IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., et al.[1],	)	(Jointly administered)
Debtors.	)	**Hearing Date: January 21, 2004 at 9:30 am EST** **Objection Deadline: January 14, 2004**

MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER AUTHORIZING ARBITRATION OF CERTAIN SPECIFIED CLAIMS AND CAUSES OF ACTION ASSERTED BY OR AGAINST DEBTORS OR ANY ONE OF THEM

The above-captioned debtors and debtors in possession (collectively, the "Debtors") move this Court for an order authorizing and approving binding, final arbitration of certain specified claims and causes of action as set forth below asserted by the Debtors against Best Yet Markets, Inc., R.S. Dale Corporation, Franklin Farms IGA, Russell's Food Store, L&L Food Center, Inc./Levandowski, LLC, and Gigante USA, Inc. (individually, a "Specified Retailer" and, collectively, the "Specified Retailers") and related counter-claims if any. In support of this Motion, the Debtors respectfully state as follows:

JURISDICTION

[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.; CIM Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., LLC.; Fleming Foods of Texas, LP.; 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.

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), (E) 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 requested relief are sections 105(a), 362(d) and 553 of the Bankruptcy Code.

BACKGROUND

4. On April 1, 2003 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code. 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 (the "Committee") 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 (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 billing 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. On October 28, 2003, Debtors filed a motion seeking the Court's approval to arbitrate various disputes between Debtors and parties who had purchased products from Debtors (the "Arbitration Motion"). The Arbitration Motion sought a global resolution of potential disputes over the enforceability of arbitration clauses in a large number of similar contracts to which Debtors are a party.

7. On December 11, 2003, the Court entered an order on the Arbitration Motion (the "Arbitration Order") authorizing the Debtors, among other things, to enter into an agreement with any Third Party to submit the Debtors' claims against any such Third Party and any counter-claims asserted by such Third Party to final and binding arbitration.[2]

8. The Arbitration Order further provided that if any Third Party refuses to enter into such an agreement with the Debtors (or any of them) or if the Committee serves the Debtors with an objection to an agreement with a Third Party for arbitration, the Debtors, prior to instituting an arbitration proceeding against such Third Party, must file a motion with the Court seeking authority to submit to final and binding arbitration the stated disputes with the Third Party and receive an order of this Court authorizing such arbitration.

9. Each Specified Retailer is a party to a prepetition agreement with one or more of the Debtors, which agreement requires the submission of any disputes between the Debtor that is a party to the agreement and the Specified Retailer party to the agreement to final

[2] Order Authorizing and Approving Arbitration of Certain Claims and Causes of Action Asserted By or Against the Debtors (Docket No. 4948)

and binding arbitration. However, when requested, as required by the Arbitration Order, to enter into a postpetition agreement with the Debtors to submit these same disputes to arbitration, the Specified Retailers refused to do so. Attached hereto as Exhibits A through F are affidavits describing the prepetition arbitration agreements applicable to each of the Specified Retailers, the amount owed the Debtors (or any of them) by each of the Specified Retailers according to the business records of the affected Debtor, and the date the debt was incurred.

RELIEF REQUESTED

10. In an effort to resolve the Debtors' claims against the Specified Retailers and any related counter-claims the Specified Retailers assert against the Debtors (or any of them) as inexpensively and expeditiously as possible, the Debtors seek an order:

a) Authorizing the Debtors (or any one of them) to institute an arbitration proceeding against each of the Specified Retailers in order to resolve the Debtors' claims;

b) Authorizing arbitrators selected from the national roster of the AAA arbitrators to proceed with any such arbitration proceeding;

c) Pursuant to section 362(d) of the Bankruptcy Code, modifying the automatic stay to allow a Specified Retailer party to an arbitration proceeding to assert and pursue any counter-claims it asserts against the Debtor party or parties to the arbitration proceeding in the arbitration proceeding without any presumption as to the validity or enforceability of such counter-claims;

d) Pursuant to sections 362(d) and 553 of the Bankruptcy Code, authorizing a Specified Retailer party to an arbitration proceeding to offset, as provided in

section 553 of the Bankruptcy Code, any amount that the arbitrator determines the Specified Retailer owes to a Debtor party to the arbitration proceeding against any amount the Debtor party to the arbitration proceeding is determined by the arbitrator to owe such Specified Retailer party so long as the amounts owed to and by the Debtors are both debts that arose prepetition or are both debts that arose postpetition;

e) Prohibiting the enforcement of any award or the collection of any amount awarded to any Specified Retailer in the arbitration proceeding except as 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; and

f) Authorizing Debtors (or any one of them) to pay their portion of the (i) administrative fees and expenses incurred in the arbitration proceeding, (ii) the arbitrators' fees and expenses and (iii) any other fees and costs (including witness' expenses) incurred in the arbitration proceeding, and authorizing the AAA and the arbitrators to apply the payments to satisfaction of fees and expenses incurred in the arbitration proceeding.

