

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

<b>In re:</b>	:	
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<b>FLEMING COMPANIES, INC., et al.,</b>	:	<b>Case No. 03-10945 (MFW)</b>
	:	<b>(Jointly Administered)</b>
	:	<b>Chapter 11</b>
<b>Debtors.</b>	:	<b>Related Docket No.: 5324</b>
	:	<b>Hearing Date: February 2, 2004 at 2:00 pm</b>
	:	<b>Objection Deadline: January 26, 2004 at 4:00 pm</b>

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**MOTION FOR AUTHORITY TO FILE EXHIBITS UNDER SEAL**

Greenwich Insurance Company (“Greenwich”), by and through its undersigned counsel, hereby moves this Court for entry of an order authorizing Greenwich to file under seal certain Exhibits to its Motion to Modify the Automatic Stay to Permit a Determination of Coverage for Certain Claims Made Under a Directors and Officers Liability Insurance Contract (“Motion to Modify the Stay”) [D.I. No.5324]. In support of this Motion, Greenwich fully references and incorporates its Motion to Modify the Stay herein and, in addition, states as follows:

**JURISDICTION AND STATUTORY AUTHORITY**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding as defined in 28 U.S.C. § 157(b)(2).
2. The statutory predicates for the relief requested herein are Bankruptcy Code §107(b), Fed. R. Bankr. P. 9018 and Fed. R. Civ. P. 26(c).

**BACKGROUND**

3. Greenwich issued Management Liability and Company Reimbursement Insurance Policy No. ELU 83018-02 (the “Policy”) to Fleming Companies, Inc. (“Fleming”). *See generally* Greenwich’s Motion to Modify the Stay and Policy. (The Policy is attached as Exhibit B to Greenwich’s Motion to Modify the Stay).

4. On May 24, 2002, Home Depot U.S.A., Inc. (“Home Depot”) filed suit against Ronald B. Griffin (“Griffin”), a former officer of Fleming, in the Delaware Chancery Court, captioned *Home Depot U.S.A., Inc. v. Griffin and Fleming Cos., Inc.*, C.A. No. 19649 NC (Del. Ch. Ct. 2002) (the “Home Depot Action”). On November 12, 2002, Home Depot amended the complaint to add Fleming as a defendant (the “Amended Complaint”). Both the original and amended complaints in the Home Depot Action were filed by Home Depot under seal and therefore are not a matter of public record. The Home Depot Action was tendered to Greenwich as a claim under the Policy.

5. As set forth in Greenwich’s Motion to Modify the Stay, a dispute exists as to the availability of coverage for the Home Depot Action under the Policy. As a result of this dispute, on January 2, 2004, Greenwich initiated a suit against Griffin in the United States District Court for the Northern District of Texas, seeking a declaration that the Policy does not afford coverage for the Home Depot Action (the “Declaratory Judgment Action”).

6. The factual allegations supporting Greenwich’s request for relief in the Complaint in the Declaratory Judgment Action rely heavily on and quote extensively from the sealed Amended Complaint in the Home Depot Action. Indeed, the allegations in the Home Depot Amended Complaint are at the heart of the Greenwich Complaint, and the Declaratory Judgment Action cannot be adjudicated without explicit reference to the Amended Complaint in the Home Depot Action.

7. The Home Depot Amended Complaint, which was filed under seal and the Complaint in the Declaratory Judgment Action, which likewise was filed under seal, contain detailed information about, *inter alia*, Home Depot’s current and former employees, its internal organization, and certain agreements entered into between Home Depot and Mr. Griffin, who

was employed by Home Depot before he was employed by Fleming. Such information may be confidential and proprietary.<sup>1</sup>

8. On January 2, 2004, Greenwich filed its Motion to Modify the Stay, requesting that this Court enter an Order modifying the stay to permit Greenwich to name Fleming as a party in the Declaratory Judgment Action. Greenwich would like to attach copies of the Complaint in the Declaratory Judgment Action and the Amended Complaint in the Home Depot Action as Exhibits A and C, respectively, to the Motion to Modify the Stay to provide the Court with the opportunity to examine them when considering the Motion to Modify the Stay. Both of those documents contain information that has been or may be<sup>2</sup> filed under seal and may be confidential and proprietary to Home Depot, Griffin and /or Fleming.

#### **RELIEF REQUESTED AND BASIS THEREFOR**

9. The Complaint in the Declaratory Judgment Action and the Amended Complaint in the Home Depot Action were filed under seal and/or contain information that has been excerpted from a pleading that was filed under seal. Because Greenwich seeks to respect the determination of the Chancery Court of the State of Delaware that the Home Depot Action, and the information contained therein, properly should be under seal, Greenwich seeks to file the Exhibits to the Motion to Modify the Stay under seal.

10. This Court has the authority to enter an order permitting certain documents to be filed under seal to protect the interest of the Movant or other parties. Section 107(b) of the Bankruptcy Code states: “[o]n request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may: (1) protect an entity with respect

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<sup>1</sup> Greenwich has not seen Home Depot’s motion for leave to file its Complaint in the Home Depot Action under seal, and therefore Greenwich cannot set forth the specific reasons on which Home Depot relied when it sought leave to file under seal.

<sup>2</sup> Greenwich’s motion for leave to file the Complaint in the Declaratory Judgment Action under seal is pending.

to a trade secret or confidential research, development or commercial information...” (emphasis added).

11. Bankruptcy Rule 9018 establishes the procedure by which a party may file a motion pursuant to Bankruptcy Code § 107(b), and provides in relevant part: “[o]n motion or its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial litigation...”

12. If Greenwich is not permitted to file the Exhibits to the Motion to Modify the Stay under seal and is therefore precluded from relying on them in support of its Motion to Modify the Stay, Greenwich may be prejudiced.

13. Bankruptcy Code section 107(b) does not require a showing of good cause for an order permitting the filing of documents under seal. Instead, it has been held that “the court is required to protect a requesting interested party and has no discretion to deny the application.” *In re Orion Pictures Corp.*, 21 F. 3d 24, 27 (2nd Cir. 1994) (internal citation omitted) (emphasis in the original).

14. No prior request for the relief requested in this Motion has been made to this Court.

Dated: January 2, 2004

Respectfully submitted,

By: /s/ Margaret M. Manning  
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