UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELEWARE

In re:	In Proceedings Under Chapter 11
Fleming Companies, Inc. et al.	Case No. 03-10945(MFW) (Jointly Administered)
Debtors.	**Objection Deadline: January 14, 2004** **Hearing Date: January 21, 2004 at 9:30 a.m.**

L & L FOOD CENTER, INC. AND LEVANDOWSKI, LLC'S OBJECTION TO MOTION FOR ORDER AUTHORIZING ARBITRATION OF CERTAIN SPECIFIED CLAIMS AND CAUSES OF ACTION ASSERTED BY OR AGAINST FLEMING COMPANIES, INC.

L & L Food Center, Inc. ("L & L") and Levandowski, LLC ("Levandowski"), appearing through their counsel, Foster Zack & Lowe, P.C., and local counsel Murphy Spadoro & Landon, state in support of their Objection to Motion for Order Authorizing Arbitration of Certain Specified Claims and Causes of Action Asserted by or Against Fleming Companies, Inc.:

JURISDICTION

1. Admit.

2. Admit.

3. Admit.

BACKGROUND

4. Admit.

5. Neither admit nor deny. Creditors L & L and Levandowski (together sometimes referred to as "Specified Retailer") lack sufficient knowledge or information on which to form a belief as to the truth of the allegation.

6. Admit.

7. Admit that On December 11, 2003 the Court entered an order in response to the Arbitration Motion, however, deny that the Arbitration Order permits the Third Party to submit "any counter-claims asserted by such Third Party to final and binding arbitration" for the reason that the Arbitration Order

includes restrictions on how the named arbitrator is permitted to treat counter-claims and defenses.

8. Admit.

9. Neither admit nor deny. L & L and Levandowski lack sufficient knowledge or information on which to form a belief as to the truth of the entire allegation. L&L and Levandowski further admit that they entered into a Facility Standby Agreement ("FSA") effective July 25, 2001 with Debtor Fleming Companies, Inc., and further admits they did not agree to enter into a postpetition agreement with the Debtors to submit disputes to arbitration for several reasons, including but not limited to the following:

a. L&L, Levandowski and Debtors were parties to a FSA which provided for a series of integrated transactions and payments in the ordinary course including specified credits, rebates, returns, and other benefits that were to be applied and adjusted at various intervals (generally quarterly). L&L and Levandowski have filed several pleadings with the court including its "Limited Objection to Assumption and Assignment of Executory Contract to SuperValu Inc." filed on or about 8-26-03 and its "Objection to Motion for Order Establishing Adequate Protection Reserve" filed on or about 9-23-03, both stating in pertinent part that they have already recouped their claims against Debtors by off-setting rights to credits, rebates and other specified adjustments due them under the terms of the FSA.

b. Bankruptcy Courts, including courts in the 3rd Circuit, have considered the remedy of recoupment and adopted the theory of recoupment as a viable defense to Debtor's claim for reimbursement, see for example: *In re HQ Global Holdings, Inc., et al.*, 290 BR 78 (Bankr. D.Del 2003)[citing *Anes v. Dehart* (*In re Anes*)], 195 F3d 177, 182 (3d Cir 1999); *University Med. Ctr. v. Sullivan* (*In re University Med. Ctr.*), 973 F.2d 1065, 1081 (3d Cir 1992).

c. The doctrine of recoupment has "long been applied in the bankruptcy context." 5 Collier on Bankruptcy §§553.10 at 553-99.

d. Recoupment "allows the creditor to asset that certain mutual claims extinguish one another in bankruptcy, in spite of the fact that they could not be 'set off' under 11 USC Section 553. The justification for the recoupment doctrine is that where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations in setoff in bankruptcy would be inequitable." *Lee v. Schweiker*, 739 F2d 870, 875 (3d Cir 1984).

e. Recoupment "permits the offset of debts even if one arose pre-petition and the other arose post-petition, so long as both arose from the same transaction." *In re HQ Global Holdings, Inc., et al.*, 290 BR at 81.

