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)
	)	(Jointly Administered)
Debtors.	)	

Objection Deadline: May 12, 2003 at 4:00 p.m. prevailing Eastern time
Hearing Date: May 19, 2003 at 12:30 p.m. prevailing Eastern time

DEBTORS' MOTION FOR ORDER: (A) SCHEDULING THE DATE, TIME AND PLACE FOR A HEARING ON THE PROPOSED RAINBOW FOOD STORES SALE MOTION; (B) APPROVING THE FORM AND MANNER OF NOTICE THEREOF; AND (C) APPROVING: (i) DEBTORS' AUCTION PROCEDURES; AND (ii) BREAK-UP FEE AND EXPENSE REIMBURSEMENT

Fleming Companies, Inc. and Rainbow Food Group, Inc., two of the above-captioned debtors and debtors in possession (collectively, the "Debtors"), file this Motion (the "Motion") for entry of an Order: (A) Scheduling the Date, Time and Place for a Hearing on the Proposed Rainbow Food Stores Sale Motion; (B) Approving the Form and Manner of Notice Thereof; and (C) Approving: (i) Auction Procedures; and (ii) Break-Up Fee and Expense Reimbursement; and in support thereof, state the following:

[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.

Jurisdiction

1. This Court has jurisdiction to consider this Motion 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)(A), (M), (N) and (O).

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory basis for the relief requested herein 11 U.S.C. §§ 363(b) and (f), and 365(a), (b), (f) and (k), and Rules 2002(a)(2), 6004(a), (b), (c) and (e), 6006(a), and 9014 of the Federal Rules of Bankruptcy Procedure.

Background

4. On April 1, 2003 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under chapter 11 of title 11 of the United Stated Code (the "Bankruptcy Code"). Pursuant to an Order of this Court, the chapter 11 cases commenced by the Debtors (the "Cases") are jointly administered for administrative purposes only. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. An official Committee of Unsecured Creditors (the "Creditors' Committee") has been appointed in these Cases. No trustee or examiner has been appointed in these Cases.

5. The Debtors are currently the largest distributor of consumable goods in the United States, supplying food-related and general merchandise products to approximately 45,000 retail locations throughout the continental United States, Hawaii, Canada, the Caribbean and the South Pacific, with approximately 50 distribution centers throughout the country. The

Debtors' customers include supermarkets, convenience stores, supercenters, discount stores, specialty stores, and gift shops, among others.

6. The Debtors' distribution business involves purchasing, receiving, warehousing, marketing, selecting and loading, delivering and distributing a wide variety of food items (including groceries, meat, dairy and delicatessen products, frozen foods, produce, bakery goods), as well as general merchandise items (such as health and beauty care related items). The Debtors distribute products purchased from major merchandise trademark holders such as ConAgra Foods, Kraft Foods, Nestle, Procter & Gamble, and General Mills, among others. The Debtors also offer products under the private Debtors brands, including BestYet™, Exceptional Value™, and Nature's Finest® labels.

7. The Debtors also operate approximately 100 retail grocery stores under the Food 4 Less, Rainbow Foods, and yes!LESS® trade names in the States of Texas, Arizona, Minnesota, New Mexico, California (in the Northern part), Utah, Wisconsin, and Louisiana.

8. As of the Petition Date, the Debtors have over 15,000 employees. The Debtors' corporate headquarters are in Lewisville, Texas, with accounting and information technology operations in Oklahoma City, Oklahoma. The Debtors' Core-Mark subsidiaries, which is a premier distributor of food and consumer products for convenience stores in North America (including Western Canada), has its corporate headquarters in San Francisco, California.

9. For the fiscal year ending December 28, 2002, the Debtors generated total net sales of $17.6 billion.

Of the Debtors' revenues for the 2002 fiscal year, approximately $15.5 billion, or 88%, were attributable to the distribution segment of their operations, and approximately $2.1 billion, or 12%, were attributable to the retail segment of their operations.

10. The food distribution business is highly competitive. The dominant features of the consumable-goods industry are high-volume sales and low-profit margins. Even small changes in pricing can have significant impact on companies like the Debtors.

11. In February 2003, Kmart Corporation, the largest customer of the Debtors, moved in its chapter 11 case (currently pending in the Northern District of Illinois) to reject its supply agreement with Debtors. In 2002, Kmart accounted for approximately 20% of the Debtors' net sales, and Kmart listed Debtors as its largest supplier of food and consumable products in pleadings filed in its chapter 11 case, accounting for $3.6 billion of total sales in fiscal year 2002.

12. Since March 2000, the Debtors have been actively engaged in the process of selling all of their retail grocery operations (other than 17 yes!LESS® stores) in order to concentrate on their core competencies in the distribution segment. In or about March 2000, the Debtors decided to sell or cease operations at all of their convenience and full service retail stores, and to focus primarily on operating price-impact stores.

Summary of Relief Requested

13. In March 2000, the Debtors engaged Morgan Stanley as their investment banker to divest certain of the Debtors' retail operations, consisting of supermarket chains in various states. The marketing efforts did not, at that time, result the sale of all of the Debtors'

retail operations. Some stores were sold and other remained unsold at the time that the initial marketing effort ended in April 2001.

