

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
	:	Case No.: 03-10945 (MFW)
FLEMING COMPANIES, INC. et al. :	:	(Jointly Administered)
	:	
Debtor.	:	Hearing Date: March 25, 2004 at 10:30 am
	:	Objection Deadline: March 18, 2004 at 4:00 pm
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**INTERNATIONAL FOOD GROUP, INC.'S MOTION FOR ALLOWANCE OF  
ADMINISTRATIVE EXPENSE AND DIRECTION FOR PAYMENT THEREOF**

International Food Group, Inc. ("IFG"), a creditor in the above-captioned bankruptcy case, by and through its undersigned attorneys, Buchanan Ingersoll PC, hereby moves the Court for an order allowing classification and payment of an administrative expense pursuant to 11 U.S.C. § 503(b) (the "Motion"). In support of its Motion, IFG respectfully states as follows:

**Jurisdiction and Venue**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The statutory predicate for the relief sought herein is 11 U.S.C. §§ 503(b) and 507(a) and Bankruptcy Rules 2002 and 9014 of the Federal Rules of Bankruptcy Procedure. Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. On April 1, 2003 (the "Petition Date"), