

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

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In re: :  
 : Chapter 11  
FLEMING COMPANIES, :  
INC., et al., : Case No. 03-10945 (MFW)  
 :  
 Debtors. : Jointly Administered  
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**AFFIDAVIT OF DENNIS F. DUNNE IN SUPPORT OF APPLICATION OF  
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF FLEMING COMPANIES,  
INC., et al., UNDER 11 U.S.C. § 1103 AND FED. R. BANKR. P. 2014  
AND 5002, FOR ORDER AUTHORIZING RETENTION AND EMPLOYMENT NUNC  
PRO TUNC OF MILBANK, TWEED, HADLEY & M<sup>c</sup>CLOY LLP AS COUNSEL**

STATE OF NEW YORK )  
 ) SS.:  
COUNTY OF NEW YORK )

DENNIS F. DUNNE, being duly sworn, says:

1. I am a member of the firm of Milbank, Tweed, Hadley & M<sup>c</sup>Cloy LLP ("Milbank"), and I am duly authorized to make this affidavit on behalf of Milbank. Milbank is an international law firm with its principal office located at 1 Chase Manhattan Plaza, New York, New York 10005, and with branch offices in Washington, D.C., Los Angeles, Palo Alto, London, Tokyo, Frankfurt, Singapore, and Hong Kong. I submit this affidavit pursuant to 11 U.S.C. § 1103(b) and Federal Rules of Bankruptcy Procedure 2014 and 5002, in support of the Application of the Official Committee of Unsecured Creditors

(the "Creditors' Committee") of Fleming Companies, Inc. and its affiliated debtors and debtors in possession (collectively, "Fleming" or the "Debtors"), for an Order, Under 11 U.S.C. § 1103 and Federal Rules of Bankruptcy Procedure 2014 and 5002, Authorizing the Retention and Employment nunc pro tunc of Milbank, Tweed, Hadley & McCloy LLP, as Counsel (the "Application"), filed contemporaneously herewith by the Creditors' Committee.

2. Unless otherwise stated in this affidavit, I have personal knowledge of the facts set forth herein and, if called as a witness, I would testify thereto.<sup>1</sup> Unless otherwise defined, capitalized terms and phrases not otherwise defined herein shall have the meanings ascribed to such terms in the Application.

### **Background**

3. On April 1, 2003 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

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<sup>1</sup> Certain of the disclosures set forth herein relate to matters within the knowledge of other attorneys at Milbank and are based on information provided by them.

4. On April 10, 2003, the United States Trustee appointed the Creditors' Committee and designated the following eight members to serve: (i) Bank One Trust Company, N.A. (as indenture trustee) ("Bank One"); (ii) Kraft Foods ("Kraft"); (iii) Apollo Management V, L.P.; (iv) AIG Global Investment Corp.; (v) Northeast Investors' Trust; (vi) Nestle USA; (vii) ConAgra Foods, Inc.; and (viii) Pension Benefit Guaranty Corporation. At such meeting, the Creditors' Committee appointed Bank One and Kraft as its co-chairs and duly selected Milbank as co-counsel to represent it during the pendency of Fleming's chapter 11 cases.

#### Qualifications Of Professionals

5. Milbank possesses extensive knowledge and expertise in the areas of law relevant to these cases, and Milbank is well qualified to represent the Creditors' Committee. Milbank has significant experience in representing creditors' committees in large chapter 11 cases and other debt-restructuring scenarios. For example, Milbank has represented official creditors' committees in the following chapter 11 cases: In re Enron Corporation, et al.; In re Pacific Gas & Electric Co., et al.; In re Safety-Kleen Corporation, et al.; In re Maxxim Medical Group, Inc., et al.; In re NPF XII, Inc., et al.; In re ICO Global Communications Services, Inc., et al.; In re Semi-Tech Corporation et al.; In re Hvide Marine Inc., et

al.; In re ATC Group Services, Inc.; In re Brazos Sportswear, Inc.; In re Johns-Manville; In re Columbia Gas Corporation; In re Baldwin Builders; and In re Megafoods, Inc., among others.

