IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	Case No. 03-10945 (MFW)
Fleming Companies, Inc., et al.,	:	Jointly Administered
	:	
Debtors.	:	**Hearing Date: September 18, 2003 at 2:00 p.m. (EST)**
	:	**Objection Deadline: September 11, 2003 at 4:00 p.m. (EST)**
	:	Contract Assignment #: 2055
	:	Proposed Cure Amount: $0
	:	
	:	**Related to Docket Items 1906, 1984, 2002, 3150, 3151, 3153, and 3142**

MOTION OF KEIL'S FOOD STORES FOR AN ORDER GRANTING RELIEF FROM THE COURT'S AUGUST 15, 2003 "ORDER (A) APPROVING ASSET PURCHASE AGREEMENT BY AND AMONG FLEMING COMPANIES, INC., C&S WHOLESALE GROCERS, INC. C&S ACQUISITION LLC, AND THE OTHER PARTIES NAMED THEREIN, (B) AUTHORIZING (I) SALE OF SUBSTANTIALLY ALL OF SELLING DEBTORS' ASSETS RELATING TO THE WHOLESALE DISTRIBUTION BUSINESS TO PURCHASER OR ITS DESIGNEE(S), FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS AND (II) PROCESS FOR ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS, LICENSE AGREEMENTS AND UNEXPIRED LEASES TO PURCHASER OR ITS DESIGNEE(S) AND ESTABLISHING THE MAXIMUM CURE AMOUNT WITH RESPECT THERETO AND (C) GRANTING RELATED RELIEF" [DOCKET NO. 3142] ON THE GROUNDS THAT IT RECEIVED NO NOTICE OF MOTIONS AND ADDITIONAL GROUNDS AND RESERVATION OF RIGHTS

NOW COMES Keil's Food Stores ("Keil's" or "Creditor"), by and through its undersigned counsel, and hereby files this Motion for the entry of an Order granting it relief from the "Order (A) Approving Asset Purchase Agreement By and Among Fleming Companies, Inc., C&S Wholesale Grocers, Inc. C&S Acquisition LLC, And The Other Parties Named Therein, (B) Authorizing (I) Sale of Substantially All of Selling Debtors' Assets Relating To The Wholesale Distribution Business To Purchaser Or Its Designee(s), Free And Clear of all Liens, Claims, Encumbrances And Interests And (II) Process For Assumption And Assignment Of

Certain Executory Contracts, License Agreements And Unexpired Leases To Purchaser Or Its Designee(s) And Establishing the Maximum Cure Amount With Respect Thereto And (C) Granting Related Relief" entered August 15, 2003 ("Order") [D.I. 3142].

In support of this Motion, the Keil's shows as follows:

JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The predicate for relief sought herein is 11 U.S.C. §§ 105, 108, and 502(j) and Rules 9006(b)(1) and 9024 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 60(b) of the Federal Rules of Civil Procedure.

SUMMARY OF THE ARGUMENT AND RELIEF SOUGHT

By this Motion, Keil's asks for relief from the Order on either of two alternate grounds, that: (1) the Order be deemed void as to Keil's for lack of notice to Keil's (F.R.C.P. 60(b)(4)); or, alternatively, (2) Keil's be relieved from the application of the Order to it on the grounds of "mistake, inadvertence, surprise or excusable neglect" due to the lack of notice (F.R.C.P. 60(b)(1), (6) and F.R. Bankr. P. 9006(b).

Keil's seeks relief in two alternative forms: (1) that the Order be treated as void as to Keil's and that the Court hear and decide Keil's objections (with an opportunity for Keil's to supplement them); or (2) that Keil's objections be deemed timely filed and that it be granted all protections of a timely objecting party, including but not limited to, the right to assert a cure amount up to $600,000 (Order ¶16), the right to assert all reservations, defenses and protections provided in the Order, including the right to assert Integration Defenses (Order ¶47), and the

right to have a specific notice given before any assumption and assignment of any executory contract (Order ¶12).[1] Keil's is not asking this Court to upset the overall Order as it relates to any other non-Debtor party, other than Keil's, or as to any notes other than those executed by Keil's, or as to any other agreements with the Debtors other than those executed by, or related to the agreements executed by, Keil's.

