

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

In re:	)	Chapter 11
	)	
Fleming Companies, Inc., <u>et al.</u> ,	)	Case No. 03-10945 (MFW)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	<b>Objection Deadline: December 18, 2003</b>
	)	<b>Hearing Date: December 23, 2003 @ 2:00 p.m.</b>
	)	

**MOTION OF BRADFORD PLAZA INVESTMENT GROUP, LLC  
FOR AN ORDER AUTHORIZING AND DIRECTING THE PRODUCTION  
OF DOCUMENTS FROM AND ORAL EXAMINATIONS BY DEPOSITION  
OF FLEMING COMPANIES, INC., C&S WHOLESALE GROCERS, INC.  
AND WHITE ROSE, PURSUANT TO FED. R. BANKR. P. 2004**

Bradford Plaza Investment Group, LLC, a creditor and landlord of the Debtors (the “Landlord”) in the above-referenced cases, by and through its undersigned counsel, Klehr, Harrison, Harvey, Branzburg & Ellers LLP, hereby moves (the “Motion”) this Court, pursuant to Fed. R. Bankr. P. 2004 for an order authorizing and directing the production of documents from and oral examinations by deposition of the Fleming Companies, Inc. (“Fleming”), C&S Wholesale Grocers, Inc. (“C&S”) and White Rose (“White Rose”, and collectively with Fleming and C&S the “Respondents”). In support of this Motion, the Landlord respectfully represents as follows:

**JURISDICTION**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. The subject matter of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this District pursuant to 28 U.S.C. § 1408. The predicates for the relief requested herein are 11 U.S.C. § 105 and Rule 2004 of the Federal Rules of Bankruptcy Procedure.

## BACKGROUND

2. On April 1, 2003 (the “Petition Date”), Fleming and certain of its affiliates (collectively the “Debtors”) filed respective voluntary petitions for reorganization pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). Since the Petition Date, the Debtors have continued to operate their businesses and manage their properties as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

3. No trustee or examiner has been appointed herein.

4. On August 15, 2003, this Court entered an order (the “Sale Order”) approving a certain asset purchase agreement by and among Fleming, C&S and certain other parties and authorizing the sale of substantially all of Fleming’s assets relating to its wholesale distribution business free and clear of liens, claims, encumbrances and interests [Docket No. 1906]. Upon information and belief, pursuant to the Sale Order, the purchaser was permitted to designate certain of Fleming’s unexpired leases for rejection or assumption and assignment to third party assignees.

5. The Landlord is the owner of the East Bradford Shopping Center located in East Bradford, Pennsylvania (the “Premises”). The Premises is a “shopping center” within the meaning of § 365(b)(3) of the Bankruptcy Code.

6. Fleming leases a retail grocery store located in the Premises pursuant to a nonresidential real property lease drafted June 21, 1989 (the “Lease”) and, in turn, subleases the store to an entity known as Giunta’s Market, Inc. (“Giunta’s”).

7. Pursuant to the *Notice of Fleming Companies, Inc. of Proposed Assumption and Assignment of Lease of Non-Residential Real Property*, filed on November 20, 2003 [Docket No. 4537] (the “Assignment Notice”), Fleming is seeking an order of this Court authorizing it to assume and assign the Lease of the Premises to Giunta’s.

8. On November 28, 2003, the Landlord filed an Objection to the Assignment Notice as it pertained to the proposed assumption and assignment of Lease [Docket No. 4628].

9. The Landlord has entered into an agreement in principle with a national grocery retailer to commence operations at the Premises, subject only to the Landlord's ability to recover the retail location which is presently subject to the Lease. In this regard, the Landlord has previously notified both Fleming and Giunta's of its strong preference for Fleming to reject, rather than to assume and assign the Lease in order that the Landlord can redevelop the Premises and install a new, substantially more qualified tenant therein.

10. The Landlord's ability to implement this strategy is critical to the present and future viability of the Premises in that, among other reasons, the current subtenant – Giunta's – does not meet current market standards for the operation of a retail grocery store and lacks the capital or financial resources to upgrade its operations to be competitive, and to make the Premises competitive, in the marketplace.

11. In contrast, the proposed new tenant will expend the resources necessary to upgrade the current retail location and will serve as a viable anchor tenant around which the Premises will be redeveloped.

12. This business strategy is essential to the Landlord in view of the substantial recent commercial development in the immediate vicinity of the Premises, which has operated and will continue to operate to exert competitive pressure on the Premises as consumers migrate to adjacent shopping centers. The effects of these competing developments will have a material adverse effect on the Premises, and the Landlord will suffer if it cannot redevelop the property with a stronger anchor tenant than Giunta's.

13. Further, the Landlord will be substantially and irreparably injured to the extent that the proposed Lease assignment is approved since Giunta's is simply unable to implement the necessary upgrades to its location to keep the Premises competitive in what is already a challenging consumer marketplace.

14. Upon information and believe, C&S is not serving, and has no intention to serve in the future, as the wholesale distributor of to Giunta's. Accordingly, the designation by C&S of the Lease for assumption by the Debtors and assignment to Giunta's makes no economic sense. Moreover, upon information and belief, the Debtor is not receiving any consideration in connection with the proposed assumption and assignment of the Lease to Giunta's.

15. As a result, the Landlord believes that the designation of the Lease for assumption and assignment is informed by a deal between C&S and White Rose – one that has not be disclosed to the Landlord or other parties in interest in this proceeding – which has no economic or other benefit to the Debtors', their creditors or these estates.

