

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

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| In re: |) |
| |) Case No. 03-10945 (MFW) |
| FLEMING COMPANIES, INC., et al., ¹ |) (Jointly Administered) |
| |) Chapter 11 |
| Debtors. |) |
| |) |

**OMNIBUS REPLY OF BAIN AND COMPANY, INC. TO OBJECTIONS OF
ACTING UNITED STATES TRUSTEE TO (A) THE APPLICATION OF
THE DEBTORS FOR ENTRY OF AN ORDER PURSUANT TO 11 U.S.C.
§§ 327(A), 330 AND 105(A) AND FED. R. BANKR. P. 2014(A), 2016 AND 5002
AUTHORIZING THE EMPLOYMENT AND RETENTION OF BAIN & COMPANY AS
TURNAROUND ADVISOR TO THE DEBTORS AND DEBTORS IN POSSESSION
NUNC PRO TUNC TO APRIL 1, 2003 AND MOTION OF THE DEBTORS FOR AN
ORDER APPROVING THE TERMINATION AGREEMENT AND (B) FIRST AND
FINAL APPLICATION FOR APPROVAL OF PROFESSIONAL FEES AND EXPENSES
INCURRED BY BAIN & COMPANY, INC. AS MANAGEMENT CONSULTANTS
TO THE DEBTORS FOR THE PERIOD APRIL 1, 2003 THROUGH APRIL 11, 2003**

NOW COMES Bain & Company, Inc. (“Bain”), professionals retained by the above captioned debtors in this case (collectively, the “Debtors”), by and through its undersigned attorneys, and hereby replies (the “Omnibus Reply”) to the objections of the Acting United States Trustee (the “UST”) in opposition to (a) the application of the Debtors for entry of an order pursuant to 11 U.S.C. §§ 327(a), 330 and 105(a) and Fed. R. Bankr. P. 2014(a), 2016 and 5002 authorizing the employment and retention of Bain as turnaround advisor to the Debtors and Debtors-in-Possession *nunc pro tunc* to April 1, 2003 and motion of the Debtors for an order approving the termination agreement (the “Retention Application”) and (b) the first and final

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.

application for approval of professional fees and expenses incurred by Bain as management consultants to the Debtors for the period April 1, 2003 through April 11, 2003 (the “Fee Application”) (the Retention Application and the Fee Application shall collectively be referred to as the “Bain Applications”). In support of the Bain Applications and in reply to the objections of the UST, Bain respectfully states as follows:

I. **INTRODUCTION.**

In the Bain Applications,² the Debtors seek: (a) authority to employ and retain Bain as turnaround advisor to the Debtors pursuant to the engagement letter between Bain and Fleming, dated September 25, 2002 (the “Engagement Letter”), *nunc pro tunc* to April 1, 2003; (b) the Court’s approval of that certain termination agreement between Fleming and Bain, dated April 1, 2003, (the “Termination Agreement”);³ and (b) authority to pay Bain final compensation of \$300,000 for services rendered to the Debtors and reimbursement of expenses of \$30,000 incurred by Bain in these cases as provided in the Termination Agreement and allowed by this Court.⁴

When the chapter 11 petitions were filed, the Debtors requested that Bain continue to perform substantial termination and transition services for the Debtors post-petition throughout the critical early stages of the Chapter 11 Cases (the “Management Consulting Services”), which were performed from April 1, 2003 until April 11, 2003 (the “Service Period”). Such services

² The Debtors filed the Retention Application on August 6, 2003, and the Fee Application on August 7, 2003.

³ The Termination Agreement provides, in its material part, for (a) Bain’s services under the Engagement Letter to terminate effective April 11, 2003; (b) Bain to provide the “Management Consulting Services” (as defined *et al.*); and (c) the Debtors to pay Bain \$300,000.00 in fees and \$30,000.00 in expenses for the Management Consulting Services.

⁴ In support of the Retention Application, the Debtors also submitted the Declaration of Mark Kovac, an officer of Bain (the “Kovac Initial Declaration”).

were needed immediately upon filing of the Debtor's bankruptcy cases to allow for a seamless transition to the Debtors' other professionals, who were subsequently retained by the Debtors.

The UST filed objections to the Retention Application (the "Retention Objection") on August 8, 2003 and to the Fee Application (the "Fee Objection") on August 27, 2003 (the Retention Objection and the Fee Objection shall collectively be referred to as the "UST Objections"). The UST, amongst other things, objects to the *nunc pro tunc* relief sought in the Retention Application and to the time entries of Bain supporting the Fee Application, which the UST contends fail to comply with the District of Delaware Local Rules of Bankruptcy Procedure (the "Local Rules"). As outlined herein, however, the *nunc pro tunc* relief sought in the Retention Application is supported by the "extraordinary circumstances" required under applicable law. In addition, the detail provided herein and in the Fee Application provide all interested parties and this Court with sufficient detail as to the services provided by Bain and the value of such services to the Debtors and their estates.

