

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	:	
	:	
FLEMING COMPANIES, INC., <i>et al.</i>	:	Chapter 11
Tax ID# 48-0222760,	:	
	:	Case No. 03-10945 (MFW)
	:	
	:	
Debtors.	:	

**GEORGIA DEPARTMENT OF REVENUE’S OBJECTION TO
DEBTORS’ CHAPTER 11 DISCLOSURE STATEMENT AND PLAN OF
REORGANIZATION**

The Georgia Department of Revenue (the “Revenue Department”), by and through undersigned counsel, and files this its objection to the proposed Disclosure Statement and Plan of Reorganization under Chapter 11 of the Bankruptcy Code, and in support thereof respectfully shows the Court as follows:

1. The Debtors have filed with the Court their proposed Disclosure Statement and Plan of Reorganization under Chapter 11 of the Bankruptcy Code. The Court has set a hearing on the approval of the Disclosure Statement for January 21, 2004.
2. The Revenue Department has filed three proofs of claim in the instant case for unpaid Georgia taxes, interest and penalties in the total amount of \$756,847.95 (representing: an unsecured priority claim in the amount of \$662,631.43 and an unsecured general claim in the amount of \$94,216.52.)
3. At the time of the filing of Debtors’ Chapter 11 petition, Debtor, Fleming Foods of Texas, L.P., had not filed Georgia sales and use tax returns as required by O.C.G.A. § 48-8-49 for the months of October 2001, January, May and June 2002, January, February and March 2003. The Revenue Department’s proof of claim includes an estimated priority claim in the

amount of \$100.00 for each of these months. At the time of the filing of Debtors' Chapter 11 petition, Debtor, Dunigan Fuels, Inc., had not filed Georgia sales and use tax returns as required by O.C.G.A. § 48-8-49 for the months of October 2001, January, May and June 2002, January, February and March 2003. The Revenue Department's proof of claim includes an estimated priority claim in the amount of \$100.00 for each of these months. At the time of the filing of Debtors' Chapter 11 petition, Debtor, Head Distributing Company, had not filed Georgia withholding tax returns as required by O.C.G.A. § 48-7-103 for the months of July through December 2001, inclusive. The Revenue Department's proof of claim includes an estimated priority claim in the amount of \$10,000.00 for these months. Debtor has still not filed these returns. Debtor should be required to file all delinquent Georgia sales and use and withholding tax returns for the above referenced periods prior to obtaining confirmation of the Plan. Without such filings, it is impossible for creditors to know the true tax obligations of the Debtor. In the absence of information regarding such obligations, the Revenue Department submits that the Disclosure Statement does not contain "adequate information" as required by 11 U.S.C. § 1125. The Disclosure Statement should not be approved until there is full disclosure regarding the Georgia tax liabilities and all delinquent returns are filed to enable all parties to have an understanding of the full amount of the liabilities.

4. The Revenue Department submits that the Plan should provide for monthly payments. Courts in the past required § 1129(a)(9)(C) payments be made monthly. See In re Mason and Dixon Lines, Inc., 71 B.R. 300, 303 (Bankr. N.D.N.C. 1987); In re Inventive Packaging Corp., 81 B.R. 74, 79 (Bankr. D. Col. 1987); In re Mahoney, 80 B.R. 197, 200 (Bankr. S.D. Cal. 1987) (Payments to priority tax claimants are required to be made at monthly intervals unless special or unusual circumstances exist.) In that the debtors remit their current

tax payments on a monthly basis, the Revenue Department suggests that its priority tax claims be paid in equal monthly payments beginning on the effective date of the plan and continuing until the sixth anniversary of thereof.

5. In order to comply with 11 U.S.C. § 1129(a)(9), the Plan must provide for the payment of interest toward priority claims in order to preserve the “value, as of the effective date” of those claims. The interest rate on deferred tax payments under § 1129(a)(9) must equate a “prevailing market rate for a similar loan of a term equal to the payout period with due consideration of the quality of the security and the risk of subsequent default.” In re Camino Real Landscape Maintenance Contractors, Inc., 818 F.2d 1503, 1505 (9th Cir. 1987). The interest rate on priority claims should put the creditor in as good a position as it would have been had the present value of its claim been paid immediately. Therefore, the interest rate has to reflect the current market rates. See In re Southern States Motor Inns, Inc., 709 F.2d 647 (11th Cir. 1983); In re Inventive Packaging Corporation, 81 B.R. 74 (Bankr. D. Colo. 1987).

