

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

In re:	§	Chapter 11
	§	Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., <u>et al.</u>	§	(Jointly Administered)
	§	
Debtors.	§	<b>Hearing: Oct. 20, 2003 @ 2:00 p.m.</b>
		<b>Objections Due: Oct. 13, 2003 @ 4:00 p.m.</b>

**MOTION OF GRAND ISLAND PROPERTIES, LLC  
TO COMPEL PAYMENT OF POST-PETITION LEASE OBLIGATIONS  
AND FOR OTHER RELATED RELIEF**

Grand Island Properties, LLC ("Grand Island" or "Landlord"), by and through its undersigned counsel, hereby moves for an order, pursuant to 11 U.S.C. § 365(d)(3), compelling the immediate payment of post petition taxes and requiring proof of insurance (the "Motion"). In support of the Motion, the Landlord respectfully states as follows:

**Background**

1. On April 1, 2003 (the "Petition Date"), Fleming Companies, Inc. and its debtor affiliates (collectively, the "Debtors" or "Fleming") each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Thereafter, this Court entered an order directing the joint administration of the Debtors' chapter 11 cases (the "Bankruptcy Cases").

2. The Debtors have continued in possession of their property and have continued to operate and manage their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. Grand Island is the owner of the property located at 1602 West 2<sup>nd</sup> Street, Grand Island, NE (the “Property”). Prior to the Petition Date, Grand Island entered a lease for the Property to an entity, which was later acquired by Fleming (the “Lease”).

4. Pursuant to Section 6.3 the Lease, the Lessee is required to pay all real estate taxes levied upon the Property. The Lease further provides: “Should the Lessor receive any notices as to any such tax, it will promptly deliver or mail the notices to Lessee for payment and Lessee shall not be required to make any payment sooner than the earlier to occur of (i) 30 days after notice thereof was delivered or mailed to Lessee by Lessor and (ii) the due date of such tax.” Section 6.3 (relevant sections of the Lease are attached hereto as Ex. A).

5. Pursuant to Section 9.1 of the Lease, the Lessee is required to carry, at its own expense, property and liability insurance, as well as other types of insurance. The current policy on the Property expired October 1, 2003.

### **Relief Requested**

6. The Hall County Treasurer has assessed real property taxes against the Property for the 2002 tax year (Copy of the tax bill is attached as Exhibit B). The taxes are payable in two installments. The Debtors have paid the first installment, but have failed to pay the second installment of \$26,038.68. Grand Island sent a notice of the taxes to Fleming on March 24, 2003. Grand Island contacted Fleming in April and was advised that it had not received the notice. The notice was then sent by certified mail on April 24. Thus, under the Lease, the Debtor did not have

an obligation to pay the taxes until 30 days after the notice was sent, or May 24, 2003.<sup>1</sup> Grand Island seeks an order compelling payment of the outstanding taxes.

7. Grand Island also seeks to compel the Debtors to comply with Section 9.1 of the Lease and provide proof of insurance with Grand Island and its mortgagee as additional insureds.

### **Authority for Relief Requested**

8. 11 U.S.C. § 365(d)(3) requires the debtor in possession to timely perform all post-petition obligations under any unexpired lease of nonresidential real property until such lease is assumed or rejected. The intent of Section 365(d)(3) is to require the debtor to perform the lease in accordance with its terms. *Montgomery Ward Holding, Corp.*, 268 F.3d 205 (3<sup>rd</sup> Cir. 2001). Thus, the debtor must comply with lease obligations as they become due after the petition date.

9. Under the terms of the Lease, the Debtors were not legally obligated to pay the taxes until 30 days after the notice was sent (that is not until May 24, 2003). Thus, the obligation arose post-petition and must be paid under section 365(d)(3). *See, Montgomery Ward*, 268 F.3d at 209.

10. The Lease also requires the Debtors to keep the Property properly insured. As the current policy has expired as of October 1, 2003, as far as Grand Island has been informed, the Debtor is required to provide proof of proper insurance.

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<sup>1</sup>Pursuant to Article XVI of the Lease, notice is required to be by certified mail, overnight delivery or hand delivery. Thus, the April 24<sup>th</sup> notice was effective under the Lease.

WHEREFORE, Grand Island requests the entry of an order (i) directing the Debtors to immediately pay the outstanding taxes, (ii) directing the Debtors to provide proof of insurance and, (iii) granting such other and further relief as is just and proper.

Dated: October 2, 2003

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