

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:

Fleming Companies, Inc. , *et al.* ,
Debtors.

) Chapter 11

) Case No 03-10945 (MFW)
) (Jointly Administered)

) **Objection Deadline: May 16, 2003 at 4:00 p.m.**
) **Hearing Date: May 19, 2003 at 12:30 p.m.**

NOTICE OF MOTION

TO: The Office of the United States Trustee; counsel to the Debtors; and those parties who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure

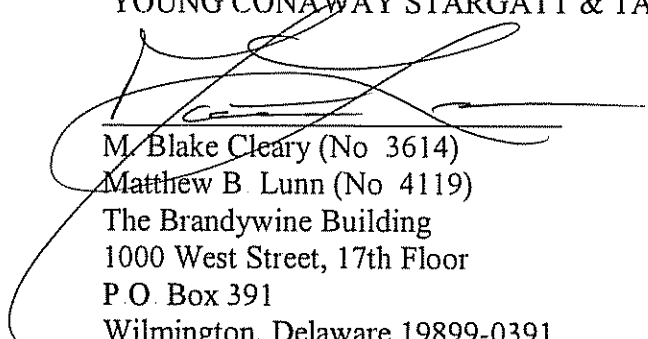
Certain current and former officers and directors of Fleming Companies, Inc (collectively, the "Movants") have filed the **Motion to Lift the Automatic Stay to Permit Advancement of Certain Defense Expenses** (the "Motion")

Responses to the Motion, if any, are to be in writing and filed on or before May 16, 2003 at 4:00 p.m. with the United States Bankruptcy Court, 824 N. Market Street, 5th Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the response upon the undersigned counsel so as to be received on or before May 16, 2003 at 4:00 p.m.

A HEARING ON THE MOTION WILL BE HELD ON MAY 19, 2003 AT 12:30 P M IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY APPROVE THE MOTION WITHOUT FURTHER NOTICE OR HEARING

Dated: Wilmington, Delaware
May 6, 2003

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ATTORNEYS FOR WILLIAM MARQUARD

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**MOTION TO LIFT THE AUTOMATIC STAY
TO PERMIT ADVANCEMENT OF CERTAIN DEFENSE EXPENSES**

Certain current and former directors and officers of Fleming Companies, Inc. (collectively "Movants"),¹ respectfully move pursuant to 11 U.S.C. § 362(d)(1) for entry of an order lifting the automatic stay, to the extent it applies, for the limited purpose of authorizing Greenwich Insurance Company ("Greenwich") to advance defense expenses to certain former and current directors and officers of Fleming under a Management Liability and Company Reimbursement Insurance Policy (the "Policy") issued by Greenwich to Fleming. These defense expenses arise out of several securities and derivative lawsuits filed against Fleming and/or certain of its directors and/or officers beginning in September 2002 and in connection with a formal investigation ordered by the United States Securities & Exchange Commission ("SEC") on February 13, 2003. Movants presently request that Greenwich be allowed to initially advance up to \$7.5 million, which is half of Greenwich's first-layer policy and 7.5% of the total coverage; Movants reserve the right to subsequently request additional funds. Movants request that these

¹ This motion is filed on behalf of the following current Fleming directors: Herbert Baum, Kenneth Duberstein, Archie Dykes, Carol Hallett, Robert Hamada, Edward Joullian III and Alice Peterson and former director Guy Osborn. The motion also is filed on behalf of the current Fleming General Counsel Carlos Hernandez and former Fleming officers Mark Hansen, Neal Rider, Mark Shapiro, Thomas Dahlen, Stephen Davis and William Marquard.

funds be advanced for the defense of the individuals specified in this motion.² Finally, Movants respectfully request expedited consideration of this motion and have filed a motion simultaneously requesting such.

BACKGROUND

1. Beginning in September 2002, several lawsuits were filed against Fleming and certain of its directors and officers in both federal and state courts. The suits include putative securities class actions and derivative suits (the "Pending Litigation"). These suits have been filed by a variety of plaintiffs and plaintiffs counsel, including Susman Godfrey, Berger Montague, Provost Umphrey and Milberg Weiss Bershad Hynes & Lerach. The pending cases are: *In re Fleming Companies Securities Litigation*, Case No. 5:02-CV-178 (E.D. Tex. Aug. 29, 2002) (consolidated); *Stroud v. Hansen*, Case No. 5:02-CV-236 (E.D. Tex. Oct. 25, 2002); *Slater v. Fleming Companies*, Case No. CIV-03-0178M (W.D. Okla. Nov. 14, 2002) (removed); *Colarich v. Fleming Companies, Inc.*, Case No. CIV-03-0177M (W.D. Okla. Nov. 14, 2002) (removed); *Kanter v. Baum*, Case No. 4: 03-CV-161 (E.D. Tex Dec. 10, 2002) (removed); *Mass. State Carpenters Pension Fund v. Hansen*, Case No. 5:03-CV-83 (E.D. Tex., Texarkana Div. April 17, 2003); *Mass. State Carpenters Pension Fund v. Fleming Companies, Inc., et al.*, Case No. 03-CV-0460 (N.D. Tex., Dallas Div. Feb. 25, 2003) (Fleming dismissed as defendant on April 22, 2003) (removed).

2. On February 13, 2003, the SEC also issued an Order Directing Private Investigation and Designating Officers to Take Testimony, pursuant to which SEC has instituted

² Counsel listed below have been engaged by the noted individuals for related matters and have been requested to represent those same individuals in the litigation noted below.

an investigation into certain activities on the part of Fleming and its management (the "SEC Investigation").

3. On April 1, 2003, Fleming filed a voluntary Chapter 11 bankruptcy petition.

4. Greenwich issued Management Liability and Company Reimbursement Insurance Policy No. ELU 83018-02 to Fleming for the period from February 5, 2002, to February 5, 2003 (the "Policy"). A copy of the Policy is attached as Exhibit A. The Policy has an aggregate limit of liability of \$15 million, inclusive of "Defense Expenses." *See* Policy, Declarations, Item 3. Thus, the advancement of Defense Expenses depletes the Policy's Limit of Liability. Policy, Section IV(B).

5. Subject to all of its terms and conditions, the Policy affords specified coverage for, *inter alia*, "Loss" incurred by current and former directors and officers of Fleming. *See* Policy, § I.A. It also affords specified coverage to Fleming for "Loss" incurred in connection with its indemnification of directors and officers for claims against them and in connection with "Securities Claims" against the company itself. *Id.* §§ I.B & I.C.

6. The Policy defines "Loss" in relevant part as "damages, judgments, settlements or other amounts . . . and Defense Expenses in excess of the Retention that the Insured is legally obligated to pay." *Id.* § II.M. The Policy defines "Defense Expenses" to include "reasonable legal fees and expenses incurred in the defense of any Claim" *Id.* § II.F. The Policy permits Greenwich, subject to certain conditions, to "advance Defense Expenses on a current basis in excess of the applicable Retention, if any, before the disposition of the Claim for which this policy provides coverage." *Id.* § V.C.

7. Greenwich has received a request to advance "Defense Expenses" in connection with the Pending Litigation and the SEC Investigation. Each of the Movants is incurring legal fees and expenses in connection with the Pending Litigation and/or the SEC Investigation. Subject to a reservation of rights and the satisfaction of other Policy conditions, Greenwich has agreed to advance "Defense Expenses" under the Policy, but Greenwich has requested that the Movants secure approval from this Court to do so.³

8. In the Movants' view, Greenwich would not violate the automatic stay by advancing such Defense Expenses. In the abundance of caution, however, and at Greenwich's request, Movants seek authorization to the extent it may be necessary.

ARGUMENT

9. As discussed below, there is a split of authority on whether the proceeds of the Greenwich Policy properly are deemed property of Fleming's bankruptcy estate. But even if the proceeds are considered property of Fleming's estate, this Court has the discretion to permit and should allow Greenwich to advance Defense Expenses to Fleming's current and former directors and officers subject to the terms of the Policy and pursuant to Greenwich's reservation of rights.

