IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case No. 03-10945-MFW
	)	Chapter 11
FLEMING COMPANIES, INC.,[1]	)	(Jointly Administered)
	)	
Debtor.	)	**Hearing Date: 12/8/03 @ 9:30 a.m.**
	)	**Objections Due: 12/1/03 @ 4:00 p.m.**

MOTION OF WCM INVESTMENT COMPANY FOR ALLOWANCE AND IMMEDIATE PAYMENT OF ADMINISTRATIVE CLAIM AS ACTUAL AND NECESSARY COST AND EXPENSE OF PRESERVING DEBTORS' ESTATES

WCM Investment Company ("WCM") moves this Court for entry of an order allowing and directing immediate payment of WCM's administrative expense claim arising from those post-petition services provided by WCM to debtors and debtors-in-possession (collectively "Fleming") pursuant to that certain Real Estate Consulting Agreement (the "Motion"). In support of this Motion, WCM shows the Court as follows:

INTRODUCTION

WCM is a small consulting business located in Oklahoma City, Oklahoma, owned by William C. Mee ("Mee"). WCM is in the business of providing, *inter alia*, advisory, consulting and real estate broker services related to the leasing, subleasing acquisition and disposition of real property. On September 30, 2002, WCM and Progressive Realty, Inc. ("Progressive Realty") (one of the above-captioned debtors and debtors-in-possession ("Debtors")) entered into a Real Estate Consulting Agreement (the "Agreement"). Under the Agreement, WCM was to provide similar services to Progressive Realty. In exchange for providing such services,

[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.

Progressive Realty was obligated to compensate WCM for providing such services, reimburse WCM for expenses incurred in providing such services, provide WCM with support staff and work space including phones and computer connections.

After Debtors filed their respective voluntary petitions and at the request of Fleming Corporation, Inc. ("Fleming") and its professionals, Debtors induced WCM to provide significant post-petition services on an expedited basis. WCM did provide these services expeditiously and, thereby, made an immediate and substantial contribution to Debtors' estates. Debtors and Debtors' professionals informed WCM that it would seek Court approval for the employment of WCM. Despite repeated assurances provided to WCM by Fleming and Fleming's professionals, Fleming, unilaterally and without consulting WCM, abandoned their efforts to obtain Court approval for WCM's employment. Fleming then notified WCM that it could not compensate WCM for providing such services. Of course, this notification was provided after WCM had completed a majority of the work that Debtors had requested. For these reasons, forcing WCM to now seek payment of its fees, all of which are actual, necessary costs and expenses of preserving the estates of Debtors as administrative expenses.

RELIEF REQUESTED

1. WCM requests entry of an order: (a) granting WCM an allowed administrative claim in an amount not less than $809,320.00, or such other amount as may be determined and allowed by the Court, pursuant to §§ 503(b)(1)(A), 503(b)(3)(D) and 507(a)(1) of Chapter 11, Title 11 of the United States Code ("Bankruptcy Code"); (b) directing Debtors to pay immediately such allowed administrative claim; (c) granting WCM an award of its reasonable costs and expenses incurred in preparing and prosecuting this Motion; and (d) granting such other and further relief as this Court deems appropriate.

JURISDICTION

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this Motion in this district is proper pursuant to 28 U.S.C. § 1408 *et seq*. This is a core

proceeding and the relief requested herein is pursuant to 11 U.S.C. §§ 365, 503(b)(1)(A), 503(b)(3)(d) and 507(a)(1) of the Bankruptcy Code and Bankruptcy Rules 2002 and 9014.

NOTICE

3. Notice of the Motion has been provided to the United States Trustee, the attorneys for Debtors, the attorneys for the official committee of unsecured creditors, and the parties who have filed notice of appearances in this case pursuant to Bankruptcy Rule 2002. WCM submits that no other or further notice is needed.

4. No previous request for the relief sought in this Motion, with the exception of the previously filed Motion for Relief From Stay heard before this Honorable Court, has been made to this or any other court.

FACTUAL AND PROCEDURAL BACKGROUND

5. On April 1, 2003, ("Petition Date"), Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Debtors are operating their businesses as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases. An Official Committee of Unsecured Creditors ("Committee") was appointed on April 14, 2003.

6. From 1989 to 1995, Mee, the principal of WCM, was employed as a real estate agent by Don A. Karchmer, Inc. ("Karchmer"), a real estate broker headquartered in Oklahoma City, Oklahoma. During his employment by Karchmer, William C. Mee handled, among other real estate transactions, real estate transactions in which Fleming was involved.

7. In December of 1995, Progressive Realty was established and incorporated under Oklahoma law by Fleming as a wholly-owned subsidiary that Fleming licensed as a real estate broker in the State of Oklahoma. Progressive Realty is one of the jointly administered Debtors herein.

8. Since incorporation, Progressive Realty was required to have a managing officer that held an Oklahoma license as a real estate broker in order to be licensed as a real estate broker under Oklahoma law. 59 O.S. § 858-305. Because of his familiarity with Fleming and

the real estate transactions in which Fleming engaged, Progressive Realty requested that Mee serve as the managing broker of Progressive Realty.

9. On January 30, 1996, Progressive Realty entered into that certain Exclusive Listing Agreement with Fleming, a copy of which is attached hereto as Exhibit "A."[2] The Exclusive Listing Agreement expressly provided that Mee was not an employee of Progressive Realty, but rather an independent contractor. In connection with this agreement, Progressive Realty also entered into a verbal agreement with Mee to become the managing broker of Progressive Realty with the nominal title of Vice President of Progressive Realty. The nominal title of Vice President was bestowed upon Mee in order for Fleming to use Mee's broker license and to be in compliance with Oklahoma law.

10. During the period from January 1996 to August 2000, Mee served exclusively as the managing broker of Progressive Realty. Mee was not a director or an officer of Fleming or any affiliate of Fleming other than in his nominal capacity with Progressive Realty. Even in his nominal capacity with Progressive Realty, Mee was never given, nor did he perform, any policy making or strategic functions for Fleming and its affiliates. Ultimate decision making authority vested in Charles L. Hall, Vice President of Fleming Companies and President of Progressive Realty. As a result, Mee was never in a capacity to make significant real estate decisions impacting Fleming Companies.

