

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
Fleming Companies, Inc., <u>et al.</u> , ¹)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	

**APPLICATION FOR ENTRY OF AN ORDER PURSUANT TO
11 U.S.C. §§ 327(A), 328(A) AND FED.R.BANKR.P. 2014(A) AUTHORIZING THE
EMPLOYMENT AND RETENTION OF THE BLACKSTONE GROUP L.P. AS
FINANCIAL ADVISOR TO THE DEBTORS AND DEBTORS IN POSSESSION**

The above-captioned debtors and debtors in possession (the “Debtors”) file this application (the “Application”) seeking entry of an order pursuant to sections 327(a) and 328(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Fed.R.Bankr.P. 2014(a) authorizing the Debtors’ retention and employment of The Blackstone Group, L.P. (“Blackstone”) as financial advisor. In support of this Application, the Debtors respectfully state as follows:

JURISDICTION

1. 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.

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.

§ 157(b)(2). Venue of this proceeding and this Application is properly in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief sought herein are sections 327(a) and 328(a) of the Bankruptcy Code and Fed.R.Bankr.P 2014(a).

BACKGROUND

3. 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"). The Debtors are operating their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case. An official committee of unsecured creditors (the "Committee") was appointed on April 10, 2003.

RELIEF REQUESTED

4. By this Application, the Debtors seek to employ and retain Blackstone as their financial advisor to provide financial advisory services pursuant to the terms of the agreement (the "Blackstone Agreement") attached as Exhibit A to the affidavit of Paul P. Huffard (the "Huffard Affidavit") filed concurrently herewith. Blackstone has rendered services to the Debtors since April 28, 2003 in connection with the Debtors restructuring efforts. Blackstone has become familiar with the Debtors' operations and is well qualified to represent the Debtors as financial advisors in connection with such matters in a cost-effective and efficient manner. Blackstone will provide such financial advisory services as Blackstone 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:²

² Capitalized terms not otherwise defined herein are as defined in the Blackstone Agreement.

- a. assist in the evaluation of the Company's businesses and prospects;
- b. assist in the development of the Company's long-term business plan and related financial projections;
- c. assist in the development of financial data and presentations to the Company's Board of Directors, various creditors and other third parties;
- d. analyze the Company's financial liquidity and evaluate alternatives to improve such liquidity;
- e. analyze various restructuring scenarios and the potential impact of these scenarios on the recoveries of those stakeholders impacted by the Restructuring;
- f. provide strategic advice with regard to restructuring or refinancing the Company's Obligations;
- g. evaluate the Company's debt capacity and alternative capital structures;
- h. participate in negotiations among the Company and its creditors, suppliers, lessors and other interested parties;
- i. value securities offered by the Company in connection with a Restructuring;
- j. advise the Company and negotiate with lenders with respect to potential waivers or amendments of various credit facilities;
- k. assist the Company in preparing marketing materials in conjunction with a possible Transaction;
- l. assist the Company in identifying potential buyers or parties in interest to a Transaction and assist in the due diligence process;
- m. assist and advise the Company concerning the terms, conditions and impact of any proposed Transaction;
- n. provide expert witness testimony concerning any of the subjects encompassed by the other financial advisory services; and
- o. provide such other advisory services as are customarily provided in connection with the analysis and negotiation of a

Restructuring or a Transaction, as requested and mutually agreed.

5. The financial advisory services set forth in the Blackstone Agreement and summarized above do not encompass other investment banking services or transactions that may be undertaken by Blackstone at the request of the Debtors, including the arranging of debt or equity capital, issuing fairness opinions, or any other specific services not set forth in the Blackstone Agreement. The terms and conditions of any such investment banking services, including compensation arrangements, would be set forth in a separate written agreement between the Debtors and Blackstone and would be subject to any necessary Court approval.

6. The financial advisory services that Blackstone will provide to the Debtors are necessary to enable the Debtors to maximize the value of the estates and to reorganize successfully. The Debtors believe that the financial advisory services will not duplicate the services that, subject to this Court entering or having entered appropriate orders, other financial advisors, if any, would provide to the Debtors in the Chapter 11 Cases.³ Blackstone will carry out unique functions and will use reasonable efforts to coordinate with the Debtors' other retained professionals to avoid the unnecessary duplication of services.

7. Blackstone has previously worked on many chapter 11 restructurings, advising both debtors and creditors in various cases and has vast experience working for companies in distressed situations. Selected current and previous advisory assignments in which Blackstone has participated include: American Banknote Corp., Chiquita Brands International, Dow Corning Corporation, Eastern Airlines, Global Crossing Ltd.,

³ On April 5, 2003 the Application of the Debtors and Debtors in Possession For an Order Pursuant to 11 U.S.C Sections 327(a) and 328(a) and Fed. R. Bankr. P. 2104(a), 2016 and 5002 Authorizing the Retention and Employment of Gleacher Partners LLC as Financial Advisor and Investment Banker to the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date (the "Gleacher Application") was filed. Gleacher is no longer providing services to the Debtors.