10. First, courts have recognized that the primary purpose of a D&O policy is to protect individual directors and officers. *See Ochs v. Lipson (In re First Central Fin. Corp.)*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999). Thus, at its core, a D&O policy is a "safeguard of officer and director interests and not a vehicle for corporate protection" even where the policy provides

³ Greenwich has indicated these Policy terms and conditions include, but are not limited to, satisfaction of the applicable retention and the receipt of a written undertaking in a form satisfactory to Greenwich guaranteeing the repayment of any Loss including Defense Expenses paid to or on behalf of an insured if it is finally determined that the Loss incurred is not covered by the Policy. Policy, Section V(C). In addition, Greenwich has issued reservation of rights letters identifying several coverage issues that ultimately may affect the availability of coverage for the Pending Litigation and SEC Investigation. Greenwich reserves the right to terminate the advance of Defense Expenses and to seek the repayment of amounts advanced upon a determination that no coverage exists.

for entity coverage. *Id.*; see also *Adelphia Comm. Corp. v. Associated Elec. & Gas Ins. Servs. Ltd. (In re Adelphia Comm. Corp.)*, 285 B.R. 580, 593 (Bankr. S.D.N.Y. Nov. 15, 2002). Thus, in *In re Cybermedica, Inc.*, 280 B.R. 12 (Bankr. D. Mass. 2002), the bankruptcy court lifted the automatic stay to permit advancement of defense costs by an insurer to fund the representation of a former director and a former officer of a Chapter 7 debtor. See 280 B.R. at 13-14. The court reasoned that advancement of defense costs was appropriate because the two insureds "may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments. [They] are in need *now* of their contractual right to payment of defense costs and may be harmed if disbursements are not presently made to fund their defense" *Id.* at 18. The court further reasoned that the debtor would not be harmed by advancement of defense costs because they "are among the claims for which the Debtor is ultimately obligated to indemnify the directors and officers." *Id.*

11. Similarly, in *In re Adelphia Comm. Corp.*, the court noted that "bankruptcy courts should be wary of impairing the contractual rights of directors and officers even in cases where the policies provide entity coverage as well." 285 B.R. at 598. The court continued, "if directors and officers are to serve, they need to have comfort in knowing that bankruptcy courts will be slow in depriving them of contractual rights under the D&O policies upon which they may have relied in agreeing to serve." *Id.*; see also *Exec. Risk Indemnity, Inc. v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.)*, 285 B.R. 87 (Bankr. D. Mass. 2002).

12. Here, Fleming's current and former directors and officers seek to fund their defense in the Pending Litigation and ongoing SEC Investigation pursuant to the terms and conditions of the Policy. The bankruptcy estate will not be harmed by the advancement of such proceeds because it ultimately may be required to indemnify the directors and officers for these

"Defense Expenses" if they are not advanced by Greenwich. Moreover, Fleming's D&O insurance program contains a total limit of \$100 million, including \$85 million in coverage excess of the \$15 million Greenwich Policy. Thus, even after the advancement of Defense Expenses, additional insurance remains available.

13. Courts have voiced differing views on the question whether the proceeds of a directors and officers liability policy are property of a bankruptcy estate. Some courts have held that such proceeds constitute estate property, while others have concluded that an estate has no property interest in the proceeds.⁴ As noted by the United States Bankruptcy Court for the Eastern District of New York, "[w]hile a majority of courts consider a directors and officers ('D&O') liability *policy* estate property, there is an increasing view that a distinction should be drawn when considering treatment of *proceeds* under such policies." *Ochs v. Lipson (In re First Central Fin. Corp.)*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999) (emphasis added); *see also In re Continental Airlines*, 203 F.3d 203, 216-17 (3d Cir. 2000) (the "proceeds from a [sic] insurance policy should be evaluated separately from the debtor's interest in the policy itself") (relying on *First Fidelity Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993), in which the court concluded that "ownership of a life insurance policy, such as involved here, does not necessarily entail ownership of the proceeds of that policy.").

14. Advances to directors and officers from the proceeds of a D&O insurance policy do not violate an automatic stay if the proceeds are not estate property. *See Youngstown Osteopathic Hospital Assoc. v. Ventresco (In re Youngstown Osteopathic Hospital Assoc.)*, 271

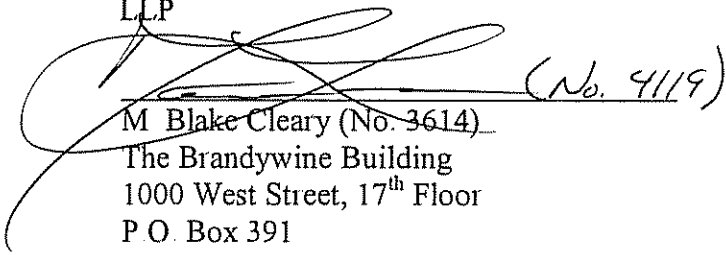
⁴ Compare, for example, *La World Exposition, Inc. v. Fed. Ins. Co. (In re La World Exposition, Inc.)*, 832 F.2d 1391 (5th Cir. 1987) (policy proceeds not property of the estate), *Ochs v. Lipson (In re First Central Fin. Corp.)*, 238 B.R. 9 (Bankr. E.D.N.Y. 1999) (same), and *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413 (Bankr. E.D. Pa. 1995) (policy proceeds property of the estate).

B.R. 544, 547 (Bankr. N.D. Ohio 2002). If a bankruptcy estate does not have any direct interest in the proceeds of an insurance policy, those proceeds are not property of the estate. *See id.* at 548. Moreover, at least one court recently has held that the proceeds of a D&O policy are not the property of an estate because neither the debtor nor the directors or officers have a "property interest in the proceeds . . . unless and until there is a judgment requiring that the insurers issue payment." *Maxwell v. Megliola (In re marchFIRST, Inc.)*, 288 B.R. 526, 530 (Bankr. N.D. Ill. 2002). This is because insurers generally advance policy proceeds under a reservation of rights, which means that the final amount to be paid by an insurer is not determined until the underlying case is resolved. *See id.* Under this reasoning, Greenwich should be permitted to advance "Defense Expenses" pursuant to the terms and conditions of the Policy because they are not property of the estate.

WHEREFORE, subject to the right to subsequently request additional funds, Movants respectfully request that the Court enter an order authorizing Greenwich to initially advance to the individual Movants up to \$7.5 million of "Defense Expenses" in connection with the Pending Litigation and the SEC Investigation.

Dated: May 6, 2003

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ATTORNEYS FOR WILLIAM MARQUARD

EXHIBIT A

Policy Number : ELU 83018-02

☒ Greenview Insurance Company
☐ XL Specialty Insurance Company

Members of the XL America Companies

Renewal of Number

**MANAGEMENT LIABILITY AND
COMPANY REIMBURSEMENT
INSURANCE POLICY DECLARATIONS**Executive Offices
70 Seaview Avenue
Stamford, CT 06902-6040
Telephone 877-953-2636

THIS IS A CLAIMS MADE POLICY. EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS POLICY ONLY APPLIES TO CLAIMS FIRST MADE DURING THE POLICY PERIOD OR, IF APPLICABLE, THE OPTIONAL EXTENSION PERIOD. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS SHALL BE REDUCED AND MAY BE EXHAUSTED BY THE PAYMENT OF DEFENSE EXPENSES. THIS POLICY DOES NOT PROVIDE FOR ANY DUTY BY THE INSURER TO DEFEND ANY INSURED. PLEASE READ AND REVIEW THE POLICY CAREFULLY.

Item 1. Name and Mailing Address of Parent Company:Fleming Companies, Inc.
1945 Lakepointe Drive
Lewisville TX 75057**Item 2. Policy Period:** From: February 5, 2002 To: February 5, 2003
At 12:01AM Standard Time at your Mailing Address Shown Above**Item 3. Limit of Liability:**

\$ \$15,000,000 Aggregate each Policy Period (including Defense Expenses)

Item 4. Retentions:

\$0	each Insured Person under INSURING AGREEMENT I (A)
\$1,500,000	each Claim under INSURING AGREEMENT I (B)
\$1,500,000	each Claim under INSURING AGREEMENT I (C)

Item 5. Optional Extension Period:

Length of Optional Extension Period:

(Either one year or two years after the end of the Policy Period, at the election of the Parent Company)

Premium for Optional Extension Period: One Year \$175% Two Years N/A

Item 6. Pending and Prior Litigation Date: February 5, 2000**Item 7. Notices required to be given to the Insurer must be addressed to:**Executive Liability Underwriters
One Constitution Plaza, 16th Floor
Hartford, CT 06103
Toll Free Telephone: 877-953-2636**Item 8. Premium:**

Total Policy Premium \$1,000,000

Item 9. Policy Form and Endorsements Attached at Issuance:

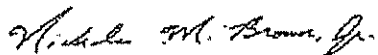
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Countersigned: _____ By: _____
Date Authorized Representative

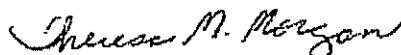
THESE DECLARATIONS AND THE POLICY, WITH THE ENDORSEMENTS, ATTACHMENTS, AND THE APPLICATION SHALL CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE INSURER AND THE INSURED RELATING TO THIS INSURANCE.

In Witness Whereof, the Insurer has caused this Policy to be executed by its authorized officers, but this Policy will not be valid unless countersigned on the Declarations page, if required by law, by a duly authorized representative of the Insurer.