11. In the late Spring of 2000, Fleming began the relocation of its real estate offices to Lewisville, Texas. While the offices, including the real estate offices, were relocated to Lewisville, Texas, Fleming continued to operate a "shared services center" in Oklahoma City, Oklahoma. At the "shared services center" in Oklahoma City, Fleming conducted a number of largely ministerial activities. As part of the "shared services center," Fleming maintained its real estate files and records in Oklahoma City.

[2] Due to the voluminous nature of the Exhibits, hard copies are being provided only to counsel for the Debtors, the Official Committee of Unsecured Creditors, the United States Trustee

12. Under Oklahoma law, the execution by a corporation of an instrument that affects real estate requires the signature of the chairman of the board, a vice chairman of the board, the president or a vice president of the corporation. 16 O.S. § 93. Because of the relocation of its corporate officers to Lewisville, Texas, in the Spring of 2000, Fleming requested that Mee become a nominal vice president of Fleming. Mee acquiesced to Fleming's request as an accommodation to Fleming in order to permit the execution at the "shared services center" of instruments affecting real estate.

13. On August 7, 2000, Fleming extended an employment offer to Mee, a copy of which is attached hereto as Exhibit "B." Mee accepted the offer on August 14, 2000. This new employment was in addition to his prior and then continuing relationship Progressive Realty. This new employment agreement expanded Mee's duties so that Fleming would be in compliance with Oklahoma law **and only expanded his role in the Fleming organization to managing the lease file record and administration**. Under such agreement, Mee became the Vice President - Real Estate Shared Services Center of Fleming and became a nominal employee of Fleming. Despite his nominal status as an employee, the bulk of Mee's compensation continued to be based on real estate-related commissions, reflecting that Mee continued to be regarded by Fleming and its affiliates more as an independent contractor rather than as a true officer.

14. During the period from August 2000 to July 2002, Mee functioned as the Vice President - Real Estate Shared Services Center of Fleming, in which capacity his activities were largely limited to the management of the lease and real estate portfolios of Fleming and its affiliates and to the ministerial execution of instruments that affected real estate. Mee was never given, nor did he perform, any policy making or strategic functions. **Further, Mee was not an individual in ultimate control of Fleming or any of its affiliates, including Progressive Realty. Again, ultimate decision making authority fell with Charles L. Hall, Senior Vice President of Fleming Companies and President of Progressive Realty.**

15. By the Spring of 2002, Fleming completed the relocation of its real estate offices, to Lewisville, Texas. Because the functions that had previously been performed by the "shared services center" were now relocated, Fleming no longer needed the accommodation that Mee had provided and Mee resigned his position with Fleming (see the attached resignation letters marked as Exhibits "C" and "D"). At that time, Mee returned to a nominal role of managing officer of Progressive Realty, in which capacity he was again only an independent contractor.

16. Soon thereafter, a Real Estate Consulting Agreement ("Pre-Petition Agreement" or "Agreement") was entered into between Progressive Realty and WCM on September 30, 2002, a copy of which is attached hereto as Exhibit "E." This Pre-Petition Agreement provided for a retention of WCM as a real estate consultant for a term of sixteen months, also specifying the duties of WCM and the compensation to be paid to WCM. The Pre-Petition Agreement also required Progressive Realty to provide the continuing obligation to, in exchange for WCM's provision of services, provide WCM with support staff and work space including phones and computer connections during the term of the Agreement.

17. On the Petition Date, Debtors filed their respective voluntary petitions under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court. The voluntary petitions were filed six months after Fleming's execution of the Pre-Petition Agreement.

18. Immediately after the Petition Date, Debtors recognized that addressing Debtors' lease and real estate portfolios was a critical aspect of the bankruptcy proceedings. Fleming also recognized that Mee's immediate involvement was an absolute necessity to addressing the lease and real estate portfolios due to his knowledge of and involvement in Fleming's prepetition leasing and real estate activities. This was especially true with respect to the required evaluation of over 1,000 leasehold interests within 60 days after the Petition Date pursuant to §365(d)(4) of the Bankruptcy Code to prevent automatic rejection. Soon after the voluntary petitions were filed, Debtors also found it necessary to liquidate a significant portion of Debtors' portfolio. The need for Mee's participation was increased due to Debtors' demand for prompt action. However, Debtors could not satisfy this demand without the "portfolio knowledge" that Mee possessed.

19. Because of Mee's specialized knowledge of Fleming's portfolio and Debtors' assurances of employment and payment for services, Mee agreed to provide these services to the Debtors in accordance with the Pre-Petition Agreement. At the time, Mee had not retained counsel in connection with these bankruptcy proceedings and relied on the recommendations of Debtors and their professionals, particularly Kirkland & Ellis (the general bankruptcy counsel to Debtors). Based upon these recommendations, and because Mee believed that WCM's efforts were in the best interests of these estates and their creditors, Mee assisted Debtors in evaluating leasehold interests, in identifying those leaseholds that had value, in liquidating certain real estate assets by marketing, identifying purchasers and then in acting as real estate broker for Debtors.

20. On May 1, 2003, Debtors filed an Application to Employ Motion for Order Authorizing Debtors to Employ and Compensate Certain Professionals ("OCP Motion") [D.I. 661] with the Court. The motion requested, among other things, that Debtors have authority to employ ordinary course professionals. WCM was originally contemplated to be one of the ordinary course professionals to be hired under the OCP Motion to provide services to Debtors as a real estate broker. By this time, WCM had been providing services to Debtors for over a month based upon Debtors and Debtors' professionals' assurances that he would be paid for such work. WCM was not consulted about or provided an opportunity to comment on to the content of the OCP Motion despite the fact that the OCP Motion sought to employ WCM. WCM continued to defer to Debtors' experienced bankruptcy counsel due to the repeated directives to WCM to focus on completing the leasehold and real estate evaluations and liquidations.

21. Fleming and its professionals continually directed WCM to promptly provide those services set forth in the Pre-Petition Agreement and that Fleming and Fleming's professionals would worry about obtaining entry of an employment order for WCM. When Mee expressed concern on behalf of WCM, Debtors and their professionals repeatedly assured Mee that the employment of WCM would be approved and that WCM would be compensated for the services that it provided to Debtors.