14. In April 2002, Morgan Stanley began re-marketing the Debtors' Rainbow Foods division. Rainbow Foods is currently a retail supermarket chain that operates 42 stores (excluding two stores closed or slated for closing in the ordinary course of business), located primarily in the Minneapolis/St. Paul area (40 stores) and central Wisconsin (two stores).

15. The Debtors have recently entered into a written Asset Purchase Agreement (the "APA") with Roundy's, Inc. and RBF Corp, each a Wisconsin corporation (collectively, the "Buyer"), for the sale of the assets used in the operation of 31 of the Rainbow Food retail grocery stores (the "Assets"). A copy of the executed APA (without exhibits) is annexed hereto as Exhibit A.

16. By this Motion, Debtors seek the establishment of relevant dates and deadlines, as well as auction procedures, for the proposed sale of the Assets. Debtors are not seeking through this Motion the actual approval of the sale, which sale approval will be sought through a subsequent motion (the "Sale Motion").

17. The Assets to be sold to Buyer include, but are not limited to: (a) specified contracts and leases relating to the Assets, including certain real property leases, subleases, and union contracts; (b) leasehold improvements owned by Debtors relating to the Assets; (c) cash located at store properties on the Closing Date; (d) all machinery, equipment, fixtures, trade fixtures and other similar items of personal property relating to the Assets; (e) certain of the saleable inventory relating to the Assets that are owned by the Debtors; (f) all

assignable permits and licenses relating to the operation of the assets; (g) all supplies located in the stores; (h) all intellectual property and trademarks relating to the mark "Rainbow;" and (i) one parcel of owned real property relating to the Assets. In addition, the APA expressly provides that certain assets will be excluded from the sale.

18. The estimated net purchase price consideration to be paid by Buyer is approximately $85,000,000, consisting of $42,500,000 for the non-inventory Assets, and approximately $42,500,000 for store inventory. The Buyer will also assume approximately $35,000,000 in capitalized real property lease obligations, for a total consideration of approximately $120,000,000.

19. Debtors seek immediate entry of the proposed order (the "Procedures Order"), substantially in the form attached hereto as Exhibit B, scheduling a date, time and place for a hearing to approve the sale of the Assets (the "Asset Sale Hearing"), and approving auction procedures (the "Debtors' Auction Procedures"). The proposed Procedures Order also specifies the procedures for objections to the proposed assumption and assignment of the assigned contracts ("Assigned Contracts") and leases ("Leases"), and approves the notice Debtors intend to provide of the auction (the "Auction") for the sale of the Assets.

20. At the conclusion of the Auction, Debtors propose to sell the Assets, and to assume and assign the Assigned Contracts and Leases, to the bidder with the highest and best offer. The successful bidder will be required to comply with the Debtors' Auction Procedures, and to commit to proceed to a closing on contractual terms at least as favorable to Debtors as those set forth in the APA.

Necessity of Sale Procedures Governing a
Section 363 Sale and Section 365 Assumption and Assignment

21. As previously noted, prior to the filing of the Cases, the Debtors made the strategic decision to divest all of their retail operations in order to concentrate on their core wholesale distribution business. The proposed sale of 31 of the Rainbow Food retail grocery stores to Buyer is a significant step in the divestiture of its retail operations. The sale will generate substantial funds to Debtors, which will improve their liquidity and general business operations.

22. At this critical juncture for both the Debtors in general, and the Assets in particular, the Debtors believe that a sale of the Assets to Buyer (or to the highest and best bidder at the Auction) on terms consistent with those set forth in the APA, is in the best interests of the Debtors, their estates and their creditors. The proposed sale procedures will serve to provide for an orderly Auction, and maximize the value the Debtors will recover on account of the sale of the Assets.

Marketing Efforts

23. As stated above, prepetition (in March 2000), the Debtors engaged Morgan Stanley to divest certain of their retail operations, which consist of supermarket chains in various states. Due to the large number of stores, the recent appetite of strategic buyers for supermarket chains, and the tendency of strategic buyers to pay more money for a division, Morgan Stanley focused its energy on selling the retail operations to a strategic buyer. For various reasons including, strategic fit and performance, at that time strategic buyers did not have significant interest in acquiring all of the divisions. Instead, the Debtors sold 16 stores from their

Baker's Supermarkets division to Kroger Co. in March 2001, and 49 stores from their Sentry Foods and ABCO Desert Markets divisions to independent retailers in April 2001.

24. In March, 2002, the Debtors decided to divest the remainder of their retail operations, re-engaging Morgan Stanley to sell its Rainbow Foods division. Morgan Stanley began the process by focusing on select national and regional retail grocery store chains. Of the first group of prospective buyers contacted in 2002, five executed Confidentiality Agreements (CAs) and received Offering Memoranda (OMs), and two submitted preliminary bids and attended management presentations, but none of these parties submitted final bids.

25. In the fall of 2002, Morgan Stanley initiated a second phase of the marketing process in which it contacted an additional five strategic buyers and 33 financial buyers. This group consisted of regional supermarket chains and financial buyers. In the second phase, three strategic and 19 financial buyer parties executed CAs and received OMs. Two potential buyers submitted preliminary bids and attended management presentations; however, neither of these parties submitted a final bid.