MANAGEMENT LIABILITY AND COMPANY REIMBURSEMENT POLICY DECLARATIONS




Nicholas M. Brown Jr.
President

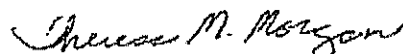


Theresa M. Morgan
Secretary

XL Specialty Insurance Company



Richard J. Callahan
President



Theresa M. Morgan
Secretary

Greenwich Insurance Company

Endorsement No. 1

Effective: February 5, 2002

Named Insured: Fleming Companies, Inc

12:01 A.M. Standard Time

Policy No: ELU 83018-02

Insurer: Greenwich Insurance Company

TEXAS AMENDATORY ENDORSEMENT

1. Clause VI. GENERAL CONDITIONS (C) OTHER INSURANCE AND SERVICE IN CONNECTION WITH NON-PROFIT ENTITIES AND JOINT VENTURES (1) is amended by the addition of the following:

"However, this provision shall not apply to the extent the Loss exceeds the deductible and the limit of liability of such other policy or policies where such Claim is not otherwise excluded by the terms of this Policy."

2. Clause VI. GENERAL CONDITIONS (E) CANCELLATION AND RENEWAL OF COVERAGE (3) is amended by the addition of the following:

"The notice shall state the reason for such nonrenewal. If notice of nonrenewal is delivered or mailed later than the sixtieth (60th) day before the Expiration Date, the Policy's coverage shall remain in effect until the sixty-first (61st) day after the date on which the notice is mailed or delivered. Earned premium for any period of coverage that extends beyond the Expiration Date shall be computed pro rata based on the Policy's current rate. If this Policy is so extended, such period of extended coverage shall be part of and not in addition to the Policy Period."

3. Clause VI. GENERAL CONDITIONS (E) CANCELLATION AND RENEWAL OF COVERAGE is amended by the addition of the following:

"(4) The Insurer shall not refuse to renew this Policy based solely on the fact that the Insurer is an elected official."

Endorsement No. 2

Named Insured: Fleming Companies, Inc

Policy No: ELU 83018-02

Effective: February 2002

12:01 A.M. Standard Time

Insurer: Greenwich Insurance Company

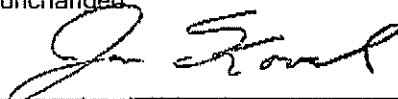
INSURED V. INSURED EXCLUSION

In consideration of the premium charged, Section III. Exclusions (G) is deleted and replaced with the following:

"(G) by, on behalf of, or in the name or right of, the Company or any Insured Person, except and to the extent such Claim:

- (1) is brought derivatively by a security holder of the Company who, when such Claim is made and maintained is acting independently of, and without the active solicitation, assistance, participation or intervention of an Insured Person or the Company;
- (2) any Claim in the form of a crossclaim, third party claim or other claim for contribution or indemnity by an Insured Person which is part of or results directly from a Claim which is not otherwise excluded by the terms of this Policy;
- (3) is an Employment Practices Claim;

All other terms, conditions and limitations of this Policy remain unchanged.



Signature

James Koval

Print Name

Sr. Vice President

Title

DO 80 142 10 01

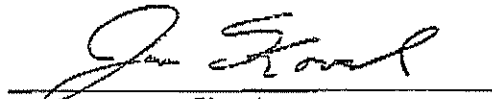
Endorsement No. 3
Named Insured: Fleming Companies, Inc.
Policy No: ELU 83018-02

Effective: February 5, 2002
12:01 A.M. Standard Time
Insurer: Greenwich Insurance Company

AMEND SECTION IV ENDORSEMENT

In consideration of the premium charged, Section IV Limit of Liability, Indemnification and Retentions (F) of the Policy is deleted in its entirety.

All other terms, conditions and limitations of this Policy shall remain unchanged.


Signature

James Koval
Print Name

Sr. Vice President
Title

XL 83 07 01 00

Endorsement No. 4

Named Insured: Fleming Companies, Inc.

Policy No: ELU 83018-02

Effective: February 5, 2002

12:01 A.M. Standard Time

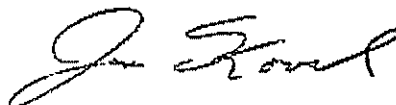
Insurer: Greenwich Insurance Company

SPECIFIED CLAIMS EXCLUSION

In consideration of the premium charged, no coverage will be available under this Policy for Loss, including Defense Expenses, in connection with any proceeding set forth below, or in connection with any Claim based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any such proceeding or any fact, circumstance or situation underlying or alleged therein:

Givoms Funds, Inc., et al v. KLS Management Group, Inc., et al

All other terms, conditions and limitations of this Policy shall remain unchanged.



Signature

James Koval

Print Name

Sr. Vice President

Title

Endorsement No. 5
Named Insured: Fleming Companies, Inc.
Policy No: ELU 83018-02

Effective: February 5, 2002
12:01 A.M. Standard Time
Insurer: Greenwich Insurance Company

FLEMING COMPANIES ENDORSEMENT

In consideration of the premium charged:

- (1) For the purposes of this endorsement, the term "David's Style Lawsuit" means a Claim which contains allegations similar to those which were asserted in the David's Litigation or which contains allegations similar to those which were asserted in any subsequent lawsuit concerning David's Litigation, but shall not include the David's Litigation or any subsequent lawsuit concerning David's Litigation.
- (2) Solely with respect to any David's Style Lawsuit, Item 4 of the Declarations is amended to read in its entirety as follows:

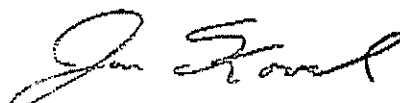
"Item 4. Retentions:

\$0	each Insured Person under INSURING AGREEMENT I (A)
\$7,500,000	each Claim under INSURING AGREEMENT I (B)
\$7,500,000	each Claim under INSURING AGREEMENT I (C)"

With respect to all other Claims, Item 4 shall remain unchanged.

- (3) Section III Exclusions (D) of the Policy shall not apply to David's Style Lawsuits.

All other terms, conditions and limitations of this Policy shall remain unchanged.



Signature

James Koval

Print Name

Sr. Vice President

Title

Manuscript 431 03 02

Endorsement No: 6
Named Insured: Fleming Companies, Inc.
Policy No: ELU 83018-02

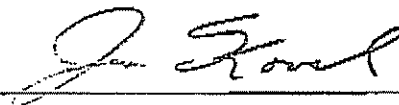
Effective: February 5, 2002
12:01 A.M. Standard Time
Insurer: Greenwich Insurance Company

ADDITIONAL COMPANIES ENDORSEMENT

In consideration of the premium charged:

- (1) The term "Company," as defined in Section II Definitions (D) of the Policy, is amended to include the following entities:
 - (a) Haniel/Scrivner but only in connection with Wrongful Acts committed or allegedly committed on or prior to July 18, 1994;
 - (b) Malone and Hyde but only in connection with Wrongful Acts committed or allegedly committed prior to August 31, 1986 (such Wrongful Acts, "M&H Acts");
 - (c) Godfrey but only in connection with Wrongful Acts committed or allegedly committed prior to November 1, 1986 (such Wrongful Acts, "Godfrey Acts");
 - (d) Bakers Supermarkets but only in connection with Wrongful Acts committed or allegedly committed prior to October 4, 1992 (such Wrongful Acts, "Bakers Acts").
- (2) The maximum aggregate limit of liability for all Claims for M&H Acts shall be \$5,000,000, which amount is included within and not in addition to the maximum aggregate Limit of Liability for this Policy as set forth in Item 3 of the Declarations.
- (3) The maximum aggregate limit of liability for all Claims for Godfrey Acts shall be \$10,000,000, which amount is included within and not in addition to the maximum aggregate Limit of Liability for this Policy as set forth in Item 3 of the Declarations.
- (4) The maximum aggregate limit of liability for all Claims for Bakers Acts shall be \$1,000,000, which amount is included within and not in addition to the maximum aggregate Limit of Liability for this Policy as set forth in Item 3 of the Declarations.

All other terms, conditions and limitations of this Policy shall remain unchanged.



Signature

James Koval

Print Name

Sr. Vice President

Title

DO 82 05 06 00

Endorsement No: 7
Named Insured: Fleming Companies, Inc.
Policy No: ELU 83018-02

Effective: February 5, 2002
12:01 A.M. Standard Time
Insurer: Greenwich Insurance Company

OUTSIDE DIRECTORSHIP LIABILITY ENDORSEMENT

In consideration of the premium charged:

- (1) The term "Non-Profit Entity," as defined in Section II Definitions, is amended to include each of the following for-profit entities:

Abco Markets, Inc.
Furr's Supermarkets
Cecils
David's Asia P.T.E. Ltd.
Transnational Foods P.T.E. Ltd.
Gigante/Fleming and S.A. de C.U.
Nelco Foods Inc. doing business as Foods for Less
Arizona Price Impact LLC
AB/Fleming Northwest LLC

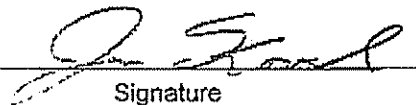
- (2) Section VI General Conditions (C)(2) is amended by deleting said paragraph in its entirety and substituting the following therefor:

"(2) For purposes of determining the coverage available to an Insured Person with respect to one or more Non-Profit Entity(s):

- (a) Loss resulting from any Claim against an Insured Person by reason of such person's service as a director, officer, trustee, regent or governor of a Non-Profit Entity shall be deemed to be payable under Section I Insuring Agreement (B), if indemnification by the Parent Company or such Non-Profit Entity is required by law or is legally permissible, whether or not actual indemnification is made, unless the Parent Company or such Non-Profit Entity is unable to make such indemnification solely by reason of its financial insolvency; and
- (b) The certificate of incorporation, charter, partnership agreement or other organizational and operational documents of the Parent Company and such Non-Profit Entity, including bylaws and resolutions, shall be deemed to provide indemnification to the Insured Person for his or her service with respect to such Non-Profit Entity to the fullest extent permitted by law."