22. Relying on the reassurances provided by Debtors and its professionals, WCM provided significant substantial services to Debtors (see attached hereto e-mail marked Exhibit "F,"). WCM assisted Debtors in analyzing their lease and real estate portfolios, making recommendations to Debtors on the assumption and the rejection of leases and the disposition by Debtors of fee interests and leasehold interests. WCM, through Mee, participated in weekly conferences with Debtors' employees and Debtors' professionals with respect to the lease and real estate portfolios. At Debtors' request, WCM made frequent presentations to the Committee with respect to the lease and real estate portfolios. WCM marketed the fee interests and the leasehold interests on behalf of Debtors, generating the actual and possible future sales reflected on Exhibit "G" (attached hereto) as approved by this Court. Throughout this process, Mee continued to provide Debtors and their professionals advice on the lease and real estate portfolios and to make frequent reports to Debtors and their professionals.

23. It is ineluctable that the costs and the expenses associated with WCM's providing these services to Debtors were actual, necessary costs and expenses of preserving Debtors' estates. In performing the services requested by Debtors, WCM made a substantial contribution to the present cases. As the simplest measure, WCM produced, through its sole efforts, contracts from third parties for the purchase of four real estate properties that have generated, to date, $7,862,990.00 of gross proceeds to Debtors. By November, one additional property (the Oklahoma City, Oklahoma warehouse) is to be sold to a ready, willing, and able buyer that WCM produced. This property will generate an additional $2,400,000.00 of gross proceeds, totaling $10,262,990.00 that WCM has generated for the benefit of Debtors' estates. However, this enormous contribution by WCM does not reflect the total amount generated for the benefit of Debtors. Moreover, Debtors and their other professionals repeatedly stated their appreciation of the services WCM provided, which appreciation was reflected in correspondence.

24. While WCM provided the services that Debtors were requesting, WCM continued to monitor, to the extent possible, the status of WCM's employment and to seek guidance and

updates from Debtors and their counsel on employment-related issues. While WCM was not entirely satisfied with the updates, WCM deferred to Debtors and their bankruptcy counsel.

25. On May 21, 2003, Marjon Ghasemi of Kirkland & Ellis advised WCM that Ms. Ghasemi would be responsible for obtaining Court approval for the employment of WCM under the OCP Motion. Ms. Ghasemi also advised Charles Hall, Senior Vice President of Real Estate and Store Development for Fleming, Carlos Hernandez, Executive Vice President and General Counsel of Fleming, and George Ward, Director of Risk Management of Fleming of her responsibility in this regard. At that time, both Mr. Hernandez and Mr. Ward emphasized the need to have the employment of WCM approved as soon as possible. Ms. Ghasemi responded that WCM would be removed from the OCP Motion and Kirkland & Ellis would prepare a retention agreement and seek Court approval of WCM's employment by separate employment motion. WCM was not informed of the purpose of or need for a "new retention agreement" when WCM was performing in accordance with the Pre-Petition Agreement.

26. Two months after WCM began providing post-petition services to Debtors, Debtors presented the "new retention agreement" to WCM. Based upon the advice of Debtors' counsel that this was the proper manner and procedure to obtain Court approval for WCM's employment, WCM was left with no choice but to execute the engagement letter presented to him on June 2, 2003, a copy of which is attached hereto as Exhibit "J."

27. On June 3, 2003, Charles Hall, Senior Vice President of Real Estate and Store Development of Fleming, informed William C. Mee that Robert Buday of Kirkland & Ellis was going to review the engagement letter. Hall implied that Mee's focus should not be on employment but rather on ensuring that WCM had signed contracts and valuations with respect to listed properties, as is reflected in the email attached hereto as Exhibit "K."

28. On June 9, 2003, Debtors and WCM executed a revised engagement letter, a copy of which is attached hereto as Exhibit "L," based upon the revisions of Mr. Buday. Without any option, WCM again executed the revised engagement letter.

29. On June 10, 2003, Debtors filed their Debtors' Application for Entry of an Order Authorizing the Employment and Retention of WCM Investment Company as Real Estate Broker with Respect to Certain Locations ("WCM's Employment Application") [D.I. 1406] with the Court, requesting the Bankruptcy Court to approve the employment of WCM on the terms contemplated by the revised engagement letter. In conjunction with that WCM's Employment Application, Debtors filed the Affidavit of William C. Mee for Entry of an Order Pursuant to 11 U.S.C. §§ 327(A), 328 and 363(b)(1) and Fed.R.Bankr.P. 2014 Authorizing the Employment and the Retention of WCM Investment Company as Real Estate Broker with Respect to Certain Locations [D.I. 1406] (the "Mee Affidavit" is attached hereto as Exhibit "M"). The Mee Affidavit was prepared by Debtors' counsel and disclosed Mee's prior relationships with these Debtors as outlined above.

30. On June 18, 2003, the Office of the United States Trustee ("Trustee") filed an objection [D.I. 1527] to the Employment Application, citing Mee's prepetition service as the nominal Vice President - Real Estate Shared Services Center of Fleming and Mee's service as the again nominal managing officer of Progressive Realty.

31. At Debtors' continued insistence, WCM continued to provide the services that Debtors were requesting. This was despite WCM's continued inquiries of Debtors and the professionals to address these issues, pressure that drew repeated reassurances from Debtors and their professionals that they would get the matter resolved, which is reflected in the emails attached hereto as Exhibits "F."

32. Then, over 90 days after the Petition Date, Debtors abruptly changed their position when, on July 2, 2003, Debtors unilaterally decided not to ask this Court for approval of WCM's employment as reflected in prior correspondence. Interestingly, WCM had already completed a substantial portion of the services Debtors had requested of WCM. Debtors' and Debtors' professionals' abrupt and willful decision to "change horses midstream" was made 90 days after WCM was first requested to perform services - services that benefited these estates -

on an expedited basis. WCM was induced by the repeated assurances that Debtors and its professionals had made to WCM.

33. Horribly disappointed with the unilateral reversal by Debtors and their professionals, WCM pressed Debtors and their professionals to follow through on their commitments to WCM. Finally, on July 18 (108 days after the Petition Date), Robert Buday of Kirkland & Ellis notified WCM that WCM's Employment Application had not been "approved" and was being withdrawn. Incredibly, Mr. Buday also notified WCM to discontinue providing further services to Debtors. Even more unbelievable, this instruction was then immediately followed by numerous requests for WCM to assist Debtors and its professionals. These requests continued through mid-August 2003.

34. On July 24, 2003, Debtors filed their Notice of Stipulated Withdrawal, Without Prejudice, of Debtors' Application for Entry of an Order Authorizing the Employment and Retention of WCM Investment Company as a Real Estate Broker for Certain Locations [D.I. 2096].

