

**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)

**Hearing Date: TBD
[Re: Docket Nos. 4693 and 4538]**

**EMERGENCY MOTION BY DIGIORGIO CORP. FOR EXPEDITED
TELEPHONIC HEARING TO DETERMINE SCOPE OF HEARING ON OBJECTION
OF BLAIR ROAD REALTY CO. TO DEBTORS’ MOTION FOR AN ORDER
PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE AUTHORIZING
DEBTORS TO ASSUME AND ASSIGN THAT CERTAIN UNEXPIRED REAL
PROPERTY LEASE WITH BLAIR ROAD REALTY CORP.**

DiGiorgio Corp., by its undersigned counsel, hereby moves this Court, pursuant to Rule 2002 of the Fed. R. Bankr. Pro. (the “Bankruptcy Rules”), section 102 of Title 11 of the United States Code (the “Bankruptcy Code”) and Del. Bankr. L.R. 9006-1(e) for an Order setting an expedited telephonic hearing to Determine Scope of Hearing on Objection of Blair Road Realty Co. To Debtors’ Motion for an Order Pursuant To Section 365 of the Bankruptcy Code Authorizing Debtors to Assume and Assign that Certain Unexpired Real Property Lease with Blair Road Realty Corp (the “Objection”), a copy of which without exhibits is annexed hereto as **Exhibit “A”**. In support thereof, the DiGiorgio state as follows:

Relevant Background

1. On April 1, 2003, the Fleming Companies, Inc., *et al.* (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.
2. On October 1, 1975, Blair Road Realty Corp. (“Blair”) leased to the Debtors the land and building (the “Premises”) known as 215 Blair Road, Woodbridge, New Jersey (the “Lease”).

3. On June 10, 1994, the Debtors subleased the Premises to DiGiorgio on a pass-through basis (the “Sublease”). From and after the date of the Sublease, DiGiorgio timely has paid all rent owed to the Debtors under the Sublease, and the Debtors timely have paid all rent owed to Blair under the Lease.

4. On November 20, 2003, the Debtors filed a motion for an order authorizing the Debtors to assume and assign the Lease to DiGiorgio under § 365(a) and (f) of the Bankruptcy Code [Docket No. 4538] (the “Assumption Motion”).

5. On December 2, 2003, Blair filed its Objection to the Assumption Motion alleging, *inter alia*, that (i) the Debtors and DiGiorgio have committed non-monetary breaches of the Lease (i.e. alleged environmental contamination of the Premises, unlawful sublets), (ii) “neither the Debtors nor DiGiorgio have established adequate assurance of DiGiorgio’s ability to perform its obligations under the Lease”, Objection, para. 10, and (iii) the proposed assignment provides no benefit to the Debtors’ estates. *Id.* The Objection alternatively argues that “[t]he breach of contract issues should be decided in another proceeding in another court ... this Court ... [should allow] the assumption and assignment only on the condition that the assignee, DiGiorgio, takes the Blair Lease subject to all existing prior defaults which Blair can later assert against DiGiorgio in state court.” Objection, paras. 37-40.

6. At the December 8, 2003 hearing on the Assumption Motion, counsel to DiGiorgio embraced Blair’s suggestion and agreed on the record that any order authorizing the assignment of the Lease would be subject to Blair’s right to raise such non-bankruptcy issues at a later date in another court. See Excerpt from Transcript of Hearing on December 8, 2003, p. 143, lines 1-14 (hereinafter referred to as the “12/8 Tr.”), attached hereto as **Exhibit “B”**. While the hearing was hurried at the end of a long calendar, DiGiorgio believes that the Court made it

clear through its words, expressions and tone that the Court did not want to hear State law default issues but instead only would adjudicate bankruptcy issues at a section 365 assumption and assignment hearing. The result is practical because it allows the assumption and assignment to go forward as a summary proceeding. It also is fair because it is without prejudice to Blair's right to seek redress in a more appropriate forum. Finally, it is consistent with section 365(b) of the Bankruptcy Code which provides in pertinent part:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

...

(2) **Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—**

...