- (3) The Insurer's maximum aggregate Limit of Liability for all Loss, including Defense Expenses, for any Claim against an Insured Person by reason of such person's service as a director, officer, trustee, regent or governor of a Non-Profit Entity shall be \$15,000,000, which amount is included within, and not in addition to the Insurer's maximum aggregate Limit of Liability set forth in ITEM 3 of the Declarations, which is applicable to all Loss from Claims for which this Policy provides coverage.

All other terms, conditions and limitations of this Policy shall remain unchanged.



Signature

James Koval
Print Name

Sr. Vice President
Title

DO 80 147 11 01

Endorsement No: 8
Named Insured: Fleming Companies, Inc.
Policy No: ELU 83018-02

Effective: February 5, 2002
12:01 A.M. Standard Time
Insurer: Greenwich Insurance Company

ADDITIONAL INSURED PERSON(S) ENDORSEMENT

In consideration of the premium charged, the term "Insured Person," as defined in Section II Definitions (J) of the Policy is amended to include the following individual(s):

G. Mealman
G. Austin
W. Lawson, Jr.

All other terms, conditions and limitations of this Policy shall remain unchanged.



Signature

James Koval

Print Name

Sr. Vice President

Title

DO 80 99 02 01

Endorsement No: 9
Named Insured: Fleming Companies, Inc.
Policy No: ELU 83018-02

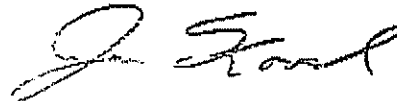
Effective: February 5, 2002
12:01 A.M. Standard Time
Insurer: Greenwich Insurance Company

AMEND ITEM 6 ENDORSEMENT

In consideration of the premium charged, Item 6 of the Declarations is amended to read in its entirety as follows:

"Item 6. Pending and Prior Litigation Date: February 5, 1997"

All other terms, conditions and limitations of this Policy shall remain unchanged.



Signature

James Koval

Print Name

Sr. Vice President

Title

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P. 002

EXECUTIVE LIABILITY UNDERWRITERS**APPLICATION FOR MANAGEMENT LIABILITY INSURANCE
INCLUDING COMPANY REIMBURSEMENT**

NOTICE: THE POLICY FOR WHICH THIS APPLICATION IS MADE APPLIES, SUBJECT TO ITS TERMS, ONLY TO "CLAIMS" FIRST MADE DURING THE POLICY PERIOD. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED BY "DEFENSE EXPENSES," AND "DEFENSE EXPENSES" WILL BE APPLIED AGAINST THE RETENTION. THE INSURER WILL HAVE NO DUTY UNDER THE POLICY TO DEFEND ANY "CLAIM." THE ENTIRE APPLICATION SHOULD BE CAREFULLY READ BEFORE IT IS EXECUTED.

1.
 - a) Name of Applicant: Fleming Companies, Inc.
(Whenever used in this Application, the term "Applicant" shall mean the Parent Company)
 - b) Principal Address: 1945 Lakepointe Drive
City: Lewisville State: TX Zip Code: 75057
 - c) Name and title of the officer of the Applicant designated as the representative to receive all notices from the insurer on behalf of all person(s) and entity(s) proposed for this insurance: Carlton M. Hernandez, Senior Vice President, General Counsel & Secretary
2. Has the Applicant or any Subsidiary in the past thirty-six (36) months completed or agreed to, or does it contemplate within the next (12) months, any of the following, whether or not such transaction was or will be completed? If "Yes," please describe the significant provisions of the transaction(s) as an attachment to this Application.
 - a) Sale, distribution or divestiture of any assets or stock other than in the ordinary course of business in an amount exceeding 25% of the Applicant's consolidated assets? ☐ Yes ☒ No
 - b) Any registration for a public or private placement of securities? See SEC filings and press releases on www.fleming.com ☒ Yes ☐ No
 - c) Merger, acquisition or consolidation with another entity whose consolidated assets exceed 25% of the Applicant's consolidated assets? ☐ Yes ☒ No
 - d) Reorganization or arrangement with creditors under federal or state law? ☐ Yes ☒ No
3. Prior Activities:
 - a) Has any person(s) or entity(s) proposed for this insurance been a party to any of the following?
 - 1) Any antitrust, copyright or patent litigation? ☒ Yes ☐ No
 - 2) Any civil, criminal or administrative proceeding alleging or investigating a violation of any securities or regulation? ☐ Yes ☒ No
 - 3) Any representative actions, class actions or derivative suits? ☒ Yes ☐ No
If "Yes" to 1), 2) or 3) above, a statement to the Application providing full details must be attached.
See SEC filings and press releases on www.fleming.com
 - b) No claims have been made against any persons or entity(s) proposed for this insurance in their capacity as a director or officer of the Applicant, except as follows (provide detail as to defense costs, settlements, judgments, or other amounts). If answer is "none" so state:
Givorns, et al v. Fleming, et al
 - c) No persons or entity(s) proposed for this insurance is cognizant of any fact, circumstance or situation which they have reason to suppose might afford grounds for any claim such as would fall within the scope of the proposed insurance, except as follows. If answer is "none," so state:

Without prejudice to any other rights and remedies of the insurer, any claim arising from any claims, facts, circumstances or situations disclosed or required to be disclosed in response to 3. b) and 3. c) is excluded from the proposed insurance.

EXECUTIVE LIABILITY UNDERWRITERS

4. As part of this Application, please submit the following documents with respect to the Applicant:

- a) Latest 10-Q report filed and any 8-K or 13D reports filed with the SEC within the last 12 months.
- b) Each prospectus, offering circular or private placement memorandum within the last 12 months.
- c) Last proxy statement, 10-K and annual report, including audited financial statements with all notes and schedules.
- d) Copies of all provisions of the Applicant's charter and bylaws relating to the indemnification of its directors and officers.

FOR THE PURPOSE OF THIS APPLICATION, THE UNDERSIGNED AUTHORIZED AGENT OF THE PERSONS AND ENTITY(S) PROPOSED FOR THIS INSURANCE DECLARES THAT TO THE BEST OF THEIR KNOWLEDGE AND BELIEF, AFTER REASONABLE INQUIRY, THE STATEMENTS HEREIN ARE TRUE AND COMPLETE. THE INSURER IS AUTHORIZED TO MAKE ANY INQUIRY IN CONNECTION WITH THIS APPLICATION. SIGNING THIS APPLICATION DOES NOT BIND THE INSURER TO COMPLETE THE INSURANCE.

THE UNDERSIGNED DECLARES THAT THE PERSON(S) AND ENTITY(S) PROPOSED FOR THIS INSURANCE UNDERSTAND:

- (A) THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED, AND MAY BE COMPLETELY EXHAUSTED BY THE PAYMENT OF "DEFENSE EXPENSES," AND IN SUCH EVENT, THE INSURER WILL NOT BE RESPONSIBLE FOR ANY ONGOING DEFENSE EXPENSES OR FOR THE AMOUNT OF ANY JUDGEMENT OR SETTLEMENT TO THE EXTENT THAT ANY OF THE FOREGOING EXCEED ANY APPLICABLE LIMIT OF LIABILITY;
- (B) "DEFENSE EXPENSES" WILL BE APPLIED AGAINST THE RETENTION;
- (C) THIS POLICY APPLIES ONLY TO "CLAIMS" FIRST MADE OR DEEMED MADE DURING THE "POLICY PERIOD," OR, IF PURCHASED, ANY EXTENDED REPORTING PERIOD;
- (D) THE INSURER HAS NO DUTY UNDER THIS POLICY TO DEFEND ANY "CLAIM."

IF THE INFORMATION IN THIS APPLICATION MATERIALLY CHANGES BETWEEN THE DATE OF THIS APPLICATION AND THE POLICY EFFECTIVE DATE, THE APPLICANT WILL NOTIFY THE INSURER WHO MAY MODIFY OR WITHDRAW ANY QUOTATION.

THE INFORMATION CONTAINED AND SUBMITTED WITH THIS APPLICATION IS ON FILE WITH THE INSURER AND, ALONG WITH THE APPLICATION, IS CONSIDERED TO BE PHYSICALLY ATTACHED TO THE POLICY AND WILL BECOME PART OF THE POLICY IF ISSUED.