ARBITRATION OF THE CLAIMS BETWEEN THE PARTIES IS APPROPRIATE

11. Section 105(a) of the Bankruptcy Code authorizes the Court to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). The purpose of section 105(a) is to ensure a bankruptcy court's power to take whatever action "is appropriate or necessary in aid of the exercise of its jurisdiction." 2 Collier on Bankruptcy, ¶ 105.01 at 105-4-6 (15th ed. 2000). There

is a strong federal policy in favor of arbitration. *See Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 885 F.2d 1149, 1153, 1155-56 (3d Cir. 1989). In these cases, there is no reason to deviate from that strong policy.

12. The Debtors seek to collect a combination of prepetition and postpetition debts owed them by the Specified Retailers. As this Court has previously held, courts have no discretion to deny the enforcement of an arbitration clause in a non-core bankruptcy proceeding. *See In re Charter Behavorial Health Systems, LLC*, 277 B.R. 54, 57 (Bankr. D. Del. 2002) (J. Walrath) (*citing Hays* at 1155-57). Fleming Companies, Inc. and each of the Specified Retailers are parties to prepetition agreements that require the parties to submit disputes between them to final, binding arbitration as is shown in Exhibits A – G. The "arbitration clause" thus exists as to each Specified Retailer and to the extent the matters are non-core, they must be submitted to arbitration.

13. To the extent the debts the Debtors seek to collect are "core" matters, the bankruptcy court has discretion to compel arbitration of such matters. *See Hays,* 885 F. 2d at 1161. When the matter at issue is core, bankruptcy courts determine whether "any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and . . . should enforce such clause unless that effect would seriously jeopardize the objectives of the [Bankruptcy] Code." *In re CGE Ford Heights LLC*, 208 B.R. 825, 827 (Bankr. D. Del. 1997) (*citing Hays and Co.*, 885 F.2d at 1161).

14. When determing whether to exercise its discretion to compel arbitration in a core proceeding, the Court may consider: (a) whether the issue can be resolved more expeditiously by the bankruptcy judge as opposed to an arbitrator; (b) whether special expertise

is necessary in deciding the issues; (c) the impact on the Debtors' other creditors; and (d) whether arbitration threatens assets of the estates. *In re Chas. P. Young Co.,* 111 B.R. 410, 417 (Bankr. S.D.N.Y. 1990); *In re T.D.M.A., Inc.,* 66 B.R. 992, 995 (Bankr. E.D. Pa 1986). In these cases, all of these factors weigh in favor of arbitration of these disputes.

15. Here, the Debtors seek to promptly collect monies owed to them by the Specified Retailers. The Debtors' cash flow depends on collection of accounts receivable and, absent their ability to have their rights quickly determined and enforced, the Debtors' ability to collect accounts receivable will be adversely affected. The Debtors are cognizant of this Court's crowded docket and submit that the initiation of arbitration proceedings with arbitrators appointed to decide each of the matters, which will be determined based on state law or federal law other than bankruptcy law, will expedite the resolution of the disputes and conserve this Court's resources for matters that necessarily require this Court's expertise.

16. In addition, arbitration of the disputes will not have any adverse impact on the creditors of the Debtors or threaten the assets of their estates. In fact, just the opposite will be the case. Arbitration promises to be a more cost effective means of dispute resolution because: a) the applicable arbitration clauses do not allow discovery deposition except upon the showing of special need and hence will dramatically reduce the cost of discovery; b) the severe limitations on motion practice in arbitration proceedings virtually eliminates the cost of a motion practice; c) arbitration hearings utilize streamlined procedures so that the hearings take far fewer days than an adversary proceeding or trial court jury trial; and d) arbitration decisions cannot be appealed based on mistake of law or fact and hence greatly reduce the cost of the appellate practice and the time needed to completely resolve the dispute. Therefore, if arbitration is

authorized by this Court, the Debtors will be able to collect monies owed to them in a very expeditious manner in an economical forum thereby benefiting their creditors and their estates.

NOTICE

17. Notice of this Motion has been given to: (i) the Office of the Unites States Trustee; (ii) counsel to the Official Committee of Unsecured Creditors; (iii) the Specified Retailers; and (iv) those persons who have requested notice pursuant to Rule 2002 of the Bankruptcy Rules.

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: December 31, 2003

KIRKLAND & ELLIS LLP
James H. M. Sprayregen, P.C. (ARDC No. 6190206)
Richard L. Wynne (CA Bar No. 120349)
Geoffrey A. Richards (ARDC No. 6230120)
Haleh Rahjoo (CA Bar No. 192137)
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400 (Telephone)
(213) 680-8500 (Facsimile)

and

PACHULSKI, STANG, ZIEHL, YOUNG, JONES & WEINTRAUB PC

Christopher J. Lhulier

Laura Davis Jones (DE No. 2436)
Ira D. Kharasch (CA No. 109084)
Scotta E. McFarland (DE No. 4184)
Christopher J. Lhulier (DE No. 3850)
919 North Market Street, 16th Floor
P.O. Box 8705
Wilmington, Delaware 19899-8705 (Courier No. 19801)
(302) 652-4100 (Telephone)
(302) 652-4400 (Facsimile)

Co-Counsel for the Debtors and Debtors in Possession