**Services To Be Rendered**

6. The Creditors' Committee has requested that Milbank render the following services, among others, in connection with these chapter 11 cases, all as directed by the Creditors' Committee:

- (a) advise the Creditors' Committee with respect to its rights, powers, and duties in these cases;
- (b) assist and advise the Creditors' Committee in its consultations with Fleming relative to the administration of these cases;
- (c) assist the Creditors' Committee in analyzing the claims of Fleming's creditors and in negotiating with such creditors;
- (d) assist with the Creditors' Committee's investigation of the acts, conduct, assets, liabilities, and financial condition of Fleming and of the operation of Fleming's businesses;
- (e) assist the Creditors' Committee in its analysis of, and negotiations with, Fleming or any third party concerning matters related to, among other things, the terms of a plan or plans of reorganization for Fleming;
- (f) assist and advise the Creditors' Committee with respect to its communications with the general creditor body regarding significant matters in these cases;
- (g) represent the Creditors' Committee at all hearings and other proceedings;
- (h) review and analyze all applications, orders, statements of operations, and schedules filed with the Court and advise the Creditors' Committee as to their propriety;

- (i) assist the Creditors' Committee in preparing pleadings and applications as may be necessary in furtherance of the Creditors' Committee's interests and objectives; and
- (j) perform such other legal services as may be required and are deemed to be in the interests of the Creditors' Committee in accordance with the Creditors' Committee's powers and duties as set forth in the Bankruptcy Code.

7. Subject to this Court's approval of the Application, Milbank is willing to serve as the Creditors' Committee's counsel and to perform the services described above.

**Milbank's Connections With Debtors And Other Parties**

8. Except as otherwise set forth herein, the partners, of counsel, and associates of Milbank do not have any connection with Fleming, Fleming's creditors, its shareholders or any other party in interest, or its or their respective attorneys and accountants. In addition, pursuant to 11 U.S.C. § 1103(b), Milbank does not represent any other entity having an adverse interest in connection with these cases.

9. In connection with its proposed retention by the Creditors' Committee in these cases, Milbank researched its client database for any services rendered within the last five years to determine whether it had any relationships with the

following entities:<sup>2</sup>

- (a) Fleming and its affiliated debtors and debtors in possession;
- (b) the 50 largest unsecured creditors of Fleming and its affiliated debtors and debtors in possession as identified by Fleming;
- (c) Agents for and members of Fleming's bank group of secured lenders as identified by Fleming;
- (d) Fleming's 5% or greater equity holders as identified by Fleming; and
- (e) Other known actual or potential parties in interest in Fleming's cases.

10. Milbank does not represent any of the entities described in paragraph 9 in any matter related to the Debtors or these chapter 11 cases. The extent of Milbank's connections with these entities in matters unrelated to the Debtors and these cases is described below.

11. Prepetition Secured Lenders. The Debtors are parties to that certain credit facility, dated as of June 18, 2002 (the "Prepetition Credit Facility") with a syndicate of more than sixty banks and other financial institutions (collectively, and together with the Prepetition Agents (as defined below), the

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<sup>2</sup> Milbank obtained the identities of the entities described in paragraph 9 from the Application For Entry Of An Order Pursuant To 11 U.S.C. § 327(A) And Fed. R. Bankr. P. 2014(A) Authorizing Employment And Retention Of Kirkland & Ellis As Attorneys For Debtors And Debtors In Possession, filed April 10, 2003. Milbank cannot represent or warrant as to the accuracy or completeness of the list of entities searched.