NOTICE TO COLORADO APPLICANTS: IT IS UNLAWFUL TO KNOWINGLY PROVIDE FALSE, INCOMPLETE, OR MISLEADING FACTS OR INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING OR ATTEMPTING TO DEFRAUD THE COMPANY. PENALTIES MAY INCLUDE IMPRISONMENT, FINES, DENIAL OF INSURANCE, AND CIVIL DAMAGES. ANY INSURANCE COMPANY OR AGENT OF AN INSURANCE COMPANY WHO KNOWINGLY PROVIDES FALSE, INCOMPLETE, OR MISLEADING FACTS OR INFORMATION TO A POLICY HOLDER OR CLAIMANT FOR THE PURPOSE OF DEFRAUDING OR ATTEMPTING TO DEFRAUD THE POLICY HOLDER OR CLAIMANT WITH REGARD TO A SETTLEMENT OR AWARD PAYABLE FROM INSURANCE PROCEEDS SHALL BE REPORTED TO THE COLORADO DIVISION OF INSURANCE WITHIN THE DEPARTMENT OF REGULATORY AGENCIES.

NOTICE TO FLORIDA APPLICANTS: ANY PERSON WHO, KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD, OR DECEIVE ANY EMPLOYER OR EMPLOYEE, INSURANCE COMPANY, OR SELF-INSURED PROGRAM, FILES A STATEMENT OF CLAIM OR AN APPLICATION CONTAINING ANY FALSE OR MISLEADING INFORMATION IS GUILTY OF A THIRD DEGREE FELONY.

NOTICE TO KENTUCKY APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES ANY APPLICATION FOR INSURANCE CONTAINING ANY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THEREYO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME.

NOTICE TO MINNESOTA, OHIO AND ARKANSAS APPLICANTS: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE/SHE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF INSURANCE FRAUD, WHICH IS A CRIME.

NOTICE TO NEW JERSEY APPLICANTS: ANY PERSON WHO INCLUDES ANY FALSE OR MISLEADING INFORMATION ON AN APPLICATION FOR AN INSURANCE POLICY IS SUBJECT TO CRIMINAL AND CIVIL PENALTIES.

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P.004

EXECUTIVE LIABILITY UNDERWRITERS

NOTICE TO NEW YORK APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMBATS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SHALL ALSO BE SUBJECT TO A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS AND THE STATED VALUE OF THE CLAIM FOR EACH SUCH VIOLATION, NO COVERAGE EXISTS FOR CLAIMS FIRST MADE AFTER THE END OF THE POLICY PERIOD UNLESS, AND TO THE EXTENT, THE EXTENDED REPORTING PERIOD APPLIES. UPON TERMINATION OF COVERAGE FOR ANY REASON, A 90-DAY AUTOMATIC EXTENDED REPORTING PERIOD WILL APPLY. FOR AN ADDITIONAL PREMIUM CALCULATED AS INDICATED IN ITEM 5 OF THE DECLARATION, AN EXTENDED REPORTING PERIOD CAN BE PURCHASED FOR A PERIOD OF AT LEAST ONE YEAR. NO COVERAGE WILL EXIST AFTER THE EXPIRATION OF THE EXTENDED REPORTING PERIOD WHICH MAY RESULT IN A POTENTIAL COVERAGE GAP IF PRIOR ACTS COVERAGE IS NOT SUBSEQUENTLY PROVIDED BY ANOTHER CARRIER. DURING THE FIRST SEVERAL YEARS OF CLAIMS MADE RELATIONSHIPS, CLAIMS MADE RATES ARE COMPARATIVELY LOWER THAN OCCURRENCE RATES, AND THE INSURED CAN EXPECT SUBSTANTIAL ANNUAL PREMIUM INCREASES, INDEPENDENT OF OVERALL RATE INCREASES UNTIL THE CLAIMS MADE RELATIONSHIP REACHES MATURITY.

NOTICE TO OKLAHOMA APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE ANY INSURED, MAKES ANY CLAIM FOR THE PROCEEDS OF AN INSURANCE POLICY CONTAINING ANY FALSE, INCOMPLETE OR MISLEADING INFORMATION IS GUILTY OF A FELONY.

NOTICE TO PENNSYLVANIA APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMBATS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SUBJECTS SUCH PERSON TO CRIMINAL AND CIVIL PENALTIES.

Fleming Companies, Inc. by

APPLICANT:

Mark S. Hansen

Mark S. Hansen

Chairman and Chief Executive Officer

02-12-02

BY (Signature of Chairman and/or President)

TITLE

DATE

It is agreed and understood that this Application will only be executed by the Chairman and/or President of the Applicant acting in their capacity(s) as the authorized agent of the individual(s) and entity(s) proposed for this insurance.

PRODUCER (Insurance Agent or Broker):

INSURANCE AGENCY OR BROKERAGE:

INSURANCE AGENCY OR BROKERAGE TAXPAYER ID
OR SOCIAL SECURITY NO.:

AGENT OR BROKER LICENSE NO.:

ADDRESS OF AGENT OR BROKER (Include Street, City, and Zip Code):

E-MAIL ADDRESS OF AGENT OR BROKER:

SUBMITTED BY (Insurance Agency or Brokerage):

INSURANCE AGENCY OR BROKERAGE TAXPAYER ID
OR SOCIAL SECURITY NO.:

AGENT OR BROKER LICENSE NO.:

ADDRESS OF AGENT OR BROKER (Include Street, City, and Zip Code):

EXECUTIVE LIABILITY UNDERWRITERS

A Member of the XL Capital Group of Companies

MANAGEMENT LIABILITY & COMPANY REIMBURSEMENT

Executive Liability Underwriters
One Constitution Plaza
16th Floor
Hartford, CT 06103
Phone: 860-246-1863
Fax: 860-246-1899
www.xlelu.com
email: elusubmissions@xlelu.com

MANAGEMENT LIABILITY AND COMPANY REIMBURSEMENT INSURANCE COVERAGE FORM

THIS IS A CLAIMS MADE POLICY WITH DEFENSE EXPENSES INCLUDED IN THE LIMIT OF LIABILITY. PLEASE
READ AND REVIEW THE POLICY CAREFULLY.

In consideration of the payment of the premium, and in reliance on all statements made and information furnished to Executive Liability Underwriters, the Underwriting Manager for the Insurer identified in the Declarations (hereinafter the Insurer) including the Application and subject to all of the terms, conditions and limitations of all of the provisions of this Policy, the Insurer, the Insured Persons and the Company agree as follows:

I. INSURING AGREEMENTS

- (A) The Insurer shall pay on behalf of the **Insured Persons Loss** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period** or, if applicable, the **Optional Extension Period**, for a **Wrongful Act** or **Employment Practices Wrongful Act**, except for **Loss** which the **Company** is permitted or required to pay on behalf of the **Insured Persons** as indemnification.
- (B) The Insurer shall pay on behalf of the **Company Loss** which the **Company** is required or permitted to pay as indemnification to any of the **Insured Persons** resulting from a **Claim** first made against the **Insured Persons** during the **Policy Period** or, if applicable, the **Optional Extension Period**, for a **Wrongful Act** or **Employment Practices Wrongful Act**.
- (C) The Insurer shall pay on behalf of the **Company Loss** resulting solely from any **Securities Claim** first made against the **Company** during the **Policy Period** or, if applicable, the **Optional Extension Period**, for a **Company Wrongful Act**.

II. DEFINITIONS

- (A) "Application" means:
 - (1) the application attached to and forming part of this Policy; and
 - (2) any materials submitted therewith, which shall be retained on file by the Insurer and shall be deemed to be physically attached to this Policy.
- (B) "Change in Control" means:
 - (1) the merger or acquisition of the **Parent Company**, or of all or substantially all of its assets by another entity such that the **Parent Company** is not the surviving entity;
 - (2) the acquisition by any person, entity or affiliated group of persons or entities of the right to vote, select or appoint more than fifty percent (50%) of the directors of the **Parent Company**; or
 - (3) the appointment of a Receiver, Conservator, Liquidator, Trustee, Rehabilitator, or any comparable authority, with respect to the **Parent Company**.
- (C) "Claim" means:
 - (1) a written demand for monetary or non-monetary relief;
 - (2) any civil proceeding in a court of law or equity, or arbitration;

