

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

In re:

Chapter 11

FLEMING COMPANIES, INC., et al.,¹

Case No. 03-10945 (MFW)

Debtors

Jointly Administered

**MOTION OF DEBTORS PURSUANT TO 11 U.S.C. §363 FOR
ENTRY OF (I) AN INTERIM ORDER AUTHORIZING THE EMPLOYMENT OF
AP SERVICES LLC AS CRISIS MANAGERS TO THE DEBTORS AND THEREBY TO
DESIGNATE REBECCA A. ROOF AS INTERIM CHIEF FINANCIAL OFFICER AND
MICHAEL SCOTT AS INTERIM TREASURER OF THE DEBTORS NUNC PRO TUNC
TO APRIL 9, 2003, AND SCHEDULING FINAL HEARING ON PROPOSED
EMPLOYMENT AGREEMENT, AND (II) A FINAL ORDER AUTHORIZING SAME**

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The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby apply to the Court for the entry of an order authorizing the Debtors’ employment of AP Services LLC (“APS”) as crisis managers to the Debtors *nunc pro tunc* to April 9, 2003 in these cases to assist them in their restructuring as more fully described below, pursuant to section 363 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the “Bankruptcy Code”). The proposed retention of APS complies with the protocol agreement between AlixPartners, LLC, formerly known as Jay Alix & Associates, and the United States Trustee for Region 3 (the “Protocol), entered into in September 2001. A copy of the Protocol is hereby attached as Exhibit C. In support of this Motion, the Debtors respectfully state as follows:

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.; Favar Concepts, Ltd.; Fleming Foods Management Co., L.L.C.; 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 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. (collectively, the “Debtors”)

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Background

1. On April 1, 2003, (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").
2. The Debtors are operating their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

Jurisdiction

3. The Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Application is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

4. As there are no novel issues of law presented herein, the Debtors waive their right to file a brief in support of the Motion pursuant to Rule 7.1.2(a) of the Local Rules of Civil Practice and Procedure of the United States District Court for the District of Delaware, incorporated by reference into the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware by Del.Bankr.L.R. 1001-1(b) (the "Local Rules"). Because of the nature of the relief requested in this Motion, the Debtors believe that no briefing is required.

Relief Requested

5. The basis for the relief sought herein is section 363 of the Bankruptcy Code.
6. By this Motion, the Debtors seek to employ APS as crisis managers to provide certain temporary personnel to Debtors to assist them in their restructuring in these chapter 11 cases, pursuant to section 363 of the Bankruptcy Code, on the terms set forth herein and in the engagement letter between Debtors and APS dated April 23, 2003 (the "Engagement Letter"). A

copy of the Engagement Letter is attached hereto as Exhibit A and incorporated herein by reference.

7. APS will provide Rebecca A. Roof as its representative to serve as Chief Financial Officer of the Debtors and Michael Scott as its representative to serve as Treasurer of the Debtors (the "Officers"). In this capacity, the Officers will direct the Debtors' operations with an objective of restructuring the Debtors, and managed the Debtors' daily operations and restructuring efforts, including negotiating with parties in interest, and coordinating the "working group" of professionals who were assisting the Debtors in the restructuring. The Officers will be assisted by a staff of temporary personnel provided through APS at various levels, all of whom had a wide range of skills and abilities related to this type of assignment (the "Temporary Staff").

8. The Officers are particularly well-suited to provide the restructuring and management services required by the Debtors. They are affiliated with the restructuring firm AlixPartners, LLC ("AlixPartners"), a leading corporate restructuring advisor, which has a wealth of experience in providing services in Chapter 11 cases and has an excellent reputation for the services it has rendered on behalf of debtors in cases throughout the United States. Since its inception in 1981, AlixPartners and the Officers have provided restructuring services in numerous large cases, including most recently: In re United Companies Financial Corp., et al., Case No. 99-459 through -461 (MFW) (Bankr. D. Del. 1999); In re Service Merchandise Co., et al., Case No. 99-02649 (GCP) (Bankr. M.D. Tenn. 1999); In re Cityscape Financial Corp. & Cityscape Corp., Case Nos. 98-22569 & 98-22570 (ASH) (Bankr. S.D.N.Y. 1998); In re Maidenform Worldwide, Inc. et al., Case No. 97-44869 (CB) (Bankr. S.D.N.Y. 1997); and In re Foxmeyer Corp., et al., Case Nos. 96-1329 through -1334 (HSB) (Bankr. D. Del. 1996).