26. Following the second phase of the sale process, Morgan Stanley reopened the process. It executed CAs with two strategic buyers and re-entered the process with one of the strategic buyers that had been initially contacted. In addition, Morgan Stanley contacted seven financial buyers. All ten buyers executed CAs and received updated OMs. Five of these potential buyers received management presentations, and five potential buyers submitted preliminary bids.

27. In all, Morgan Stanley contacted 13 potential strategic buyers and 40 financial buyers. Morgan Stanley negotiated CAs with, and sent OMs to, 36 potential buyers. During the process, Morgan Stanley wrote and produced both the OM and the management presentation. To produce these documents, Morgan Stanley spent extensive time with the Debtors' representatives researching the intricacies of this particular business, its market and its competition. In aggregate, many hundreds of hours went into producing and distributing these documents.

28. During management presentations, Morgan Stanley attendees facilitated the meetings and oversaw the data room. Morgan Stanley helped assemble and proctor the data room, and oversaw the production and distribution of confidential materials made available to potential buyers. After the management presentations, Morgan Stanley oversaw and guided the diligence process by facilitating the flow of information with the potential buyers by staying in close contact with the potential buyers to make sure they had all information they needed to submit meaningful bids. This activity involved numerous conference calls, prioritizing and assembling diligence request lists that at times exceeded 40 pages in length.

Debtors' Auction Procedures

29. While Debtors believe the offer of Buyer to be fair and reasonable, the Debtors believe that the best interests of its estate are served by conducting a public auction to identify the highest and best offer for the Assets. Accordingly, the Debtors seek this Court's approval of the following Debtors' Auction Procedures, which are also attached verbatim as Exhibit 1 to the Procedures Order:

Fleming Companies, Inc. and Rainbow Food Groups, Inc., two of the above-captioned debtors and debtors in possession (collectively, the "Debtors") have established the following auction procedures (the "Debtors' Auction Procedures") for the solicitation of offers of purchase for certain owned and leased retail grocery stores and related assets, as more fully described in the Procedures Motion (as defined as "Acquired Assets" in the APA, the "Assets"). The auction for the Assets (the "Auction") shall be conducted in accordance with section 363 of the Bankruptcy Code, Rule 6004 of the Federal Rules of Bankruptcy Procedure, and the Procedures Order, including the Debtors' Auction Procedures:

1. **Confidential Information.** Any person or entity seeking Confidential Information regarding the Debtors and/or the Assets must execute and deliver a confidentiality agreement in a form and in substance acceptable to the Debtors in their sole and absolute discretion, and deliver to the Debtors evidence (satisfactory to the Debtors in their sole and absolute discretion) establishing such person's or entity's financial capability to timely consummate the purchase of the Assets. The Debtors, in their sole and absolute discretion, may decline to provide Confidential Information or any other non-public information to any person or entity seeking it hereunder if the Debtors conclude, in the sole and absolute discretion, that provision of such information to a particular person or entity could harm the Debtors' estates in any way whatsoever or diminish the value of the Assets or their marketability.

2. **Bid Deadline.** Written bids for the acquisition of the all of the Assets must be RECEIVED by the Debtor's counsel no later than **May 28, 2003 at 4:00 p.m., prevailing Eastern time.** Unless the Debtor, in its sole and absolute discretion determines otherwise, only those parties who submit timely written bids will be entitled to bid at the Auction.

3. **Qualifying Bidders.** To be considered a "Qualified Bidder," the party's written bid ("Qualifying Bid") must be accompanied by: (a) notice of the identity of such potential bidder (including the name of any direct or indirect parent corporations, partners and/or joint venturers of the potential bidder) and the name, address, telephone number and fax number and e-mail address of an officer or authorized agent who has the legal authority to bind the bidder, and will appear at the Auction on behalf of such bidder; (b) a minimum earnest money deposit of at least $4,000,000 in a cashier's check, wire transfer or other immediately available funds for the Assets (which must be place into an escrow no later than **May 30, 2003**, which escrow must be approved by the Debtors in writing); (c) an acknowledgment that the offer is not subject to any financing contingencies, or any other contingencies, such as due diligence or internal approval contingencies, that extend beyond the date of submission of such potential Qualified Bidder's initial Qualifying Bid; (d) a signed asset purchase agreement (with a copy marked for changes from the APA); and (e) evidence of such potential Qualified Bidder's financial ability to consummate the proposed transaction and evidence of adequate assurance of Future performance of Acquired Contracts (whether or not the evidence provided is sufficient to show such potential Qualified Bidder's financial viability and ability to provide adequate

assurance of Future performance of Acquired Contracts is within the sole and absolute discretion of the Debtors). All bidders, whether a Qualified Bidder or not, and their partners and joint venturers, are deemed to have submitted to the exclusive jurisdiction of the Bankruptcy Court with respect to all matters related to bids, the Auction, and the sale of the Assets.