35. Throughout this entire process, WCM understood that it had a continuing contractual obligation to perform under the Pre-Petition Agreement with Progressive Realty, attached hereto as Exhibit "E." Debtors have not sought Court approval to assume or reject this executory contract. Because of this fact, WCM, correctly or incorrectly, felt was compelled to meet its contractual obligations to Debtors or be in breach of its agreement. This was a "Catch-22" situation for WCM. Mee was never consulted or asked to make any accommodation to assist in presentation of the WCM Employment Application. Mee never received even a phone call to obtain his input with respect to the withdrawal of the WCM Employment Application.

36. Further, Mee is unfamiliar with the bankruptcy process and has never been involved or retained as a professional in any bankruptcy case before. Obviously, Mee is not a lawyer and, therefore, does not have legal skills or any prior bankruptcy experience to rely upon or assist him in navigating the nuances of WCM's retention and employment under the Bankruptcy Code or of obtaining Court approval of his employment. As such, WCM was not

able to anticipate or discover for WCM those potential traps to which WCM now has fallen victim. WCM instead, and in hindsight, foolishly, relied upon Debtors and Debtors' highly experienced counsel to be the guide. WCM's reliance is foreseeable and, under the circumstances, justified - especially where WCM was continuously pushed and pressed by Debtors and Debtors' professionals to focus on the real estate transactions (which have been one of the largest matters to arise from these jointly administered cases) and Debtors' professional will focus on the rest.

37. In addition to the evaluation of over 1,000 leaseholds, WCM assisted Debtors in the sale of thirteen properties. These transactions generated substantial benefit to these estates as outlined in the attached Exhibit "G." Under the prepetition agreement, **WCM was to receive a 4% commission for its work in conjunction with the sale of these properties**. Of the thirteen properties, WCM exclusively procured buyers for the Leawood, Kansas property, for the Marquette, Michigan property, for the Austin, Texas warehouse, and the York, Pennsylvania warehouse. All four of the properties have sold and generated $7,862,990.00 in gross proceeds for the estate. Further, the Oklahoma City warehouse sale is scheduled to close by early November 2003 with a buyer whom WCM alone identified, attracted and brought to the table. This sale will generate $2,400,000.00 in gross proceeds for these estates. WCM provided contracts for sale on four additional properties which would have been sold; however, the contracts were pulled from escrow due to the C & S sale. These properties included the Memphis, Tennessee location with an escrow price of $1,150,000.00; the Elm Grove, Wisconsin location with an escrow price of $800,000.00; the Kearney, Nebraska location with an escrow price of $320,000.00; and the King of Prussia, Pennsylvania leasehold with an offer price of $3,500,000.00. In addition, WCM had generated three offers from ready, willing, and able buyers for the King of Prussia leasehold with the sale contract being given to the highest bidder which is reflected in the above price. The final four properties were sold at auction. However, all of these properties had sales contracts in escrow with buyers provided by WCM. These contracts were used as "stalking horses" that were pulled from escrow to set a minimum floor for

the auction price. Michael Sharp stated to Mee that WCM would get paid the "stalking horse" commissions for procuring buyers for these properties. These properties included the Peoria, Illinois location with an escrow price of $500,000.00; the Salem, Virginia warehouse with an escrow price of $1,800,000.00; the Oklahoma City closed store location with an escrow price of $300,000.00; and the Pleasanton, California office leasehold with the highest of three offers being $1,600,000.00. If all of these thirteen properties would have been sold to the buyers WCM provided, they would have generated $20,232,990 in gross proceeds for the benefit of these estates. However, while WCM recognizes that not all of the sales went to the buyers provided by WCM, some of the sales prices for the properties sold obtained a higher bid at auction due to the "stalking horse" floor price which originated with a "WCM" generated original bidder.

38. As part of the pre-petition agreement signed on September 30, 2002, which is attached hereto as Exhibit "E," WCM was responsible for finding offsite office space for Progressive Realty. WCM was also responsible for paying all of the Progressive Realty contractors. Further, as part of the post-petition agreement signed June 9, 2003, which is attached hereto as Exhibit "L," WCM was responsible for paying local brokers for their work in securing buyers for subject properties. Therefore, a large portion of the proceeds in connection with this Motion for Allowance and Payment of Administrative Claim will be paid to various local brokers and contractors as part of the expenses incurred by WCM.

39. In sum, WCM is entitled to an allowed administrative expense claim in the amount of not less than $809,320.00, representing the total of the unpaid commissions and expenses owed by Debtor.

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ARGUMENT AND AUTHORITY

A. WCM Is Entitled To An Allowed Administrative Expense Claim For Post-Petition Performance Under The Prepetition Agreement Between WCM and Fleming.

1. Debtors Induced WCM's Performance Which Conferred a Benefit on these Estates.

40. Courts have constructed a two-part test in evaluating whether a claimant is entitled to an allowed administrative claim. The test is: (1) there must be a post-petition transaction between the creditor and the debtor; and (2) the estate must receive a benefit from the transaction. *In re Merry-Go-Round Enterprises, Incorporated*, 180 F.3d 149, 157 (4th Cir. 1999) (*citing In re Stewart Foods, Inc.*, 64 F.3d 141, 145 n.2 (4th Cir. 1995) and *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2nd Cir. 1986)); *see also, In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527, 532-33 (3d Cir. 1999); *In re Jartran, Inc.*, 732 F.2d 584, 586-587 (7th Cir. 1984) (*citing Cramer v. Mammoth Mart, Inc., (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir.1976)).

41. Courts have found the requirement under first prong of the test is met where there has been a post-petition inducement of a party's performance by a debtor-in-possession. *In re Jartran, Inc.*, 732 F.2d at 586; *In re Lunan Family Rest.*, 194 B.R. 429 (N.D.Ill. 1996); *In re Cardinal Indus., Inc.*, 142 B.R. 801, 803-04 (Bankr. S.D.Ohio 1992). There is no doubt that Debtors induced WCM post-petition performance under the Pre-Petition Agreement which, to date, has still not been assumed or rejected. WCM was induced to provide these post-petition services as expeditiously as possible because of Debtors' immediate need for assistance to meet the strictures of § 365(d)(4) to evaluate over 1,000 non-residential real property leases held by Debtors and because of WCM's specialized knowledge of Debtors' leasehold and real property interests. Debtors' and Debtors' professionals induced WCM's post-petition performance through the repeatedly assurances made to WCM that WCM would be compensated for such services and that Debtors were obtaining Court approval for WCM's employment.