Motorola, Inc. (in the restructuring of Iridium LLC), Levitz Furniture, Inc., Loehmann's, Inc., The LTV Corporation, Marvel Entertainment Group, Inc., MobileMedia Corp., Montgomery Ward Holding Co. (GECC), Paragon Trade Brands, Inc., Penn Traffic, Phar-Mor, Inc., R.H. Macy & Co., The Singer Company N.V., and Winstar Communications, Inc.

A. Terms of Retention

8. Blackstone has agreed to represent the Debtors for compensation at the amounts agreed upon between the parties pursuant to the Blackstone Agreement. As more fully described in the Blackstone Agreement, in consideration of the financial advisory services provided by Blackstone, the Debtors have agreed to pay Blackstone:

- a. a monthly advisory fee (the “Monthly Fee”) in the amount of \$200,000 in cash, with the first Monthly Fee payable upon the execution of this Agreement by both parties and Bankruptcy Court approval, and additional installments of such Monthly Fee payable in advance on each monthly anniversary of the Effective Date. Fifty percent (50%) of the aggregate Monthly Fees paid by the Company to Blackstone during its engagement hereunder shall be credited against the Restructuring Fee (as defined below), as applicable;
- b. upon the completion of a Restructuring, an additional fee (the “Restructuring Fee”) equal to \$10 million, less the Transaction Fee (as defined below); and
- c. upon the consummation of a Transaction, a Transaction fee (“Transaction Fee”) with respect to such Transaction payable in cash calculated according to the following scale: 1.5% of Consideration up to \$100 million of Consideration and 1.0% of Consideration in excess of \$100 million. If there are multiple transactions, this calculation shall be applied to each Transaction. With respect to the sale of the Company’s retail assets, the corresponding Transaction Fee will be equal to 50% of the amount as calculated according to the preceding formula (together with the Monthly Advisory Fee and the Restructuring Fee, the “Fee Structure”).

9. Except as otherwise provided in the Blackstone Agreement, Restructuring shall be understood to have been completed upon the execution, confirmation and consummation of a plan of reorganization pursuant to an order of the Bankruptcy Court. Notwithstanding the foregoing, Restructuring specifically shall be understood to exclude any assumption at face value of Obligations in connection with the sale or disposition of any subsidiaries, joint ventures, assets or lines of business of the Company. The Restructuring Fee and the Transaction Fee will be paid in cash promptly upon the consummation of a Restructuring or Transaction, respectively.

10. Blackstone will maintain detailed records of any actual and necessary costs and expenses incurred in connection with the aforementioned services, including receipts for any individual expenditure in excess of \$75.

11. Blackstone will seek compensation and reimbursement of expenses, as specified in the Blackstone Agreement, with the payment of such fees and expenses to be approved in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules and any orders of this Court; to the extent time records are required, Blackstone will keep them in one-half hour increments; and provided further, that the approval of Blackstone's fees and expenses in these Chapter 11 Cases will be subject to the standards contained in Section 328(a) of the Bankruptcy Code.

12. The Debtors seek approval of the Fee Structure pursuant to section 328(a) of the Bankruptcy Code, which provides, in relevant part, that a debtor "with the court's approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis." 11 U.S.C. § 328(a). Accordingly, section 328(a) of the Bankruptcy Code permits the Court to approve the Fee Structure outlined herein. The Fee Structure appropriately reflects the nature and scope of the services to be provided by Blackstone, Blackstone's substantial experience with

respect to financial advisory services, and the fee structures typically utilized by Blackstone and other leading financial advisors, which do not bill their clients on an hourly basis. Similar fixed and contingency fee arrangements have been approved and implemented in other large chapter 11 cases in this District and elsewhere. See, e.g., In re Trans World Airline, Inc. et al., Case No. 01-0056 (PJW) (Bankr. D. Del. Jan. 10, 2001) (order dated Jan. 26, 2001 approving the retention of Rothschild, Inc. as investment bankers for the debtor, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code); In re United Artists Theatre Company et al., Case No. 00-03514 (SLR) (Bankr. D. Del. Sept. 7, 2000) (order dated Nov. 14, 2000 approving the retention of Houlihan Lokey Howard & Zukin Capital as investment bankers for the debtor, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code); In re Harnischfeger Industries et al., Case No. 99-02171 (PJW) (Bankr. D. Del. June 7, 1999) (order dated Feb. 8, 2000 approving the retention of Blackstone as financial advisors to the debtor, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code).

