

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

In re: FLEMING COMPANIES, INC., <u>et al.</u> , ¹ Debtors	Case No. 03-10945 (MFW) Chapter 11 Jointly Administered Hearing Date: October 2, 2003 at 2:00 p.m. Objection Deadline: September 25, 2003 Related Docket Nos.: 1016, 1727, 3055
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**MOTION TO ENFORCE ORDER ESTABLISHING PROCEDURES FOR THE SALE
OF REAL ESTATE AND PERSONAL PROPERTY LOCATED THEREIN**

Kinsley Equities II Limited Partnership, a Pennsylvania limited partnership (“Kinsley”), by and through its undersigned counsel, hereby files this Motion to Enforce a Court Order and in support hereof states as follows:

I. BACKGROUND

1. The Debtors entered into an Agreement of Sale (the “Agreement,” Exhibit “A” hereto) with Kinsley on June 6, 2003 for the purchase of real estate located at 1100 North Sherman Street, Springettsbury Township, York County, Pennsylvania (the “Property”).

2. Kinsley’s offer for the Property was \$5.7 million dollars, and it has placed a \$285,000.00 deposit with the Debtors. The Agreement is contingent on approval from the Bankruptcy Court and provides, in part, that *time is of the essence*.

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.

II. THE ORDER

3. On May 21, 2003, this Court entered an Order (I) Establishing Procedures for the Sale of Real Estate and Personal Property Located Therein and (II) Authorizing the Sale of Real Estate and Personal Property Located Therein Pursuant to Sections 363(b), 363(f) and 1146(c) of the Bankruptcy Code (the “Order,” docket no. 1016, Exhibit “B” hereto).

4. The Order provides that “once the Debtors have procured a buyer, they shall give notice to (a) the United States Trustee, (b) counsel to the Senior Secured Lenders, (c) counsel to the Committee and (d) any known creditor(s) asserting a Lien on such parcel of Real Estate or personal property, except as provided below (the “Notice Parties”) and such notice will (a) generally describe the Real Estate and personal property to be sold, (b) the marketing efforts undertaken to sell the Real Estate, (c) the proposed purchase price, (d) the basis for the Debtors’ conclusion that the sale is in the best interest of the estates, (e) identity of the proposed buyer and (f) any connection proposed buyer has to the Debtors’ estates.”

5. The Order also provides that “the Debtors shall give notice upon entry of this Order to the Notice Parties, including any party who has previously expressed any interest in pursuing the Real Estate and any party asserting secured status with respect to the Real Estate or personal property being sold (provided that the Real Estate or personal property is less than the value of such secured creditor’s Lien on the Real Estate or personal property to be sold and such secured creditor has not previously consented in writing to such sale). The Order further provides that “the Notice Parties shall have seven (7) business days from the date of receiving notice of a proposed sale, exclusive of the date of service of such notice, to object to the proposed sale.”

6. Most importantly, the Order provides that “**unless a Notice Party objects to the proposed sale of Real Estate and, if applicable, personal property within seven (7) business days of receiving notice of the proposed sale, exclusive of the date of service of such notice, the**

Debtors shall file a Certificate of No Objection and a Proposed Order with the Court and the Debtors may proceed with the sale upon the Court entering an order authorizing the sale of the particular real estate and, if applicable, personal property” (emphasis added).

7. Following execution of the Agreement, on June 26, 2003 the Debtors gave the notice (the “Notice of Sale,” docket no. 1727, Exhibit “C” hereto) required by the Order and gave the Notice Parties until July 7, 2003 to file a response. No party timely filed a response.

III. THE DEBTORS DISOBEY THE ORDER

8. Although no parties objected by the objection deadline of July 7, 2003, the Debtors failed and refused to act in accordance with the Order by filing a Certificate of No Objection and a Proposed Order with the Court.

9. After the deadline to file objections passed, Kinsley contacted the Debtors repeatedly seeking to have them comply with the Order and get the sale approved, to no avail. Despite the clear and unequivocal language of the Order, the Debtors now apparently refuse to submit a Certificate of No Objection and a proposed order for confirmation of the sale to the Court.