42. With respect to the second prong of the test, there is no doubt that the estate received a benefit from WCM's post-petition performance. The record is replete with references

to the benefits Debtors received from WCM's performance. WCM assisted Debtors in analyzing their lease and real estate portfolios, making recommendations to Debtors on the assumption and the rejection of leases and the disposition by Debtors of fee interests and leasehold interests. WCM participated in weekly conferences with Debtors' employees and Debtors' professionals with respect to the lease and real estate portfolios and made frequent presentations to the Committee with respect to the lease and real estate portfolios. WCM marketed the fee interests and the leasehold interests on behalf of Debtors, **generating the actual and possible future sales in excess of $10 million**. Therefore, WCM is entitled to an allowed administrative claim in the amount of $809,320.00, representing the total of the unpaid commissions and expenses owed by Debtor.

2 WCM Is Entitled to An Administrative Expenses Claim in the Amount Equal to the Value of the Post-Petition Benefit Conferred on the Estate Prior to Assumption or Rejection.

43. Courts have also found these requirements under the test to be met where, in the context of executory contracts, the non-debtor party to an executory contract has conferred a post-petition benefit on the estate prior to assumption or rejection and, thereby, entitled to an administrative expenses claim equal to the benefit conferred. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984); *In re BCE West, L.P.*, 264 B.R. 578, 584 (9th Cir. BAP 2001). This Court has adopted the "Countryman" definition to determine whether or not an agreement is an executory contract pursuant to § 365 of the Bankruptcy Code. *Sharon Steel Corp. v. National Fuel Gas Distr. Corp.* 872 F.2d 36, 39 (3d Cir. 1989). The Countryman definition states that a contract is executory only where the obligations "of *both* the bankruptcy and the other party to the contract are so far under performed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Countryman, EXECUTORY CONTRACTS IN BANKRUPTCY: PART I, 57 Minn.L.Rev. 429, 460 (1973).

44. Here, the Pre-Petition Agreement is an executory contract because both Progressive Realty and WCM have continued performance under the Agreement. Specifically,

WCM is to provide services such as evaluate Fleming's leasehold interests, consult with Fleming's executives with respect to real estate transactions and related services for a term of sixteen months. **Progressive Realty is to provide WCM with support staff and work space including phones and computer connections during the term of the Agreement and to pay for such services. However, Progressive Realty had the option to terminate this obligation with thirty days notice, which was exercised on December 1, 2002. WCM has been providing support staff and work space for Progressive Realty since that time.** It is undisputed that the Pre-Petition Agreement between WCM and Progressive Realty is an executory contracts subject to Debtors' assumption or rejection under § 365 of the Bankruptcy Code where there are continuing obligations thereunder such that the failure of either party to complete performance would constitute a material breach excusing the performance of the other. Further, for those reasons asserted above, there is no doubt that a post-petition benefit was conferred on the estate prior to assumption or rejection. WCM asserts that the value of that benefit is at a minimum $809,320.00.

45. To compensate and protect WCM during the period given Debtors to assume or reject the Agreement, the Bankruptcy Code provides WCM with an administrative expense for the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); *see also, In re Windmill Farms, Inc*., 841 F.2d 1467, 1469 (9th Cir.1988); *In the Matter of Continental Airlines, Inc.*, 146 B.R. 520, 527 (Bankr. D. Del. 1992) (granting "administrative rent" to the lessor under an aircraft lease Agreements). Thus, WCM is entitled to payment for the value conferred upon Debtors' estates pursuant to the WCM's post-petition performance under the Agreement. Since the Petition Date, Debtors required WCM to perform under the Agreement. WCM's performance unquestionably inured to the benefit of Debtors' estate. Hence, Debtors are obligated to pay for the reasonable value of the use of those benefits.

B. Equity Demands that, in the Alternative, WCM's Administrative Claim be Deemed Allowed and Immediately Payable as Professional Reimbursement and Compensation *Nunc Pro Tunc*.

46. The Third Circuit has held that retroactive *nunc pro tunc* approval of professionals may be granted by the bankruptcy court in its discretion under extraordinary circumstances. *In the matter of Arkansas Company, Inc.*, 798 F.2d 645, 650 (3d Cir. 1986). The underlying policy is that under certain circumstances the granting a *nunc pro tunc* order will "validate a previous failure to obtain the requisite court approval and obviate an oversight which would otherwise result in unfair and inequitable circumstances." *In re Freehold Music Center, Inc.*, 49 B.R. 293, 296 (Bankr. D. N.J. 1985). "When considering an application, the bankruptcy court may grant retroactive approval only if it finds, after a hearing, that it would have granted prior approval, which entails a determination that the applicant satisfied the statutory requirements of 11 U.S.C. §§ 327(a) and 1103(a), that the applicant be disinterested and not have an adverse interest, and that the services performed were necessary under the circumstances." *In the matter of Arkansas Company, Inc.*, 798 F.2d at 650. Factors the court should consider in making this determination include: (1) whether the applicant or some other person bore responsibility for applying for approval; (2) whether the applicant was under time pressure to begin service without approval; (3) the amount of delay after the applicant learned that initial approval had not been granted; (4) the extent to which compensation to the applicant will prejudice innocent third parties; and (5) other relevant factors. *Id.* An additional factor that court should weigh in balancing the equities is the good faith of the professional in proceeding without an order from the court. *In re Freehold Music Center, Inc.*, 49 B.R. at 296.

47. A perfect example of a case similar to the situation here is *In re Freehold Music Center, Inc*. In *Freehold*, the president of the Debtors requested accountants to provide services essential to the continuation of the debtors' business. *Id.* at 294. At all times throughout these proceedings, the services of an accounting firm were essential to the continuation of the debtors'

business. *Id.* The accountants met with the debtors' counsel to discuss their services and the attorneys advised that they needed to get an order authorizing the retention of the accountants from the court but that they attorneys would prepare the appropriate application and submit it to the court. *Id.* Over 100 days after beginning work, the accountants became aware that court approval would be necessary for them to receive payment for their services, but in good faith, they believed that authorization for their work had been properly arranged by debtors' counsel. *Id.* It was not for another month and a half until the accountants learned that they had not been retained pursuant to Court order and would not receive payment for the work they had already performed, and therefore at this time, the accountants ceased to work. . *Id.* The Court found that in balancing the equities and evaluating the factors, the accountants were entitled to an order authorizing their employment *nunc pro tunc*. *Id.* at 296.