- (3) any criminal proceeding which is commenced by the return of an indictment; and
- (4) a formal civil, criminal, administrative regulatory proceeding or formal investigation of an **Insured Person** or the **Company** (but with respect to the **Company** only for a **Company Wrongful Act**) which is commenced by the filing or issuance of a notice of charges, formal investigative order or similar document identifying in writing such **Insured Person** or the **Company** as a person or entity against whom a proceeding as described in (C)(2) or (3) above may be commenced, including any proceeding before the Equal Employment Opportunity Commission or any similar federal, state or local governmental body having jurisdiction over any **Employment Practices Wrongful Act**.
- (D) "**Company**" means the **Parent Company** and any **Subsidiary** created or acquired on or before the Inception Date set forth in ITEM 2 of the Declarations or during the **Policy Period**, subject to GENERAL CONDITIONS VI (D).
- (E) "**Company Wrongful Act**" means any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty by the **Company** in connection with a **Securities Claim**.
- (F) "**Defense Expenses**" means reasonable legal fees and expenses incurred in the defense of any **Claim** including the premium for an appeal bond, attachment bond or similar bond but will not include applying for or furnishing such bond. **Defense Expenses** will not include the **Company's** overhead expenses or any salaries, wages, fees, or benefits of its directors, officers or employees.
- (G) "**Employment Practices Wrongful Act**" means any actual or alleged:
- (1) wrongful termination of employment whether actual or constructive;
 - (2) employment discrimination of any kind including violation of any federal, state or local law involving employment or discrimination in employment which would deprive or potentially deprive any person of employment opportunities or otherwise adversely affect his or her status as an employee, because of such person's race, color, religion, age, sex, national origin, disability, pregnancy, or other protected status;
 - (3) sexual or other harassment in the workplace; or
 - (4) wrongful deprivation of career opportunity, employment related misrepresentations, retaliatory treatment against an employee of the **Company**, failure to promote, demotion, wrongful discipline or evaluation, or refusal to hire.
- (H) "**Employment Practices Claim**" means a **Claim** alleging an **Employment Practices Wrongful Act**.
- (I) "**Insured**" means the **Insured Persons** and the **Company**.
- (J) "**Insured Person**" means:
- (1) any past, present or future director or officer, or member of the Board of Managers, of the **Company** and those persons serving in a functionally equivalent role for the **Parent Company** or any **Subsidiary** operating or incorporated outside the United States;
 - (2) any past, present or future employee of the **Company** to the extent any **Claim** is a **Securities Claim**;
 - (3) an individual identified in (J)(1) above who, at the specific written request of the **Company**, is serving as a director, officer, trustee, regent or governor of a **Non-Profit Entity**;
 - (4) any individual identified in (J)(1) above who, at the specific written request of the **Company** is serving in an elected or appointed position having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an **Insured Person** of the **Company**, regardless of the name or title by which such position is designated, of a **Joint Venture**; or

- (5) the lawful spouse of any person set forth in the above provisions of this definition, but only to the extent the spouse is a party to any **Claim** solely in their capacity as a spouse of such persons and only for the purposes of any **Claim** seeking damages recoverable from marital community property, property jointly held by any such person and spouse, or property transferred from any such person to the spouse.

In the event of the death, incapacity or bankruptcy of an individual identified in (J)(1), (2), (3), (4) or (5) above, any **Claim** against the estate, heirs, legal representatives or assigns of such individual for a **Wrongful Act** or **Employment Practices Wrongful Act** of such individual will be deemed to be a **Claim** against such individual.

- (K) **"Interrelated Wrongful Acts"** means any **Wrongful Act**, **Company Wrongful Act**, or **Employment Practices Wrongful Act** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any of the same or related facts, series of related facts, circumstances, situations, transactions or events.
- (L) **"Joint Venture"** means any corporation, partnership, joint venture, association or other entity, other than a **Subsidiary**, during any time in which the **Parent Company**, either directly or through one or more **Subsidiary(s)**:
- (1) owns or controls at least thirty three percent (33%), but not more than fifty percent (50%), in the aggregate of the outstanding securities or other interests representing the right to vote for the election or appointment of those persons of such an entity occupying elected or appointed positions having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an **Insured Person** of the **Company**, regardless of the name or title by which such position is designated, of a **Joint Venture**; or
 - (2) has the right, by contract, ownership of securities or otherwise, to elect, appoint or designate at least thirty three (33%) of those persons described in (L)(1) above.
- (M) **"Loss"** means damages, judgments, settlements or other amounts (including punitive or exemplary damages, where insurable by law) and **Defense Expenses** in excess of the Retention that the **Insured** is legally obligated to pay. **Loss** will not include:
- (1) the multiplied portion of any damage award;
 - (2) fines, penalties or taxes imposed by law; or
 - (3) matters which are uninsurable under the law pursuant to which this Policy is construed.
- NOTE:** With respect to judgments in which punitive damages are awarded, the coverage provided by this Policy shall apply to the broadest extent permitted by law. If, based on the written opinion of counsel for the **Insured**, punitive damages are insurable under applicable law the Insurer will not dispute the written opinion of counsel for the **Insured**.
- (N) **"Non-Profit Entity"** means a corporation or organization other than the **Company**, which is exempt from taxation under Section 501(c)(3), (4) and (10) of the Internal Revenue Code as amended or any rule or regulation promulgated thereunder.
- (O) **"Parent Company"** means the entity named in ITEM 1 of the Declarations.
- (P) **"Policy Period"** means the period from the Inception Date to the Expiration Date set forth in ITEM 2 of the Declarations or to any earlier cancellation date.

(Q) **"Securities Claim"** means a **Claim** made against an **Insured** for:

- (1) any actual or alleged violation of the Securities Act of 1933 as amended, the Securities Exchange Act of 1934 as amended, any similar federal or state statute or any rules or regulations promulgated thereunder; or
- (2) any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty arising from or in connection with the purchase or sale of, or offer to purchase or sell any securities issued by the **Company**, whether such purchase, sale or offer involves a transaction with the **Company** or occurs in the open market.

(R) **"Subsidiary"** means any entity during any time in which the **Parent Company** owns, directly or through one or more **Subsidiary(s)**, more than fifty percent (50%) of the outstanding securities representing the right to vote for the election of such entity's directors.

(S) **"Wrongful Act"** means any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any **Insured Person** while acting in his or her capacity as an:

- (1) **Insured Person** of the **Company** or a person serving in a functionally equivalent role for the **Parent Company** or any **Subsidiary**;
- (2) **Insured Person** of the **Company** who at the specific written request of the **Company** is serving as a director, officer, trustee, regent or governor of a **Non-Profit Entity**; or
- (3) **Insured Person** of the **Company**, who at the specific written request of the **Company** is serving in an elected or appointed position having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an **Insured Person** of the **Company**, regardless of the name or title by which such position is designated, of a **Joint Venture**.

III. EXCLUSIONS

The Insurer shall not be liable to make any payment for **Loss** in connection with any **Claim** made against an **Insured Person**, or with respect to INSURING AGREEMENT (C), the **Company**:

- (A) for any actual or alleged bodily injury, sickness, mental anguish, emotional distress, libel, slander, oral or written publication of defamatory or disparaging material, disease or death of any person, or damage or destruction of any tangible property including loss of use thereof; however, this EXCLUSION (A) will not apply to any allegations of libel, slander, defamation, mental anguish or emotional distress if and only to the extent that such allegations are made as part of an **Employment Practices Claim** for an **Employment Practices Wrongful Act**;
- (B) for any actual, alleged or threatened discharge, dispersal, release, escape, seepage, transportation, emission, treatment, removal or disposal of pollutants, contaminants, or waste of any kind including but not limited to nuclear material or nuclear waste or any actual or alleged direction, request or voluntary decision to test for, abate, monitor, clean up, recycle, remove, recondition, reclaim, contain, treat, detoxify or neutralize pollutants, contaminants or waste of any kind including but not limited to nuclear material or nuclear waste. With respect to a **Claim** made under INSURING AGREEMENT (A) only, this EXCLUSION (B) will not apply to a **Claim** unless a court of competent jurisdiction specifically determines the **Company** is not permitted to indemnify the **Insured Person**;

NOTE: EXCLUSIONS (A) and (B) above will not apply with respect to a **Securities Claim** brought by a security holder of the **Company**, or a derivative action brought by or on behalf of, or in the name or right of, the **Company**, and brought and maintained independently of, and without the solicitation, assistance, participation or intervention of, an **Insured**.