In support of the Bain Applications and this Reply, Bain includes herewith (a) the Supplemental Affidavit of Mark Kovac, attached hereto as **Exhibit 1** and incorporated herein by reference (the "Kovac Supplemental Declaration"), (b) the Affidavit of Mary Welch, Bain's Corporate Controller, attached hereto as **Exhibit 2** and incorporated herein by reference (the "Welch Declaration"), and (c) the Affidavit of Stephany Phelps, attached hereto as **Exhibit 3** and incorporated herein by reference (the "Phelps Declaration") (**Exhibit 1** through **Exhibit 3** shall collectively be referred to as the "Reply Declarations"). Bain respectfully submits that the Bain Applications, the Initial Declaration, this Reply and the Reply Declarations speaks to each of the objections raised by the UST and provides sufficient support for the relief sought by Bain.

Based on the foregoing, Bain respectfully requests that this Court approve its retention *nunc pro tunc* to April 1, 2003 and the payment of fees and expenses requested in the Fee Application.

II. BACKGROUND.

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 these cases. An official committee of unsecured creditors was appointed on April 14, 2003.

As discussed in the Bain Applications and the Kovac Initial Declaration, in 2002, the Debtors required an entirely new business model.⁵ Accordingly, pursuant to a pre-petition engagement letter between Fleming and Bain dated September 25, 2002 (the “Engagement Letter”), the Debtors engaged Bain to perform Management Consulting Services by creating a post-Kmart business model.⁶ Because of the size and complexity of the assignment, Bain was required to immediately devote substantial resources to the project, which in turn required Bain to both divert personnel from other existing projects and decline other employment to ensure it had sufficient resources available to meet the Debtors’ needs. Immediately prior to the filing of the Chapter 11 Cases, the Debtors requested that Bain provide the Management Consulting

⁵ Kmart Corporation (“Kmart”) accounted for twenty percent (20%) of the net sales of Fleming Companies, Inc. (“Fleming”), and Kmart listed Fleming as its single largest supplier of food and consumable products in pleadings filed in its bankruptcy case, accounting for \$3.6 billion of total sales per annum. In January of 2002, Kmart and approximately 37 subsidiaries filed for relief under chapter 11 of the Bankruptcy Code in the Northern District of Illinois. Ultimately, in February 2003, Kmart, the largest customer of the Debtors’ distribution segment, moved in its bankruptcy case to reject its supply agreement (the “Kmart Supply Agreement”) with Fleming. *See* Kovac Initial Declaration, ¶¶ 3-5. Quite obviously, such rejection had a substantial, negative effect on the business of the Debtors.

⁶ In addition to the K-mart related work performed within the one (1) year period prior to the Petition Date, Bain also provided consulting services to the Debtors beginning in September 2002 related to post-merger integration consulting services after the Debtor’s acquisition of Core-Mark International and Head Distributing, as well as the design of a long-term action plan for the Debtor’s realization of full potential. Bain also provided consulting services in 1998 and 1999.

Services during the Service Period. Bain provided such services during the Service Period. See Kovac Initial Declaration, ¶¶ 3-5.

Despite the objections of the UST to the contrary,⁷ Bain provided all of the contemplated Management Consulting Services in the Engagement Letter and the Termination Letter, services which imparted substantial benefit to the Debtors, to their estates, and ultimately, to the creditors of the Debtors. Such services should be compensated by the Debtors, and the retention of and compensation to be paid to Bain outlined in the Retention Application and the Fee Application is fair and reasonable given the value-added benefit of the Management Consulting Services.⁸ The Bain Applications, as supplemented by the Kovac Initial Declaration, this Reply and the Reply Affidavits, adequately address all objections raised by the UST and all requirements under applicable law. Accordingly, the relief sought in the Bain Applications should be granted.

III. **THIS COURT SHOULD GRANT BAIN’S RETENTION TO APRIL 1, 2003 *NUNC PRO TUNC*.**

The Retention Application and the relief sought therein as reasonable and fair under the circumstances, and should be granted pursuant to 11 U.S.C. §§ 327(a), 330 and 105(a) and Fed. R. Bankr. P. 2014(a), 2016 and 5002. Under section 327 of the Bankruptcy Code and applicable case law, this Court may grant retroactive approval of professional employment. See F/S Airlease II v. Simon, 844 F.2d 99, 105 (3rd Cir. 1988); In re Arkansas, 798 F.2d 645 (3d Cir. 1986). This Court may grant *nunc pro tunc* relief where it finds that (1) “the applicant satisfies the disinterestedness requirements of section 327(a) and would therefore have been appointed initially” and (2) “in the exercise of its discretion ... that the particular circumstances presented are so extraordinary as to warrant retroactive approval.” F/S Airlease II, 844 F.2d at 105. Bain

⁷ See Fee Objection, ¶ 5 (UST contends that Management Consulting Services provided “no benefit”).

⁸ Initially, the Official Committee of Unsecured Creditors (the “Committee”) also filed an objection to the Retention Application. The Committee subsequently withdrew this objection and supports the Bain Applications.

submits that (a) it is disinterested under section 327(a) and (b) extraordinary circumstances exist warranting retroactive approval.

A. **Bain Is Disinterested Pursuant to Section 327(A).**

In preparing the Kovac Initial Declaration, Bain originally checked for any conflicts with (a) the Debtors, (b) directors and officers of the Debtors, (c) secured lenders and agents, (d) creditors holding twenty (20) largest unsecured claims (e) shareholders holding 5% or more of the Debtors' stock, (f) indenture trustees, (g) professionals employed by the Debtors, and (h) insurers of the Debtors. Following the preparation of the Kovac Initial Declaration, Bain searched certain other databases to determine whether Bain has provided in the recent past or currently is providing services to any creditor or party-in-interest to the Debtors and in the Debtors' cases. Bain has supplemented its initial disclosures in the Kovac Initial Declaration with the Kovac Supplemental Declaration, which fully discloses the minimal contacts between Bain and four (4) parties-in-interest in the Chapter 11 Cases. See Kovac Supplemental Declaration, ¶ 4-7.

Based on the foregoing and as provided in the Kovac Initial Declaration and the Kovac Supplemental Declaration, (a) Bain is a "disinterested person" within the meaning of section 101(14) of the Bankruptcy Code and as required by section 327(a) of the Bankruptcy Code and holds no interest adverse to the Debtors or their estates in respect of the matters for which Bain was employed and (b) Bain has no connection to the Debtors, their creditors or their related parties herein except as disclosed herein or in the Kovac Initial Declaration and the Kovac Supplemental Declaration.⁹

⁹ While Bain received various payments, as outlined in Addendum A to the Kovac Supplemental Declaration, from the Debtors in the ordinary course of business in the ninety-day period prior to the Petition Date (collectively, the "Payments"), the Payments do not affect the disinterestedness of Bain. An examination of the payment history in this case reveals that the Payments received by Bain during the preference period were consistent

B. **Extraordinary Circumstances Favor the Retention of Bain *Nunc Pro Tunc*.**

Initially, courts scrutinize professional applications under section 327(a) as “a means of ‘ensuring that the court may know the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same.’” F/S Airlease II, 844 F.2d at 105 (citations omitted). In exercising its discretion regarding the existence of “extraordinary circumstances,” bankruptcy courts consider the following factors:

whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.

Id. at 105–106.

In analyzing these factors, “the Third Circuit’s interpretation of the standard suggests a flexible approach which requires bankruptcy courts to consider the circumstances of each case in light of equitable factors,” suggesting “*broad bankruptcy court discretion in the matter.*” In re ICG Communs, Case No. 00-4238 (PJW), 2001 Bankr. LEXIS 1251, *12 (Bankr. D. Del. 2001) (Walsh, J.) (emphasis added) (granting *nunc pro tunc* retention of a professional to the Creditors Committee).

As outlined below, each of the above-referenced factors supports the retention of Bain *nunc pro tunc*. Should this Court determine that extraordinary circumstances exist, then Bain is entitled to “reasonable compensation” for all “actual, necessary services” performed. See In re Rheam of Indiana, 133 B.R. 325, 338 (E.D. Pa. 1991).

with past practices established by the parties prior to the preference period and were made according to the contractual, thirty (30) day terms between Bain and the Debtors. See Kovac Supplemental Declaration, ¶ 8.

1. **Bain Is Not a Sophisticated Bankruptcy Party and Was Not Responsible for the Filing of the Retention Application.**

The first part of the *nunc pro tunc* analysis “is whether the movant bore the responsibility of applying for approval, or whether another individual bore this responsibility. If the movant bore the responsibility, then the Court is less likely to grant approval.” In re Hercules Service Corp., 116 B.R. 50, 52 (Bankr. W.D. Pa. 1990). Here, Bain acted as a business consultant to the Debtors, and the Debtors, under Fed.R.Bankr.P. 2014(a), ultimately bore the burden of filing the application. Such factor favors *nunc pro tunc* retention. See generally In re Lynx Transp., Inc., Case No. 98-36433DAS, 1999 Bankr. LEXIS 975 (Bankr. E.D. Pa. 1999) (in granting *nunc pro tunc* relief, the Court noted that “Debtor's counsel rather than the officers themselves bore the responsibility of sending the notice and simply failed to do so”).

Despite the foregoing, Bain actively and persistently sought its retention throughout the proceeding and did not solely rely upon the efforts of the Debtors. The Debtors, however, requested on numerous occasions that the Bain Applications be included in a later hearing, for reasons discussed below in section 3. See Phelps Declaration, ¶ 14 and 18 (and e-mails referenced therein). As noted by the Third Circuit in F/S Airlease II, Bankruptcy Rule 2014(a) does not relieve the professional person who seeks appointment from responsibility to know that such approval is necessary and to insure that it has in fact been sought. See F/S Airlease II, 844 F.2d at 106. Consequently, as outlined in section 3 below, despite the fact that the Debtors ultimately bore the burden of seeking the approval of the Retention Application, Bain continued to take an active part in the process and persistently sought its retention by the Debtors.

In addition, unlike the broker-professional in F/S Airlease II, Bain was not a “sophisticated [party] ... represented by attorneys throughout the course of [its] dealings with [the Debtors].” F/S Airlease II, 844 F.2d at 107. Instead, Bain, much like the professionals in

Freehold Music Center, which was cited to positively by the Third Circuit in F/S Airlease II and Arkansas,¹⁰ initially relied on the Debtors' counsel to "quarterback" its retention and payment for services, especially since the Debtors initially informed Bain that such services would be compensated in the "ordinary course." See In re Freehold Music Center, Inc., 49 B.R. 293 (Bankr. D.N.J. 1985). Bain lacked the bankruptcy experience and sophistication of the broker-professional in F/S Airlease II, as it was relatively new to bankruptcy proceedings at the time of its discussions with the Debtors and was not familiar or experienced with the procedures involved in formal retention in bankruptcy cases. See Phelps Declaration, ¶¶ 7 to 8. Compare to In re United Cos. Fin. Corp., 241 B.R. 521, 527 (Bankr. D. Del. 1999) (J. Walrath) (denying *nunc pro tunc* relief to "sophisticated bankruptcy professional, well aware of the need for prior approval by the Bankruptcy Court before services should be rendered").¹¹

Based on the foregoing, this factor weighs in favor of Bain. See, e.g., In re Rheam of Indiana, 142 B.R. 698, 701 (E.D. Pa. 1992) (finding that trustee was responsible for applying for approval of appointment of auctioneer under bankruptcy rule 2014(a) and therefore this factor weighed in favor of the retention of the professional).

2. Bain Was Under Time Pressure to Begin Service Without Approval.

As contemplated pursuant to the test outlined in F/S Airlease II, the "time pressure" "relates solely to whether there is sufficient time to request court approval before the professional's services must begin." F/S Airlease II, 844 F.2d at 107. Accordingly, the proponent of *nunc pro tunc* retention must demonstrate that its retention prior to court approval was a result of "an emergency situation in which services had to be initiated within a very short period before

¹⁰ See In re Metropolitan Hosp., 119 B.R. 910, 920 (Bankr. E.D. Pa. 1990).

¹¹ In addition, Bain sought assistance from outside counsel upon its determination that formal court approval was necessary (see below for more detailed discussion).

approval could be sought.” Id. Based on the timing of the Petition Date and the work to be completed by Bain, the Debtors could not have sought Court approval prior to retaining Bain and requesting that Bain perform services. See Kovac Supplemental Declaration, ¶¶ 10 to 12.

For example, in Indian River Homes, the Court found exigent circumstances requiring the immediate retention of professionals. As noted by the Court, “the professionals in [the Indian River Homes case] were under time pressure to bring the sale to closing since the closing was scheduled to occur on April 14, only two weeks after the bankruptcy petition was filed.” Indian River Homes, 108 B.R. at 52; see also Icg Communs., 2001 Bankr. LEXIS 1251 at *13-14 (allowing *nunc pro tunc* retention were “the committee’s effective role early in the case called for immediate professional assistance”). In the instant case, when the Chapter 11 Cases were initiated, the Debtors needed Bain to continue to perform the Management Consulting Services during the critical early stages of the Debtors’ Chapter 11 Cases. In order to allow for a seamless transition to the Debtors’ other professionals who were subsequently retained by the Debtors post-petition, Bain performed the much needed Management Consulting Services during the Service Period. In order to complete the K-mart Project, thereby allowing the Debtors to utilize such consulting services for the benefit of their creditors and the Debtors’ estates, Bain needed to perform services through the Petition Date until April 11, 2003. See Kovac Supplemental Declaration, ¶ 12.

The expedited, seamless work schedule made addressing the retention of Bain prior to its provision of services difficult, if not impossible. Most of the services provided by Bain were focused on providing important information to the Debtors necessary to monitor the operations of the Debtors post-bankruptcy. Most if not all of the processes, mechanisms, and forecasts created by Bain were not available to the Debtors pre-bankruptcy, and were necessary to allow

the Debtors the opportunity to react to changes in their business environment resulting from their bankruptcy filing. The Debtors' bankruptcy filing necessitated that the Debtors approach their operations and their business model from a new perspective. Bain assisted the Debtors in modifying the Debtors' business structure to meet their rapidly changing needs. Any delay by the Debtors in adapting their business structure would most probably have had disastrous effects on the Debtors, their operations, and ultimately, the value of their assets. See Kovac Supplemental Declaration, ¶¶ 18-43.

For example, Bain provided inventory allocation and wire transfer services during the Service Period. Given the unwillingness of many of the Debtors' vendors to continue providing goods to the Debtors following their bankruptcy filing, these services allowed the Debtors to retain customers in the first two weeks of the bankruptcy. Without this new system, very few vendors would have been paid, effectively halting the flow of goods from vendors to customers and decreasing the value of many customer contracts that were ultimately sold by the Debtors and provided returns to their creditors. A mass exodus of customers would have dramatically and negatively impacted the asset value and eventual sale price of the Debtors' assets. See Kovac Supplemental Declaration, ¶¶ 19-25.