Scope of Services

9. The Officers and the Temporary Staff began assisting the Debtors in their restructuring efforts on April 9, 2003. Among other things, the Officers have provided assistance to Debtors with respect to implementing and developing ongoing business and financial plans, and conducting restructuring negotiations with creditors.

10. Pursuant to the Engagement Letter, APS will provide such business recovery services as APS and the Debtors shall deem appropriate and feasible in order to advise the Debtors in the course of the Chapter 11 Cases, including, but not limited to, the following:

- a) Manage the Company's financial and treasury functions;
- b) Provide leadership to the financial function including, without limitation, assisting the Company in (i) strengthening the core competencies in the finance organization, particularly cash management, planning, general accounting and financial reporting information management and (ii) formulation and negotiation with respect to a plan of reorganization;
- c) Assist in managing the "working group" professionals who are assisting the Company in the reorganization process or who are working for the Company's various stakeholders to improve coordination of their effort and individual work product to be consistent with the Company's overall restructuring goals;
- d) Assist in overseeing and driving financial performance in conformity with the Company's business plan;
- e) Assist in developing and implementing case management strategies, tactics and processes. Work with the Company's treasury department and other professionals and coordinate the activities of the representatives of other constituencies in the cash management process;
- f) Assist management with the development of the Company's revised business plan, and such other related forecasts as may be required by the bank lenders in connection with negotiations or by the Company for other corporate purposes;
- g) Supervise the preparation of regular reports required by the Bankruptcy Court or which are customarily issued by the Company's Chief Financial Officer, management of the claim and claims reconciliation processes as well as providing assistance in such areas as testimony before the Bankruptcy Court on matters that are within our areas of expertise;

- h) Assist with such other matters as may be requested that fall within our expertise and that are mutually agreeable.

11. The Debtors believe that APS' business recovery services will not duplicate the services that, subject to this Court entering or having entered appropriate orders, other Professionals may provide to the Debtors in the Chapter 11 Cases. APS will use reasonable efforts to coordinate with the Debtors' other retained Professionals to avoid duplicating services unnecessarily.

Compensation Terms

12. APS and Debtors have entered into the Engagement Letter to govern the relationship between them. By the Engagement Letter, APS has agreed to provide interim senior management and a staff of temporary personnel at various levels, all of whom have a wide range of skills and abilities related to this type of assignment. The Officers and the Temporary Staff will be compensated at the following hourly rates:

- a) Principals \$ 540 – 670
- b) Senior Associates \$ 430 – 495
- c) Associates \$ 300 – 390
- d) Accountants and Consultants \$ 225 – 280
- e) Analysts \$ 150 – 180

The compensation will be adjusted annually, effective January 1.

13. In addition to the compensation set forth above, the Debtors shall pay directly or reimburse APS upon receipt of periodic billings, for all reasonable out-of-pocket expenses incurred in connection with this assignment such as travel, lodging, telephone and facsimile charges.

14. The Debtors seek court approval to pay APS a retainer of \$500,000 under the terms of the Engagement Letter to be applied against the compensation earned and expenses incurred

specific to the engagement. APS will hold this retainer for application in accordance with the Engagement Letter.

15. The Debtors have not paid any amount to APS prior to the Petition Date.

16. In addition to hourly fees, APS will be compensated for its efforts by the payment of a success fee (the "Success Fee"). The Success Fee consists of two components.

- a) A Confirmation Success Fee of \$2.0 million due upon the confirmation of a Chapter 11 plan, and;
- b) A Time Success Fee equal to \$2.0 million if a plan is confirmed within 12 months of the inception of the agreement. For each month in excess of 12 months, the Time Success Fee will be reduced by \$100,000 per month to a minimum of \$500,000.

17. APS acknowledges that the Success Fee is not payable if APS is terminated for cause or if there is a conversion of these cases to chapter 7, and APS further acknowledges that the Success Fee is subject to Court approval when earned.