48. This situation is almost exactly the situation presented here. Immediately after the filing of the voluntary petition, Debtors recognized that addressing Debtors' lease and real estate portfolios was a critical aspect of the bankruptcy proceedings. Debtors also recognized that Mee's immediate involvement was an absolute necessity to addressing the lease and real estate portfolios due to his knowledge of and involvement in Fleming's prepetition leasing and real estate activities. This was especially true with respect to the required evaluation of over 1,000 leasehold interests within 60 days after the Petition Date pursuant to §365(d)(4) of the Bankruptcy Code to prevent automatic rejection. Soon after the voluntary petitions were filed, Debtors also found it necessary to liquidate a significant portion of Debtors' portfolio. The need for Mee's participation was increased due to Debtors' demand for prompt action. However, Debtors could not satisfy this demand without the "portfolio knowledge" that Mee possessed.

49. At the time, Mee did not retain counsel in connection with these bankruptcy proceedings and relied on the recommendations of Debtors and their professionals, particularly Kirkland & Ellis (the general bankruptcy counsel to Debtors). Debtors counsel assured Mee that

his employment would be their responsibility and that he should concentrate on the evaluation of the leaseholds and securing buyers for the surplus properties. Debtors' counsel knew all along of Mee's possible disinterestedness due to his nominal officer status within Progressive Realty and despite this knowledge they induced WCM to continue working all the while failing to inform Mee of the legal requirements and consequences for his retention. Even though Mee had the title of Vice President of Progressive Realty, ultimate strategic and decision making authority vested in Charles L. Hall, President of Progressive Realty. Due to the assurances by Debtors and Debtors' counsel that WCM would receive payment for services, Mee agreed to provide these services to the Debtors in accordance with the Pre-Petition Agreement. Based upon these recommendations and because Mee believed in good faith that WCM's efforts were in the best interests of these estates and their creditors, Mee assisted Debtors in evaluating leasehold interests, in identifying those leaseholds that had value, in liquidating certain real estate assets by marketing, identifying purchasers and then in acting as real estate broker for Debtors. Had Mee known that he would not be retained and that Debtors' counsel would withdraw their efforts to obtain this retention after WCM had substantially completed its work, WCM would have ceased its work efforts until that time in which some sort of retention could have been established. However, if WCM had not performed, then it would have been in violation of its Pre-Petition Agreement with Debtors.

50. WCM was never afraid to perform its obligations to the Debtors. Through repeated assurances WCM believed in good faith that Debtors and Debtors' counsel would retain his employment. The only fear that WCM had was that if it did not perform, then Debtors would bring a stay violation claim against it due to the Pre-Petition Agreement. The First Circuit in a recent case held that threatening to revoke a debtor's real estate broker's license is impermissible coercion and thus a violation of the automatic stay. *Diamond v. Premier Capital Inc. (In re Diamond)*, 346 F.3d 224 (1st Cir. 2003). This was precisely the position of WCM. Even though

WCM's Pre-Petition Agreement was a personal services contract, if Mee did not perform but rather withdrew, Progressive Realty would no longer have a license to practice real estate in the State of Oklahoma and therefore be in violation of Oklahoma law. WCM's action would be deemed by the court as being an attempt to collect from the Debtors and a violation of the automatic stay. Further, WCM, correctly or incorrectly, felt compelled to meet its contractual obligations to Debtors or be in breach of its agreement. This was a "Catch-22" predicament for WCM.

51. Debtors and Debtors' counsel could have handled this situation a completely different way. Debtors could have sought to assume the Pre-Petition Agreement. The agreement is essentially an employment contract subject to assumption or rejection by the Debtors. However, the Debtors have yet to assume or reject the Pre-Petition Agreement. Contracts with essential management are usually assumed early in cases, though neither Debtors nor Debtors' counsel has ever given due and substantive consideration to issue. Because of Mee's specialized knowledge of Fleming's portfolio and the absolute need for WCM's immediate involvement in addressing the lease and real estate portfolios due to Mee's involvement in Fleming's prepetition leasing and real estate activities, Mee was essential to the successful continuance of Debtors' business. Therefore, it is unexplainable why Debtors and Debtors' counsel never considered assumption of the Pre-Petition Agreement. Rather, Debtors and Debtors' counsel, after WCM had substantially completed its work, withdrew their efforts to retain WCM for all its tedious and tireless work on behalf of the estate after continuous assurances that they would do everything to retain WCM and to ensure that Mee and WCM were compensated. In light of these facts, the evaluation of the factors, and the principles of equity, Debtors are obligated to pay for the reasonable value of the use of those benefits

C. WCM Has Established An Administrative Priority For The Post-Petition Services Provided To Debtors.

53. The main purpose in granting administrative priority under § 503(b)(1)(A) is to provide an incentive for creditors to continue doing business with the debtor. *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1384 (11th Cir. 1994). The Bankruptcy Code contains numerous provisions that are designed to promote the viability and continuance of insolvent businesses. *See, In re Zagata Fabricators, Inc. v. Superior Air Products*, 893 F.2d 624, 627 (3d Cir. 1990); *In re United Trucking Services, Inc.*, 851 F.2d 159, 161-62 (6th Cir. 1988). In *Zagata*, the Court found that "[b]y placing creditors who are entitled to payment of these administrative expenses first in line, § 503 and § 507 advance the estate's interest in survival above all other financial goals." *Id.* at 627. In this regard, §§ 503(b)(1)(A) and 503(b)(3)(D) of the Bankruptcy Code provide an administrative expense claim priority over other unsecured claims. 11 U.S.C. §§ 503(b)(1)(A) and 503(b)(3)(D). Sections 503(b)(1)(A) and 503(b)(3)(D) state, in full, as follows:

> (b) After notice and a hearing, there **shall** be allowed administrative expenses, other than claims allowed under Section 502(f) of this title, including -
>
> > (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case. 11 U.S.C. § 503(b)(1)(A). [and]
> >
> > (3) the actual and necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by -
> >
> > (D) a creditor, an indenture trustee, an equity security holder, or a committee representing

> creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

11 U.S.C. § 503(b)(3)(D) (emphasis added).

54. Section 503(b) of the Bankruptcy Code describes six, general non-exclusive categories of claims entitled to administrative expense status and, therefore, entitled to priority distribution under § 507(a) of the Bankruptcy Code. The first of these categories is described by § 503(b)(1)(A) as "the actual, necessary costs and expenses of the estate." Generally, for a debt to qualify as a necessary preservation expense, it must satisfy two requirements: (a) it must have arisen from a transaction with the estate; and (b) it must have benefited the estate in some demonstrable way. *See, In re O'Brien Environmental Energy, Inc.*, 181 F.3d at 532-533 (*citing In re Mammoth Mart, Inc.*, 536 F.2d at 954 ("the debt must arise from a transaction with the debtor-in-possession ....[and] the consideration supporting the claimant's right to payment [must be] beneficial to the debtor-in-possession in the operation of the business"). This section evidences Congressional intent to, not only encourage, but to provide an incentive for creditors and others to continue or commence doing business with an insolvent entity. *See, e.g., In re White Motor Corp.*, 831 F.2d 106 (6th Cir. 1987); *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976).

