

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

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

Objection Deadline: July 10, 2003 at 4:00 p.m. prevailing Eastern time  
Hearing Date: July 17, 2003 at 3:00 p.m. prevailing Eastern time

**DEBTORS' MOTION FOR ORDER EXTENDING  
EXCLUSIVE PERIODS FOR FILING A PLAN AND SOLICITING VOTES**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this Motion (the "Motion") for entry of an Order Extending Exclusive Periods For Filing a Plan and Soliciting Votes. In support thereof, the Debtors state the following:

**Jurisdiction**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).
2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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<sup>1</sup> 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.

3. The statutory bases for the relief requested herein are sections 105(a) and 1121(d) of the Bankruptcy Code.

### **Background**

4. On April 1, 2003 (the "Petition Date"), the Debtors filed their voluntary petitions (the "Petitions") for relief under chapter 11 of title 11 of the United States 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. As of the Petition Date, the Debtors were 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.

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. Additionally, Debtors offer products under their own private brands, including BestYet™, Exceptional Value™, and Nature's Finest® labels.

7. As of the Petition Date, the Debtors also operated 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. Also, as of the Petition Date, the Debtors had 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 are premier distributors of food and consumer products for convenience stores in North America (including Western Canada), have their 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. Fundamental changes in the Debtors' business and financial situation precipitated the filing of the Petitions. Kmart Corporation ("Kmart"), which was the Debtors' largest customer, accounted for approximately 20% of the Debtors' net sales and \$3.6 billion of

total sales in fiscal year 2002. Kmart listed Debtors as its largest supplier of food and consumable products in pleadings filed in its chapter 11 case, which is currently pending in the Northern District of Illinois. In February 2003, Kmart rejected its supply agreement with Debtors.

11. Due to industry-wide and company-specific events (such as the Kmart contract rejection), the Debtors experienced a liquidity crisis in early 2003, and they were unable to timely service their debt and other financial obligations. As a result of this liquidity crisis, the Debtors filed the Petitions on April 1, 2003.

#### **Relief Requested**

12. By this Motion, the Debtors seek an order extending the Debtors' exclusive period in which to file a chapter 11 plan through and including November 27, 2003, and the Debtors' exclusive period to solicit votes thereon through and including January 26, 2004.

13. During the three months since the Petition Date, the Debtors and their professionals have devoted substantial time and effort in these large and complex cases addressing fundamental issues, such as maintaining liquidity and stabilizing operations

14. For instance, the Debtors liquidity crisis had to be addressed immediately after the Petitions were filed. Responding to the crisis meant quickly obtaining postpetition interim (and then final) debtor in possession financing for the Debtors' postpetition lenders, agreeing on the use of cash collateral with the Debtors' prepetition lenders, obtaining this Court's approval of the junior trade lien program, the critical vendor program and other measures

to maintain continued vendor support, continuing of customer programs and practices to maintain continued customer support, and timely paying wages, salaries, commissions and benefits to associates to enhance employee moral and retention. As a result of these steps, the Debtors now have in place a \$150 million debtor in possession loan, and over \$200 million of negotiated vendor credit lines.

15. The Debtors also hired seasoned turnaround professionals to stabilize the Debtors' operations and develop a strategic business plan. A critical component of the Debtors' strategy is to liquidate non-core assets, such as retail grocery stores. The Debtors began to close or sell their retail grocery stores prepetition as part of a strategic plan to exit the retail grocery business, and concentrate on their multi-tiered wholesale distribution network for consumable goods.<sup>2</sup> They have successfully sold 40 stores postpetition (with an additional 19 sales pending), and have rejected 147 leases (with an additional 15 lease rejections pending). They have also established procedures to conduct store closing sales, sell de minimus assets, dispose of obsolete and excess inventory, sell real estate and the personal property located therein, and conduct going out of business sales. To date, Court-authorized going concern and liquidation sales have netted the Debtors' estates over \$100 million.

16. Additionally, several customers are seeking to terminate supply arrangements with the Debtors. The Debtors' management and professionals have been

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<sup>2</sup> 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<sup>®</sup> 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.

expending an extraordinary amount of time preparing for litigation and litigating with customers to preserve the going concern value of the Debtors businesses.