18. APS will file monthly invoices with the Debtors. The Debtors will be authorized to pay, in the ordinary course of its business, all reasonable amounts invoiced by APS for fees and expenses. ♦

19. Because APS is not being employed as a professional under section 327 of the Bankruptcy Code, it will not be submitting quarterly fee applications pursuant to sections 330 and 331 of the Bankruptcy Code. However, APS will submit to the court quarterly reports of compensation earned. Parties in interest shall have the right to object to fees paid when quarterly reports of compensation earned are filed with the Court. The first quarterly report shall be due

on August 15, 2003 and shall cover the period to and including June 30, 2003. This procedure will continue at three month intervals thereafter.

Indemnification Provisions

20. In the Engagement Letter, the Debtors agreed to indemnify, hold harmless, and defend APS from and against all claims, liabilities, losses, damages and reasonable expenses as they are incurred, including reasonable legal fees and disbursements of counsel. Except for the indemnity provided below, APS agrees to waive indemnification.

21. APS employees serving as officers of the Debtors shall be entitled to receive whatever indemnities are made available, during the term of APS' engagement, to other (non-APS affiliated) officers of the Debtors, whether under the by-laws, certificates of incorporation, applicable corporate laws, or contractual agreements of general applicability to officers of the Debtors.

Authority for the Requested Relief

22. Section 363(c) of the Bankruptcy Code authorizes the Debtors to enter into certain transactions and use property of the estate in the ordinary course of business.

23. Arguably, entering into contractual arrangements for the provision of interim management is within the ordinary course of Debtors' business as contemplated by the Bankruptcy Code. Corporations routinely hire and fire senior executives. The absence of executives capable of achieving a successful reorganization would severely hinder a debtor's ability to reorganize in an efficient and effective manner.

24. Even if entering into an agreement for the provision of interim Officers is not considered to be ordinary course, Debtors should be permitted to do so pursuant to section 363(b) of the Bankruptcy Code. Bankruptcy Code section 363(b)(1) permits a debtor-in-possession to use

property of the estate “other than in the ordinary course of business” after notice and a hearing. The following cases have authorized retention of officers under section 363: In re Iridium Operating LLC, Case Nos. 99-45005 CB (Bankr. S.D.N.Y. 1999); In re Integrated Health Services, Inc., Case No. 00-389 (MFW)(Bankr. D. Del. 2000); In re Bill’s Dollar Stores, Inc., Case No. 01-0435 (PJW)(Bankr. D. Del. 2001); In re Warnaco Group, Inc., Case Nos. 01-41643 (Bankr. S.D.N.Y. 2001).

25. This Court should authorize Debtors to employ and indemnify the Officers, and to employ other temporary staff, pursuant to the Engagement Letter, outside the ordinary course of business, if the Debtors demonstrate a sound business justification for doing so. In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983); In re Delaware Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. D. Del. 1991).

26. Once Debtors articulate a valid business justification, “the business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.’” In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

27. The business judgment rule has vitality in chapter 11 cases and shields a debtor’s management from judicial second-guessing. In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)); In re Johns-Manville Corp., 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (“The Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor’s management decisions.”).

28. The Officers are clearly qualified for the position for which they are being employed. Debtors have determined that the terms of the Engagement Letter are within the range of those for senior executive officers employed with companies of comparable size, value and reputation. Accordingly, Debtors' decision to enter into the Engagement Letter reflects an exercise of the Debtors' sound business judgment.

Notice

29. Notice of this Motion has been given to the following creditors and parties in interest: (a) the United States Trustee; (b) counsel to the senior secured lenders; (c) proposed counsel to the Official Committee of Unsecured Creditors; (d) counsel to certain PACA claimants and (e) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure will be sufficient for entry of an Order on the Application.

30. The Debtors believe that such notice is appropriate and no further notice is necessary under the circumstances.

No Prior Request

31. No prior request for the relief sought in this Motion has been made to this or any other court.

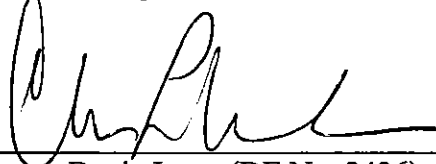
WHEREFORE, Debtors respectfully request that the Court enter (i) an interim order authorizing the employment of AP Services LLC as crisis managers to the Debtors and thereby to designate Rebecca A. Roof as Interim Chief Financial Officer and Michael Scott as interim Treasurer of the Debtors *nunc pro tunc* to April 9, 2003, and scheduling final hearing on proposed employment agreement and (ii) a final order authorizing the same.

Dated: May 1, 2003

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