55. The third general category includes the payment of actual and necessary expenses incurred by a creditor in making a substantial contribution in a case under Chapter 11 of the Bankruptcy Code. The Bankruptcy Code does not define the term "substantial contribution" nor does it set forth factors to be used to determine if one has been made to a case. In addition, the legislative history does not indicate that a contrary intent to the plain meaning of the statute should be evaluated in defining the term "substantial contribution." *Hall Fin. Group v. DP Partners, Ltd. Partnership*, 106 F.3d 667, 672 (5th Cir.), cert. denied, 552 U.S. 815, 118 S.Ct.

63, 139 L.Ed.2d 26 (1997). The issue of whether a particular entity has made a substantial contribution is a question of fact. 4 Collier on Bankruptcy § 503.10[5] at 503-64 (15th ed. 2003) (*citing Pierson & Gaylen v. Creel & Atwood*, 785 F.2d 1249 (5th Cir. 1986); *Roberts v. Petroleum World, Inc. (In re Roberts)*, 93 B.R. 442 (D.S.C. 1988); *In re Alumni Hotel Corp.*, 203 B.R. 624 (Bankr. E.D. Mich. 1996).

56. The term "substantial contribution" has been interpreted by the Third Circuit to mean contributions to the bankruptcy case that "foster and enhance, rather than retard or interrupt the progress of reorganization." *Pacificorp Kentucky Energy Corp. v. Big Rivers Elec. Corp. (In re Big Rivers Elec. Corp.)*, 233 B.R. 739, 746 (W.D. Ky. 1998) (*citing In re DP Partnership*, 106 F.3d at 671); *Lebron v. Mechen Fin., Inc.*, 27 F.3d 937, 944 (3d Cir. 1994); *In re Ace Fin Co.*, 69 B.R. 827, 829 (Bankr. N.D. Ohio 1987); *In re Richton Int'l Corp.*, 15 B.R. 854, 856 (Bankr. S.D.N.Y. 1981). To determine whether a party has made a "substantial contribution" under § 503(b)(3)(D), some courts look to see "whether the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor's estate and the creditors." *Marcus Montgomery Wolfson & Burten, P.C. v. Am Int'l, Inc. (In re AM Int'l., Inc.)*, 203 B.R. 898, 904 (D. Del. 1996) (citing *In re Lebron*, 27 F.3d at 944 (citations omitted)); *Haskins v. United States (In re Lister)*, 846 F.2d 55, 57 (10th Cir. 1988).

57. Both the Tenth Circuit and the Third Circuit have held creditors' activities are presumed to be in their own interests until it is shown to the court that their activities are not for self-protection. *In re Lebron*, 27 F.3d at 944; *In re Lister*, 846 F.2d at 57. However, both courts have stated that "a party acting in his or her own self interest is not barred from seeking administrative expenses, but it is a factor to consider in determining if a substantial contribution was made." *Id.* However, the Fifth Circuit has held that self-interest is irrelevant as a factor in reimbursement. *In re DP Partners, Ltd. Partnership*, 106 F.3d at 673.

58. The Supreme Court has stated that a court's function in interpreting statutory language "is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Ass'ns*, 310 U.S.534, 542 (1940). "The most compelling demonstration of congressional intent is the wording of the statute." *In re DP Partners, Ltd. Partnership*, 106 F.3d at 670. The word "shall" as stated in § 503(b) connotes a mandatory intent and the court is bound by the plain language of the statute where there is nothing in the statute or its legislative history to indicate contrary intent. *Id.* at 671. "Section 503 patently states that a creditor is entitled to actual and necessary expenses 'incurred ... in making a substantial contribution in a case under chapter 9 or 11"' and this means "a contribution that is 'considerable in amount, value or worth.'" *Id.* at 673 (quoting, respectively, 11. U.S.C. § 503(b)(3)(D), and Webster's Third New International Dictionary 2280 (4th ed. 1976)) (stating that "Legislative history, albeit scant, also supports this construction: the phrase 'substantial contribution in the case' is derived from Bankruptcy Act §§ 242 and 243. It does not require a contribution that leads to confirmation of a plan, for in many cases, it will be a substantial contribution if the person involved uncovers facts that would lead to a denial of confirmation, such as fraud in connection with the case."). The evaluation of factors used to determine the meaning of substantial contribution, according to the Fifth Circuit, would be against the Supreme Court's holdings on statutory interpretation. *See In re DP Partners, Ltd. Partnership*, 106 F.3d at 670.

59. It is unquestionable that WCM satisfies the requirements of 11 U.S.C. §§ 503(b)(1)(A) and 503(b)(3)(D) whether the Court evaluates the facts in light of the plain language of the statute or by statutory interpretation from the factors set forth by the courts. Therefore, WCM should be granted an award of its administrative claim.

60. WCM should be reimbursed for its work in conjunction with the sales, marketing, and consulting of thirty-five real estate properties owned by Fleming and by providing real estate

services to Debtors pursuant to §§ 503(b)(1)(A) and 503(b)(3)(D). All of the transactions in which WCM is seeking reimbursement transpired post-petition. All of the transactions benefited these estates and their creditors due to the resulting sales of property or pending sales of property and have added significant monetary value to the estates. It is unquestionable that efforts of WCM have resulted in an actual and demonstrable benefit for Fleming. Efforts recognized by Debtors as outlined above as beneficial to these estates.