FACTUAL BACKGROUND

The Order Is Void As To Keil's For Lack of Proper Notice

As set forth in its Initial Opposition Papers, Keil's inability to timely respond to the Motions was the result of its not receiving notice of the Motions and that when Keil's did learn of the Motions, it was already too late to timely oppose. Specifically, Keil's did not receive notice either of the Motion for approval of the sale, or of the Notice of potential assumption and assignment of certain executory contracts. In fact, Keil's received no notices in this case until received the Claims Bar Date Notice dated July 28, 2003 (the date on which opposition to the sale motion and to the proposed cure amounts was due). See Keil's Opposition Memo filed August 15, 2003 [D.I. 3150] ("Opposition Memo"), the Declaration of Rick Keil dated August 13, 2003 filed in this case on August 15, 2003 [D.I. 3151] ("First Keil Declaration") and the Declaration of Michael E. Busch dated August 14, 2003 and also filed August 15, 2003 [D.I. 3153] ("First Busch Declaration") (collectively, "Initial Opposition Papers").[2] Therefore, under the United States Constitution and case law due process grounds, any order purportedly entered

[1] To date, Keil's has not received notice of any request to assume any agreement to which it is a party.

[2] For the Court's convenience, copies of these pleadings are attached to the Second Busch Declaration.

adversely affecting Keil's claims and/or interests is void.

As set forth in the First Keil Declaration, Keil's operates two stores in San Diego, California and receives mail from a hundred or more vendors and other parties per week. To handle that volume, Keil's has a centralized system for opening, tracking and responding to any and all mail at its headquarters at 3015 Clairemont Drive, San Diego, California 92117. Thus, whether mail is sent to Keil's stores at 7403 Jackson Drive in San Diego or at 3015 Clairemont Drive in San Diego, all mail is brought to the Clairemont Drive location and processed through the corporate office. Mr. Rick Keil's two assistants are in charge of monitoring the mail, which is processed five days per week. (First Keil Decl. ¶3).

Keil's has experienced no problems with its mail handling system in the period from April 1, 2003, when this case was filed, to date. Keil's has no record of receiving any notice in this case prior to the bar date notices. Had any notice been received, it is Keil's practice to attend to it promptly. Mr. Keil instructed that a thorough search be made to locate any prior notices in this case that might have been received, and he was informed that none was located. Based on its procedures for the handling of its mail, and this search, Keil's believes that it did not receive notices in this bankruptcy case prior to the bar date notices, copies of which are attached as Exhibit "A" to the Keil Declaration. (First Keil Decl. ¶3). Keil's received multiple copies of the Notice and Proof of Claim form, sent to two addresses. This contrasts with the earlier notices, which were not received at all. (First Keil Decl. ¶ 3 and Ex. "A").

Keil's does not know why it did not receive the notices because it is not privy to how the Debtors, Debtors' counsel, or the outside noticing agent, Bankruptcy Management Corporation ("BMC"), prepared and served the notices. Based upon counsel's preliminary review of the motions and affidavits of service, there are certain inconsistencies in the way Keil's was listed

that may have contributed to the Debtors' failure to provide actual notice to Keil's in connection with these motions. As set forth in the First Busch Declaration, it appears that the Debtors scheduled Keil's as having a Facility Standby Agreement in the Cure Amount Schedule, then at some point, in a pleading not even purportedly served on Keil's, changed the listing to a Supply Agreement (First Busch Decl. ¶ 6). Keil's did not receive any of those notices. (First Keil Decl. ¶¶ 2 and 3). The first notices received were copies of the bar date notice. (First Keil's Decl. ¶¶ 2 and 3).

