

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

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC., ET AL.)	Case No. 03-10945 (MFW)
)	Jointly Administered
Debtors.)	
)	

**MOTION OF K&Y THUNDERBIRD & 83RD, LLC
FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIM**

K&Y Thunderbird & 83rd, LLC (“K&Y”) by and through its undersigned counsel, Fox Rothschild LLP, hereby seeks, pursuant to Sections 365(d)(3), 503(a) and 503(b)(1) of the United States Bankruptcy Code (the “Bankruptcy Code”) and 9006(b)(1) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), an order from this Court granting its Motion for Allowance and Payment of Administrative Claim (the “Motion”). In support of the Motion, K&Y represents as follows:

Jurisdiction

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1334.
2. Venue is proper in this Court pursuant to 28 U.S.C. § 1409.
3. This matter constitutes a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B).
4. The statutory predicates for the relief requested herein are sections 365(d)(3), 503(b)(1)(A) and 501(a)(1) of the Bankruptcy Code.

Background

5. On April 1, 2003, (the "Petition Date"), the Debtor, along with other affiliated entities (collectively, “Debtors”), filed their voluntary petitions for relief under Chapter 11 of

the Bankruptcy Code. The Debtors operate and manage their businesses as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

6. K&Y is an Arizona Limited Liability Company with principal places of business located at 22 South Santa Cruz Avenue, Second Floor, Los Gatos, California 95030.

7. On or about July 5, 2001 K&Y, as landlord, entered into a Commercial Lease for certain nonresidential real property (the “Lease”) with Debtor Fleming Companies, Inc. (“Debtor”) for property located in Maricopa County, Arizona, commonly referred to as Thunderbird Crossing II (the “Premises”). A copy of the Lease is attached here to as Exhibit “A”.

8. On September 8, 2003, K&Y filed a Proof of Claim with BMC, Debtor’s registered agent. Pursuant to the Proof of Claim, K&Y seeks an unsecured claim of \$3,528,479.38. A copy of K&Y’s Proof of Claim is attached hereto as Exhibit “B”.

9. On December 4, 2003, Debtor filed the Notice of Deadline for Filing Certain Administrative Claims (“Notice of Administrative Claim Bar Date”). Pursuant to the Notice of Administrative Claim Bar Date, K&Y has until January 15, 2004 in which to file a Motion for Administrative Claim for Rent Due Under the Lease.

10. The outstanding amount of rent due to K&Y from Debtor arising under the Lease is \$120,410.94. An itemization of rent, fees and other related expenses due under the lease is attached hereto as Exhibit “C”.

Relief Requested

11. Section 365(d)(3) of the Bankruptcy Code provides that a debtor-in-possession “shall timely perform all the obligations ... arising from and after the order for relief under any

unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.”

12. Section 503(b)(1)(A) of the Bankruptcy Code grants administrative expense status to “the actual, necessary costs and expenses of preserving the estate ...”

13. Section 507(a)(1) of the Bankruptcy Code grants first priority status to “administrative expenses allowed under section 503(b)” of the Bankruptcy Code.

14. A lease which was not terminated prepetition is an unexpired lease on the petition date, and the lessor is entitled to administrative lease payments for the date of the filing of the petition until the date the court approves rejection of the lease. *Interface Group-Nevada, Inc., v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 145 F.3d 124, 136 (3d. Cir. 1998).

15. “[A]n obligation arises under a lease for the purposes of § 365(d)(3) when the legally enforceable duty to perform arises under the lease.” *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward)*, 268 F.3d 205, 211 (3rd Cir. 2001).

16. As supported by the itemization attached hereto, Debtor owes K&Y \$120,410.94 for post-petition rent and related charges arising under the Lease following the Petition Date. The fees owed by the Debtors constitute an administrative expense claim under 11 U.S.C. §§ 365(d)(3) and 503(b)(1), and should be paid in accordance with the priority of 11 U.S.C. § 507(a)(1).

