

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

In re:)	Chapter 11
)	
Fleming Companies, Inc., <u>et al.</u> , ¹)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Related Docket No.: 3296
)	

SUPPLEMENTAL RESPONSE OF KIRKLAND & ELLIS LLP TO ACTING UNITED STATES TRUSTEE'S REPORT ON, AND OBJECTIONS TO, THE FIRST INTERIM FEE APPLICATIONS OF CERTAIN DEBTOR PROFESSIONALS AND REQUEST FOR HEARING

As requested by the Court at the omnibus hearing on November 25, 2003, Kirkland & Ellis LLP (K&E) submits as follows:

Background

1. K&E filed the First Quarterly Application for Compensation of Kirkland & Ellis LLP for Allowance of Administrative Claim for Compensation and Reimbursement of Expenses for the Interim Period April 1, 2003 through June 30, 2003 (the "First Quarterly Fee Application") on August 21, 2003. [Docket No. 3296]

2. The UST filed its objection to the First Quarterly Fee Application on September 22, 2003 (the "Objection"). [Docket No. 3744 and 3745] K&E filed its detailed

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.

response to each of the allegations in the Objection in on September 30, 2003 (the "Response").
[Docket No. 3870]

3. K&E and the UST have engaged in discussion regarding the UST's concerns. K&E has provided information to the UST regarding its concerns of K&E's billing rates as well as comparable rates for non-bankruptcy K&E attorneys. After reviewing the information provided by K&E, the UST has indicated that it is withdrawing its objection to K&E's rates. Remaining unresolved issues relate to the UST's concern with respect to the perceived staffing of these cases and the participation of K&E attorneys in internal meetings, teleconferences and court hearings. Set forth herein is the response provided to the UST's concern regarding staffing and also attached as Exhibit A is a chart that demonstrates which attorneys were present at what hearings and for what principal purpose.

**The Complexity and Pace of These Cases Demanded Significant Immediate Attention by
K&E**

4. Because of the emergency manner in which the Debtors were forced to file for bankruptcy and the short amount of time in which K&E was involved before the bankruptcy filing (approximately one week), the Debtors' cases required immediate and significant attention at the outset. In addition to the typical operational challenges that any company faces when it files for chapter 11, the situation facing the Debtors was particularly acute given the loss of significant management at the outset of the case and the severe vendor and customer disruption that occurred. The Debtors' entire businesses supply chain had been virtually eliminated, and the automatic payment and invoice processing systems (used to process the thousands of invoices covering the myriad goods bought and sold by the debtors on a daily basis) could not be used due to vendors placing the Debtors on COD or cash in advance deliveries. As a result, the early chaotic weeks of the Debtors' cases were an exercise in constant

crisis management, both operationally and financially, as well as legally. Normally, in most Chapter 11 cases Debtors' counsel has months, or at the least weeks, to understand the companies financial and operating structure, and educate management about the necessary procedures as to how to operate in Chapter 11. Due to the crisis nature of this case, and at the Debtors' request, K&E immediately allocated significant resources in order to work with company officials full-time to stabilize the Debtors' operations.

5. K&E has more fully outlined the complexity of the Debtors' cases and the attendant emergencies, both operationally and legally, that arose as a result of the Debtors' expeditious entry into chapter 11 and addressing the contentions made in the Objection in the Response.

6. **Hearings**. The UST objected to the number of K&E attorneys attending the various hearings. During the First Interim Period, K&E and PSZYJW concluded ten hearings during which time over 150 items in the aggregate appeared on the hearing agendas with over half of those motions being contested. Several hundred objections were filed to the Debtors' motions, which objections were assigned to individual K&E or PSZYJW attorneys to resolve before each hearing with Debtor personnel and opposing counsel. K&E, PSZYJW and the Debtors have been dedicated to and quite successful at resolving the vast majority of all the myriad objections filed so that the Court only has to deal with those matters that cannot otherwise be resolved. Based upon the number of attorneys required to resolve objections filed by third parties on a timely basis, K&E has made every effort to only bring to omnibus hearings those attorneys that are critical to achieving the Debtors' objectives. In most cases where multiple attorneys are present, K&E determined upon consultation with the Debtors, that given the knowledge base of an attorney, it would not be an efficient use of the Debtors' resources to

attempt to bring another attorney up to speed to resolve substantive issues where objections remained pending. Often, it was the critical 24 to 48 hour period prior to a hearing where the majority of objections were resolved, stipulations were drafted and/or specific order language was prepared, and negotiated, first with the objectors and then with the Senior Lenders and Creditors Committee whose approval was often necessary. For efficiency, the Debtors and counsel were also often able to convene meetings with objectors and interested parties the day before or even the day of the relevant hearing at the PSZYJW Delaware offices. As reflected on Exhibit A, where it was possible for involved attorneys to participate or be available by telephone for a specific hearing, that was done. Ironically, one of the Debtors repeated requests to K&E in the early stages of the case was that they wanted more K&E attorneys dedicated to this case, not fewer.