The time pressure of the Debtors' bankruptcy filing required Bain to begin performing services prior to its formal, court-approved retention, and such actions were reasonable and necessary under the circumstances. The willingness and ability of Bain to provide services immediately upon the initiation of the Debtors' bankruptcy proceeding added significant value to the Debtors' bankruptcy estates and the return to creditors. In the end, the Debtors' bankruptcy filing created an emergency situation in which services had to be initiated within a very short period before this Courts' approval could be sought, and this factor weighs in favor of Bain. See,

e.g., Airlease F/S II, 844 F.2d at 105 (noting that an example of such exigency would be where counsel was retained by a creditors' committee just two weeks before a crucial meeting and was required to prepare immediately).

3. **Bain Sought its Retention in a Timely Manner.**

In analyzing the third factor in the *nunc pro tunc* analysis, the court must determine “how long ... the movant delayed before requesting retroactive approval after learning that prior approval had not been obtained.” Hercules Service Corp., 116 B.R. at 52. “The longer the delay, the less likely it is that the Court will grant approval.” Id. As outlined and discussed herein, upon learning that it needed to file a retention application, Bain sought to immediately initiate the retention process and work diligently with the Debtor to ensure that an accurate and complete Retention Application was submitted to this Court. Such action satisfies the third prong of the *nunc pro tunc* requirements. Id. (finding that the third prong was met where the Court was not “presented with any evidence to suggest that Movants unreasonably delayed in attempting to gain retroactive approval of employment once they had actual knowledge that prior approval had not been sought”); compare to Matter of Arkansas Co., Inc., 798 F.2d 645, 649 (3d Cir. 1986) (noting that inadvertence or oversight of counsel does not constitute excusable neglect sufficient to relieve the parties of the consequences of their inaction), In re United Cos. Fin. Corp., 241 B.R. 521 (Bankr. D. Del. 1999) (Walrath, J.) (denying *nunc pro tunc* relief where the delay in filing was a direct result of actions of counsel).

The circumstances and events leading to the retention of Bain most resemble the *nunc pro tunc* retention of a professional granted by the bankruptcy court in In re Freehold Music Center, Inc., 49 B.R. 293 (Bankr. D.N.J. 1985). In Freehold Music Center, the court granted the application of accountants for an order authorizing their employment *nunc pro tunc*, finding that the equities balanced in favor of the accountants in that they were unsophisticated and unfamiliar

with the mandates of the Code regarding professional compensation, they had a good faith belief that authorization for their work had been arranged, and their work was essential to the debtor's business. Following its determination that formal retention under the Bankruptcy Code was required, the accountants ceased performing services and immediately sought approval from the bankruptcy court. Freehold Music Center, 49 B.R. at 294.

As discussed above, Bain is relatively unfamiliar with the bankruptcy process and the retention requirements under the bankruptcy code and applicable law. See Phelps Declaration, ¶ 8. In addition, similar to the accountants in Freehold Music Center, Bain held a good faith belief that its services or the payment therefor from the Debtors would not require formal retention or court approval. Upon completion of the Management Consulting Services, Bain awaited payment for services from the Debtors and was informed that the Debtors would make payment to Bain in the ordinary course of business. In-house counsel for Bain followed-up with the Debtors and contacted the counsel for the Debtors to inquiry as to the status of such payment. At that time, counsel for the Debtors proposed filing an abbreviated retention application based on the limited period of time the Debtors retained Bain and paying Bain in the ordinary course of business. See Phelps Declaration, ¶¶ 4-5.

Counsel for the Debtors, however, subsequently determined that a full retention application needed to be presented to the Court and that Bain needed to submit a final fee application. Again, much like the accountants in Freehold Music Center, Bain acted expeditiously to seek court-approved retention after this notification from the Debtors. The Debtors and Bain negotiated and prepared the Bain Applications over the course of the next several weeks, requiring that Bain seek the assistance of outside counsel to advise Bain as to the retention and fee application process. See Phelps Declaration, ¶¶ 6-10.

Further delaying the filing of the Retention Application were the requests from the Debtors to include the Retention Application in a later hearing.¹² See Phelps Declaration, ¶ 14 and 18 (and e-mails referenced therein). Based on conversations with counsel for the Debtors, the Debtors made such requests because of (a) the large amount of activity and other issues (including the sales of assets and DIP financing) occurring in the Chapter 11 Cases¹³ and (b) the lack of ongoing services to be provided by Bain.

Such lack of ongoing services differentiates Bain's retention from many proceedings where professionals are sought to be retained *nunc pro tunc*. Bain did not provide services to the Debtors on an ongoing basis while its retention was left unattended and unaddressed. As noted previously, Bain provided Management Consulting Services during the Service Period, a finite period of time during the initial stages of the Chapter 11 Cases. Other than repeated requests and general "nagging," Bain lacked the ability to withhold the provision of its services or assert any other kind of pressure on the Debtors to compel them to file the Retention Application in a more timely fashion. See, e.g., In re Metropolitan Hosp., 119 B.R. 910, 921 (Bankr. D. N.J. 1990) (noting that professional should have ceased performing any further services until court approval was obtained).

This finite service period also obviates many of the traditional concerns involved with *nunc pro tunc* retention, which are factors specifically when the professional provides services on an ongoing basis. As discussed below, Bain needed to begin providing services immediately

¹² Additionally, the retention of counsel by Bain resulted in a delay in the process. As mentioned previously, such delay resulted from Bain's need to retain counsel *after* learning that it needed to seek formal court approval for its retention and the payment of its fees. Bain's counsel therefore needed to complete conflict checks and to become familiar with the proceeding at a later date.

