

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

In re:	Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., <u>et al.</u> , ¹	Chapter 11
Debtors	Jointly Administered
	Related Docket Nos.: 1016, 1727, 3666

**PARTIAL OBJECTION OF KINSLEY EQUITIES II LIMITED PARTNERSHIP TO
DEBTORS' MOTION FOR ORDER: (A) AUTHORIZING AND SCHEDULING AN
AUCTION FOR THE SALE OF CERTAIN OF THE DEBTORS' REAL PROPERTY; (B)
APPROVING THE TERMS AND CONDITIONS OF SUCH AUCTION, INCLUDING
BIDDING PROCEDURES RELATED THERETO; AND (C) APPROVING ASSIGNMENT
PROCEDURES FOR AFFECTED UNEXPIRED LEASES**

Kinsley Equities II Limited Partnership, a Pennsylvania limited partnership ("Kinsley"),
by and through its undersigned counsel, hereby files this Partial Objection and in support hereof
states as follows:

I. BACKGROUND

1. Debtors own real estate located at 1100 North Sherman Street, Springettsbury Township, York County, Pennsylvania (the "Property").
2. After marketing the Property for several years, Debtors entered into an Agreement of Sale (the "Agreement," Exhibit "A" hereto) with Kinsley on June 6, 2003 (the "Sale") for the purchase of the Property.

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.

3. 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*.

II. THE ORDER

4. 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).

5. 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."

6. 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."

7. 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).

8. 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. In accordance with the court orders, Debtors represented that the Agreement was in the best interests of creditors and that the price was fair. No party entitled to notice under the court order ever objected to the terms of sale or opposed confirmation.

III. THE DEBTORS DISOBEY THE ORDER

9. Although no parties objected by the objection deadline of July 7, 2003, the Debtors failed and refused to file a Certificate of No Objection (CNO) and a Proposed Order with the Court as required both by the prior court order and the Agreement.

10. After the deadline to file objections passed, Kinsley contacted the Debtors repeatedly, seeking to have them comply with the Order and Agreement and file the CNO and Order, but to date, Debtors have yet to file the CNO and Order. Despite the clear and unequivocal language of the Order and the express terms of the Agreement, the Debtors have failed and refused to submit the Agreement for confirmation by filing the required Certificate of No Objection and a proposed order for confirmation of the sale to the Court.

IV. DEBTORS' EFFORTS TO AUCTION THE PROPERTY

11. Thereafter, Kinsley discovered that, in conflict with both the Agreement and Order, the Debtors listed the Property for auction through Keen Consultants, LLC ("Keen"). The auction date is set for October 14, 2003. The Debtors offered the property for sale to third parties without prior approval from the court, without notice to Kinsley and before Debtors submitted the Agreement for confirmation. Attached is an advertisement regarding the auction that provided Kinsley its first knowledge the property was offered for sale. (Exhibit "D" hereto). Kinsley discovered this advertisement through informal channels and was not provided with a copy of the advertisement by Debtors.

12. On September 12, 2003, Debtors filed with the Court a Motion for Order: (A) Authorizing and Scheduling an Auction for the Sale of Certain of the Debtors' Real Property; (b) Approving the Terms and Conditions of Such Auction, Including Bidding Procedures Related Thereto; and (c) Approving Assignment Procedures for Affected Unexpired Leases (the "Motion", docket no. 3666).

13. The Motion requests a Court Order authorizing the auction of several different properties owned by Debtors, including the Property. Although Debtors request authorization to auction all of the properties listed in the Motion, an essential difference exists between the Property and the other properties discussed in the Motion. The Property is already subject to the Agreement. The Debtors, in the Notice of Sale, admitted that the Sale will "generate the highest and best value for the estates" and no objections were timely and/or properly filed with regard to the Notice of Sale.¹ Therefore, absent any evidence that the Sale will not generate the highest and best value for

¹ Although the Motion states that objections were received with respect to the Sale, the only objection that was filed and has, as of yet, not been resolved, is clearly without merit, having been filed untimely by Matthew C. Bupp t/a Lenders Group, a real estate broker that represented a Notice Party. The broker was not entitled to notice of sale separate from its principal. The principal, Penn State Investments (PSI) was a Notice Party, did receive Notice of Sale and PSI never objected to the sale. Further, PSI wrote a letter to the court (additional copy attached hereto as

the estates, the Debtors should be required to comply with Order, submit a Certificate of No Objection and a proposed order and remove the Property from auction.

