

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

In re:)	Chapter 11
)	
Fleming Companies, Inc., et al.,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Objections Due: 9/25/2003 at 4:00 p.m.
)	Hearing Date: 10/02/2003 at 2:00 p.m.
)	

**MOTION OF GLOBAL INTERFACE SOLUTIONS, INC. TO COMPEL
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM
AND CURE CLAIM UNDER 11 U.S.C. §§ 503(b)(1)(A) AND 365(b)**

Global Interface Solutions, Inc. ("Global") moves for allowance and payment of its administrative expense claim and cure claim.

FACTUAL BACKGROUND

1. Global licenses data center maintenance software. This software is not an application for end-users; rather, it runs on a server or mainframe computer to help the data center run more efficiently. Typically, the software is customized for the customer's needs and becomes an integral part of the data center.

2. Global and debtor Fleming Companies, Inc. ("Fleming") entered into a three-year license agreement for Global's software (the "Software") effective as of June 1, 1999. The parties renewed the license agreement for an additional three-year term effective as of June 1, 2002. The software license agreement (the "Agreement"), with all amendments, is attached as Exhibit A.

3. Under the Agreement, the annual license fee of \$49,000, plus any applicable taxes, is due at the beginning of each year of the three-year term, i.e., by May 31, 2002, May 31, 2003 and May 31, 2004.

4. Fleming filed for bankruptcy on April 1, 2003. Subsequently, Global sent Fleming an invoice (the "Invoice", Exhibit B) for the second annual license fee, including taxes, of \$53,103.75.

5. Global then contacted Fleming to inquire whether Global had to engage counsel or file any pleadings to be paid on the Invoice. Fleming told Global that Global was a post-petition creditor, that no motion would be required and that Fleming would timely pay the Invoice.

6. After a number of phone calls and letters, Fleming finally informed Global that "the check was in the mail." However, despite this further reassurance, the check had not arrived within two weeks after Fleming claimed to have mailed it.

7. A check in the amount of \$53,103.75 (the "Check") finally arrived on or about July 24, 2003. A copy of the Check is attached as Exhibit C.

8. Global then attempted to deposit the Check; however, Fleming had issued a stop-payment order on the Check and the Check never cleared.

9. Global then contacted Fleming for an explanation. Fleming told Global that it had issued a stop-payment order on the Check because Fleming thought that the Check had been lost in the mail. Fleming assured Global that it would issue a replacement check.

10. Fleming never sent Global a replacement check and the Invoice remains unpaid.

11. On or about July 24, 2003, Global received a "Notice Re: Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with Sale Motion" (the "Notice," Exhibit D).¹ The Notice states that the cure amount under the Agreement is \$0. The Notice also states that objections to the proposed cure amount were due on July 28, 2003.

12. As of the objection deadline--approximately four days after Global received the Notice--Global had received the Check and had sent the Check to its bank for deposit. However, Global did not know at that time that the Check would be dishonored.

13. After the objection deadline in the Notice had passed, a Fleming accounts payable clerk told Global that Fleming was selling its assets and would not pay the Invoice. Global's subsequent phone calls to Fleming's management were not returned.

14. During the entire post-petition period, Fleming has continued to use the Software without having paid for it in violation of federal copyright laws. See records of requests for assistance from Fleming to Global, Exhibit E.

RELIEF REQUESTED AND REASONS THEREFOR

A. Global Is Entitled to Allowance and Payment of Its Administrative Claim

15. Section 503(b)(1)(A) of title 11 of the United States Code provides that an administrative expense claim shall be allowed for "the actual, necessary costs and expenses of preserving the estate."

16. Under the Agreement, the Invoice became due for continued use of the Software on May 31, 2003.

17. Despite repeated promises that it would pay for the Invoice, Fleming has continued and is continuing to use the Software without having paid the license fee in violation of the Agreement and federal copyright laws.

18. Fleming's continuing use of the Software is plainly beneficial to the estate in that it is an integral part of the Debtors' data center without which the Debtors, or any purchaser of the

¹ The docket shows that service of the Notice, including the cure schedule, was made on July 19, 2003.

Debtors' assets, could not operate. In fact, the Software cannot be removed without shutting down the data center.

19. Accordingly, Global is entitled to allowance and payment of an administrative claim under 11 U.S.C. § 503(b)(1)(A) in the amount of the Invoice.

20. In addition, Global should be awarded legal fees under Section G of the Agreement, particularly in light of the facts that (i) Fleming repeatedly reassured Global that it would pay the Invoice without the necessity of filing a Motion, (ii) Fleming issued a check to Global which was later dishonored and (iii) Fleming is continuing to use the software without payment.