4. **Qualified Bids and Overbids.** The initial bid by a Qualified Bidder for the Assets shall not be less than **$9,500,000** over and above the Estimated Cash Purchase Price of approximately $85,000,000. All subsequent bids must exceed the prior highest bid of a Qualifying Bidder (a "Qualifying Bid") by not less than **$250,000**. Any and all overbids shall be on the same terms and conditions in all material respects to those set forth in the APA. The deposit shall be credited to the purchase price if a Qualified Bidder is the successful bidder or, if not, returned to other bidders upon consummation of the sale or permanent withdrawal of the proposed sale.

5. **Auction.** A live oral Auction will be conducted at the offices of Pachulski, Stang, Ziehl, Young, Jones & Weintraub P.C., 919 North Market Street, Sixteenth Floor, Wilmington, Delaware 19801, on **June 3, 2003 at 11:30 a.m., prevailing Eastern time** (the "Auction Date") for the sale of the Assets, and any Qualified Bidder may appear and submit its initial overbid, subsequent overbid(s) and/or highest and final bid for the Assets. The Buyer is a Qualifying Bidder, and may bid and overbid at the Auction. The Buyer's initial bid shall be on the terms set forth in the APA and in the amount of the Estimated Cash Purchase Price. Additional terms and conditions, agreed to by the Debtors and the Buyer (which agreement shall not be unreasonably delayed or unreasonably withheld) and as approved by the Bankruptcy Court, may be imposed and announced at the Auction. During the Auction, all Qualifying Bids must be solicited and submitted in the presence of all other Qualified Bidders attending the Auction, other than those Qualifying Bidders who have affirmatively left the Auction (Qualified Bidders who are absent from the Auction for more than ten consecutive minutes while the Auction is in progress are presumed to have affirmatively withdrawn from the Auction). An Auction will be conducted even if there is no competing bid from a Qualified Bidder other than the Buyer.

6. **Highest and Best Bid.** The Debtors reserve the right to: (a) determine which offer, if any, for the Assets is the highest and/or best offer, including, without limitation, considering cash offers (with assumption of payables); and (b) reject at any time prior to entry of an Order of the Court approving an offer, any offer which the Debtor, in its discretion, deems to be: (i) inadequate or insufficient; (ii) not in conformity with the requirement of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules or the terms and conditions of the sale set forth herein; or (iii) contrary to the best interests of the Debtors and their estates. The "Highest and Best Bid" shall be determined by considering, among other thing: (A) the number, type and nature of any changes to this APA requested by each Qualified Bidder; (B) the extent to which such modifications are likely to delay closing of the sale of the Assets, and the cost to the Debtors of such modifications or

delay; (C) the total and net consideration to be received by the Debtors; (D) the likelihood of the Qualified Bidder's ability to close a transaction and the timing thereof; and (E) the net benefit to the Debtors' estates, taking into account Buyer's rights to the Break-Up Fee and Expenses Reimbursement. Other than as set forth in section 11.14(c)(x) of the APA, the Debtors, however, have no obligation to accept or submit for Court approval any offer presented at the time of the Auction. The Buyer shall have standing to contest the Highest and Best Bid selected by the Debtors if the successful Qualified Bidder is not the Buyer.

7. **All Bids Remain Open Through Closing or Permanent Withdrawal of Sale**. All written offers and other bids submitted on the Bid Date, as modified by a Qualified Bidder at the Auction, shall remain open and irrevocable through the closing of the transaction for the sale of the Assets. Acceptance of a Bid shall, in all respects, be subject to entry of an Order by the Bankruptcy Court which, among other things, authorizes the Debtors to consummate the sale with the successful Qualified Bidder. In the event that the successful bidder does not close, the earnest money deposit of that bidder will be retained as liquidated damages, and the Debtors may seek to close with the next highest bidder, whose bid shall remain open and whose deposit shall be held until such time as the Debtors are able to consummate their transaction with a successful bidder (this process may continue, at the sole and absolute discretion of the Debtors, until a sale is closed or the Debtors permanently withdraw the proposed sale).

8. **Proposed Sale May Be Withdrawn**. The proposed sale of Assets may be withdrawn, without liability (other than any liability to the Debtors under the APA and any liability of the Debtors for Expense Reimbursement), prior to, during or at the conclusion of the Asset Sale Hearing, for any reason, including (but not limited to) a determination that a sale pursuant to the terms and conditions offered at the Auction is not in the best interest of the Debtors' estates.

9. **Break-Up Fee and Expense Reimbursement**. Upon the date the Debtors consummate an Acquisition Proposal, the Debtors shall immediately pay to Buyer (in immediately available cash via wire transfer to an account designated by Buyer), the Break-Up Fee of $3,000,000 directly from the proceeds of such Acquisition Proposal and prior to the attachment thereto of any lien, claim, encumbrance or interest whatsoever. If the transactions contemplated by the APA are not consummated for any reason other than the material breach by Buyer of the APA or the failure of Parent to obtain the Lender's Consent, the Debtors shall immediately pay to Buyer (in immediately available cash via wire transfer to an account designated by Buyer) an amount equal to the reasonable costs and out-of-pocket expenses incurred by Buyer in connection with its legal, environmental, accounting and business due diligence, the securing of any necessary Lenders' Consents, and the preparation and negotiation of the APA (including, without limitation, the reasonable costs and expenses associated with section 8.2 of the APA) up to a maximum of $1,500,000. Pursuant to section 364(c)(1) of the Bankruptcy Code, the Buyer shall have a superpriority administrative expense claim (which claim shall be senior to any and all claims of any creditors of or holders of equity in the Debtors, including,