17. Also, the Debtors have been defending a number of actions brought by suppliers seeking to impose a constructive trust over funds received from customers. Along with the litigation discussed in this paragraph and the previous paragraph, the Debtors' management and professionals have devoted significant resources in an effort to stabilize the Debtors operations.

18. Additionally, the Debtors have been reconciling and resolving an extraordinary large number and amount of claims asserted under the Perishable Agricultural Commodities Act ("PACA") and similar statutes. The Debtors have spent, and will continue to spend, a great deal of time and expense to analyze, reconcile, and negotiate and/or litigate these claims. Currently, creditors have asserted approximately 265 PACA claims for approximately \$51 million. The PACA claims and related issues remain an important focus of the Debtors. After an extensive amount of work done by the Debtors and their professionals, the Debtors filed their PACA report (regarding the Debtors' view of the validity and allowability of PACA claims) on June 16, 2003, as required by an Order of this Court. The Debtors have also funded a segregated trust for the benefit of PACA claimants with \$40 million. The PACA trust has paid out approximately \$17 million to date. The Debtors are still in the process of resolving numerous issues and objections regarding PACA claims.

19. As well, the Debtors have been reconciling and resolving an extraordinary large number and amount of reclamation claims. There are approximately 620 reclamation

claims asserted against the Debtors for approximately \$305 million. The Debtors plan to file their reclamation claims report (regarding the Debtors' view of the validity and allowability of reclamation claims) on July 21, 2003, as required by an Order of this Court.

20. The four-month exclusivity period for filing a plan is a short period of time in which to address the myriad disputes, matters and proceedings that accompany a "Mega-Case." The Debtors' exclusive period to file a plan of reorganization expires after July 30, 2003, and the exclusive period to solicit acceptance of the plan expires after September 28, 2003 (collectively, the "Exclusive Periods").

21. The Debtors believe that their continuing efforts will result in their ability to propose a confirmable chapter 11 plan that will be in the best interests of all of the Debtors' constituents. In order to achieve this goal, the Debtors will need additional time beyond the initial Exclusivity Periods to perform the tasks necessary to propose such a plan.

### **Argument**

22. The Debtors seek these extensions: (a) to avoid premature formulation of a chapter 11 plan; and (b) to ensure that the formulated plan takes into account the interests of all of the Debtors and their respective employees, creditors, and estates.

23. Section 1121(d) of the Bankruptcy Code grants this Court authority to extend the Debtors' exclusive periods to file a plan and solicit acceptances "for cause" after notice and hearing. Although the Bankruptcy Code does not define the term "cause," the legislative history indicates that it is to be viewed flexibly "in order to allow the debtor to reach an agreement." H.R. Rep. No. 95, 95<sup>th</sup> Cong., 1st Sess. 232 (1997). See also, In re McLean Indus., Inc., 87 B.R.

830, 833 (Bankr. S.D. N.Y. 1987) (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 231 (1978), reprinted in 1978, U.S.C.C.A.N. 5963, 6190); In re Public Serv. Co. of New Hampshire, 88 B.R. 521, 534 (Bankr. D.N.H. 1988) (“[T]he legislative intent . . . [is] to promote maximum flexibility.”)

24. To facilitate this legislative intent, a debtor should be given a reasonable opportunity to negotiate an acceptable plan with creditors and to prepare adequate financial and nonfinancial information concerning the ramifications of any proposed plan for disclosure to creditors. See e.g. In re McLean Indus., Inc., 87 B.R. at 833-34; In re Texaco Inc., 76 B.R. 322, 327 (Bankr. S.D. N.Y. 1987).

25. The decision to extend a debtor’s exclusive period is committed to the sound discretion of the bankruptcy court, based upon the facts and circumstances of each particular case. See, e.g., First American Bank of New York v. Southwest Gloves and Safety Equip., Inc., 64 B.R. 963, 965 (D. Del. 1986).