21. Additionally, if Fleming intends to assign Agreement to the purchaser of its assets, the Invoice must be paid to cure the amount due under the Agreement pursuant to 11 U.S.C. § 365(b).

22. Moreover, Global's claim should not be disallowed due to the mere fact that Global did not object to the Notice. As of the objection deadline in the Notice, Global had received the Check and had no reason to believe that the Check would not clear. Global was not at fault for not objecting to the Notice.

23. Furthermore, Global is entitled to prompt payment of the Invoice. As there is no apparent evidence of a risk of administrative insolvency in this case, there is no risk that the payment of the Invoice would have any adverse effect on the Debtors' estates.

24. Finally, if Fleming decides to assume the Agreement, the Invoice must be paid promptly as a condition of assumption under 11 U.S.C. § 365(b).

B. At Most, the Fact That Global Did Not Respond to the Notice Was a Byproduct of Excusable Neglect.

25. Fed. R. Bankr. P. 9006(b)(1)(2) provides that, except as to certain circumstances not present here, "when an act is required or allowed to be done at or within a specified period by

these rules or by a notice given thereunder or by order of court, the court for cause shown may . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.”

26. The Supreme Court in Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993) articulated a test for determining whether “excusable neglect” exists under Rule 9006(b):

Because Congress has provided no other guideposts for determining what sorts of neglect will be considered “excusable,” we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer Investments Services, 507 U.S. at 395.

27. The Court in Pioneer held that another factor that should be considered is whether the pertinent legal notice is “prominently announced and accompanied by an explanation of its significance.” Id. at 398.

28. Following Pioneer, the Court of Appeals for the Third Circuit in In re O’Brien Environmental Energy, Inc., 188 F.3d 116 (3d Cir. 1999) reversed the decisions of the Bankruptcy Court and District Court that held that an administrative claimant had not shown “excusable neglect.” The Court held that the mere fact that the debtor had not accounted for the claim was insufficient to show prejudice under Pioneer stating that “prejudice is not an imagined or hypothetical harm; a finding of prejudice should be a conclusion based on facts in evidence.” In re O’Brien, 188 F.3d at 127. In determining whether prejudice exists, the Court looked to “the size of the claim with respect to the rest of the estate; whether allowing the late claim would

have an adverse impact on the judicial administration of the case; whether the plan was filed or confirmed with knowledge of the existence of the claim; the disruptive effect that the late filing would have on the plan or upon the economic model upon which the plan was based; and whether allowing the claim would open the floodgates to other similar claims.”

29. The Court in O’Brien proceeded to analyze the concept of excusable neglect. The Court reasoned that the concept embraced conduct involving a lack of care by the claimant. Id. at 128. See also In re The Grand Union Company, 204 B.R. 864 (Bankr. D. Del. 1997) (excusable neglect found where claimants did not effectively communicate with their counsel concerning the bar date notice).

30. Global’s actions were not the result of *any* neglect on its part — excusable or otherwise — but its reasonable reliance on the Fleming’s repeated representations that the Invoice would be paid. To the extent that the Court finds otherwise, such neglect was excusable. As of the objection deadline in the Notice, Global had received the Check and had no reason to think that the Check would be dishonored or that Fleming had decided not to pay. There was therefore no reason for Global to believe that the stated cure amount of “zero” in the Notice was wrong. It was only later that Global found out that Fleming had made a stop-payment order on the Check. Even then, Global assured Fleming that it would send a replacement check and that the Invoice would be paid — just as it had done from the very beginning of this bankruptcy case. Any neglect by Global was plainly excused due to Global’s reasonable reliance on Fleming’s statements and conduct.

31. Moreover, Fleming would not be prejudiced by allowing Global’s claim, which is miniscule compared to the size of the Debtors’ estates. In addition, as this is a liquidating chapter 11 case, there is no business plan or economic models that could be affected by payment

of the Invoice. Finally, there is no evidence that payment of the Invoice would open floodgates of similar claims.

WHEREFORE, Global moves this Court for entry of an order, substantially in the form attached, (i) allowing the amount of the Invoice, plus attorneys' fees associated with the Motion, as a cost of administration under 11 U.S.C. § 503(b)(1)(A), (ii) requiring payment of the Invoice, plus attorneys' fees associated with the Motion, as a condition of the assumption or assignment of the Agreement under 11 U.S.C. § 365(b), (iii) directing Debtors to pay the Invoice promptly and (iv) granting such other and further relief as this Court deems just and proper.

Dated: September 12, 2003

/s/ Christopher D. Loizides
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