without limitation, the Debtors' prepetition and postpetition senior secured lenders, trade lien claimants and reclamation claimants) for Expense Reimbursement, and that to the extent that the Buyer's claim for Expense Reimbursement is not otherwise paid, such claim shall be satisfied from the proceeds of collateral of the Debtors' prepetition and postpetition senior secured lenders. Other than the Buyer, no party submitting any other offer to purchase the Assets or a Qualifying Bid shall be entitled to any expense reimbursement, breakup fee, bid protection, or termination or similar fee or payment.

10. **Adjustment of Purchase Price for Cure of Executory Contracts and Unexpired Leases, and Effect of Assignment.** If a cure obligation (pursuant to section 365 of the Bankruptcy Code) is not set forth on Schedule 5.19 of the APA, or if any Acquired Contract is subject to a cure in excess of the amount set forth next to such Acquired Contract on Schedule 5.19, Seller shall have paid the amount of such cure or the excess of such cure over the amount set forth on Schedule 5.19 or shall have agreed in form and substance satisfactory to Buyer (or the non-Buyer purchaser, as the case may be) that such additional cure obligations shall reduce the Asset Purchase Price. Pursuant to 11 U.S.C. § 365(k), upon assignment of the Assigned Contracts and Leases, each Debtor and its estate shall have no liability for any breach of such contract or lease occurring after such assignment. Also, the counterparty shall be forever barred, estopped and enjoined from asserting or enforcing against the Buyer any additional cure amounts in connection with the applicable lease or contract.

11. **Free and Clear Sale.** The Debtors intend to sell the Assets free of all liens, claims, rights, interests and encumbrances, subject to any applicable defenses, including without limitation any defenses to the validity, extent or priority of any liens.

12. **Good Faith Purchaser.** The Order approving the sale may provide that the purchaser of the Assets will be found to be a good faith purchaser, and the existence of such a finding in the Order approving the sale may be a closing condition for a purchaser.

Assignment of Executory Contracts and Unexpired Leases

30. The APA contemplates that the Debtors will assume, and Buyer will take by assignment, certain executory contracts and unexpired leases of real and personal property associated with the Assets. The specific contracts and leases to be assumed and assigned are set forth in the schedules to the APA (which are available upon request). The APA also provides a

mechanism for a purchaser to exclude certain executory contracts and unexpired leases from the sale transaction.

31. As set forth in the Debtors' Auction Procedures, the Debtors shall send a notice, a copy of which is attached hereto as Exhibit C (the "Cure Notice"), to each counterparty to an executory contract or unexpired lease with the Debtors that is to be assumed and assigned to the purchaser. Each such executory contract or unexpired lease may be assumed by the Debtors and assigned to a prospective purchaser at the conclusion of the Auction. The Cure Notice shall identify the amounts, if any, that the Debtors believe they owe to such contract or lease counterparty to cure defaults under each respective executory contract and unexpired lease (the "Cure Amounts"). The Debtors propose that, unless a contract counterparty objects, in writing, to any of the Cure Amounts contained in the Cure Notice, the Debtors (or the purchaser) will pay the Cure Amounts as set forth in the Cure Notice. Such objection must set forth a specific default in any executory contract or unexpired lease and claim a specific monetary amount that differs from the amount (if any) specified by the Debtors in the Cure Notice. The Debtors shall be relieved of all liability accruing or arising thereafter pursuant to 11 U.S.C. § 365(k). Also, if no timely objection is filed by a counterparty, the counterparty shall be forever barred, estopped and enjoined from asserting or enforcing against the Buyer any additional cure amounts in connection with the applicable lease or contract.

32. In addition, in the event that between the time of the distribution of the Cure Notice and the Auction, the Debtors identify additional executory contracts or unexpired leases not set forth in the Cure Notice, the Debtors seek authority to file a supplemental notice to

assume and assign each such contract or lease, and send a supplemental Cure Notice (a "Supplemental Cure Notice") to the counterparties to such additional executory contracts and unexpired leases. If a counterparty does not object to the Cure Amount set forth in the Supplemental Cure Notice within five days upon receipt of such, the purchaser will pay the Cure Amounts as set forth in the Supplemental Cure Notice. Such objection must set forth a specific default in any executory contract or unexpired lease and claim a specific monetary amount that differs from the amount (if any) specified by the Debtors in the Cure Notice.

Statutory Authority to Approve Sale Procedures

33. Courts have made clear that a debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate. See, e.g., Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.), 147 BR 650, 656-57 (S.D.N.Y. 1992) (noting that overbid procedures and break-up fee arrangements that have been negotiated by a debtor are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid"), appeal dismissed 3 F.3d 49 (2d Cir. 1993); In re 995 Fifth Ave. Assocs., L.P., 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (same).