26. In determining whether cause exists for an extension of a debtor’s exclusivity periods, courts have relied on a variety of factors, each of which may provide sufficient grounds for extending the periods. These factors include (a) the size and complexity of the case, (b) the debtor’s progress in resolving issues facing the estate, and (c) whether an extension of time will harm the debtor’s creditors. See, e.g., In re Gibson & Cushman Dredging Corp., 101 B.R. 405, 409-10 (E.D.N.Y. 1989) (listing the above-referenced factors); In re Grand Traverse Development Co. Ltd. Partnership, 147 B.R. 418, 420 (Bankr. W.D. Mich. 1992) (same); In re General Bearing Corp., 136 B.R. 361, 367 (Bankr. S.D.N.Y. 1992) (same); In re Southwest Oil



Co. of Jourdanton, 84 B.R. 448, 451-54 (Bankr. W.D. Tex. 1987) (same). See also Bunch v. Hoffinger Industries, Inc. (In re Hoffinger Industries, Inc.), 292 B.R. 639, 643-44 (8<sup>th</sup> Cir. B.A.P. 2003) (factors include: (a) the size of the debtor and the difficulty of formulating a plan of reorganization for a large debtor with a complex financial structure; (b) the need for the creditors' committee to negotiate with the debtor; (c) whether there has been good faith progress toward reorganization; (d) the existence of an unresolved contingency; (e) whether the debtor is paying its bills as they become due; (f) the length of any previous extensions; (g) breakdowns in plan negotiations, such that an extension would give the debtor an unfair bargaining position over others; (h) any failure of the debtor to resolve fundamental reorganization issues that are essential to its survival; and (i) any gross mismanagement of the debtor; see also the case law cited therein). The Debtors submit that the Exclusivity Periods should be extended under each of these factors.

27. Although here the Debtors are requesting an initial extension, Courts often grant multiple extensions of a debtor's exclusivity periods when sufficient cause exists. "Cause" typically relates to the size and complexity of the chapter 11 cases. See e.g., Hoffinger Industries, 292 B.R. at 643-45 (B.A.P. affirmed Bankruptcy Court order extending the exclusivity periods for five months in a "complex" case where the debtor had annual sales of \$36 million, the creditors' committee had not completed its investigation of transactions between the debtor and related parties, and the debtor was in the process of securing financing, finishing audits and appraisals, and appealing a significant prepetition judgment against it); In re Edison, Case No. 95-1354 (PJW) (Bankr. D. Del. Aug. 21, 1997) (extending the exclusivity periods for

twenty-one months); In re Perkins, 71 B.R. 294, 296 (W.D. Tenn. 1987) (exclusivity periods extended for more than twenty-two months); In re Phar-Mor Inc., Case No. 92-41599 (Bankr. N.D. Ohio Sept. 21, 1994) (exclusivity periods extended for more than two years); In re Federated Dep't Stores, Inc., Case No. 1-90-00130 (Bankr. S.D. Ohio Aug. 27, 1991) (exclusivity retained by the debtors for almost two years); In re Trans World Airlines, Inc., Case No. 92-115 (HSB) (Bankr. D. Del. May 6, 1993) (exclusivity retained by the debtor for approximately sixteen months); In re R.H. Macy & Co., Case No. 92 B 40477 (BRL) (Bankr. S.D.N.Y. Feb. 22, 1994) (debtor retained exclusivity for two and one-half years); and In re Caldor, Inc., Case No. 95 B 44080 (JLG) (Bankr. S.D.N.Y. July 30, 1996) (exclusivity period extended for seventeen months). An examination of the factors set forth above establishes that cause exists for the Exclusivity Periods in these cases to be extended.

**A. The Size and Complexity of the Debtors' Cases Justify An Extension of the Exclusivity Periods.**

28. Both Congress and the courts have recognized that the size and complexity of a debtor's case alone may constitute cause for the extension of a debtor's exclusive periods. "[I]f an unusually large company were to seek reorganization under chapter 11, the Court would probably need to extend the time in order to allow the debtor to reach an agreement." H.R. Rep. No. 595, 95th Cong., 1st Sess. 231, 232, 406 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6191, 6362. In the Texaco reorganization, for example, the court stated:

The large size of the debtor and the consequent difficulty in formulating a plan of reorganization for a huge debtor with a complex financial structure are important factors which generally constitute cause for extending the exclusivity periods.

29. Here, the Debtors' cases are unquestionably large. The Debtors are the largest distributor of consumable goods in the United States with net sales of \$17.6 billion for the twelve months ending December 28, 2002. As of the Petition Date, the Debtors serviced approximately 45,000 retail locations through a network of approximately 50 distribution centers throughout North America, Hawaii, the Caribbean and the South Pacific. As of the Petition Date, the Debtors had over 15,000 employees.