¹³ Following the Petition Date, the Debtors (and their counsel) have focused their energy on (a) restructuring their costs, while preserving their assets, and (b) achieving milestones in the Chapter 11 process, while attempting to sell a substantial portion of their assets for the highest and best cost.

upon the inception of the Chapter 11 Cases. Accordingly, this Court could not have analyzed any potential conflicts of interest or the competency of Bain prior to Bain's provision of Management Consulting Services.¹⁴ Since the services provided by Bain were not ongoing, the circumstances, conditions, and effect of Bain's retention would not change following its provision of services, and therefore its retention was not susceptible to many of the typical concerns in *nunc pro tunc* retention for an ongoing professional, including (a) "prevent[ing] various counsel from simultaneously representing and charging debtors, Creditors' Committees, etc. to the detriment of the creditors," see In re Bible Deliverance Evangelistic Church, 39 B.R. 768, 772 (Bankr. E.D. Pa. 1984); and (b) "ensuring that the court may know the type of individual who is engaged in the proceeding, their integrity, their experience in connection with work of this type, as well as their competency concerning the same," see F/S Airlease II, 844 F.2d at 106. In retrospect, under any circumstances, this Court has to evaluate these concerns *after* the completion of services by Bain, and such evaluation is not time dependent. In other words, neither the conflicts nor the competency analysis changes because the Retention Application was filed in August 2003, as opposed to May 2003 or earlier.

The limited engagement of Bain supports the granting of *nunc pro tunc* relief. See, e.g., In re Indian River Homes, Inc., 108 B.R. 46, 51 (D. Del. 1989) (approving *nunc pro tunc* retention were "employment of the professionals for purposes of that sale was for only a short time period, since the closing was scheduled to occur about two weeks after the bankruptcy petition was filed"). Bain made every effort to expedite the Retention Application process as it sought immediate payment. See Phelps Declaration, ¶¶ 4 to 18. Based on the foregoing, Bain

¹⁴ As discussed herein and in the Kovac Supplemental Declaration, Bain does not have any conflicts of interest to its provision of services to the Debtors and clearly possesses experience and competency in providing the Management Consulting Services.

submits that it met its obligation to seek the timely filing of its Retention Application and that this factors weighs in favor of its *nunc pro tunc* request.

4. **The Payment of Compensation to Bain Will Not Prejudice Innocent Third Parties.**

In the Fee Application, Bain requests final approval and allowance of compensation for its professional services in the aggregate amount of \$300,000 and for the reimbursement of the reasonable and necessary out-of-pocket expenses that it incurred in connection therewith of \$30,000. The rates for which Bain seeks approval herein are its usual and customary billing rates for the types of services performed, as described in the Application and Motion and the Kovac Initial Declaration. Bain performed extensive essential management consulting services for the Debtors during the Service Period. Such payments will result in no prejudice to any third party.

In fact, as discussed in detail below, the services provided by Bain to the Debtors resulted in a substantial increase in the value of the assets of the Debtors, resulting in an increased return for all creditors when some of these assets were sold. Accordingly, the estates of the Debtors and the creditors of the Debtors benefited from the services of Bain. The only party that will be prejudiced by the denial of the Retention Application will be Bain.

C. **Any Indemnification of Bain Will Require Court Authorized Notice and Approval, and Bain Agrees to Strike the Limitation of Liability Provision Contained in the Engagement Letter.**

Pursuant to the Bain Agreement, the Debtors were obligated to indemnify and hold harmless Bain from certain claims and causes of action (the “Indemnification Provision”). The UST has objected to the Indemnification Provision to the extent it (a) grants of indemnification without prior court notice and approval and (b) limits the liability of Bain to the Debtors.

As to the first concern of the UST regarding prior court notice and approval, Bain proposes including the language (or something substantially similar) outlined in **Exhibit 4**

(attached hereto and incorporated herein by reference) in any order approving the retention and termination of Bain. Bain believes the inclusion of such language in any order granting the retention of Bain shall alleviate any concerns of the UST as to the indemnification of Bain without prior court notice and approval, and understands that the UST agrees to that such language is sufficient.

In addition, as to the limitation of liability language, Bain understands that the UST refers to the following statement in the Indemnification Provision:

In no event will either party be liable to the other for any lost profits, or other indirect, special, punitive or consequential damages. Bain will not be liable for any amount in excess of the total of fees (excluding reimbursement of expenses) actually paid to Bain.

To address the UST's concerns, Bain shall strike the foregoing provision from the Engagement Letter.

D. **Conclusion**

Based on the foregoing, Bain submits that it is a disinterested party, as contemplated under Section 327(a) of the Bankruptcy Code, and that "extraordinary circumstances" (as contemplated by applicable Third Circuit law) exist that support the retention of Bain *nunc pro tunc* to April 1, 2003.