f. Recoupment is appropriate under the present facts and circumstances. Both Debtors' invoice to L&L and Levandowski for product (accounts receivable invoices) and the incentive obligations and other detailed adjustments due L&L and Levandowski from Debtor arose under the same transaction. Debtors are now attempting to dismiss the recoupment defense and assign its claims to Arbitration while tying the arbitrator's hands, and denying L&L and Levandowski's ability to assert the recoupment defense by placing restrictive wording in the Arbitration Order.

g. Furthermore, Debtors have rejected the Contract with L&L and Levandowski and now want to enforce only certain provisions of that contract (i.e. the Arbitration Clause), with added restrictions. Such selective enforcement is unjust, inequitable and contrary to the provisions of the bankruptcy code and case law as cited above.

RELIEF REQUESTED

10. L&L and Levandowski deny that the relief proposed by Debtors will allow Specified Retailer to resolve **"any"** related counter-claims for the reasons set forth in Paragraph 9 above. In addition, the arbitration clause in the Specified Retailer's FSA contract that has since been rejected by Debtors provides that the AAA arbitrators would be selected from a panel in Wayne, Oakland and Macomb Counties, Michigan, not from the national roster of the AAA arbitrators as alleged by Debtors. L&L and Levandowski further assert that the proposed restrictions on the Arbitrator will severely hamper Specified Retailer from enforcing its rights under the FSA, and deny Specified Retailer's access to equitable relief available directly from the court in the way of recoupment. Instead, the proposed Order seeks the best of both worlds for Debtors (rights to remedies without requirement for payment of claims that cross the artificial barrier of April 1, 2002 (petition date). For example, Debtors may owe Specified Retailer credits payable April 15, 2003 (15 days after the end of the quarter) for product purchased during the period January 1, 2003 through March 30, 2003. Specified Retailer may owe Debtors money for the product delivered during the period January 1, 2003 thorough March 30, 2003 on which the credit is based (accounts receivable). Equity requires the account receivable for product delivered and the credit based on the purchase of that product to be considered as one integrated transaction, rather than separate them as two distinct pre and post petition claims. The theory of Recoupment allows for these off-setting claims to be treated as the same transaction, rather then artificially straddling the April 1st filing date with the claim of Debtors for receivables being considered in a separate time period then the claim retailers have for credits on those same receivables. The restrictions included in the Arbitration Order requested by Debtors take away the Arbitrators ability to consider the transaction as a whole.

IN THIS CASE ARBITRATION IS INAPPROPRIATE

11. The Bankruptcy Code Sections speak for themselves Furthermore Bankruptcy Courts as noted above have adopted the theory of recoupment and it should be an available defense in the matter at hand.

12. Deny, as the Debtors have rejected the FSA with L&L and Levandowski, therefore the Arbitration clause in that Contract is null and void.

13. Deny, as ordering the Debtors' and Specified Retailer's claims to arbitration, while restricting the Specified Retailer's ability to offer defenses and all counter-claims would seriously jeopardize the objectives of the Bankruptcy Code which includes the right to defend under the recoupment theory.

14. The cases cited speak for themselves, furthermore the equities of this case weigh against arbitration of the disputes between Debtors, L&L and Levandowski.

15. Deny that referral to arbitration takes precedence over a fair and full consideration of the matter by the Court, including the Specified Retailer's rights to assert the defense of recoupment.

16. Deny that referral to arbitration takes precedence over a fair and full consideration of the matter by the Court including, the specified Retailer's rights to assert the defense of recoupment.

Relief Requested by L&L and Levandowski

Wherefore L&L and Levandowski respectfully request that the Court deny Debtors' Motion as presented and grant such further relief as this Court deems just and equitable.

Respectfully submitted,

Dated: January 13, 2004

/s/ Chase T. Brockstedt

Chase T. Brockstedt (ID# 3815)
Murphy Spadaro & Landon
Suite 700
824 Market Street
Wilmington, DE 19801
(302) 654-4600

and

Michelyn E. Pasteur (P44536)
Foster Zack & Lowe, P.C.
Attorneys for L & L Food Center, Inc.
and Levandowski, LLC
2125 University Park Drive, Suite 250
Okemos, MI 48864
517/706-5810