As set forth in the First Keil Declaration ¶¶ 4-6, Keil's in fact had a Supply Agreement (not a Facility Standby Agreement) with the Debtor, as well as other agreements, which are relevant to the substance of Keil's objections to the motions. However, the inconsistency of the scheduling of Keil's suggests that, notwithstanding that Keil's is listed on schedules attached to affidavits of service filed on behalf of the Debtors for these motions, Keil's name and address may in fact have been omitted or deleted in the system that generated the mailing labels. In any event, these inconsistencies raise a doubt about the accuracy of the affidavits of service and support Keil's position that it did not receive notice.

Keil's learned of the motions when it learned that there may be a claims bar date and explored what it needed to do to respond to the claims bar date. Keil's retained San Diego, and later Delaware counsel, and the Opposition Papers were filed in opposition to the motion. After Keil's contacted counsel, counsel reviewed the Court's docket and learned of the sale motion. Thus, at the point when Keil's first received the bar date notice, the deadline to timely object to the sale motion or assert a cure amount had already passed. With no prior involvement in this case, Keil's had to find counsel and Keil's and its counsel had to learn of the motions, review the relevant multiple pleadings in a very long docket, review Keil's transactional documents with

Fleming and the law, try to determine what had occurred as to notice, retain local counsel and seek to oppose. Keil's and its counsel acted diligently once they learned of the motions. Counsel began monitoring the docket and local counsel began to monitor hearings. (Second Busch Declaration ¶ 4.)

Nevertheless, because of the failure of notice, Keil's opposition papers were not filed and served until August 15, 2003, the same date the order was entered and one day after the conclusion of the hearing on August 14, 2003. It appears that Keil's notes are treated under the Order as sold and Keil's is excluded from the protections granted to objecting parties, including, among others, paragraph 16 of the Order (related to cure amounts) and paragraph 47 (related to reservation of defenses) as well as any other protections of the Order granted to objecting parties. Keil's has attempted promptly to address the lack of notice to Keil's with Debtors' counsel to attempt to resolve the issues. (Second Busch Declaration ¶ 5.)

THE LAW

1. This Motion Should Be Granted As To Keils, and Keil's Should Be Granted Relief From The Order.

Rule 60(b) of the Federal Rules of Civil Procedure provides in part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

F.R. Bankr. P. 9024 provides in relevant part that "Rule 60 F.R. Civ. P. applies in cases under

the Code . . ."

Failure to give actual notice of the motions makes any Orders on the motions void and ineffective as to Keil's. The Third Circuit Court of Appeals has recognized that under Supreme Court authority, "(d)ue process requires 'notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Folger Adam Security, Inc. v. Dematteis/MacGregor, J.D., 209 F.3d 252, 265 (3d Cir. 2000), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15, 94 L.N. 865, 70 S.Ct. 652 (1950) (citations omitted) ["[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections . . . The notice must be of such a nature as reasonably to convey the required information . . it must afford a reasonable time for those interested to make their appearance . .].

An order entered under Bankruptcy Code Section 363 cannot affect a party unless that party is accorded proper advance notice and an opportunity to be heard. As the court stated in Western Auto Supply Co. vs. Savage Arms (In re Savage Industries), 43 F.3d 714, 720 (1st Cir. 1994), "[n]otice is the cornerstone underpinning Bankruptcy Code procedure . . . . Under the Code, therefore, the debtor-in-possession or trustee must ensure "parties-in-interest" adequate notice and opportunity to be heard before their interests may be adversely affected." See also In re Times Sales Finance Corp., 445 F.2d 385 (3d Cir. 1971). "If the notice requirement of the due process clause is not satisfied, the order is void." Citicorp Mortgage vs. Brooks (In re Ex-Cel Concrete Co.), 178 B.R. 198, 203 (9th Cir. BAP 1995) (citations omitted).

As the facts set forth above, and in the Initial Opposition Papers and in the First Keil and

First Busch Declarations show, it is clear that the Debtors seek to "adversely affect" Keil's interest and claims, and that the "notice" which the Debtors purported to give Keil's was not, in fact, "reasonably calculated. . . . to apprize [it] of the pendency of the action and afford [Keil's] an opportunity to present [its] objections." Folger Adam Security, Inc. v. Dematteis/MacGregor, J.D., 209 F.3d at 265. As a result, Keil's should be permitted to voice and have heard each of its substantive objections to the sale, assumption and assignment proposed by the Debtor.