IV. **THIS COURT SHOULD APPROVE THE PAYMENT OF COMPENSATION TO BAIN AS OUTLINED IN THE FEE APPLICATION.**

Bain incurred \$300,000.00 in fees and \$30,000.00 in expenses during the period from April 1, 2003 through April 11, 2003. Pursuant to the Fee Application, Bain seeks the approval of this Court as to the payment of the fees and expenses incurred by Bain related to its retention. In support of the Fee Application, attached to the Fee Application are (collectively, the "Fee Exhibits"):

a. **Exhibit A**, which is a summary of the hours charged for services rendered by Bain, including the name of each professional who worked on the case during the Service Period, the number of hours that they expended, and a description of the services rendered; and

b. **Exhibit B**, which is a summary of the expenses incurred by Bain during the Service Period in connection with this engagement.

Bain performed extensive essential management consulting services for the Debtors during the Service Period. In rendering these services and seeking the fees outlined in the Fee Exhibits, Bain made every effort to maximize the benefit to the Debtors and to coordinate its efforts with those of the Debtors and other professionals to avoid duplication of effort. Similarly, the expenses sought in the Fee Application reflect actual out-of-pocket expenses incurred by Bain, and Bain believes that they were reasonable and necessary.

The UST argues that Bain (a) failed to meet the reporting standards required under Local Bankruptcy Rule 2016 and (b) failed to contribute value to the estate because the services furnished by Bain only benefited business of the Debtors sold postpetition. Notwithstanding these objections, for the reasons outlined below and in the Fee Application, the compensation requested in the Fee Application should be approved by this Court and ultimately paid by the Debtor to Bain.

A. **The Billing Detail Provided by Bain Is Sufficient to Adequately Inform this Court of the Services Provided and Work Performed by Bain.**

Bain has reviewed the Local Bankruptcy Rule 2016-2, and Bain believes that its time entries are substantially in compliance with that Rule. All of the services that Bain has performed for the Debtors fall into a single category – “management consulting.” Bain has submitted herewith a supplemental statement of work containing detailed descriptions of services performed by individual professionals of Bain during the Services Period, which is attached to Addendum 2 to the Kovac Supplemental Declaration (the “Fee Supplement”). Under the

circumstances, Bain respectfully contends that the Fee Exhibits and the Fee Supplement provide sufficient information for this Court to adequately evaluate the Fee Application and ultimately grant the relief sought therein. In support thereof, Bain notes the following:

1. **Bain Lacks the Procedures, Mechanisms, and Ability to Comply with Local Rule 2016-2.**

Bain bills clients on a project basis, not on a time basis. The exact scope of a consulting project, including the duration, the anticipated staffing levels, and the final deliverable product, are agreed upon up front with a client. The parties then determine a fixed monthly fee based on these elements. The monthly fee will remain the same regardless of the amount of hours or days actually spent by individual team professionals working on the project. As a result, Bain does not require its employees to maintain detailed time records on a daily basis, let alone on the basis of increments as small as six (6) minutes. See Kovac Supplemental Declaration, ¶¶ 13 to 14.¹⁵

In addition, the costs involved to Bain to introduce and employ detailed time record procedures would be exorbitant. Historically, Bain has had limited engagements in bankruptcy proceedings and therefore has not been asked to submit detailed time records in the past to its clients. Any efforts to provide detailed time records as contemplated by the Delaware Local Rules of Bankruptcy Procedure would result in substantial costs and expenses to Bain, which, to allow Bain to continue providing services to such distressed customers, would result in Bain passing along such costs and expenses to its distressed clients. Accordingly, the implementation of different procedures would increase the costs of doing business for Bain and result in increased professional fees and expenses for its clients. See Welch Declaration, ¶ 4.

Bain employs a team-based approach to management consulting. Client engagements are priced and staffed based on a case team month. Time required throughout the project will often

¹⁵ Bain does not monitor or record hours of service on a daily basis. However, Bain professionals routinely work twelve (12) hour workdays. Most, if not all members of the team of professionals involved worked the entire Service Period (including weekends), as is apparent by analyzing the number of hours each professional worked on the Debtors matter based on seven (7) days or eleven (11) days. For example, one of the Bain professionals, Amy Manning, provided one hundred twenty (120) hours of Management Services during the Service Period. Ms. Manning did not work 17+ hours a day for 7 days but did work 12 hours a day for 11 days. See Kovac Supplemental Declaration, ¶ 15.

ebb and flow, however the project team is allocated to the client engagement and fully committed to the unpredictable travel and overtime required to complete the project. Consulting staff below the level of manager are typically committed to no more than two half-time client project teams. This focused approach to a limited number of clients minimizes potential for scheduling conflicts that arise from juggling multiple client assignments, as is often the norm in professional organizations that bill on an hourly basis. See Welch Declaration, ¶ 5-6.

Detailed time based reporting and billing would require additional time spent by the following:

- a. Staffing officers, to assign all staff to several clients to smooth the hourly billing;
- b. Client engagement partners, to increase client communication regarding anticipated or incurred peaks in monthly billable hours;
- c. Professional staff, to maintain detailed time records by client by hour instead of the practice today of reporting hours (such practice is currently inconsistent with our operating principles and business practices for the month);
- d. Finance staff, to audit the timesheets submitted by professional staff and to prepare variable monthly client billing and to forecast and manage cash flow; and
- e. Office heads, to manage profitability given higher variability in monthly revenue.

