejudice to Fleming.

6. The "key to determining whether to permit an action to proceed in another tribunal" is whether that case will cause "interference with the pending bankruptcy case." In re Penn-Dixie Indus., 6 B.R. 832, 835 (Bankr. S.D.N.Y. 1980). Even participation in preliminary proceedings can be disruptive, as the Penn-Dixie court explained:

> Interference by creditors in the administration of the estate, no matter how small, through the continuance of a preliminary skirmish in a suit outside the Bankruptcy Court is prohibited. In short, the Debtor should not be required to devote energy to this collateral matter at this juncture.... This Court will not allow Plaintiffs to chip away piecemeal at the Debtor's automatic stay protection.

Id. at 835-37 (refusing to lift stay for debtor to produce customer list only in class certification proceeding); see also In re Curtis, 40 B.R. 795, 806 (Bankr. D. Utah 1984) ("Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit.").

7. Allowing the stay to be lifted in this case would be prejudicial to Fleming. It would cause a financial hardship on Fleming, and a resulting hardship on Fleming's creditors. Even assuming Stewart only seeks insurance proceeds, Stewart ignores the remaining financial impact on Fleming, including the litigation costs associated with defending the action and the payment of a $500,000.00 insurance deductible that must be satisfied before insurance proceeds are paid. See Borman, 946 F.2d at 1036 (purpose of the automatic stay is, among other things, "to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it"). These monies would come directly from monies that could be used to pay a pro rata distribution to all creditors.

8. Additionally, any insurance coverage that does exist cannot prevent the real harm to Fleming's ability to effectively and efficiently develop a comprehensive litigation and reorganization plan. Because Fleming would have to defend or provide information to its insurers to defend against Stewart's allegations, the existence of insurance coverage cannot be a sufficient basis to lift the stay. See In re Swann Gasoline Co., 46 B.R. 640, 641-42 (E.D. Pa. 1985) (relief from stay would not promote judicial economy, and was therefore denied, where only early pleadings had been filed in lawsuit prior to stay). Fleming would suffer significant harm from the distraction created by having to actively participate in the defense of the Stewart claims.

9. Furthermore, if the Court lifts the automatic stay with respect to the Stewart Action, it will likely prompt large numbers of other claimants to seek relief from the stay to pursue their claims against Fleming. Were the floodgates to open, Fleming would be relegated to the position it was in prior to filing for bankruptcy. Fleming should be given the breathing

spell provided for by the automatic stay to allow it to develop its litigation and reorganization plans.

B. The Balance of Hardships Weighs In Favor of Fleming.

10. The above-described burdens forced upon Fleming by the prosecution of the Stewart Action outweigh any difficulties encountered by Stewart. Unsecured creditors, such as Stewart, "bear the heavy and possibly insurmountable burden of proving that the balance of hardships tips significantly in favor of granting relief as against the hardships to the Debtor in denying relief." In re Micro Design, Inc., 120 B.R. 363, 369 (E.D. Pa. 1990).

11. While Stewart's injuries are not to be minimized, every creditor's issues are important to that creditor. Stewart should not receive preference over other creditors. Otherwise, every creditor would seek to lift the stay, and the purpose and function of the bankruptcy process would be frustrated. See In re Micro Design, 120 B.R. at 369 ("Clearly, if unsecured creditors could easily obtain relief from the stay to pursue their claims against debtors in other forums, rather than in the bankruptcy claims process, much of the purpose for bankruptcy filings, featuring a summary process for resolving claims, would be undermined.").

C. Stewart Has Not Demonstrated A Probability of Success On the Merits.

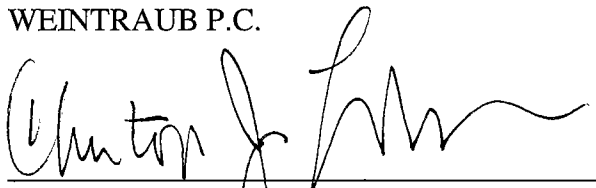
12. In light of the fact that Stewart has not shown that the factors of prejudice to the debtor and balance of hardships weigh in favor of lifting the stay, the probability of success on the merits of the underlying dispute has little or no significance in determining whether the automatic stay should be lifted. Even if the Court disagrees, however, that the first two elements have not been met, the Motion should still be denied. Stewart has not even attached his complaint setting forth his allegations, let alone attempted to demonstrate a likelihood of success on the merits. See In re Ward, 837 F.2d 124, 128 (3d Cir. 1988) (movant bears burden of proof).

WHEREFORE, Fleming requests that the Motion be denied in its entirety.

Dated: December 29, 2003

Respectfully Submitted,

PACHULSKI, STANG, ZIEHL, YOUNG, JONES & WEINTRAUB P.C.



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