7. Additionally, the Debtors have also exercised judgment as to which attorney time incurred should be billed to the estates. For example, for the first day hearing and preparation thereof, James H.M. Sprayregen, Esq., the senior billing partner for K&E attended the full day of preparation sessions and the entire first day hearing in Delaware, but none of his time was charged to the estates.

8. **Case Coordination to Avoid Overlap.** As discussed in greater detail in the Response, given the size and magnitude of the Debtors' cases and the amount of items on the omnibus hearing agendas, it has been essential for multiple Debtors' professionals to participate in conference calls where several attorneys may be present to ensure that (i) all matters raised by creditor constituencies are addressed in a cohesive manner; (ii) duplication of efforts is avoided within K&E (and also between K&E and PSZYJW) because attorneys know who is handling what issue; and (iii) attorneys have a forum to ascertain quickly who has knowledge of certain

issues in order to resolve objections quickly, and to have consistency in resolution of issues. To that end, the Debtors and K&E have established regular standing calls to discuss legal issues and agenda items. As needed, the Debtors and K&E have also established regular standing calls as needed to discuss issues relating to specific areas of concern in the Debtors' cases, such as for real estate or tax matters. These organizational calls are essential to the administration of the Debtors' cases, and range in frequency from daily at times of heavy work, to weekly or bi-weekly for long range project.

9. K&E and PSZYJW attorneys occasionally work on the same matter, but only when appropriate, including: (a) A K&E non-bankruptcy specialist (e.g., tax, benefits, real estate) may work with a PSZYJW bankruptcy attorney on the same matter because of expertise in a subject area; (b) a K&E associate may work with a senior PSZYJW attorney in a situation where it would be appropriate to staff a senior partner and an associate for cost efficiency purposes; and (c) a K&E attorney will coordinate directly with the two principal PSZYJW attorneys assigned to handle court filings (Chris Lhulier and Scotta McFarland).

10. **Institutional Case Knowledge.** K&E has allocated a significant number of attorneys from its bankruptcy department to work full-time or substantially full time on Fleming's bankruptcy case, which has meant removing these attorneys from their other case commitments. These attorneys have been involved in the case from the filing of the petition or shortly thereafter and have dedicated more than a significant majority of their billable time to the case. A break-down of the principal bankruptcy attorneys on these cases is set forth on Exhibit B.

11. Given the sheer magnitude and number of the Debtors' vendors, employees, and customers as well as the complex legal issues presented by many of the

constituents, the Debtors have had to utilize many K&E specialists from different legal disciplines including tax, real estate, corporate financing, corporate mergers and acquisitions (with respect to sale efforts) and litigation attorneys in addition to the bankruptcy attorneys involved in the case. For example, during the first interim fee period, the Debtors have relied on (i) K&E corporate finance specialists for negotiating the terms of the Debtors' DIP facility, (ii) K&E tax specialists to assess the nature of the Debtors' outstanding pre-petition tax liabilities, bond liabilities and to preserve the Debtors' ability to utilize net operating losses; and (iii) K&E real estate specialists to analyze the myriad of real estate issues surrounding the Debtors' interests in leases and subleases. A sampling of the staffing of major case areas covered in the First Quarterly Fee Application, along with principal attorneys responsible are set forth below:

(A) DIP

- (i) The Debtors, together with their professionals, negotiated the terms of a cash collateral order with the Secured Lenders. In addition, after a period of several weeks of protracted negotiations, the Debtors were able to enter into a DIP credit facility that provided financing of \$150 million to the Debtors' estates.
- (ii) Principal attorneys: Richard Wynne (bankruptcy partner); Linda Myers (corporate partner); Maureen Sweeney (corporate partner); Andy Bates (corporate associate); Ashley Anderson (corporate associate).