10. On August 7, 2003, over one month after the objection deadline had passed, an entity known as the Lenders Group¹ filed an Objection to Notice of Sale of Real Estate and Personal Property Located Therein (the “Late Objection,” docket no. 3055) claiming that the proposed sale would not generate the highest and/or best value to the estate. The Late Objection should be disregarded entirely since (i) Lenders Group was not a Notice Party, as defined in the Order, and (ii) it was not timely filed.

¹ This is not the Debtors’ pre- or post-petition lending group. It is a private business entity that claims it previously expressed interest in purchasing the Property.

IV. RECENT DEVELOPMENT

11. To Kinsley's amazement, and in conflict with both the Agreement and Order, the Debtors have just recently listed the Property for auction through Keen Consultants, LLC ("Keen"). The auction date is set for **October 14, 2003**. The Debtors failed to provide notice of the listing or auction to Kinsley, who discovered it only when certain third parties contacted Kinsley to discuss the matter.

12. Upon learning of the auction, Kinsley again attempted to contact the Debtors, but all such attempts have failed. Kinsley spoke with Keen, however, who indicated it was acting on the Debtors' behalf in listing the property for auction.

13. According to Keen, the Debtors now support and accept as valid the Late Objection. This is apparently so even though (a) it was far late, (b) the Lenders Group was not a Notice Party, and (c) neither the Lenders Group nor any other party has expressed interest in purchasing the Property. Keen also stated that the Debtors will not schedule a hearing on the issues relating to the Late Objection and their failure to file the Certificate of No Objection to the Court prior to the October 14, 2003 scheduled auction.

V. REQUEST FOR RELIEF

14. Kinsley requests that the Court enter an order (1) compelling the Debtors to comply with the Order by requiring them to immediately file a Certificate of No Objection and proposed form of order approving the sale of Property, so that Kinsley may enforce the Agreement; (2) overruling the Late Objection; and (3) requiring the Debtors to immediately cancel the proposed Property auction.

VI. BASIS FOR THE RELIEF REQUESTED

15. As set forth above, the Debtors' efforts to auction the Property conflict with the terms of the Sales Agreement. Furthermore, the Debtors' failure to comply with the Order is simply inexcusable and must not be countenanced.

16. The Debtors' failure to comply with the Order and seek court approval of the sale has harmed and continues to harm Kinsley, and it puts the estate and the Debtors' creditors at the risk of losing a large amount of money. Three months have passed since the Debtors and Kinsley entered into the Agreement, which (as noted above) provides that time is of the essence, and Debtors have now failed to comply with the Order itself for over two months.

17. According to the Notice of Sale, the Property was marketed for several years by a local real estate broker that pursued potential national and regional purchasers and "in the Debtors' sound business judgment," the sale to Kinsley would "generate the highest and best value for the estates." Sound business judgment indeed - the only party other than Kinsley to make an offer for the Property, Penn State Investments, has disclaimed its interest in writing (Exhibit "D" hereto).

18. There is no reason to believe that anyone is willing to exceed Kinsley's offer for the Property, unless the Debtors have a purchaser they have not disclosed to the Court. Kinsley's \$5.7 million dollar offer to purchase is thus plainly in the best interests of the estates and the creditors. Accordingly, this Court should enter an order granting this Motion and help bring this transaction to a close.

CONCLUSION

WHEREFORE, Kinsley respectfully requests that the Court enter an order:

1. Compelling the Debtors to comply with the Order Establishing Procedures for the Sale of Real Estate and Personal Property Located Therein and Authorizing the Sale of Real Estate and Personal Property Located Therein Pursuant to Sections 363(b), 364(f) and 1146(c) of the Bankruptcy Code by requiring them to immediately file a Certificate of No Objection and proposed form of order approving the sale of Property, so that Kinsley may enforce the Agreement;
2. Overruling the Late Objection; and
3. Requiring the Debtors to immediately cancel the proposed Property auction.

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