6. The Plan does not include a default provision in the event the Debtor fails to make required payments. Reorganized debtors should not remain as semi-permanent wards of the bankruptcy court. See In re Bankeast Corp., 132 B.R. 665 (Bankr. D.N.H. 1991) (court drafted limited post-confirmation jurisdiction provisions); In re Ernst, 45 B.R. 700 (Bankr. D. Minn. 1985) (creditor who wishes to foreclose after post-confirmation default would proceed in state court, not bankruptcy court). A plan should allow the post-confirmation pursuit of legal remedies in nonbankruptcy forums. See In re Barton Industries, Inc., 159 B.R. 954 (Bankr. W.D. Ok. 1993). Priority tax claims do not lose their status as such by being included in a confirmed Chapter 11 plan. Matter of Official Committee of Unsecured Creditors of White Farm Equipment Co., 943 F.2d 752 (7th Cir. 1991). Therefore, the Revenue Department should not be

required to return to Bankruptcy Court in order to enforce its tax claims upon default by the Debtor. The Georgia Department of Revenue suggests the inclusion of the following language in the Debtor's Plan:

Enforcement Remedies. A failure by the reorganized Debtor to make a payment to tax claimants pursuant to the terms of the Plan shall be an event of default. If the reorganized Debtor fails to cure an event of default as to tax payments within ten days after the date of a written notice of default by the tax claimant to the Debtor and its attorney, then the tax claimant may (a) enforce the entire amount of its claim; (b) exercise any and all rights and remedies such tax claimant may have under applicable state law; and/or (c) seek such relief as may be appropriate in the bankruptcy court.

The inclusion of this language will provide the Department with some certainty regarding its rights upon Debtor's default in Plan payments.

7. With regard to the Plan submitted with the Disclosure Statement, the Revenue Department reserves its right to file an Objection to confirmation.

WHEREFORE, for reasons including, but not limited to those specified above, the Georgia Department of Revenue prays that the Court deny approval of the Debtor's Disclosure Statement and further prays for such other and further relief as the Court deems just and proper.

This 13th day of January, 2004.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

DANIEL M. FORMBY 269350
Deputy Attorney General

JOHN B. BALLARD, JR. 035550
Senior Assistant Attorney General

/s/ W. Wright Banks, Jr.
W. WRIGHT BANKS, JR. 036156
Assistant Attorney General

/s/ Lesley W. Berggren
LESLEY W. BERGGREN 054398
Assistant Attorney General

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

LESLEY W. BERGGREN
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3376

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	:	
	:	
FLEMING COMPANIES, INC., <i>et al.</i>	:	Chapter 11
Tax ID# 48-0222760,	:	
	:	Case No. 03-10945 (MFW)
	:	
	:	
Debtors.	:	

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing GEORGIA DEPARTMENT OF REVENUE'S OBJECTION TO DEBTORS' CHAPTER 11 DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION upon:

Kirkland & Ellis, LLP
777 South Figueroa Street
Los Angeles, CA 90017
Attn: Richard L. Wynne, Esq.
Facsimile: (213) 680-8500

Pachulski, Stang, Ziehl, Young, Jones & Weintraub, P.C.
919 North market Street, Sixteenth Floor
P.O. Box 8705
Wilmington, Delaware 19899-8705 (Courier 19801)
Attn: Lara Davis Jones, Esq.
Facsimile: (302) 652-4400

Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza,
New York, New York 10005
Attn: Dennis Dunne, Esq.
Facsimile: (212) 822-5770

Pepper Hamilton LLP
100 Renaissance Center, Suite 3600
Detroit, Michigan 48243-1157
Attn: I. William Cohen, Esq.
Facsimile: (313) 259-7926

Office of the United States Trustee
844 King Street, Suite 2313
Wilmington, Delaware 19801
Attn: Joseph J. McMahon, Esq.
Facsimile: (302) 573-6497

Via Federal Express Overnight Delivery and facsimile at the numbers listed above.

This 13th day of January, 2004.

/s/ Lesley W. Berggren
LESLEY W. BERGGREN
Assistant Attorney General