(B) Sales

- (i) In addition to the disposition of the Retail Division (\$2 billion revenue) stores, as mentioned above and more fully set forth in the fee application, K&E developed real estate disposition procedures including procedures to establish procedures to allow the Debtors to efficiently handle de minimis assets, excess inventory, and store closing sales.
- (ii) Principal attorneys: Geoffrey Richards (bankruptcy partner); Seth Gerson (corporate partner); Ashley Anderson (corporate associate); Jason Horwitz (bankruptcy associate). In addition, Rebecca Williams, a corporate attorney at Baker Botts assisted in these efforts because of Baker Botts' prior institutional knowledge. Ira

Kharasch spearheaded the sale of certain of the Retail Division stores to Roundy's. See PSZYJW's response memo for further detail.

(C) Real Estate

- (i) Given the number of the Debtors' leases, K&E real estate transactional attorneys have been involved in daily conference calls with Fleming to address legal issues and assist in disposition of real property and lease interests. K&E professionals also filed several motions to assume or reject leases.
- (ii) Principal attorneys: Robert Buday (real estate transactional partner); Victoria Wales (real estate transactional associate); Haleh Rahjoo (bankruptcy associate). Jim Stang (PSZYJW) is the senior bankruptcy partner.

(D) Professionals

- (i) K&E coordinated the retention of most of the Debtors' professionals, including several real estate specialists necessary to conduct store closing sales and asset dispositions. In addition, K&E coordinated the retention of the OCPs.
- (ii) Principal attorneys: Marjon Ghasemi (bankruptcy associate). Ms. Ghasemi worked in conjunction with PSZYJW professionals where specific Delaware procedural issues were involved. PSZYJW attorneys also assisted in the retention of certain professionals not handled by Ms. Ghasemi and had primary responsibility for resolving objections received to retention applications. Ms. Jones from PSZYJW generally presented the retention applications for hearing before the Court.

(E) Vendors

- (i) Critical Trade/ Junior Trade Lien Program: K&E worked with the company, Committee professionals, and lenders to develop a critical trade program that would offer sufficient incentive in the vendor community to continue to do business with the Debtors and normalize trade terms.
- (ii) Principal attorneys were Richard Wynne (bankruptcy partner); Maureen Sweeney (corporate partner); Tim Brown (corporate associate); Shirley Cho (bankruptcy associate).

(F) PACA

- (i) K&E successfully developed a process to resolve and reconcile in excess of 340 PACA claims that totaled more than \$56 million and to establish a mechanism to pay valid PACA claims.
 - (ii) The principal K&E attorney was Steve Kotarba (bankruptcy associate). Mr. Kotarba worked in conjunction with senior PSZYJW attorneys.
- (G) DSD/ Trust Claimant litigation
- (i) K&E defended a number of motions and adversary proceedings brought by constructive trust claimants for turnover of estate funds. Where K&E had a conflict, PSZYJW handled the dispute.
 - (ii) Principal attorneys were Eric Liebeler (litigation partner) and Damian Capozzola (litigation partner).
- (H) Tax
- (i) During the first fee period, K&E assessed the nature of the Debtors' outstanding pre-petition tax liabilities and worked with company personnel on bond issues relating to tax liabilities. K&E also analyzed the NOL status of the Debtors and preserved the Debtors' ability to utilize existing NOL.
 - (ii) Principal attorneys: Natalie Keller (tax associate); Robert Jason (tax partner); Geoffrey Richards (bankruptcy partner). Scotta McFarland (PSZYJW) assisted on the motion to pay pre-petition taxes. Shirley Cho (bankruptcy associate) drafted the emergency NOL motion.

WHEREFORE, for all of these reasons, the Debtors respectfully request that the Objection be overruled and that the First Quarterly Fee Application be approved. If the Court has additional questions or concerns of K&E after its review of this Supplement and Exhibit A, K&E would request a hearing and opportunity to respond to the issues identified by the Court. In re Busy Beaver Building Centers, Inc., 19 F.3d 833, 845-46 (3d Cir. 1994).

Wilmington, Delaware
Dated: December 1, 2003

Respectfully submitted,

KIRKLAND & ELLIS LLP

Rick Wynne by CJL (#3850)
James H.M. Sprayregen, P.C. (ARDC No. 6190206)
Richard L. Wynne (CA Bar No. 120349)
Geoffrey A. Richards (ARDC No. IL 6230120)
Shirley S. Cho (CA Bar No. 192616)
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400 (Telephone)
(213) 680-8500 (Facsimile)

Co-Counsel for the Debtors and Debtors in Possession