

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

In re:	)	Chapter 11
FLEMING COMPANIES, INC., et al <sup>1</sup>	)	
	)	
Debtor,	)	Case No. 03-10945 (MFW)
<hr style="width:40%; margin-left:0"/>	)	(Jointly Administered)
	)	
FLEMING COMPANIES, INC.,	)	
	)	
Plaintiffs,	)	Adv. No. 03-60189 (MFW)
v.	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	
	)	
Defendants.	)	
<hr style="width:40%; margin-left:0"/>	)	

**DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO  
STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding pursuant to Fed.R.Bank.P. 7012, Defendant, Zurich American Insurance Company ("Zurich" or "Defendant"), by and through its counsel, Eckert Seamans Cherin & Mellott, LLC, hereby moves this Honorable Court to dismiss the Complaint for Avoidance and Recovery of Preferential Transfers Pursuant to 11 U.S.C. §§ 547 and 550 filed in the United States Bankruptcy Court for the District of Delaware, at Civil Action No. 03-10945 (the "Complaint"). In support of its Motion to Dismiss, the Defendant states as follows:

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<sup>1</sup> The "Debtors" are the following entities: Core-Mark International, Inc.; Plaintiff Companies, Inc.; ABCD 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.; Favara Concepts, Ltd.; Plaintiff Foods Management Co., LLC.; Plaintiff Foods of Texas, LP.; Plaintiff International, Ltd.; Plaintiff Supermarkets of Florida, Inc.; Plaintiff 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. Plaintiff, Fleming Companies, Inc. (“Fleming” or “Debtor”), seeks to avoid and recover alleged preferential payments made to Defendant. The Complaint alleges that within ninety (90) days of the Petition Date, and “in response to Zurich’s demand that [Fleming] provide it with additional collateral security, [Fleming] established a letter of credit in the sum of \$7,500,000 (the “Transfer) naming Zurich as beneficiary.” Complaint, ¶ 9 (a copy of the Complaint is attached hereto as Exhibit A). The remainder of the Complaint parrots the statutory elements of Section 547(b) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, without setting forth the factual averments required to satisfy the statute.

2. By this Motion, Defendant seeks an order dismissing the Complaint because both counts fail to state a claim upon which relief can be granted. The First Claim for Relief (“Count I”) is patently defective because it fails to state such basic facts as (i) what property of the Debtor was allegedly transferred; (ii) the individual amount of the alleged transfer allegedly made by the Debtor; or (iii) the alleged antecedent debt(s) on account of which the alleged transfer was made. Accordingly, Count I of the Complaint (and consequently Fleming’s Second Claim for Relief (“Count II”) as well) fails to satisfy the pleading requirements of Fed.R.Civ.P. 8, made applicable pursuant to Fed.R.Bank.P. 7008. See Conley v. Gibson, 355 U.S. 41, 47 (1957) (finding that plaintiff’s statement of claim must “give the defendant fair notice of what plaintiff’s claim is and the grounds upon which it rests”).

3. One Court within this District has recently granted a motion to dismiss a complaint on facts similar to this case. See Valley Media, Inc. v. Borders, Inc., 288 B.R. 189 (Bankr. D. Del. 2003). In Valley Media, an action to avoid and recover alleged preferential transfers, the Plaintiff alleged that during the ninety day preference period, Defendant received preferential payments totaling “not less than \$624,627.18.” Valley Media at 191 (quoting Valley

Media's Complaint). The complaint failed to specify the specific amount of the alleged transfer. It merely noted a "rough estimate of the total amount of the preferential transfers." Id. at 192. The remainder of the complaint contained no further description of the alleged preferential transfers or antecedent debt, but merely parroted the statutory elements of sections 547(b) and 550(a) of the Bankruptcy Code. Id. Similar to the case at bar, Valley Media argued that these payments were avoidable under 11 U.S.C. § 547(b) and recoverable under 11 U.S.C. § 550(a)(1) because the payments were used to satisfy antecedent debt.