To maintain profitability and allow Bain to provide management consulting to bankrupt companies (as opposed to avoiding bankruptcy proceedings due to lower profit margins and related costs), any incremental cost associated with the increased time demands discussed necessarily would have to be passed on by Bain to its clients. See Welch Declaration, ¶ 7.

By maintaining billing and cost practices across the board (i.e., to bankrupt and non-bankrupt clients), Bain is able to provide consistent, efficient services to all clients, and not charge bankrupt clients a premium for services. Bain realizes that its management consulting services provide much need assistance to bankrupt parties and wishes to provide such services

where needed. However, in the event it is forced to adapt its billing practices to certain specific bankruptcy guidelines, Bain may be unable to provide such services in the future. See Welch Declaration, ¶¶ 7-8.

2. **The Terms of Bain's Provision of Services Were Not Dependent on the Amount of Time Spent by Bain Related to its Retention.**

Quite simply, Bain agreed to provide certain management consulting services to Bain for as long as necessary to complete the Management Consulting Services for an agreed upon amount of \$300,000 in professional fees and \$30,000 in expenses. The number of hours that Bain expended in completing these services would not impact the fees and expenses to be paid to Bain. In fact, when the parties negotiated and agreed to the Termination Agreement, both parties contemplated that, in the event Bain expended more hours and expenses than originally anticipated under the Termination Agreement, Bain would not be able to recoup such fees and expenses from the Debtor. See Kovac Supplemental Declaration, ¶¶ 12 to 14.

As is apparent from any review of the Fee Exhibits, the completion of the Management Consulting Services required Bain to expend substantially more hours and incur more expenses than originally contemplated by the parties. Nonetheless, Bain agreed to cap its fees and expenses to \$300,000 and \$30,000 respectively. Accordingly, the actual time entries and more detailed breakdown of services performed by each individual are not necessary to value the Management Consulting Services.

B. **The Services Provided by Bain Adequately Support the Compensation Sought by Bain Pursuant to the Fee Application and Directly Benefited All Creditors of the Debtor.**

Instead, the valuation of the Management Consulting Services necessarily requires an analysis of whether the Debtor received the contemplated and bargained for value that formed the basis of the Engagement Letter and the Termination Letter. Based on all indicators and the

results of the Sale, it is quite apparent that the Debtor received the bargained for value contemplated under the Engagement Letter and the Termination Letter.

First, Bain performed significant services that enabled the Debtors to maintain and perhaps increase the value of their assets, which ultimately resulted in a greater recovery for creditors. In summary, the Management Consulting Services included:

- a. Developed and implemented a new daily process to allocate inventory purchases to Product Supply Centers (PSCs) and initiate wire transfers to pay vendors in advance of shipment of goods;
- b. Created integrated financial model and overhead cost reduction roadmap to establish cost reduction targets for key overhead functions in various scenarios for downsized business,
- c. Finalized action plan to eliminate excess and aged inventory;
- d. Finalized action plan to re-design procurement organization to improve customer service levels at a lower cost;
- e. Finalized Information Technology (IT) cost diagnostic and developed restructuring options to significantly reduce IT costs;
- f. Created financial model to assess impact of various PSC network restructuring alternatives and potential distribution center closures;
- g. Collected relevant data and analyzed opportunities to sell/monetize certain assets (corporate stores, warehouses);
- h. Maintained daily/weekly executive management “dashboard” to monitor health of business, including early warning system to identify potential customer defections.

See Kovac Supplemental Declaration, ¶¶ 18-43. As discussed above and in the Kovac Supplemental Declaration, such services provided extraordinary value to the Debtors and to their estates, and enhanced the value of their estates for the benefit of their creditors. See id.

Second, the Debtors support the fees sought by Bain and believe that such fees are reasonable given the Management Consulting Services and their usefulness in enabling certain successful sales of assets in the Chapter 11 Cases. In conversations between representatives of

the Debtors and Bain, the Debtors have continuously expressed their satisfaction with the Management Consulting Services and believe that such services ultimately assisted in the successful Sale. See Kovac Supplemental Declaration, ¶¶ 16.

C. **Conclusion.**

Bain believes the amount requested in the Fee Application is fair and reasonable given (a) the complexity of the case, (b) the time expended, (c) the nature and extent of the services rendered, (d) the value of such services, and (e) the costs of comparable services other than in a case under the Bankruptcy Code. Bain respectfully contends that the Fee Exhibits and the Fee Supplement provide sufficient information for this Court to adequately evaluate the Fee Application, and that the relief sought therein should be granted by this Court.

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V. **CONCLUSION.**

In conclusion, based on the foregoing, Bain respectfully requests that this Court approve the retention of Bain *nunc pro tunc* to April 1, 2003 pursuant to 11 U.S.C. §§ 327(a), 330 and 105(a) and Fed. R. Bankr. P. 2014(a), 2016 and 5002 and approve the fees and expenses to be paid to Bain pursuant to the Fee Application.

Dated: October 15, 2003

Respectfully submitted,

By: /s/ Brian A. Sullivan

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