30. The Debtors' cases, which consist of 29 procedurally consolidated cases, are unusually complex. As of the Petition Date, the Debtors leased over one thousand properties located throughout the nation, which the Debtors are in the process of analyzing, closing or selling. The Debtors have established a junior trade lien financing program to ensure the continued support of the Debtor's vendors. The Debtors have also established a critical vendor program to incentivize vendors to continue to support the Debtors' operations. The Debtors have continued their customer programs to ensure customer support, and to aid in the stabilization of the Debtors' businesses. The Debtors have responded to numerous actions by customers and vendor to terminate important contracts, which if successful would have a debilitating effect on the Debtors' reorganization. The Debtors have negotiated and documented a complex debtor in possession financing facility. They have also reconciled a enormous number of PACA and reclamation claims, which have been filed in the hundreds of millions of dollars. The Debtors have had to contend with these and a number of other issues while operating a multibillion dollar

business that has thousands of employees with less management personnel than they had prior to the Petition Date.

31. The size and complexity of the Debtors' business, corporate structure, and new financing arrangements compel the requested extension of the Exclusivity Periods. While much progress has been made in the Debtors' cases, a great deal of work and negotiation must still be accomplished before a cogent reorganization plan can be filed with this Court. Although, as stated below, the Debtors continue to make significant strides in stabilizing their postpetition business operations and their relationships with their creditors and other parties in interest, they have not yet reached a position where they are able to evaluate the universe of claims against them and consider their ultimate strategic restructuring alternatives.

32. In light of the size and complexity of the Debtors' cases and the magnitude of the task at hand, the Debtors' request for an approximate four month extension is relatively modest. In fact, the Debtors' request is well within the range of extensions granted by this and other courts in large reorganization cases. See, e.g., Hoffinger Industries, 292 B.R. at 643-45 (exclusivity extended five months); In re Fruit of the Loom, Inc., No. 99-04497 (PJW) (exclusivity extended for approximately six months); In re Montgomery Ward Holding Corp., No. 97-1409 (PJW) (Bankr. D. Del.) (exclusivity extended for twenty-one months); In re Trans World Airlines, Inc., No. 92-115 (HSB) (Bankr. D. Del.) (exclusivity extended for approximately twenty months); In re Federated Dep't Stores, Inc., No. 1-90-00130 (Bankr. S.D.

Ohio) (exclusivity extended for approximately two years); In re Phar-Mor, Inc., No. 92-41599 (Bankr. N.D. Ohio) (exclusivity extended for approximately three years).<sup>3</sup>

**B. The Debtors' Progress in These Cases Warrants an Extension of the Exclusivity Periods.**

33. An extension of a debtor's exclusivity periods is also justified by progress in the resolution of issues facing a debtor's creditors and estates. See, e.g., In re McLean Industries Inc., 87 B.R. 830, 835 (Bankr. S.D.N.Y. 1987) (basing extension of exclusivity periods, in part, on debtors' progress in resolving issues with creditors); Texaco, 76 B.R. at 327 (same); In re Swatara Coal Co., 49 B.R. 898, 899-900 (Bankr. E.D. Pa. 1985) (same).

34. So far in these cases the Debtors have had to devote a great amount of their time and resources simply to meet their liquidity needs, scale back and/or close unprofitable portions of their business, exit from unprofitable markets, restore customer and vendor confidence, and improve employee morale. The Debtors have taken and continue to take decisive action in these areas and have made significant strides in correcting and improving the operation of their business.

35. Other key components of the Debtors' progress since Petition Date include the Debtors':

- (a) development of a business plan and analysis of strategic alternatives;

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<sup>3</sup>See also In re Edison Bros. Stores, Inc., 95-1354 (PJW) (Bankr. D. Del.) (180-day initial extension); Gibson & Cushman, 101 B.R. at 407, 411 (exclusive period extended fourteen months); Perkins, 71 B.R. at 296 (exclusive period extended more than twenty-two months); Ravenna, 20 B.R. at 887 (exclusive period extended more than ten months).