"Prepetition Lenders") and the following agent banks: Deutsche Bank Trust Company America, as Administrative Agent; JPMorgan Chase Bank, in its capacity as Collateral Agent and provider of Treasury Services and together with Citicorp North America, Inc., as Syndication Agents; Lehman Commercial Paper Inc. and Wachovia Bank, N.A., as Documentation Agents; Deutsche Bank Securities Inc. and J.P. Morgan Securities Inc., as Joint Book Managers; and Deutsche Bank Securities Inc., J.P. Morgan Securities Inc. and Salomon Smith Barney Inc., as Joint Lead Arrangers (collectively, the "Prepetition Agents"). Of the Prepetition Agents, Milbank currently represents or has represented in the past, in matters unrelated to the Debtors or these chapter 11 cases, the following entities and/or affiliates of such entities: Deutsche Bank Trust Company America; Citicorp North America, Inc; Lehman Commercial Paper Inc; Wachovia Bank, N.A.; Deutsche Bank Securities, Inc.; J.P. Morgan Securities, Inc.; and Salomon Smith Barney, Inc. Of the remaining Prepetition Lenders, Milbank currently represents: First Union Securities; Fleet Bank; Fortis Capital Corp.; Franklin National Bank; GE Capital; Bank Indosuez; ING; Lehman Brothers, Inc.; Mizuho Corporate Bank, Ltd.; and Morgan Stanley & Co., Inc. Milbank has also in the past represented these and other Prepetition Lenders.

12. Unsecured Noteholders/Indenture Trustees.

Milbank is not aware of the identity of all of the holders of certain indentures issued by the Debtors, including: (i) the 10 1/8% senior notes due in 2008; (ii) the 9 1/4% senior notes due in 2010; (iii) the 10 5/8% senior subordinated notes due in 2007 (two series); (iv) the 5 1/4% convertible senior subordinated notes due in 2009; and (v) the 9 7/8% senior subordinated notes due in 2012 (collectively, the "Notes"). Prior to being selected as co-counsel for the Creditors' Committee, on the day before the Petition Date, Milbank had been selected to represent an ad hoc committee of holders of certain of the Notes (the "Ad Hoc Committee"). Given Fleming's bankruptcy filing one day following Milbank's retention by the Ad Hoc Committee, Milbank's services for the Ad Hoc Committee were limited to monitoring the Debtors' bankruptcy cases and the proceedings therein. Milbank received no compensation in respect of its representation of the Ad Hoc Committee and ceased representing the Ad Hoc Committee upon being selected as co-counsel for the Creditors' Committee. The Creditors' Committee includes members of the Ad Hoc Committee. Milbank currently represents, in matters unrelated to the Debtors or these chapter 11 cases, the following entities and/or affiliates of such entities that were identified by the Debtors as indenture trustees for certain of the Notes: Bank One, N.A., Bankers Trust Company, and Bank of New York (as



successor trustee). In addition, Milbank currently represents or has represented in the past, in matters unrelated to the Debtors or these chapter 11 cases, various investment funds managed by Apollo Management, L.P. Milbank also represents and has represented in the past noteholder committees and other creditors' committees that include or have included as members entities that are holders or potential holders of the Notes.

13. Other Unsecured Creditors. Of the Debtors' 50 largest unsecured creditors, as identified by the Debtors, Milbank currently represents in matters unrelated to the Debtors or these chapter 11 cases the following entities and/or their affiliates: Clorox Sales Co.; Conoco, Inc.; Pepsi-Cola Company; Procter & Gamble; Reliant Energy; and Unilever HPC. In addition, Milbank has previously represented in matters unrelated to the Debtors or these chapter 11 cases the following entities and/or their affiliates: Borden; Campbell Soup Co.; Citgo Petroleum; Dr. Pepper Bottling; Exxon Company, USA; Frito Lay, Inc.; General Mills; Hershey Chocolate USA; Hormel Foods Co.; Kellogg Co.; Kimberly Clark Corp.; Marathon Oil; Midwest Coca-Cola Bottling Co.; Nabisco Biscuit Co.; Nestle U.S.A., Inc.; Pfizer; and Phillips Petroleum.

14. Major Shareholders. Milbank neither currently represents nor has represented in the past any holder of 5% or

more of the outstanding shares of the Debtors' stock, as such shareholders were identified by the Debtors.

15. Professionals. Milbank currently represents Deloitte & Touche LLP and Gleacher Partners and has in the past represented BMC Corp and Latham & Watkins in matters unrelated to the Debtors or these chapter 11 cases. Furthermore, from time to time, Milbank works with professional advisory firms that are expected to be retained by the Debtors in these cases or that may be rendering advice to other parties in interest in these cases. For example, Milbank is counsel to certain pre-petition secured lenders in the chapter 11 cases of Adelphia Communications Corp., et al., and those institutions have retained FTI Consulting, Inc. as their financial advisors.