Keil's acknowledges that there is a presumption that a notice that is properly mailed is presumed delivered, and that the often-called "mailbox rule" may apply as set forth by the Supreme Court in Hagner v. United States, 285 U.S. 427, 430, 52 S. Ct. 417, 419, 76 L. Ed. 861 (1932) ("that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"). However, this presumption can be rebutted if the creditor introduces sufficient evidence through testimony, affidavits or declarations to support a finding that it did not receive notice. See Chrysler Motors Corporation v. Schneiderman, 940 F.2d 911 (3d Cir. 1991); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dodd (In re Dodd), 82 B.R. 924 (N.D. Ill. 1987); In re Cassell, 206 B.R. 853 (Bankr. W.D. Va 1997). This rebuttal often takes the form of: "direct testimony of non-receipt, particularly in combination with evidence that standardized procedures are used in processing claims, ... sufficient to support a finding that the mailing was not received, and thereby rebut the presumption accorded a proper mailing." In re Dodd, 82 B.R. at 929-30. (First Keil Decl. at ¶¶ 2-3, Second Keil Decl. at ¶ 2.)

The Second Declarations of Keil and Busch, and the First Keil Declaration present precisely this type of rebuttal that overcomes the "mailbox rule." Keil's has demonstrated its non-receipt and its standardized procedures that would have identified the notices if they had

been received. Keil's had a Supply Agreement (not a Facility Standby Agreement) with the Debtor, as well as other agreements, which are relevant to the substance of Keil's objections to the motions. However, Keil's was listed as having a Facility Standby Agreement on the notices allegedly sent. (First Busch Decl. ¶¶ 3-6.) The inconsistency of the scheduling of Keil's suggests that, notwithstanding that Keil's is listed on schedules attached to affidavits of service filed on behalf of the Debtor for these motions, Keil's name and address may in fact have been omitted or deleted in the system that generated the mailing labels. In any event, these inconsistencies raise a doubt about the accuracy of the affidavits of service and support Keil's position that it did not receive notice. Indeed, even if notice had been received, it would have been of a nonexistent agreement, that is, of a Facility Standby Agreement.

2. Keil's Is Entitled To Relief From The Order Under Rule 60(b)(1).

Pursuant to Bankruptcy Rule 9024 and Fed.R.Civ.P. 60(b), the Court may relieve Keil's from the Order for "mistake, inadvertence, surprise, or excusable neglect." Similarly, the Court in its discretion, may extend the time for Keil's to respond to the Objection, if Keil's failure to respond to the Objection was a result of "excusable neglect." Bankruptcy Rule 9006(b)(1).

In determining whether neglect is "excusable," the Courts should take into account "all relevant circumstances surrounding the party's omission." Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395 (1993). These factors include "the danger or prejudice to the debtor, the length of delay amid its potential impact on the judicial proceedings, the reason for the delay including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id.

A motion under Rule 60(b) is an appropriate vehicle for a party to employ, when the party alleges that it had not received proper notice of the action sought which resulted in the

questioned order. See In re U.S. Metalsource Corp., 163 B.R. 260, 267-68 (Bankr. W.D. PA 1993); In re Pettibone Corp., 123 B.R. 304, 309-10 (Bankr. N.D. Ill. 1990).

As set forth in Keil's Initial Opposition Papers, notwithstanding that certain proofs of service purport to reflect service of the motions on Keil's, Keil's received no notice of the motions. Keil's learned of the motions when it learned that there may be a claims bar date and explored what it needed to do to respond to the claims bar date. Keil's retained San Diego, and later Delaware counsel, and the Opposition Papers were filed in opposition to the motion. Nevertheless, because of the failure of notice, Keil's opposition papers were not filed and served until August 15, 2003, the same date the order was entered and one day after the conclusion of the hearing on August 14, 2003. After Keil's contacted counsel, counsel had to review the Court's docket and learned of the sale motion. Thus, at the point when Keil's first received the bar date notice, the deadline to timely object to the sale motion or assert a cure amount had already passed. With no prior involvement in this case, Keil's had to find counsel and Keil's and its counsel had to learn of the motions, review the relevant multiple pleadings in a very long docket, review Keil's transactional documents with Fleming and the law, try to determine what had occurred as to notice, retain local counsel and seek to oppose. Keil's and its counsel acted diligently once they learned of the motions. Counsel began monitoring the docket and local counsel began to monitor hearings. Second Busch Declaration ¶¶ 2, 4 and 5.