(D) **the satisfaction of any ... provision relating to a default arising from the any failure by the debtor to perform nonmonetary obligations under the ... unexpired lease.**

11 U.S.C. sec. 365(b)(1)(**emphasis added**)

7. The Court did narrow the scope of the issues to be considered in connection with the Objection to “bankruptcy” issues. 12/8 Tr. at 143-44. When counsel for Blair then requested discovery -- solely on the issue of DiGiorgio's ability to demonstrate adequate assurance of future performance under the Lease -- the Court suggested that DiGiorgio submit an affidavit of its CFO and permit his deposition. The discovery schedule was agreed to by both parties, see 12/8 Tr. at p. 147, lines 22-25. The Court then set January 14, 2004 as the hearing date on the bankruptcy questions (adequate assurance of future performance and

consideration to the estate) and required that discovery disputes, if any, would be heard on December 23, 2003.

8. Thereafter, DiGiorgio promptly provided Blair (under a confidentiality agreement) with the Affidavit of Lawrence Grossman, DiGiorgio's Chief Financial Officer and Senior Vice President, made him available for a deposition and offered Blair (again under an agreement of confidentiality) access to such additional documents that Blair may wish to review. Because the Grossman Affidavit includes and attaches certain commercially sensitive financial information, DiGiorgio filed on December 22, 2003 a motion to file the Grossman Affidavit under seal. On December 23, 2003, counsel for DiGiorgio reported to the Court that no discovery disputes existed between the parties.

9. Following its review of the Grossman Affidavit, Blair conceded that DiGiorgio had met its burden of demonstrating adequate assurance of future performance under the Lease pursuant to section 365(f)(2)(B). Having given counsel for Blair a copy of the settlement agreement under a confidentiality agreement, counsel for DiGiorgio believes that Blair cannot seriously or legitimately contest the consideration in this global settlement which paid millions of dollars to the Debtor and C&S and completely resolved complex multi-party claims and litigation. Thereafter, counsel to DiGiorgio engaged in colloquy with counsel to Blair in an effort to work out a consensual form of order authorizing the assumption and assignment of the Lease. When counsel to Blair re-stated his intention to pursue the full breadth of the Objection, counsel to DiGiorgio sent a letter dated January 8, 2004 setting forth DiGiorgio's firm conviction that no legitimate bankruptcy issues remained extant and that further litigation was a frivolous waste of both the Court and counsel's time. A true and correct copy of the letter with is exhibit is attached hereto as **Exhibit "C"**.

10. Blair has recently indicated to DiGiorgio that it seeks to have this Court, among other things, adjudicate alleged illegal sublet defaults at the hearing on January 14, 2004 or at a later omnibus hearing in the case. Clearly, the Court did not authorize discovery on this issue and this is the type of claim which the Landlord suggested and DiGiorgio agreed to have survive the assumption and assignment hearing to be decided by a Court of appropriate jurisdiction, if Blair seeks to pursue such alleged default at a later date. DiGiorgio believes the illegal sublet issues are without merit although, in some respects, they are factually intensive and cannot be adjudicated in summary fashion as will be hereafter set forth.

11. Briefly, the claims involve two situations – Lily Trucking utilizes a truck maintenance facility on the premises to maintain and repair DiGiorgio's trucks. A truck repair facility has been on the Premises upon information and belief for more than twenty years and certainly for the nine years that DiGiorgio has operated a refrigerated warehouse facility on the Premises. Blair never objected to the repair facility before these proceedings were commenced.

12. The situation involving Foodtown is complex. Foodtown is both a prominent customer of DiGiorgio and DiGiorgio contends that Foodtown is an affiliated entity under the terms of the Lease and applicable state law. DiGiorgio, through a subsidiary, WFRT Holdings, Inc. is a stockholder of Foodtown. WFRT Holdings, Inc. is also a member of the Board of Directors of Foodtown. Foodtown has openly occupied a small amount of space for executive offices at the Blair Road facility on a sublease basis since March, 1999. Foodtown's sign has been prominently displayed outside the premises since March, 1999. It occupies less than three (3%) percent of a 190,000 square feet facility and pays \$1,587 a month; an amount designed to reimburse DiGiorgio for its administrative expenses and overhead related to the

occupancy. The occupancy relationship is so casual that the sublease agreement expired on February 27, 2003 and has not been renewed.

