

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

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC., et al.,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
_____)	
)	
MADISON FOODS, INC., LARRY J. HENG)	
And JANE A. HENG,)	
)	Adv. No. 04-53402 (MFW)
Plaintiffs,)	
)	
vs.)	
)	
FLEMING COMPANIES, INC., C & S)	
ACQUISITION LLC, ASSOCIATED)	
WHOLESALE GROCERS, INC., and SURRY)	
LICENSING, LLC)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION¹

Before the Court is the Plaintiffs' Motion to Reconsider, Alter, and Amend the Court's December 10, 2004, Order denying the Joint Motion to Enforce Settlement and for Approval of Settlement between the Plaintiffs and the Defendants. For the reasons set forth below, the Motion will be denied.

I. FACTUAL BACKGROUND

Madison Foods, Inc., Larry J. Heng and Jane A. Heng ("the

¹ This Opinion Constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Plaintiffs") operated a grocery store in Kansas City, Missouri, which they had purchased from Fleming Companies, Inc. ("the Debtor"). In connection with that transaction, the Plaintiffs had executed certain Notes, Guaranties and other agreements with the Debtor.

On April 11, 2003, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Thereafter, the Debtor sold a portion of its business, including the Notes from the Plaintiffs to C & S Acquisition LLC, Associated Wholesale Grocers, Inc., and Surry Licensing, LLC (collectively "the Buyers").

A dispute arose over the assumption and assignment of the Plaintiffs' Notes as part of the sale. On May 18, 2004, the Plaintiffs filed a Complaint against the Debtor and the Buyers (collectively "the Defendants") alleging that the Notes are unenforceable as a result of fraud, breach of contract, and promissory estoppel. On August 11, 2004, the Plaintiffs met with the Defendants to negotiate a settlement of the adversary proceeding.

At a status hearing held on August 17, 2004, counsel informed the Court that a settlement had been reached and that the parties would submit a settlement stipulation for approval by the Court. The Debtor's counsel also advised that the parties' settlement was subject to approval of the Post-Confirmation Trust

("PCT"), which was to come into existence on August 23, 2004, as a result of the confirmation of the Debtor's Third Amended and Revised Joint Plan of Reorganization.

At the continued status conference held on September 15, 2004, the Defendants' counsel advised that the PCT had not approved the settlement and that, therefore, it was of no effect. In response, on October 8, 2004, the Plaintiffs filed a motion seeking to enforce and approve the settlement. A hearing on the Motion was held on December 10, 2004. At that time, we denied the Motion because: (1) there was no settlement between the parties, or (2) alternatively, if there was a settlement, the condition of PCT approval had not been met.

The Plaintiffs filed this Motion to Reconsider that decision on December 20, 2004. On January 5, 2005, the PCT filed an Objection to the Plaintiffs' Motion to Reconsider. Briefing is complete and the matter is ripe for decision.

II. JURISDICTION

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) & (O).

III. DISCUSSION

Under Rule 9023 of the Federal Rules of Bankruptcy Procedure, a court may reconsider a ruling if the moving party

can establish "one of three major grounds: '(1) an intervening change in controlling law; (2) the availability of new evidence [not available previously]; [or] (3) the need to correct clear error [of law] or prevent manifest injustice.'" North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995) (citations omitted). "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985).

In this case, there is no newly discovered evidence to take into consideration. Thus, absent an error of fact or law our Order denying the Motion will be upheld. The Plaintiffs argue that cause exists to reconsider because the Court made a legal or factual error which has resulted in manifest injustice. Manifest injustice requires "misapprehension of the law or mistake of fact." In re Winer, 39 B.R. 504, 512 (Bankr. S.D.N.Y. 1984).

We conclude, however, that there was no mistake of law or fact in our original decision. It is undisputed that the business terms of a settlement were reached; the parties dispute, however, whether PCT approval was a condition precedent to the settlement's effectiveness.