16. The Landlord has requested but has failed to obtain any information concerning (a) financial information relating to Giunta's which would demonstrate that entity's ability to provide adequate assurance of future performance under the Lease in the future, (b) the agreements between the Debtors' and C&S which describe the economic benefit, if any, to the Debtors' estates of the proposed assumption and assignment of the Lease, and/or (c) the agreements between the C&S and White Rose which relate to the proposed Lease assignment. This latter category of documents is essential to the Landlord in that, upon information and belief, White Rose is in fact Giunta's wholesale inventory distributor and is surreptitiously directing the designation by C&S with respect to the assumption and assignment of the Lease. If

true, this situation effectively creates a mechanism whereby a party who has not received approval from this Court to exercise lease designation rights is nevertheless doing so sub rosa.

**RELIEF REQUESTED**

17. By this Motion, the Landlord seeks an order pursuant to Bankruptcy Rule 2004, authorizing and directing the Respondents to produce the documents specified in the Document Requests attached hereto and incorporated herein as Exhibit “B”. The Landlord requests the production of relevant documents within ten (10) days after the entry of an order granting this Motion, at the offices of Klehr, Harrison, Harvey, Branzburg & Ellers LLP, 260 South Broad Street, Philadelphia, PA 19102-5003.

18. Additionally, the Landlord requests that this Court authorize the Landlord to conduct depositions of witnesses designated by the Respondents under Fed. R. Civ. P. 30(b)(6).

**GROUND FOR RELIEF**

19. The subject matter of this Motion is related “to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or . . . affect the administration of the Debtor’s estate . . . .” Fed. R. Bankr. P. 2004(b). The Rule 2004 production and examination sought by the Landlord is an appropriate means for the Landlord to determine whether Fleming and Giunta’s can meet their burden for the Lease to be assigned to Giunta’s under 11 U.S.C. § 365(b)(3).

20. Bankruptcy Rule 2004 provides this Court with the necessary authority to order the production of documents. Rule 2004 provides, in relevant part, as follows:

(a) **Examination on Motion.** On motion of any party in interest, the court may order the examination of any entity.

(b) **Scope of Examination.** The examination of an entity under this rule . . . may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any

matter which may affect the administration of the debtor's estate . . . . In a . . . case under chapter 11 of the Bankruptcy Code, . . . the examination may also relate to . . . the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

**(c) Compelling Attendance and Production of Documentary Evidence.** The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

Fed. R. Bankr. P. 2004(a)-(c).

21. The scope of inquiry under Bankruptcy Rule 2004 is intended to be very broad and permits the party invoking it a great latitude of inquiry, in the nature of a “fishing expedition.” In re Valley Forge Plaza Associates, 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990); In re Fearn, 96 B.R. 135, 137-38 (Bankr. S.D. Ohio 1989); In re GHR Energy Corp., 33 B.R. 451, 453 (Bankr. D. Mass. 1983) (scope of examination under Rule 2004 is “unfettered and broad”).

22. Requests for examination under Bankruptcy Rule 2004 are routinely granted by this Court. See e.g., In re Starter Corp., Case No. 99-906 (PJW) (June 22, 1999 Order); In re Montgomery Ward, Case No. 97-1409 (PJW) (December 8, 1997 Order); In re Color Tile, Inc., Case No. 96-76 (HSB) (March 22, 1996 Order); In re SLM Int'l, Inc., Case No. 95-1313 (HSB) (January 10, 1996 Order); In re DG Acquisition Corp, et al., Case Nos. 92-1492 through 92-1496 (HSB) (March 9, 1995 Order); In re Everett P. Priestly, Case No. 94-621 (PJW) (August 16, 1994 Order); In re Bill's Dollar Stores, Inc., Case No. 93-808 (PJW) (February 25, 1994 Order).

23. Under the circumstances presented, the Landlord is entitled to examine the Respondents. The requested discovery relates directly to: (a) the transactions between the Respondents as they relate to the Lease and the Premises, (b) the post-petition sale of Fleming's distribution business to C&S, (c) agreements or understandings between C&S and White Rose as

they relate to the Lease and Premises, and (d) other matters relevant to the estates' claims and property rights in these cases. Thus, the need for the requested discovery meets the standards courts have implemented under Bankruptcy Rule 2004.

24. The Landlord anticipates that it may be necessary to request the production of additional documents, and/or the depositions of additional persons and/or entities at a later time, depending on what the requested discovery reveals. The Landlord expressly reserves the right to make any additional requests regarding the issues set forth herein or any other issues, as necessary and appropriate, pursuant to Bankruptcy Rule 2004.

25. No previous application or motion for the relief sought herein has been made to this or any other Court.

#### **CERTIFICATION OF COUNSEL**

26. Pursuant to Bankruptcy Local Rule 2004-1(b), the undersigned certifies that the Committee, through its counsel, attempted to obtain the discovery sought herein on a consensual basis, as reflected in Exhibit "A". As of the date hereof, the undersigned has not received a commitment from any of the Respondents to produce such evidence in a timely manner and therefore an agreement could not be reached.

27. Under these circumstances, the matters requested in this motion are appropriate and within the scope of Rule 2004.

WHEREFORE, the Landlord respectfully requests the Court to enter an order:

- (a) permitting it to proceed with the requested discovery;
- (b) directing each of the Respondents to turn over the requested documents within ten (10) days of the entry of the order;

(c) and grant such other and further relief as the Court deems just and proper.

Respectfully Submitted,

Dated: December 12, 2003

KLEHR, HARRISON, HARVEY,  
BRANZBURG & ELLERS LLP

By: /s/ Jennifer L. Scoliard  
Jeffrey Kurtzman, Esquire  
Jennifer L. Scoliard, Esquire (# 4147)  
919 Market Street, Suite 1000  
Wilmington, Delaware 19801  
(302) 552-5510 (telephone)  
(302) 426-9193 (fax)

Counsel for Bradford Plaza Investment  
Group, LLC