- (b) sale of assets by numerous means (going concern sales of stores, store closing sales, de minimus asset sales, sales of obsolete and excess inventory, sales of real estate and the personal property located therein, and going out of business sales), and throughout the country;
- (c) closing of stores and distribution centers, and rejection of certain burdensome executory contracts and unexpired leases;
- (d) preparation of schedules and statements of financial affairs, and setting a claims bar date;
- (e) continuation of reconciling reclamation and PACA claims, including preparation and filing of a Debtors' reports regarding same;
- (f) retention of professionals to assist the Debtors in selling their assets and collecting receivables;
- (g) stabilization of their cash management operations;
- (h) responding to requests for adequate assurance of future payment by utility companies;
- (i) maintenance of employee morale and good relations with the Debtors' various employee constituencies;
- (j) resolution or opposition to motions to lift the automatic stay;
- (k) further development of a cohesive bankruptcy litigation strategy;
- (l) preservation of net operating losses (a tax asset) by obtaining limitations on trading of equity;
- (m) continuing to resolve or litigate intellectual property disputes;
- (o) entry in to an international protocol regarding Debtor Core-Mark International, Inc.'s concurrent proceeding under the Companies' Creditors Arrangement Act in British Columbia, Canada; and
- (n) preparation of their monthly operating reports.

The Debtors' progress on these crucial issues justifies the requested extension of the Exclusivity Periods.

36. Further, these cases do not bear characteristics that would justify the denial of an extension of the Exclusive Periods. See e.g. In re Gagel & Gagel, 24 B.R. 674 (Bankr. S.D. Ohio 1982) (denying extension of exclusivity period because extension would be fruitless); In re Dow Corning Corporation, 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997) (stating that an extension of the exclusive period should be denied if debtor appeared to be attempting to delay the administration of the bankruptcy case). The Debtors do not seek this extension to delay administration of the case or to pressure creditors to accept unsatisfactory plans. On the contrary, this request is intended to facilitate an orderly, efficient and cost-effective plan process for the benefit of creditors.

**C. Extension of the Exclusive Periods Will Not Harm the Debtors' Creditors or Other Parties in Interest.**

37. Extension of the Exclusivity Periods requested herein will not harm the Debtors' creditors or other parties in interest. In light of the size and complexity of the Debtors' cases and the significant issues that necessarily must be resolved before a reorganization plan can be formulated, neither the Debtors' creditors nor any other party in interest would be in a position to propose a confirmable plan of reorganization that would provide meaningful distributions to creditors at this time.

38. Termination of the Exclusivity Periods at this juncture would defeat the purpose of 11 U.S.C. § 1121, which affords the debtor a meaningful and reasonable opportunity to negotiate with creditors and propose and confirm a consensual chapter 11 plan. Termination of the Exclusivity Periods would likely be a destabilizing event that would cause a deterioration

in the Debtors' business and the value of their assets to the detriment of the Debtors' estates and creditors.

39. In addition, there is a legitimate risk that an unrealistically brief extension of the Exclusivity Periods would signal a loss of confidence in the Debtors and their reorganization effort, which would undermine the gains the Debtors have made since the commencement of these cases and harm both the Debtors and their creditors. The objective of a chapter 11 reorganization case is the rehabilitation of the debtor's business and the negotiation, formulation, development, confirmation and consummation of a consensual plan of reorganization.

40. The Debtors request this extension in good faith, and there is no risk of harm to the Debtors' creditors from the requested extension of the Exclusive Periods.

41. Accordingly, granting the extension of the Exclusivity Periods requested by the Debtors is reasonable and appropriate under the circumstances of these cases.

#### **Notice**

42. Notice of this Motion has been given to: (a) the Office of the United States Trustee; (b) counsel for the Lender; (c) counsel to the Official Committee of Unsecured Creditors; and (d) all parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

#### **Prior Requests**

43. This is the Debtors' first request for an extension of the Exclusive Periods. No prior requests for the relief sought herein have been made by the Debtors.



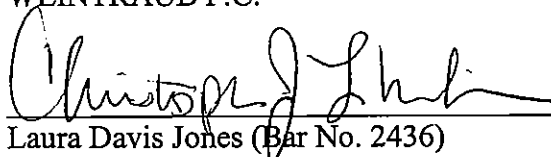
WHEREFORE, the Debtors respectfully request entry of an order, substantially in the form attached hereto, granting the relief requested herein and such other and further relief as is just and proper.

Dated: June 27, 2003

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