V. OBJECTION

14. The auction would be in clear contravention of the Agreement and the Order. Therefore, Kinsley objects to the auction of the Property and asks that the Court deny the Motion with respect to the Property.

VI. BASIS FOR THE RELIEF REQUESTED

15. Calpine Corporation vs. O'Brien Environmental Energy, Inc., 181 F.3d 527 (3rd Cir. 1999), a case relied upon by Debtors, strongly supports Kinsley's position. Calpine states that Kinsley, as a purchaser from a Chapter 11 debtor, has "the right to require ...[Debtors] to seek approval as per its contract..." and this court's order. Id. at 531. In citing Calpine as supporting its position, the Debtor failed to point out that the debtor in Calpine both submitted Calpine's contract for confirmation and supported confirmation at the hearing. Confirmation was ultimately refused on account of shareholder objections. On that basis, the Circuit concluded that Calpine's rights as a purchaser were not impaired. Id. at 530, 531. Here, the Debtors refusal to submit the Agreement for confirmation within the time required by the Agreement and the subject Order, is a breach of the Debtor's obligations under both and impairs - in fact - denies Kinsley its contractual and legal rights. Accordingly, under the rule established by Calpine, the Debtors must submit the Agreement for confirmation on October 2, 2003 before Debtors offer to sell the property to third parties for public or private sale. Debtors failure and refusal to submit the Agreement for confirmation breaches the court order, the terms of the Agreement and the Debtors underlying obligation of "good faith and fair dealing" that inheres in every contract. While the Debtor may exercise "business judgment" with

Exhibit "E") expressly disclaiming any interest in the Property. PSI's broker is not a creditor, has no separate interest in the proceedings or the Property, has never expressed any interest in acquiring the property in its own

respect to properties that are not under contract, the “business judgment rule” does not authorize unlawful conduct, breaches of the Agreement or the Court Order or bad faith by the Debtors.

16. Further, under Calpine, any order disapproving the Agreement would...“relieve [Kinsley]... of any duty to perform”...the Agreement. Id. at 531. If the Court does not confirm the Agreement, Kinsley is relieved of its obligations, the \$285,000 deposit must be returned and Kinsley must be allowed to participate in the auction on the same terms as any other potential purchaser. Failure to do so would, again, impair Kinsley's rights under the Agreement and accompanying order. This is essential because the terms of sale offered to potential auction bidders are substantially more advantageous than the terms offered to Kinsley. For example, the Debtors reserve complete discretion over the choice of Qualifying Bidders; although a Qualifying Bidder must submit financials to the Debtors, Debtors are under no duty to require that entities admitted to the auction have adequate financial reserves to meaningfully participate, as Kinsley clearly does.

17. However, Kinsley stands ready willing and able to perform its Agreement and asserts that the Agreement should be confirmed and the Debtors directed to close. The standards for confirmation of a bankruptcy sale are well established. Confirmation may be denied if there exists unfairness to bidders, stifling of competition, inaccurate or insufficient advertisement, sham bidding or puffing, lack of due notice and interference with the orderly conduct of the sale is shown. Moreover objections to confirmation may only be raised by persons “with sufficient interest interest to have a standing to object.” In re Blue Coal Corporation, 168 B.R. 553, 560-61 (Bkrtcy M.D. Pa. 1994). [opinion by the Honorable John J. Thomas, Middle District Bankruptcy Judge approving a private sale of assets that netted more than 75% of appraised values]. Mere inadequacy of price is not sufficient grounds for refusing to confirm a sale unless it is accompanied by evidence of unfairness. Id. at 563. Rather “confirmation may be denied only where there is a substantial

name, plainly has no further authority to act for PSI to acquire the property and, does not allege that any other party

disparity between the contemplated sales price and the appraised or fair market value, and there is reasonable degree of probability that a substantially better price will be obtained by a resale or there is some element, however slight, of unfairness on the part of the purchaser." Id.