16. Neither Milbank nor any attorney at the firm is or was a creditor, an equity security holder or an insider of Fleming.

17. Neither Milbank nor any attorney at the firm is or was an investment banker for any outstanding security of Fleming.

18. Neither Milbank nor any attorney at the firm is or was, within three years before the commencement of these cases, an investment banker for a security of Fleming, or an attorney for an investment banker in connection with the offer, sale or issuance of a security of Fleming.

19. Neither Milbank nor any attorney at the firm is or was, within two years before the commencement of these cases, a director, officer, or employee of Fleming or an investment banker of Fleming.

20. Fleming has numerous creditors and other relationships with third parties. Consequently, although every reasonable effort has been made to discover and disclose all connection with parties-in-interest, including the efforts outlined above, Milbank is unable to state with certainty whether one of its clients or an affiliated entity is a creditor, shareholder or otherwise is a party-in-interest in these chapter 11 cases. If Milbank discovers any information that is contrary to or pertinent to the statements made herein, Milbank will disclose such information to the Court on notice to creditors and the United States Trustee promptly.

**Professional Compensation**

21. As of the date of this Affidavit, Milbank has received no compensation for its work on behalf of the Creditors' Committee.

22. Subject to the Court's approval, Milbank will charge for its legal services on an hourly basis in accordance with its ordinary and customary hourly rates in effect on the

date services are rendered.<sup>3</sup> These rates will change from time to time in accordance with Milbank's established billing practices and procedures. Milbank will maintain detailed, contemporaneous records of time and any actual and necessary expenses incurred in connection with the rendering of the legal services described above by category and nature of the services rendered.

23. The hourly rates set forth herein are the firm's standard hourly rates for work of this nature. These rates are set at a level designed to compensate Milbank fairly for the work of its attorneys and legal assistants and to cover fixed and certain routine overhead expenses. It is the firm's policy to charge its clients for all disbursements and expenses incurred in the rendition of services. These disbursements and expenses include, among other things, costs for telephone and facsimile charges, photocopying, travel, business meals, computerized research, messengers, couriers, postage, word

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<sup>3</sup> The hourly rates charged by Milbank professionals differ based on, among other things, such professional's level of experience. The current hourly rates charged by Milbank are:

Partners	\$550 to \$725
Of Counsel	\$500 to \$650
Associates	\$225 to \$480
Legal Assistants	\$125 to \$265

processing, secretarial staff, witness fees and other fees related to trials and hearings.

24. Milbank intends to apply to the Court for payment of compensation and reimbursement of expenses in accordance with applicable provisions of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules of this Court, and pursuant to any additional procedures that have already been or may be established by the Court in this case.

25. Other than as set forth above, there is no proposed arrangement between the Creditors' Committee and Milbank for compensation to be paid in these cases. Milbank has no agreement with any other entity to share any compensation received, nor will any be made, except as permitted under section 504(b)(1) of the Bankruptcy Code.

26. The proposed employment of Milbank is not prohibited by or improper under Rule 5002 of the Bankruptcy Rules. I am not related, and to the best of my knowledge, no attorney at the firm is related, to any United States Bankruptcy Judge or District Court Judge for the District of Delaware or to the United States Trustee for such district or any employee in the office thereof.

27. The foregoing statements are made to the best of my knowledge as of the date hereof. Milbank has instituted and is carrying on further inquiries of its partners, associates and

other employees with respect to the matters contained herein.  
Milbank will file supplemental affidavits regarding this  
retention if any additional relevant information comes to its  
attention.

  
DENNIS F. DUNNE

SWORN TO AND SUBSCRIBED before  
me this 1<sup>st</sup> day of May, 2003

  
Notary Public

**RENA K. STRAPPAZON**  
Notary Public, State of New York  
No. 01ST6028430  
Qualified in New York County  
Commission Expires August 2, 2005