4. Based on these facts, this Court granted Borders' motion to dismiss the complaint. Valley Media at 193. In doing so, the Court reiterated that "merely quoting statutory language is insufficient to survive a Rule 12(b)(6) motion." Id. at 192 (citations omitted). According to the Court, "the following information must be included in a complaint to avoid preferential transfers in order to survive a motion to dismiss: (a) an identification of the nature and amount of each antecedent debt and (b) an identification of each alleged preference transfer by (i) date, (ii) name of debtor/transferor, (iii) name of transferee and (iv) the amount of the transfer." Valley Media at 192 citing Posman v. Bankers Trust Company, Adv. Pro. No. 97-245, Walsh, C.J. (Bank. D. Del. July 28, 1999) (dismissing debtor's preferential transfer avoidance action because merely quoting the statutory language of 11 U.S.C. §§ 546(b) and 550(a) is insufficient to survive a Rule 12(b)(6) motion).

5. Here, the Complaint fails to identify the nature and amount of any antecedent debt let alone with specificity. Rather, the Complaint merely avers that "[t]he Transfer was made for or on account of an antecedent debt owed by Debtors to Zurich before the Transfer was made." Complaint, ¶ 13. Thus, this paragraph is devoid of even the most basic information which would indicate that an antecedent debt even existed.

6. Additionally, the Complaint fails to clearly identify a preferential “transfer.” Plaintiff defines the “Transfer as “Debtors establishment of a letter of credit in the sum of \$7,500,000.” Complaint, ¶ 9. Plaintiff’s designation is perplexing, as the purported transfer, (the issuance of the letter of credit) was not provided or “issued” by Plaintiff. Rather, it was provided as an independent obligation by Debtors’ already undersecured lender in exchange for Zurich ceasing its bond termination process.<sup>2</sup> As a result, Debtor fails to adequately plead to what transfer it made to Zurich which forms the basis of the complaint. Accordingly, the Complaint must be dismissed because it fails to state a claim upon which relief can be granted.

7. Alternatively, should the Court decide not to dismiss the Complaint, Defendant requests that the Court require Plaintiff to provide a more definite statement of its claim, pursuant to Fed.R.Civ.P. 12(e), as incorporated by Fed.R.Bank.P. 7012, because the Complaint is so vague and ambiguous that Defendant cannot reasonably be expected to frame a responsive pleading. In any such statement, Fleming should be required to supply all of the basic facts as outline by this Court in Posman and Valley Media as discussed above at ¶ 4.

8. Because this motion presents no novel issues of law, Defendant waives its right under D.Del.L.R. 7.1.2 to file an opening brief in support of this motion. Defendant expressly reserves its right to file a reply brief.

9. Notice of this Motion has been served on counsel and other professionals for the Debtors and Defendant believes that no further notice is necessary under the local rules of this Court and District.

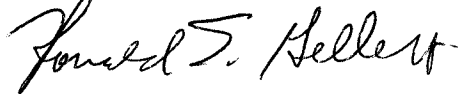
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<sup>2</sup> Furthermore, in terms of receipt by Zurich, of payment the Complaint fails to specify the specific dates and amounts of any draws on the letter of credit. In fact, the Complaint does not aver that Defendant has drawn on the letter of credit.

WHEREFORE, for the foregoing reasons, Defendant requests that this Honorable Court enter an Order dismissing the Complaint for failure to state a claim upon which relief can be granted and granting such other and further relief as is just and proper.

Respectfully submitted,

ECKERT SEAMANS CHERIN &  
MELLOTT, LLC



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Karen Lee Turner (4332)  
Ronald S. Gellert (4259)  
8 East 8<sup>th</sup> Street, Suite 200  
Wilmington, DE 19801

Attorneys for Defendant, Zurich American  
Insurance Company

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