18. The objections filed by the realtor and the motion filed by the Debtors fail each and every one of Judge Thomas' requirements for disapproval. There is no evidence of wrongdoing on Kinsley's part and some indication of bad faith by the Debtors and PSI's broker. Neither Debtors nor the broker allege any disparity between the agreed sale price and an appraised value. Neither of them allege that there is another purchaser willing to pay more nor do they assert any facts that would show "a reasonable degree of probability" that the auction will generate a "substantially better price."

19. The standing requirement assures that objections are filed in good faith and for proper purposes. The broker who objected here is not a creditor and has no interest in the Property. The potential buyer the broker represents withdrew and the broker's efforts to close a transaction and recover a commission were therefore disappointed. His objections serve only to delay closing on and potentially terminate the only viable alternative sale. The objections place at risk the estate's right to receive 5.7 million dollars for the Property and threaten termination of a transaction which substantially benefits the Estate. While the broker may hope to profit from the delay and uncertainty his objections create, the realtor's personal profit motive does not amount to a "substantial interest" that would confer standing to object.

20. The Notice of Sale provides that 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 same "business judgment" that Debtors rely on for the approval of the Motion, the sale to Kinsley would "generate the highest and best value for the estates." In fact, as

might be willing to pay a price higher than that agreed to months ago by the Debtors and Kinsley.

noted, the only party other than Kinsley to make an offer for the Property during the several years it was marketed, Penn State Investments, has disclaimed its interest in writing (Exhibit “E” hereto). There is thus no evidence of stifling of competition, unfairness to bidders, inadequate advertisement, or any other interference with the marketing of the property such as would require disapproval of the Agreement.

21. No basis exists to further delay confirmation of the Agreement.

22. The Debtors’ failure to comply with the Order and obtain court approval of the sale has harmed and continues to harm Kinsley, and it puts the estate and the 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. Based on Debtors past performance, it is conceivable that even if Debtors auction the Property, Debtors will not seek subsequent Court confirmation, rather again seeking a higher price, treating the successful bidder just as they have Kinsley and resulting in further delay in compensating creditors.

23. Debtors sought the best price for the property prior to executing the Agreement and found that Kinsley’s offer provided the best value to the estate. Debtors’ continued failure to consummate the Sale and put money back into the hands of the creditors is clearly wrong. There is no reason to believe that anyone is willing to exceed Kinsley’s offer for the Property, unless the Debtors have a purchaser that 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.

24. In the interests of fairness, and for the benefit of all parties involved, the Court should confirm the Sale on October 2, 2003. Alternatively, if the Agreement is disapproved, Kinsley is relieved of further liability under the Agreement and the Earnest Money is returned to it.

25. Accordingly, this Court should dismiss the Motion with respect to the Property.

CONCLUSION

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

1. Denying the Motion;
2. Canceling the Auction with respect to the Property;
3. Requiring the Debtors to immediately 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 filing a Certificate of No Objection and proposed form of order approving the sale of Property, so that Kinsley may enforce the Sale.

4. Denying the objection of Matthew C. Bupp t/a The Lenders Group.
5. Confirming the Agreement

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6. In the alternative, if the Agreement is disapproved, relieving Kinsley of further duties thereunder and directing the immediate return of the Earnest Money. Kinsley shall be permitted to participate in the auction on the same terms as any other potential purchaser.

KLEHR, HARRISON, HARVEY,
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