3. Notwithstanding the Pending Appeals, This Court Can Hear this Motion; Case Law Sets the Procedure for Applying Rules 60(b) and 9024 In This Situation.

Keil's has filed timely a notice of appeal of the sale order. Timely notices of appeal were filed by PAQ, Inc., Quinn Supers, Inc. and Times Supermarkets, Ltd. (collectively "PAQ") on August 25, 2003 [Docket Nos. 3335 and 3338]. Pursuant to F.R. Bankr. P. 8002(a), Keil's

timely filed its notices on September 3, 2003, within ten (10) days of PAQ's notices.

Generally, filing a notice of appeal divests the trial court of jurisdiction over the matter appealed. However, this general rule is modified as to F.R.C.P. 60(b) motions, which is applicable under F.R. Bankr. P. 9024. In Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985), the Third Circuit Court of Appeals approved of the procedure for Rule 60(b) motions filed after a notice of appeal set out in Smith v. Pollin, 90 U.S. App. D.C. 178 (D.C. Cir. 1952). Under this procedure the trial court may consider the Rule 60(b)(1) motion and determine its merits. The trial court (in this situation, the Bankruptcy Court) has jurisdiction to deny the motion. However, if the trial court determines that it would grant the Rule 60(b) motion, it notifies the moving party who may seek remand of the case by the Court of Appeals (in this situation, the District Court) for the trial court to grant the motion. The Third Circuit Court of Appeals explained:

> Most courts of appeals hold that while an appeal is pending, a district court, without permission of the appellate court, has the power both to entertain and to deny a Rule 60(b) motion. If a district court is inclined to grant the motion or intends to grant the motion, those courts also hold, it should certify its inclination or its intention to the appellate court which can then entertain a motion to remand the case. Once remanded, the district court will have the power to grant the motion, but not before.

Sweet, supra, 758 F.2d at 123 (quoting Main Line Federal Savings and Loan Assn. v. Tri-Kell, 721 F.2d 904, 906 (3d Cir. 1983) which is quoting from Smith v. Pollin).

In Hancock Industries v. Schaeffer, 811 F.2d 225, 239-40 (3d Cir. 1987), the Third Circuit noted its approval of the above procedure for Rule 60(b) motions filed after an appeal. In a recent Delaware District Court case, TA Instruments, Inc. v. Perkin-Elmer Corporation, 2000 U.S. Dist. LEXIS 1306 (2000), the court held that it had jurisdiction after a notice of appeal was filed to entertain a Rule 60(b) motion, to determine the merits of a Rule 60(b) motion, to deny a

Rule 60(b) motion, but not to grant a Rule 60(b) motion. See also, Phillips v. Corestates Bank, N.A., 33 F. Supp. 2d 419, 421 n.5 (D.V.I. 1999) (holding that the court lacked jurisdiction to grant Rule 60(b) motion when the motion was filed after jurisdiction had been vested in the appellate division of the district court by timely notice of appeal).

Thus, the law in the Third Circuit is that a party may pursue both an appeal and a Rule 60(b) motion. However, filing the notice of appeal divests the trial court of jurisdiction to grant a Rule 60(b) motion until the matter is remanded for that purpose. Once the Rule 60(b) motion has been filed and the trial court certifies its intention to grant the motion, the moving party then files a motion with the appellate court to remand the case in order that the trial court may grant the motion. Therefore, Keil's asks this Court to follow the procedure set forth above by hearing and considering this motion, and if the Court is inclined to grant the motion, certifying its intention so that Keil's can bring the appropriate remand motion.