The Plaintiffs claim that PCT approval was not a condition of the settlement, arguing that such approval was impossible as the PCT did not even exist at the time of the settlement

negotiations. Instead, they assert that the condition of PCT approval was unilaterally added to the settlement by the Defendants at the August 17, 2004, hearing.

We disagree. At the hearing held on August 17, 2004, the Plaintiffs did not dispute the Debtor's assertion that PCT approval was required. In fact, the record shows that the Plaintiffs affirmatively agreed that PCT approval was necessary. The Plaintiff's attorney stated that "I believe but for the fact that we're now caught between post-confirmation pre-effective, we do not have the PCT in place to basically bless the settlement agreement." (8/17/04 Transcript at p. 13.) Thus, the facts support our conclusion that approval of the PCT was a condition precedent to the effectiveness of the settlement.

Further, if the Plaintiff had asserted at the August 17 hearing that PCT approval was not a condition of the settlement, then we would have concluded that there was no settlement. Like a contract, for a settlement to exist there must be meeting of the minds. No meeting of the minds could occur where the existence of a material aspect of the contract is disputed. See, e.g., United States v. Park Side Ct., Inc., 257 F. Supp. 177, 188 (D.N.J. 1966); Davis v. Wells, 104 U.S. 159 (1881). For mutual assent to be present in this case, PCT approval must have been a condition of the settlement. Thus, there is sufficient evidence to support our alternative conclusion that, if the approval of

the PCT was not a condition, there was no settlement.

The Plaintiffs argue nonetheless that the evidence clearly shows that a settlement existed. However, the Plaintiffs fail to raise any new facts in support of their theory. In a motion for reconsideration, the movant "must do more than simply reargue the facts of the case or legal underpinnings." In re Chama, Inc., 265 B.R. 662, 670 (Bankr. D. Del. 2000) (holding that motion for reconsideration "should not be used to rehash arguments already briefed or allow a 'never-ending' polemic between the litigants and the Court."). Therefore, we conclude that there is no basis on which to overturn our Order.

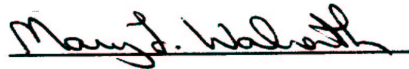
IV. CONCLUSION

For the foregoing reasons, the Motion to Reconsider, Alter, and Amend the Court's December 10, 2004, Order and Judgment Denying Joint Motion to Enforce and for Approval of Settlement is denied.

An appropriate Order is attached.

Dated: May 10, 2005

By the Court:

A handwritten signature in black ink, appearing to read "Mary F. Walrath", written over a horizontal line.

Honorable Mary F. Walrath
United States Bankruptcy Judge

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

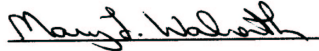
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WHOLESALE GROCERS, INC., and SURRY)	
LICENSING, LLC)	
Defendants.)	

ORDER

AND NOW, this **10th** day of **MAY, 2005**, having considered the Motion to Reconsider, Alter, and Amend the Court's December 10, 2004, Order and Judgment Denying Joint Motion to Enforce and for Approval of Settlement filed by the Plaintiffs, and the PCT's Objection thereto, it is hereby

ORDERED that the Motion is **DENIED**.

By the Court:



Honorable Mary F. Walrath
United States Bankruptcy Judge

cc: Jeffrey R. Waxman, Esquire¹

¹ Counsel shall distribute a copy of this Opinion and Order to all interested parties and file a Certificate of Service with the Court.

SERVICE LIST

John T. Carroll, III, Esquire
Jeffrey R. Waxman, Esquire
Cozen O'Connor
1201 N. Market Street, Suite 1400
Wilmington, DE 19801
Counsel to the Plaintiffs

Danny L. Curtis, Esquire
McDowell, Rice, Smith & Buchanan, P.C.
605 West 47th Street
Kansas City, MO 64112
Counsel to the Plaintiffs

David Fournier, Esquire
Pepper Hamilton LLP
Hercules Plaza, Suite 5100
1313 N. Market Street
P.O. Box 1709
Wilmington, DE 19899-1709
Counsel to the PCT