61. The service of WCM that resulted in an actual and demonstrable benefit for the estates included: (a) helping to establish strategies, tactics, goals, and parameters with respect to the properties; (b) contacting the landlords, subtenants or such other third-parties with respect to negotiation of the goals and parameters concerning rent reductions, term modifications and any other modifications that were necessary; (c) working with landlords and Debtors to document all proposals and pending transactions and provide status reports; (d) attending and participating in Committee meetings, and meetings with Debtors and Debtors' counsel; (e) conducting negotiations for the properties with respect to mitigating the landlords' allowed reduction claims; (f) negotiating with respect to the properties waivers, reductions or pay-out terms for pre-petition cure amounts, that were due and owed to landlords at the time of assumption of leases; (g) marketing surplus or unwanted properties and perform customary brokerage services; (h) developing and designing marketing programs for the sale and/or assignment of the properties; and (i) implementing a marketing plan including solicitation of offers and advising Debtors to the acceptability of particular offers or settlements.

62. WCM marketed thirteen properties for sale that to date have generated actual gross revenue in the amount of $7,862,990.00 where one property is scheduled to close by early November, 2003, generating an additional $2,400,000.00 in gross proceeds for the estate. However, by the end of October, that figure will rise to $10,262,990.00. These thirteen properties represent those that WCM marketed the fee interests and the leasehold interests on

behalf of Debtors, generating the actual and possible sales reflected on Exhibit G. **WCM was to receive a 4% commission on its work in conjunction with these properties pursuant to the Pre-Petition Agreement**. Of the thirteen properties, WCM exclusively procured buyers for five of the thirteen properties. WCM provided contracts for sale on four other properties, but the contracts were pulled due to the C & S sale. These four properties would have, and possibly did, generate $5,770,000.00 in gross proceeds for the estate depending on the amount C & S paid for these properties. The final four properties were sold at auction. However, all of these properties had sales contracts in escrow with buyers provided by WCM. These contracts were used as "stalking horses" that were pulled from escrow to set a minimum floor for the auction price. WCM was to be paid the "stalking horse" commissions for procuring buyers for these properties. The total "stalking horse" price for these properties was $4,200,000.00, which is the minimum that a buyer would have had to pay at auction to purchase them and is the minimum gross proceed for the estate generated by WCM. If all of these thirteen properties would have been sold to the buyers WCM provided, they would have generated $20,232,990 in gross proceeds for the benefit of the estate. However, not all of the sales went to the buyers provided by WCM. Some of the sales prices for the properties were even higher for some of the properties due to the "stalking horse" floor price at the auction.

63. In addition, WCM provided substantial services to Debtors in marketing twenty-two other properties for Fleming that resulted in rejection, acceptance, or modification of leases. These efforts also provided monetary benefit and savings to Debtors. For example, WCM assisted Debtors in analyzing their lease and real estate portfolios. WCM assisted Debtors by making recommendations to Debtors on the assumption and the rejection of leases. And WCM assisted Debtors with the disposition by Debtors of fee interests and leasehold interests. WCM, through Mee, participated in weekly conferences with employees of, and professionals employed by Fleming, with respect to the lease and real estate portfolios. WCM, through Mee, made

frequent presentations to the Creditors' Committee with respect to the lease and real estate portfolios. Throughout this process, Mee provided advice to Debtors and its professionals advice on the lease and real estate portfolios and made frequent reports to Debtors and its professionals.

64. On numerous occasions, WCM was informed by Debtors and its professionals that they would obtain Court approval to allow Debtors to employ WCM post-petition. These communications repeatedly noted the substantial benefits provided by WCM to Debtors and their estates. Debtors and its professionals induced WCM's to continue its services through repeated assurances including e-mails, phone conversations, and face-to-face discussions that all of WCM's work would be compensated. Even after the assurances were given by Fleming, WCM made repeated inquiries as to its reimbursement for its commissions and expenses and was reassured that they would be compensated, which is assurance is memorialized in the background section *supra* and the attached e-mail exhibits. Obviously, WCM relied on these repeated assurances to its detriment and to the benefit of Debtors and Debtors' estates.

65. The activities and efforts of WCM fit squarely within the intentions of §§ 503(b)(1)(A) and 503(b)(3)(D). WCM directly benefited Fleming through its efforts to expeditiously assist Debtors in assessing and liquidating Debtors' leasehold and fee interests. The efforts of WCM have resulted to date in an actual monetary gain of $7,862,990.00 and other savings to the estate and the creditors. Unquestionably, this is an actual and demonstrable benefit to Debtors and WCM has met its burden under both §§ 503(b)(1)(A) and 503(b)(3)(D). WCM did not perform these activities for self-protection of any interest it had in the estate pre-petition. Rather, Fleming requested WCM immediately and expeditiously perform these activities for the benefit of the estate and for the benefit of the creditors. Even before the Bankruptcy Court had ruled on the OCP Motion to retain WCM, Fleming and its counsel requested that WCM immediately begin providing services to Debtors because Debtors were in a state of crisis. When Mee expressed concern on behalf of WCM, Debtors and their counsel

repeatedly assured Mee that the employment of WCM would be approved and WCM need not be concerned. Therefore, WCM's performance of its activities directly correlated to the benefits provided to the estates, producing an increase in value to the estates and doing so only because of the repeated promises and assurances that it would be compensated for its efforts post-petition.

66. Alternatively, §§ 503(b)(1)(A) and 503(b)(3)(D) state that a creditor **shall** be paid for its commissions for services provided after the commencement of the cases. Further, the creditor **shall** be paid for its expenses in making a substantial contribution to the chapter 11 case. When viewed in the plain language of the statute under the command of the Supreme Court, WCM should be paid its commissions and expenses because the commissions were earned after the commencement of the case and the expenses were incurred in adding a significant monetary value to the estate. WCM Investment Company requests that the amounts described above and referred to as the Unpaid Services and Expenses constitute administrative expenses and should be paid as such by Debtors.

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CONCLUSION

WHEREFORE, WCM Investment Company respectfully requests that this Court enter an order substantially in the form attached hereto granting WCM an allowed administrative expense claim in the full amount of $809,320.00, plus interest from the date accrued, and granting WCM such other and further relief as is just.

Respectfully submitted,

McCarter & English, LLP

/s/ Thomas D. Walsh
Thomas D. Walsh, Esq. (Del. # 3783)
919 North Market Street, Suite 1800
P.O. Box 111
Wilmington, DE 19801
(302) 984-6300; (302) 984-6399 (fax)
TWalsh@McCarter.com

-and-

JUDY H. MORSE, OBA # 6450
ROGER STONG, OBA # 11710
WILLIAM H. HOCH, OBA # 15788

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
20 North Broadway, Suite 1800
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)

ATTORNEYS FOR WCM INVESTMENT COMPANY