- (C) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged violation of the Employee Retirement Income Security Act of 1974 (ERISA) as amended or any regulations promulgated thereunder or any similar law, federal, state or local law or regulation;
- (D) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act** underlying or alleged in any prior and/or pending litigation or administrative or regulatory proceeding or arbitration which was brought prior to the Pending and Prior Litigation Date set forth in ITEM 6 of the Declarations;
- (E) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act** which, before the Inception Date of this Policy, was the subject of any notice given under any other Management Liability policy, Directors and Officers liability policy or similar policy;
- (F) brought about or contributed to in fact by any:
- (1) intentionally dishonest, fraudulent or criminal act or omission or any willful violation of any statute, rule or law; or
 - (2) profit or remuneration gained by any **Insured** to which such **Insured** is not legally entitled;
- as determined by a final adjudication in the underlying action or in a separate action or proceeding;
- (G) by, on behalf of, or at the direction of the **Company**, except and to the extent such **Claim**:
- (1) is brought derivatively by a security holder of the **Company** who, when such **Claim** is made and maintained, is acting independently of, and without the solicitation, assistance, participation or intervention of an **Insured Person** or the **Company**; or
 - (2) is brought by the Bankruptcy Trustee or Examiner of the **Company** or any assignee of such Trustee or Examiner, or any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the **Company**;
- (H) by, on behalf of, at the direction of or in the name or right of any **Non-Profit Entity or Joint Venture** against an **Insured Person** for a **Wrongful Act or Employment Practices Wrongful Act** while acting in his or her capacity as a director, officer, trustee, regent or governor of such, or persons occupying elected or appointed positions having fiduciary, supervisory or managerial duties and responsibilities comparable to those of an **Insured Person** of the **Company**, regardless of the name or title by which such position is designated; or
- (I) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving an **Insured Person** acting in their capacity as a **Insured Person** of any entity other than the **Company, Non-Profit Entity or Joint Venture**.

No conduct of any **Insured Person** will be imputed to any other **Insured** to determine the application of any of the above EXCLUSIONS.

IV. LIMIT OF LIABILITY, INDEMNIFICATION AND RETENTIONS

- (A) The Insurer shall pay the amount of **Loss** in excess of the applicable Retention(s) set forth in ITEM 4 of the Declarations up to the Limit of Liability set forth in ITEM 3 of the Declarations.
- (B) The amount set forth in ITEM 3 of the Declarations shall be the maximum aggregate Limit of Liability of the Insurer under this Policy. Payment of **Loss**, including **Defense Expenses**, by the Insurer shall reduce the Limit of Liability.

- (C) With respect to the **Company's** indemnification of its **Insured Persons**, the certificate of incorporation, charter, by-laws, articles of association, or other organizational documents of the **Parent Company**, each **Subsidiary** and each **Non-Profit Entity** or **Joint Venture**, will be deemed to provide indemnification to the **Insured Persons** to the fullest extent permitted by law.
- (D) The Retention applicable to INSURING AGREEMENT (B) shall apply to any **Loss** as to which indemnification by the **Company**, **Non-Profit Entity** or **Joint Venture** is legally permissible, whether or not actual indemnification is made unless such indemnification is not made by the **Company**, **Non-Profit Entity** or **Joint Venture** solely by reason of its financial insolvency. In the event of financial insolvency, the Retention(s) applicable to INSURING AGREEMENT (A) shall apply.
- (E) If different retentions are applicable to different parts of any **Loss**, the applicable Retention(s) will be applied separately to each part of such **Loss**, and the sum of such Retention(s) will not exceed the largest applicable Retention set forth in ITEM 4 of the Declarations.
- (F) Notwithstanding the foregoing, solely with respect to a **Securities Claim**, no Retention shall apply to such **Claim** and the Insurer will reimburse those **Defense Expenses** incurred by the **Insured** if:
- (1) the **Securities Claim** is dismissed, or there is a stipulation to dismiss the **Securities Claim**, with or without prejudice and without the payment of any monetary consideration by the **Insured**;
 - (2) there is a final judgment of no liability obtained prior to or during trial, in favor of the **Insured**, by reason of a motion to dismiss or a motion for summary judgment, after the exhaustion of all appeals; or
 - (3) there is a final judgment of no liability obtained after trial, in favor of the **Insured**, after the exhaustion of all appeals.

Any reimbursement in the case of (F)(1), (2), or (3) above will only occur if ninety (90) days after the date of dismissal, stipulation, final judgment of no liability is obtained and only if:

- (a) the same **Securities Claim** (or a **Securities Claim** containing **Interrelated Wrongful Acts**) is not brought again within that time; and
- (b) the **Insured** provides the Insurer with an Undertaking in a form acceptable to the Insurer that such reimbursement of the applicable Retention(s) will be paid back to the Insurer in the event the **Securities Claim** (or a **Securities Claim** containing **Interrelated Wrongful Acts**) is brought after the ninety (90) day period.

V. DEFENSE, SETTLEMENT AND ALLOCATION OF LOSS

- (A) It shall be the duty of the **Insured** and not the duty of the Insurer to defend any **Claim** under this Policy.
- (B) No **Insured** may incur any **Defense Expenses** or admit liability for, make any settlement offer with respect to, or settle any **Claim** without the Insurer's consent, such consent not to be unreasonably withheld.
- (C) Upon the written request of an **Insured**, the Insurer will advance **Defense Expenses** on a current basis in excess of the applicable Retention, if any, before the disposition of the **Claim** for which this policy provides coverage. As a condition of the advancement of **Defense Expenses**, the Insurer may require a written undertaking, in a form satisfactory to the Insurer, which will guarantee the repayment of any **Loss** including **Defense Expenses** paid to or on behalf of the **Insured** if it is finally determined that the **Loss** incurred is not covered under this Policy.
- (D) If both **Loss** covered by this Policy and **Loss** not covered by this Policy are incurred, either because a **Claim** made against the **Insured** contains both covered and uncovered matters, or because a **Claim** is made against both the **Insured** and others (including the **Company** for **Claims** other than **Securities Claims**) not insured

under this Policy, the **Insured** and the Insurer will use their best efforts to determine a fair and appropriate allocation of **Loss** between that portion of **Loss** that is covered under this Policy and that portion of **Loss** that is not covered under this Policy. Additionally, the **Insured** and the Insurer agree that in determining a fair and appropriate allocation of **Loss**, the parties will take into account the relative legal and financial exposures of, and relative benefits obtained in connection with the defense and/or settlement of the **Claim** by, the **Insured** and others.

- (E) In the event that an agreement cannot be reached between the Insurer and the **Insured** as to an allocation of **Loss**, as described in (D) above, then the Insurer shall advance that portion of **Loss** which the **Insured** and the Insurer agree is not in dispute until a final amount is agreed upon or determined pursuant to the provisions of this Policy and applicable law.

VI. GENERAL CONDITIONS

(A) NOTICE

- (1) As a condition precedent to any right to payment under this Policy with respect to any **Claim**, the **Insured** shall give written notice to the Insurer of any **Claim** as soon as practicable after it is first made.
- (2) If, during the **Policy Period**, the **Insured** first becomes aware of a specific **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act** and if, during the **Policy Period**, the **Insured**:
- (a) provides the Insurer with written notice of the specific **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act**, the consequences which have resulted or may result therefrom (including but not limited to actual or potential damages), the identities of the potential claimants, the circumstances by which the **Insured** first became aware of such **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act**; and
- (b) requests coverage under this Policy for any subsequently resulting **Claim** for such **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act**;
- then any **Claim** subsequently made arising out of such **Wrongful Act, Company Wrongful Act or Employment Practices Wrongful Act** will be treated as if it had been first made during the **Policy Period**.
- (3) All notices under GENERAL CONDITIONS (A)(1) and (2) must be sent by certified mail or the equivalent to the address set forth in ITEM 7 of the Declarations; Attention: Claim Department.

(B) INTERRELATED CLAIMS

All **Claims** arising from the same **Interrelated Wrongful Acts** shall be deemed to constitute a single **Claim** and shall be deemed to have been made at the earliest of the time at which the earliest such **Claim** is made or deemed to have been made pursuant to GENERAL CONDITIONS (A)(1) above or GENERAL CONDITIONS (A)(2), if applicable.

(C) OTHER INSURANCE AND SERVICE IN CONNECTION WITH NON-PROFIT ENTITIES AND JOINT VENTURES

- (1) All **Loss** payable under this Policy will be specifically excess of and will not contribute with any other insurance, including but not limited to any insurance under which there is a duty to defend, unless such other insurance is specifically excess of this Policy. This Policy will not be subject to the terms of any other insurance policy.

- (2) All coverage under this Policy for **Loss** from **Claims** made against the **Insured Persons** while acting in their capacity as a director, officer, trustee, regent or governor of a **Non-Profit Entity** or persons occupying elected or appointed positions having fiduciary, supervisory or managerial duties and responsibilities comparable to those of the **Insured Persons** of the **Company**, regardless of the name or title by which such position is designated, of a **Joint Venture** will be specifically excess of and will not contribute with, any other insurance or indemnification available to such **Insured Person** from such **Non-Profit Entity** or **Joint Venture** by reason of their service as such.