CONCLUSION

Keil's respectfully submits that it can not be deprived of its due process rights to have its objections filed and heard, and that it is entitled to receive this Court's rulings on those objections as an objecting party. To the extent that the August 15, 2003 Order purports to make a determination of Keil's rights, it is and should be ineffective, invalid and void as to Keil's. The Court needs to consider and rule on Keil's objections after allowing it full and proper briefing. At a minimum, Keil's is entitled to all of the protections of a timely-objecting party under the Order, as outlined above.

Debtors and perhaps the purchaser may argue that Keil's objections should not hold up the Order which is purportedly critical and time sensitive for the benefit of the overall estate. It is respectfully submitted that granting the relief Keil's requests in this Motion will not hold up

the Order. The Order addresses numerous assets and agreements to be assigned, including numerous other notes. The Court can and need only carve out Keil's notes, Supply Agreement and relationship with Fleming from the overall C&S transaction. Doing so will not prevent the rest of the C&S transaction from going forward on the terms set forth in the Order. There is no reason that the Court cannot protect all parties by allowing the rest of the transaction to go forward, if it so chooses, while granting Keil's the relief requested in this Motion.

Dated: September 3, 2003

Respectfully Submitted,

McCARTER & ENGLISH

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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

ORDER GRANTING KEIL'S FOOD STORES RELIEF FROM ORDER (A) APPROVING ASSET PURCHASE AGREEMENT BY AND AMONG FLEMING COMPANIES, INC., C&S WHOLESALE GROCERS, INC., C&S ACQUISITION LLC, AND THE OTHER PARTIES NAMED THEREIN, (B) AUTHORIZING (I) SALE OF SUBSTANTIALLY ALL OF SELLING DEBTORS' ASSETS RELATING TO THE WHOLESALE DISTRIBUTION BUSINESS TO PURCHASER OF ITS DESIGNEE(S), FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTEREST AND (II) PROCESS FOR ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS, LICENSE AGREEMENTS AND UNEXPIRED LEASES TO PURCHASER OF ITS DESIGNEE(S) AND ESTBLISHING THE MAXIMUM CURE AMOUNT WITH RESPECT THERETO AND (C) GRANTING RELATED RELIEF [D.I. 3142]

The Motion of Keil's Food Stores ("Movant") for Order Granting Relief From the Court's August 15, 2003 "Order (A) Approving Asset Purchase Agreement by and Among Fleming Companies, Inc., C&S Wholesale Grocers, Inc., C&S Acquisition LLC, and the Other Parties Named Therein, (B) Authorizing (I) Sale of Substantially All of Selling Debtors' Assets Relating to the Wholesale Distribution Business to Purchaser or its Designee(s), Free and Clear of all Liens, Claims, Encumbrances and Interests and (II) Process for Assumption and Assignment of Certain Executory Contracts, License Agreements and Unexpired Leases to Purchaser or its Designee(s) and Establishing the Maximum Cure Amount with Respect Thereto and (C) Granting Related Relief" [D I. 3142] (the "Motion") having been filed with this Court, it appearing that due and proper notice having been given to all interested parties in this case, and good cause appearing therefor,

IT IS HEREBY ORDERED as follows:

1. The Motion is granted.

2. The Court's August 15, 2003 Order (the "Prior Order") [D.I. 3142] is deemed void as to Keil's for lack of notice to Keil's and the Court will hear and decide Keil's prior objection (with an opportunity for Keil's to supplement its objection) or;

3. Keil's is hereby relieved from the application of the Prior Order of this Court on the grounds of "mistake, inadvertence, surprise or excusable neglect" due to lack of notice.

4. IT IS FURTHER ORDERED that Keil's objection is deemed timely filed and Keil's shall be granted all protections of a timely objecting party, including the right to assert a cure amount up to $600,000.00, the right to reservations, defenses and protections provided in the Order, including the right to assert Integration Defenses, and the right to have a specific notice given before any assumption and assignment of any executory contract.

Dated: _____, 2003

_____
The Honorable Judge Mary F. Walrath
United States Bankruptcy Court