13. At no time prior to the filing of the Chapter 11 case, did Blair ever object to Foodtown's occupancy of the Premises. Moreover, the occupancy is consistent with the use clause in the Leases. Foodtown is using the space exactly in the same manner as DiGiorgio, Fleming and the Landlord's family historically used the space when they occupied the space. As a result of DiGiorgio's status as a stockholder of Foodtown, a member of its Board of Directors and By-Law designated third party supplier, DiGiorgio believes that in this context, Foodtown and DiGiorgio should be deemed affiliates under the Lease and thus Blair's consent to sublease would not be required under state law.

14. DiGiorgio believes that the Foodtown matter raises a whole host of issues relating to waiver, estoppel and laches which would be decided under state law. There are also questions as to damages, appropriate remedy and forfeiture, all of which can likewise be determined by the New Jersey landlord and tenant courts. The Blair Road lease is of critical importance to DiGiorgio's day-to-day operations as more than \$1,000,000 of business a day is transacted from that facility where approximately 290 employees report to work on a daily basis. DiGiorgio would never allow its tenancy at that facility to be adversely affected by what DiGiorgio perceives is merely an accommodation to a major customer. DiGiorgio believes that this Court intended that any "illegal sublet" claims be adjudicated outside of the Bankruptcy Court together with the "environmental claims" raised by the Landlord.

Relief Requested

15. The proposed assumption and assignment of the Lease is an important transaction for DiGiorgio. Among other things, it is an integral part of a global settlement of a

multitude of previously hotly contested issues between DiGiorgio and the Debtors that was filed under seal and approved by the Court on November 25, 2003. Prior to its submission to the Court, Blair reviewed the settlement agreement under a confidentiality agreement. Discovery in this matter was provided to Blair and now has been completed. Blair has conceded the sole bankruptcy issue that DiGiorgio has the burden of proving (adequate assurance of future performance). The remaining bankruptcy issue – best interests of the estate – is self-evident from any reasonable review of the settlement agreement which resolves, inter alia, over \$50 million in claims. See Exhibit “C”.

16. Because Blair and DiGiorgio do not agree on what "bankruptcy issues", if any, remain open in respect of the Objection, DiGiorgio respectfully requests that this Court conduct a very brief telephonic hearing (15 minutes or less) and advise the parties what bankruptcy issues remain to be determined by the Court at the January 14 hearing.

17. Because no substantive rights are affected by this Motion, DiGiorgio respectfully requests that it be heard at the Court's earliest convenience.

18. Notice of this Request for an Emergency Telephonic Hearing has been provided by hand or telecopier to the following: (i) Office of the United States Trustee, 844 King St., Room 2313, Wilmington, Delaware 19801; (ii) Pachulski, Stang, Ziehl, Young, Jones & Weintraub P.C., 919 N. Market St., Wilmington, Delaware 19801, Attn: Laura Davis Jones, Esq.; (iii) Kirkland & Ellis, 777 South Figueroa Street, Los Angeles, California 90017, Attn: Richard Wynne, Esq.;(iv) Hellring Lindeman Goldstein Siegal LLP, One Gateway Center, Newark, New Jersey 07102, Attn: John A. Adler, Esq.; (v) Archer & Greiner, 1300 Market Street, Suite 700, Wilmington, Delaware 19801, Attn: John V. Fiorella, Esq. ; and (vi) Milbank Tweed

Hadley & McCoy LLP, One Chase Manhattan Plaza, New York, New York 10005, Attn:
Dennis Dunne, Esq.

WHEREFORE, DiGiorgio respectfully requests that this Court enter an order granting an expedited telephonic hearing to set the scope of the hearing on the Objection and grant such other and further relief as is just and proper.

Dated: January 9, 2004
Wilmington, Delaware

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