34. Here, the proposed bid procedures, including the Debtors' Auction Procedures, are reasonable, appropriate, and within the Debtors' sound business judgment under the circumstances because they will serve to maximize the value that the Debtors will recover on account of the sale.

The Bid Procedures Are Appropriate

35. The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. See, e.g., Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 107 F.3d 558, 564-65 (8th Cir. 1997) (in bankruptcy sales, "a primary objective of the Code [is] to enhance the value of the estate at hand); Integrated Resources, 147 B.R. at 659 ("It is a well-established principle of bankruptcy law that the . . . Debtors' duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate.") (quoting Cello Bay Co. v. Champion Int'l Corn. (In re Atlanta Packaging Products, Inc.), 99 B.R. 124, 131 (Bankr. N.D. Ga. 1988)).

36. To that end, courts uniformly recognize that procedures intended to enhance competitive bidding are consistent with the goal of maximizing the value received by the estate and therefore are appropriate in the context of bankruptcy sales. See, e.g., Integrated Resources, 147 B.R. at 659 (such procedures "encourage bidding and maximize the value of the debtor's assets"); In re Financial News Network, Inc., 126 B.R. 152, 156 (S.D.N.Y 1991) ("court-imposed rules for the disposition of assets. . . [should] provide an adequate basis for comparison of offers, and [should] provide for a fair and efficient resolution of bankrupt estates"), appeal dismissed sub. nom Consumer News and Business Channel Partnership v. Dow Jones/Group W Television Co. (In re Financial News Network, Inc.), 931 F.2d 217 (2d Cir. 1992).

37. The Debtors believe that the bid procedures, including the Debtors' Auction Procedures, establish the parameters under which the value of the Assets may be tested at the Auction and ensuing Asset Sale Hearing. Such procedures unquestionably will increase

the likelihood that the Debtors will receive the greatest possible consideration for the Assets because they will ensure a competitive and fair bidding process.

The Initial and Subsequent Overbids Are Appropriate.

38. One important component of the Debtors' Auction Procedures is the "overbid" provision, pursuant to which any initial offer for the Assets must be in an amount of at least $9,500,000 more than the purchase price offered by Buyer, and each minimum bid increment thereafter must be at least $250,000.

39. Indeed, a minimum initial overbid is necessary not only to compensate the Debtors for the risk that it assumes in foregoing a known, willing, and able purchaser (the Buyer) for a new potential acquirer, but also to ensure that there is an increase in the net proceeds received by the estate, after deducting the $3,000,000 Break-Up Fee and up to $1,500,000 Expense Reimbursement to be paid to the Buyer in the event of a prevailing overbid. See, e.g., In re Wintex, Inc., 158 B.R. 540, 543 (D. Mass. 1992). ("A debtor may avoid the increased costs and complexity associated with considering additional bids unless the additional bids are high enough to justify their pursuit. The 10% increase requirement is one example of a reasonable litmus test."); Financial News Network, 126 B.R. at 154 (requiring minimum overbids to exceed purchaser's offer of $105 million by at least $10 million) (9.5%); In re Colony Hill Associates, 111 F.3d 269 (2d Cir. 1997) (requiring minimum overbids to exceed purchaser's initial offer of $7.5 million by at least $650,000 (8.6%); In re Tempo Technology Corp., 202 B.R. 363, 369 (D.

Del. 1996) (requiring minimum overbids of $1.4 million in cash where original purchase price was $150,000 cash plus $3 million in stock of the purchaser and $500,000 of assumed liabilities).

40. Here, the initial overbid amount due is 7.9% of the $120,000,000 aggregate purchase price offered by Buyer. The Debtors believe that such initial overbid is reasonable under the circumstances.

The Break-Up Fee Is Appropriate

41. In order to compensate Buyer for the time, effort, expense, and risk that it has incurred and will incur in negotiating, documenting, and seeking to consummate the sale transaction, the Debtors' Auction Procedures also provide that if Buyer is not the successful bidder for the Assets at the conclusion of the Auction, then Debtors will pay the Buyer a reasonable break-up fee of $3,000,000, which is 2.5% of the aggregate purchase price of $120,000,000 offered by the Buyer. Moreover, approval of the Auction Procedures, including the Break-up Fee and Expense Reimbursement, is a condition to the Buyer going forward with the sale. The Debtors' obligation to pay Expense Reimbursement is capped at $1,500,000; therefore, the aggregate maximum amount of the Break-Up Fee and the Expense Reimbursement is $4,500,000 or 3.75% of the aggregate purchase price offered by the Buyer under the APA.

42. Break-Up fees and other termination fees are a normal and, in many cases, necessary component of significant sales conducted under section 363 of the Bankruptcy Code:

> Break-Up fees are important tools to encourage bidding and to maximize the value of the debtor's assets. . . . In fact, because the. . . corporation ha(s) a duty to encourage bidding, break-up fees can be <u>necessary</u> to discharge [such] duties to maximize values.