WHEREFORE, K&Y respectfully requests that this Court enter an Order:

(a.) Allowing K&Y an administrative expense claim for unpaid lease payments in the amount of \$120,410.94 to be paid immediately to K&Y in accordance with the priority of 11 U.S.C. § 507(a)(1); and,

(b.) Granting such other and further relief as this Court deems fair and just.

FOX ROTHSCHILD LLP

/s/ L. JASON CORNELL, ESQUIRE
L. JASON CORNELL, ESQUIRE (No. 3821)
Citizens Bank Center
919 Market Street, Suite 1300
P.O. Box 2323
Wilmington, DE 19899-2323
(302) 622-4206
Attorneys for K&Y Thunderbird & 83rd, LLC

Dated: January 13, 2004

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

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC., ET AL.)	Case No. 03-10945 (MFW)
)	Jointly Administered
Debtors.)	
)	Objection Deadline: January 26, 2004 at 4:00 p.m. EST.
)	Hearing Date: February 2, 2004 at 2:00 p.m. EST.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the 13th day of January , 2004, K&Y Thunderbird & 83rd, LLC (“K&Y”) filed a MOTION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIM (the “Motion”).

PLEASE TAKE FURTHER NOTICE, that any responses and/or objection to the Motion must be in writing, filed with the Clerk of the Bankruptcy Court, and served so as to be received on or before January 26, 2004 at 4:00 p.m., Eastern,, Standard time, by the undersigned counsel. If no objections are timely filed and received, the Court may enter an order granting the relief requested without further notice or a hearing. If an objection is timely filed, a hearing (the “Hearing”) on the Motion will be held before the Honorable Mary F. Walrath at the United States Bankruptcy Court for the District of Delaware, 824 N. Market Street, Wilmington, Delaware 19801 on February 2, 2004 at 2:00 p.m.. Only those objections that are timely filed and received will be considered at the Hearing.

FOX ROTHSCHILD LLP

/s/ L. JASON CORNELL, ESQUIRE

L. JASON CORNELL, ESQUIRE (No. 3821)

Citizens Bank Center

919 Market Street, Suite 1300

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ORDER

Upon consideration of the MOTION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE CLAIM (the "Motion"), filed by K&Y Thunderbird & 83rd, LLC ("K&Y"), and after due deliberation and sufficient cause appearing thereof,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted in its entirety;
2. K&Y is allowed an administrative expense claim in the amount of \$120,410.94;
3. Debtors are required to pay K&Y \$120,410.94 within thirty (30) days from the date of this order.

SO ORDERED THIS _____ day of _____, 2003.

Honorable Mary F. Walrath
Chief Judge
United States Bankruptcy Court for
the District of Delaware

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the attached Motion was served
this 13th day of January, 2004, upon the following individuals in the manner designated
below:

Laura Davis Jones, Esquire
Christopher James Lhulier, Esquire
Pachulski Stang Ziehl Young
Jones & Weintraub P.C.
919 Market Street, Suite 1600
Wilmington, DE 19801
(Via Hand Delivery)

Richard Wynne, Esquire
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, CA 90017
(Via First Class Mail, Postage Prepaid)

Andrew P. DeNatale, Esquire
White & Case
1155 Avenue of Americas
New York, NY 10036-2787
(Via First Class Mail, Postage Prepaid)

Scott D. Cousins, Esquire
Greenberg Traurig LLP
The Brandywine Building
1000 West Street, Suite 1540
Wilmington, DE 19801
(Via Hand Delivery)

I William Cohen, Esquire
Pepper Hamilton LLP
100 Renaissance Center, Suite 3600
Detroit, Michigan 48243-1157
(Via First Class Mail, Postage Prepaid)

David M. Fournier, Esquire
Pepper Hamilton LLP
1201 Market Street
Suite 1600
Wilmington, DE 19899
(Via Hand Delivery)

Julie L. Compton, Esquire
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2313
Wilmington, DE 19801
(Via Hand Delivery)

Dennis Dunne, Esquire
Milbank Tweed Hadley & McCloy
One Chase Manhattan Plaza
New York, NY 10005-1413
(Via First Class Mail, Postage Prepaid)

/s/ L. JASON CORNELL, ESQUIRE
L. JASON CORNELL, ESQUIRE