13. Notwithstanding the approval of the Fee Structure requested herein, all of Blackstone's fees and expenses in these Chapter 11 Cases will be subject to approval of the Court upon proper application by Blackstone in accordance with sections 330 and 331 of the Bankruptcy Code, Fed. R. Bankr. P. 2016, the fee and expense guidelines established by the United States Trustee and any other applicable requirements or orders of the Court. However, pursuant to section 328(a) of the Bankruptcy Code, the Court may not subsequently allow Blackstone's compensation on terms different from the approved Fee Structure unless such compensation "prove[s] to have been improvident in light of developments not capable of being anticipated at the time" the Fee Structure was originally approved. 11 U.S.C. § 328(a).

14. To date, Blackstone has received no compensation for services performed.

B. Blackstone's Disinterestedness

15. Blackstone's compliance manager, Robert J. Gentile, has submitted an affidavit describing the results of his conflict search (the "Gentile Affidavit"), based on the entities listed on Exhibit A to the Huffard Affidavit. Based on the results of that search, neither Blackstone, nor any member or employee thereof, has any connection with the Debtors, its creditors, other parties-in-interest (as reasonably known to Blackstone), its respective attorneys, or the United States Trustee or any person employed in the Office of the United States Trustee, except as disclosed in the Huffard and Gentile Affidavits.

16. To the best of the Debtors' knowledge, Blackstone is a "disinterested person" as that term is defined in Section 101(14) of title 11 of the United States Code, as modified by Section 1107(b) of the Bankruptcy Code and does not hold or represent any interest adverse to the Debtors' estates.

17. The entities listed on Exhibit A to the Huffard Affidavit have been located by Blackstone using its reasonable efforts and with assistance from the Debtors and Debtors' counsel. Blackstone will periodically review its files during the pendency of the Chapter 11 Cases to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new relevant facts or relationships are discovered or arise, Blackstone will use reasonable efforts to identify such further developments and will promptly file a Supplemental Affidavit as Rule 2014(a) of the Federal Rules of Bankruptcy Procedure requires.

C. Indemnification and Contribution Provisions

18. Blackstone requests that the indemnification provisions of the Blackstone Agreement be approved, subject to the following:

a. subject to the provisions of subparagraph (c), *infra*, the Debtors are authorized to indemnify, and shall indemnify, Blackstone in accordance with the Blackstone Agreement, for any claim arising from, related to

or in connection with the financial advisory services but not for any claim arising from related to or in connection with Blackstone's postpetition performance of any services other than the financial advisory services unless such postpetition services and indemnification therefore are approved by the Court;

b. notwithstanding any provision of the Blackstone Agreement to the contrary, the Debtors shall have no obligation to indemnify Blackstone, or to provide contribution or reimbursement to Blackstone, for any claim or expense to the extent any losses, claims, damages or liabilities (or expenses relating thereto) are judicially determined by a court of competent jurisdiction (the determination having become final) to have primarily resulted from the bad faith, gross negligence or willful misconduct of Blackstone; and

c. if, before the earlier of (i) the effective date of chapter 11 plan, and (ii) the entry of an order closing the Chapter 11 Case, Blackstone believes that it is entitled to the payment of any amounts by the Debtors on account of the Debtors' indemnification, contribution and/or reimbursement obligations under the Blackstone Agreement, including without limitation, the advancement of defense costs, Blackstone must file an application therefor in this Court, and the Debtors may not pay any such amounts to Blackstone before the entry of an order by this Court approving payment. This subparagraph (c) is intended only to specify the period of time under which the Court shall have jurisdiction over any request for fees and expenses by Blackstone for indemnification, contribution or reimbursement and not to limit the duration of the Debtors' obligation to indemnify Blackstone.

19. The preceding indemnification and contribution provisions in the Blackstone Agreement are in substantially the same form as the indemnification procedures that were negotiated with the United States Trustee and approved by the Court in In re United Artists Theatre Company, et al., Case No. 00-03514 (SLR) (Bankr. D.Del. Sept. 7, 2000); In re Ameriserve Food Distribution, Inc., Case No. 00-0358 (PJW) (Bankr. D. Del. May 9, 2000); and In re Planet Hollywood International, Inc., Case No. 99-3612 (JJF) (Bankr. D. Del. Dec. 17, 1999).

NOTICE

20. Notice of this Application has been given to: (a) the United States Trustee; (b) counsel to the senior secured lenders; (c) proposed counsel to the Committee; and (d) 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. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

NO PRIOR REQUEST

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

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form attached hereto, authorizing the Debtors to employ and retain Blackstone as financial advisors *nunc pro tunc*, to April 28, 2003 and granting such further relief as is just and proper.

Wilmington, Delaware

Respectfully submitted,

FLEMING COMPANIES, INC

Dated: May 16 2003

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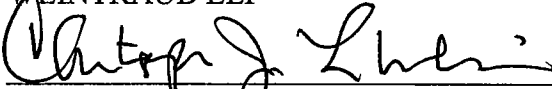
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