Integrated Resources, 147 B.R. at 659-60 (emphasis in original). Specifically, "breakup fees and other strategies may be legitimately necessary to convince a 'white knight' bidder to enter the bidding by providing some form of compensation for the risks it is undertaking." 995 Fifth Avenue, 96 B.R. at 28 (quotations omitted); see also Integrated Resources, 147 B.R. at 660-61 (break-up fees can prompt bidders to commence negotiations and "ensure that a bidder does not retract its bid"); In re Hupp Indus., Inc., 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992) ("without such fees, bidders would be reluctant to make an initial bid for fear that their first bid will be shopped around for a higher bid from another bidder who would capitalize on the initial bidder's . . . due diligence").

43. As a consequence, courts frequently approve break-up fees in connection with proposed bankruptcy sales. The standard that the Court should apply when considering whether a break-up fee is appropriate, however, currently is in question as a result of the Third Circuit's recent decision in Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527 (3d Cir. 1999).

44. Prior to O'Brien, courts considering the propriety of a proposed breakup fee typically considered "(1) whether the relationship of the parties who negotiated the fee is marked by self-dealing or manipulation; (2) whether the fee hampers, rather than encourages, bidding; and (3) whether the amount of the fee is reasonable in relation to the proposed purchase price." In re Twenver, Inc., 149 B.R. 954, 956 (Bankr. D. Colo. 1992). Accord In re Bidermann Indus. U.S.A., Inc., 203 B.R. 547, 552 (Bankr. S.D.N.Y. 1997); Integrated Resources, 147 B.R. at 657.

45. In O'Brien, however, the Third Circuit held that, under the circumstances of that case, the payment of a break-up fee was appropriate only if the fee was among the actual, necessary costs and expenses of preserving the estate and therefore qualified as an administrative expense within the meaning of section 503(b) of the Bankruptcy Code. O'Brien, 181 F.3d at 535. The Third Circuit distilled the inquiry to whether awarding. . . break-up fees [was or] was not necessary to preserve the value of [the debtor]'s estate. Id. at 536.

46. Because O'Brien did not involve a request to approve the payment of a break-up fee prior to consummation of an auction, and instead involved a post-auction payment request by a disappointed bidder under section 503(b) of the Bankruptcy Code, O'Brien is distinguishable from the Debtors' pre-sale request to approve the proposed break-up fee for Buyer. Rather, the Debtors submit that the appropriate analysis is that undertaken by the Integrated Resources, Twenver, and Bidermann Industries courts.

47. Even applying O'Brien's "necessary to preserve the value of the estate" standard, however, the proposed Break-Up Fee is appropriate here. See In re Homelife Corp., 2002 WL 31115654, 2002 U.S. Dist. LEXIS 17915 (D. Del. Sept. 20, 2002) (approval of termination fee, similar to break-up fee, under factors set forth in O'Brien). Specifically, the Buyer has indicated that it is not prepared to proceed with the purchase of the Assets unless it has reasonable assurance that it will receive payment of the Break-Up Fee in the event that a third-party prevails at the auction for the Assets. As explained above, the Buyer's offer currently represents the highest and best offer for the Assets, and the Debtors are not confident that the sale will generate any superior offers.

48. Accordingly, if the Court does not approve the proposed Break-Up Fee, the Debtors risk losing the Buyer's offer to the detriment of the estate. Moreover, the Debtors believe that the willingness of the Buyer to commit to a purchase of the Assets, subject to higher and better offers may encourage third parties to submit higher bids for the Assets.

49. Also, considering the factors traditionally considered by courts in analyzing proposed break-up fees prior to a sale (as set forth below), it is clear that the Break-Up Fee of $3,000,000, representing only approximately 2.5% of the aggregate purchase price of $120,000,000 offered by the Buyer for the Assets, is appropriate under the circumstances.

50. Courts also routinely approve break-up fees where, as here, such fees are not tainted by self-dealing and instead are the product of arm's length negotiations. See, e.g., Integrated Resources, 147 B.R. at 657; 995 Fifth Avenue, 96 B.R. at 28. Cf. Bidermann, 203 B.R. at 552-53 (not approving break-up fees where "[t]here is manifest self-dealing" because the debtor's management had created the proposed buyer that would benefit from the payment of such fees).

51. The Debtors and the Buyer are not affiliated in any way, engaged in arm's-length negotiations regarding the proposed sale, and the Buyer has indicated that the Debtors' Auction Procedures, including the Break-Up Fee provision, would be a critical component of any offer made for the Assets. The Buyer's willingness to commit to the sales transaction, to continue to perform the activities necessary to consummate the transaction, and to serve as a "stalking horse" against which other prospective purchasers will be compared in and of itself represents a significant contribution to the estate. As a result, by agreeing to pay the

Break-Up Fee, the Debtors ensured that the estate would have the benefit of the Buyer's initial offer without sacrificing the potential for interested parties to submit overbids at the Asset Sale Hearing.

52. The Break-Up Fee will also encourage fair and competitive bidding. The usual rule is that if break-up fees encourage bidding, they are enforceable; if they stifle bidding, they are not enforceable. Integrated Resources, 147 SR. at 659. See, e.g., 995 Fifth Avenue, 96 B.R. at 28. A break-up fee may encourage bidding by serving "any of three possible useful functions: (1) to attract or retain a potentially successful bid; (2) to establish a bid standard or minimum for other bidders to follow; or (3) to attract additional bidders." Integrated Resources, Inc., 147 B.R. at 662. The Break-Up Fee here accomplishes all of these objectives.