(D) **MERGERS AND ACQUISITIONS (CHANGES IN EXPOSURE OR CONTROL)**

- (1) If during the **Policy Period**, the **Company** acquires any assets, acquires a **Subsidiary**, or acquires any entity by merger, consolidation or otherwise, or assumes any liability of another entity, coverage shall be provided for any **Loss** involving a **Claim** for a **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** occurring after the consummation of the transaction.
- (2) If, however, by reason of the transaction (or series of transactions) described in (D)(1) above, the entity, assets, **Subsidiary** or liabilities so acquired or so assumed, exceed thirty five percent (35%) of the total assets or liabilities of the **Company**, as represented in the **Company's** most recent audited consolidated financial statements, coverage under this Policy shall be provided for a period of ninety (90) days for any **Loss** involving a **Claim** for a **Wrongful Act**, **Company Wrongful Act**, or **Employment Practices Wrongful Act** that occurred after the transaction has been consummated. Coverage beyond the ninety (90) day period will be provided only if:
- (a) the Insurer receives written notice containing full details of the transaction(s); and
 - (b) the Insurer at its sole discretion, agrees to provide such additional coverage upon such terms, conditions, limitations, and additional premium that it deems appropriate.
- (3) With respect to the acquisition, assumption, merger, consolidation or otherwise of any entity, asset, **Subsidiary** or liability as described in (D)(1) and (2) above, there will be no coverage available under this Policy for **Claims** made against the acquired, assumed, merged, or consolidated entity, asset, **Subsidiary**, liability, or **Insured Person** for a **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** committed any time during which such entity, asset, liability or **Subsidiary** is not an **Insured**.
- (4) If during the **Policy Period** any entity ceases to be a **Subsidiary**, the coverage provided under this Policy shall continue to apply to the **Insured Persons** who, because of their service with such **Subsidiary**, were covered under this Policy but only with respect to a **Claim** for a **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** that occurred or allegedly occurred prior to the time such **Subsidiary** ceased to be a **Subsidiary** of the **Company**.
- (5) If, during the **Policy Period**, there is a **Change In Control**, the coverage provided under this Policy shall continue to apply but only with respect to a **Claim** against an **Insured** for a **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** committed or allegedly committed up to the time of the **Change In Control**; and
- (a) coverage will cease with respect to any **Claim** for a **Wrongful Act**, **Company Wrongful Act** or **Employment Practices Wrongful Act** committed subsequent to the **Change In Control**; and
 - (b) the entire premium for the Policy will be deemed to be fully earned immediately upon the consummation of a **Change In Control**.

(E) **CANCELLATION AND RENEWAL OF COVERAGE**

- (1) Except for the nonpayment of premium, as set forth in (E)(2) below, the **Parent Company** has the exclusive right to cancel this Policy. Cancellation may be effected by mailing to the Insurer written notice when such cancellation shall be effective, provided the date of cancellation is not later than the Expiration Date set forth in ITEM 2 of the Declarations. In such event, the Insurer shall retain the customary short rate portion of the earned premium. Return or tender of the unearned premium is not a condition of cancellation.
- (2) The Insurer may only cancel this Policy for nonpayment of premium. The Insurer will provide not less than twenty (20) days written notice stating the reason for cancellation and when the Policy will be canceled. Notice of cancellation will be sent to the **Parent Company** and the agent of record for the **Insured**, if applicable.
- (3) The Insurer is under no obligation to renew this Policy upon its expiration. Once the Insurer chooses to non-renew this Policy, the Insurer will deliver or mail to the **Parent Company** written notice stating such at least sixty (60) days before the Expiration Date set forth in ITEM 2 of the Declarations.

(F) **OPTIONAL EXTENSION PERIOD**

- (1) If either the **Parent Company** or the Insurer does not renew this Policy, the **Parent Company** shall have the right, upon payment of an additional premium set forth in ITEM 5 of the Declarations, to an extension of the coverage provided by this Policy with respect only to any **Claim** first made during the period of time set forth in ITEM 5 of the Declarations after the Policy Expiration Date, but only with respect to a **Wrongful Act, Company Wrongful Act, or Employment Practices Wrongful Act**, occurring prior to the Policy Expiration Date.
- (2) As a condition precedent to the right to purchase the Optional Extension Period the total premium for this Policy must have been paid in full. The right of the **Parent Company** to purchase the Optional Extension Period will be immediately terminated if the Insurer does not receive written notice by the **Parent Company** advising it wishes to purchase the Optional Extension Period together with full payment of the premium for the Optional Extension Period within thirty (30) days after the Policy Expiration Date.
- (3) If the **Parent Company** elects to purchase the Optional Extension Period as set forth in (F)(1) and (2) above, the entire premium for the Optional Extension Period will be deemed to be fully earned at the Inception Date for the Optional Extension Period.
- (4) The purchase of the Optional Extension Period will not in any way increase the Limit Of Liability set forth in ITEM 3 of the Declarations, and the Limit of Liability with respect to **Claims** made during the Optional Extension Period shall be part of and not in addition to the Limit of Liability for all **Claims** made during the **Policy Period**.

(G) **ASSISTANCE, COOPERATION AND SUBROGATION**

- (1) The **Insured** agrees to provide the Insurer with all information, assistance and cooperation that the Insurer may reasonably request, and further agree that they will do nothing which in any way increases the Insurer's exposure under this Policy or in any way prejudices the Insurer's potential or actual rights of recovery.
- (2) In the event of any payment under this Policy, the Insurer shall be subrogated to all of the potential or actual rights of recovery of the **Insured**. The **Insured** shall execute all papers required and will do everything necessary to secure such rights including but not limited to the execution of such documents as are necessary to enable the Insurer to effectively bring suit in their name, and will provide all other assistance and cooperation which the Insurer may reasonably require.

(H) EXHAUSTION

If the Insurer's Limit of Liability as set forth in ITEM 3 of the Declarations is exhausted by the payment of **Loss**, the premium as set forth in ITEM 8 of the Declarations will be fully earned, all obligations of the Insurer under this Policy will be completely fulfilled and exhausted, and the Insurer will have no further obligations of any kind whatsoever under this Policy.

(I) REPRESENTATION CLAUSE

The **Insured** represents that the statements and particulars contained in the **Application** as well as any prior application submitted to the Insurer are true, accurate and complete, and agree that this Policy is issued in reliance on the truth of that representation, and that such particulars and statements, which are deemed to be incorporated into and constitute a part of this Policy, are material to the risk assumed and form the basis of this Policy. No knowledge or information possessed by any **Insured** will be imputed to any other **Insured** except for material facts or information known to the person(s) who signed the **Application**. In the event that any of the particulars or statements in the **Application** are untrue, this Policy will be void with respect to any **Insured** who knew of such untruth or to whom such knowledge is imputed.

(J) ACTION AGAINST THE INSURER, ASSIGNMENT, AND CHANGES TO THE POLICY

- (1) No action may be taken against the Insurer unless, as a condition precedent thereto:
 - (a) there has been full compliance with all of the terms and conditions of this Policy; and
 - (b) the amount of the obligation of the **Insured** has been finally determined either by judgment against the **Insured** after actual trial, or by written agreement of the **Insured**, the claimant and the Insurer.
- (2) Nothing contained herein shall give any person or entity any right to join the Insurer as a party to any **Claim** against the Insurer to determine their liability, nor may the **Insured** implead the Insurer in any **Claim**.
- (3) Assignment of interest under this Policy shall not bind the Insurer unless its consent is endorsed hereon.
- (4) Notice to any agent or knowledge possessed by any agent or other person acting on behalf of the Insurer will not cause a waiver or change in any part of this Policy or prevent the Insurer from asserting any right under the terms, conditions and limitations of this Policy. The terms, conditions and limitations may only be waived or changed by written endorsement.

(K) AUTHORIZATION AND NOTICES

It is understood and agreed that the **Parent Company** will act on behalf of the **Company** and the **Insured Persons** with respect to:

- (1) the payment of the premiums;
- (2) the receiving of any return premiums that may become due under this Policy;
- (3) the giving of all notices to the Insurer as provided herein; and
- (4) the receiving of all notices from the Insurer.

(L) **ENTIRE AGREEMENT**

The **Insured** agrees that the Declarations, Policy, including the endorsements, attachments and the **Application** shall constitute the entire agreement between the Insurer or any of its agents and the **Insured** relating to this insurance.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

_____)	
In re:)	Chapter 11
)	
Fleming Companies, Inc , et al ,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
_____)	Ref. Docket No.

**ORDER GRANTING MOTION TO LIFT THE AUTOMATIC STAY
TO PERMIT ADVANCEMENT OF CERTAIN DEFENSE EXPENSES**

Upon consideration of the Motion to Lift the Automatic Stay to Permit Advancement of Certain Defense Expenses filed by Movants;¹ after reviewing the Motion and all other relevant pleadings filed in this case; and after finding that, under the circumstances, due notice of the Motion and an opportunity to be heard thereon has been given; and after due deliberation and sufficient cause appearing therefore, it is hereby

ORDERED that the Motion is granted; and it is further

ORDERED that Greenwich Insurance Company is authorized to advance to the individual Movants up to \$7.5 million of Defense Expenses in connection with the Pending Litigation and the SEC Investigation; and it is further

ORDERED that nothing in this Order shall be deemed to prejudice Movants' rights to request additional funds at a later date.

Dated: May _____, 2003

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

¹ All defined terms not defined herein shall have the meaning ascribed to them in the Motion