

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)
)	
Debtor.)	Jointly Administered

**REQUEST OF INLAND PARK SQUARE, LLC FOR ALLOWANCE
AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO SECTIONS
365(D)(3), 503(B)(1)(A) AND 507(A)(1) OF THE BANKRUPTCY CODE**

Inland Park Square, LLC (“Inland”), by and through its undersigned counsel, hereby requests that this Court enter an order that allows its administrative expense claim pursuant to sections 365(d)(3), 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code (the “Request”), and that directs the above-captioned debtors and debtors-in-possession (the “Debtors”) to pay such claim. In support thereof, Inland respectfully represents as follows:

Background

1. On or about April 1, 2003 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). Upon information and belief, the Debtors are currently operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. Prior to the Petition Date, one of the Debtors, Fleming Companies, Inc., as tenant, entered into a lease (the “Lease”) with a predecessor of Inland Park Square, LLC (“Inland”), as landlord, for certain non-residential real property located at 8020 Brooklyn Boulevard, Brooklyn Park, Minnesota (the “Premises”), at which the Debtors operated their store no. 184. Pursuant to the Lease, the Debtors were required to pay Inland rent every month. In addition, under the Lease, the Debtors

were responsible for paying real estate taxes and charges for common area maintenance of the Premises (“CAM”) that accrued on the Premises when such charges become due under the Lease.

3. On or about October 30, 2003, the Debtors filed a Motion for Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property (the “Motion”), which was granted by the Court on November 25, 2003 (the “Rejection Order”). Pursuant to the Rejection Order, the Lease was deemed rejected as of October 31, 2003 (the “Rejection Date”).

4. The Debtors did not pay Inland the full amounts due under the Lease from the Petition Date through the Rejection Date. A summary of the unpaid post-petition, pre-rejection charges due under the Lease is attached hereto as Exhibit A.

Relief Requested

5. By this Request, Inland respectfully requests that this Court enter an order that allows its claim for unpaid post-petition amounts due under the Lease (the “Claim”) as an administrative expense claim pursuant to sections 365(d)(3), 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code. In addition, Inland respectfully requests that this Court enter an order that directs the Debtors to immediately pay the Claim to Inland.

Basis for Relief

6. Section 365(d)(3) of the Bankruptcy Code provides that a debtor-in-possession shall timely perform all the obligations of the debtor arising from and after the petition date under any unexpired lease of nonresidential real property until such lease is assumed or rejected. See 11 U.S.C. § 365(d)(3). In addition, section 503(b)(1)(A) of the Bankruptcy Code provides that an administrative

expense exists for the actual and necessary costs and expenses of preserving the debtor's estate, and section 507(a)(1) provides that administrative expenses allowed under section 503(b) have first priority. See 11 U.S.C. §§ 503(b)(1)(A), 507(a)(1).

7. The Claim is unquestionably an administrative expense claim pursuant to sections 365(d)(3), 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code because it was incurred by the Debtors' estates and has preserved the Debtors' estate. The Debtors benefitted from the use of the Premises through the Rejection Date, and specifically requested that the Court extend their time to assume or reject the Lease until they could market the Lease and then make a final business determination that they should reject the Lease. Pursuant to the Lease, and as detailed on Exhibit A, the amount of unpaid charges that accrued under the Lease from the Petition Date through the Rejection Date equals \$80,731.14.

8. Moreover, the Claim should be paid immediately. Section 365(d)(3) of the Bankruptcy Code mandates that the Debtors immediately pay to Inland the Claim because it requires timely performance of all post-petition obligations that arise under non-residential real property leases. In addition, pursuant to sections 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code, although courts have discretion as to whether to require administrative expense claims to be paid on a current basis or to be deferred to a later date, such as the date of confirmation of a plan of reorganization, the better view is to require payments to be made on a current basis when the claimant applies to the court for such relief. See Rutland Indus. Development Corp. v. Kors, Inc. (In re Kors, Inc.), 13 B.R. 683 (Bankr. D. Vt. 1981). See also Vonderehe v. Flint Hills Foods, Inc. (In re Isis foods, Inc.), 27 B.R. 156, 158 (W.D. Mo. 1982); In re Photo Promotion Associates, Inc., 881 F.2d 6, 9 (2d Cir. 1989); In

re Verico Indus., 20 B.R. 664, 665 (9th Cir. BAP 1982); In re Misty Touch, Inc., 31 B.R. 853, 857 (Bankr. S.D.N.Y. 1983).

WHEREFORE, for all of the foregoing reasons, Inland respectfully requests that this Court enter an order that allows the Claim in the amount of \$80,731.14 as an administrative expense claim pursuant to sections 365(d)(3), 503(b)(1)(A) and 507(a)(1) of the Bankruptcy Code, that directs the Debtors to pay the Claim to Inland within five (5) days of the entry of such an order, and that grants such other and further relief as is just and proper.

Dated: December 23, 2003
Wilmington, Delaware

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EXHIBIT A

Summary of Amounts due under the Lease (from April 1, 2003 through October 31, 2003)

2 nd installment 2003 real estate taxes through October 31, 2003 ¹	\$51,940.41
CAM reconciliation for April 1, 2003 through October 31, 2003	<u>\$28,790.73</u> ²
TOTAL	\$80,731.14

¹ These installments were due under the Lease on May 15, 2003 and October 15, 2003.

² The common area maintenance billing for 1/1/03 - 10/31/03 resulted in the Debtors owing \$41,091.00. Ninety-one (91) days of the foregoing period related to a pre-petition period (1/1/03 through 4/1/03), and two hundred and thirteen (213) days related to a post-petition period (4/2/03 through 10/31/03). Accordingly, \$28,790.73 of the \$41,091.00 net amount due is a post-petition claim.