53. Here, as noted above, the Buyer has indicated that the Court's approval of the proposed Break-Up Fee is a material condition to its offer for the Assets. The Debtors believe that the Buyer's demand in this regard is reasonable because the Buyer has expended and will continue to expend considerable time and resources negotiating, drafting, and performing due diligence activities necessitated by the sales transaction, despite the fact that its bid will be subject not only to Court approval but also to overbidding by third parties. Given this substantial risk, the Buyer quite reasonably did not want to proceed with a transaction that would not provide it with protections in the event that an overbidder ultimately prevailed at the Asset Sale Hearing.

54. The proposed Break-Up Fee therefore will permit the Debtors to proceed to seek approval of the sale, which in turn establishes the standard upon which other bidders may

base their competing offers. Without the Break-Up Fee, however, the estate would not have the benefit of the Buyer's offer, and the Debtors then would not have the leverage necessary to require competing bidders to make better offers.

55. Thus, in short, the proposed Break-Up Fee is essential to the Debtors' efforts to sell the Assets for the greatest possible consideration and is appropriate under the above-noted standards.

56. The amount of the Break-Up Fee is fair and reasonable under the circumstances.

> A break-up fee should constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably related to the risk, effort, and expenses of the prospective purchaser. When reasonable in relation to the bidder's efforts and to the magnitude of the transaction, break-up fees are generally permissible.

Integrated Resources, 147 B.R. at 662 (quoting 995 Fifth Avenue, 96 B.R. at 28). See also Hupp Int'l Indus., 144 B.R. at 195.

57. In this case, the Break-Up Fee to the Buyer will amount to only approximately 2.5% of the aggregate purchase price of $120,000,000 offered by the Buyer for the Assets. As such, the proposed fee is well within the range of fees typically paid in other significant sales transactions that have been consummated in a bankruptcy setting. See, e.g., Consumer News & Business Channel Partnership v. Financial News Network, Inc., (In re Financial News Network Inc.), 980 F.2d 165, 167 (2d Cir. 1992) (noting that the transaction at issue provided for a $8.2 million break-up fee on the $149.3 million transaction); Integrated

Resources, 147 B.R. at 662 (approving a $7.5 million break-up fee on a $565 million transaction).

58. Thus, the proposed Break-Up Fee is reasonable and appropriate under the circumstances.

Auction, Hearing and Notice

59. For the reasons described in this Motion, Debtors wish to proceed to an Auction and Asset Sale Hearing as expeditiously as applicable law and the Court's calendar will allow, but still will give the requisite 20 days notice of the proposed sale of Assets.

60. Upon entry of the Procedures Order, the Debtors will distribute a Notice of Sale of Assets and Auction, a copy of which is attached hereto as Exhibit D (the "Auction Notice"), to: (a) the Office of the United States Trustee; (b) counsel to the Creditors' Committee; (c) counsel to the Debtors' postpetition lender; (d) counsel to the Buyer; (e) those parties that requested notice of all pleadings in the Cases pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure; and (f) any prospective bidders at the Auction, including, but not limited to, those parties that have previously submitted tentative bids during the process by which the Debtor, together with its advisors, sought interested bidders for the Assets.

61. In addition, if the Court believes it is appropriate, the Debtors will publish the Auction Notice at least once in the national edition of The Wall Street Journal at least ten days prior to the Auction. The Debtors contend that such notice of the Auction is good and sufficient notice and that no other or further notice is required.

Conclusion

62. The Debtors' proposed sale procedures of the Assets is proper, necessary and serves the best interests of the Debtors, their estates and their creditors. The Debtors reasonably believe that the relief requested in this Motion will maximize recoveries for all creditors of the estates. The Debtors' Auction Procedures will permit the Debtors to sell the Assets in a fair, expedient and prudent manner.

63. The Debtors have invested substantial time and effort in negotiating the terms of the APA, and have concluded, in their reasonable business judgment, that the relief requested in the Motion serves the best interests of creditors. The Debtors believe that the Buyer's offer provides a realistic hope that the Debtors will be able to pursue a successful reorganization for the benefit of their creditors. The Debtors, however, welcome any other third-party purchasers who could pay a higher price than that proposed in the APA.

Notice

64. Notice of this Motion has been given by personal service or overnight delivery to: (a) the office of the United States Trustee; (b) counsel for the Creditors' Committee; (c) counsel for the Lenders; and (d) counsel for the Buyer, and by first class mail upon those parties that requested notice of pleadings pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure, and potential bidders. In light of the nature of the relief requested, the Debtors submit that no further notice is required for entry of the Procedures Order.

No Prior Request

65. No prior Motion for the relief requested herein has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court: (a) grant the Motion scheduling date, time and place for hearing on the sale of the Assets to the bidder who offers the highest and best offer at the Auction; (b) approve the form and manner of notice thereof; and (c) approve: (i) the Debtors' Auction Procedures and (ii) the Break-Up Fee and Expense Reimbursement.

Dated: May 5, 2003

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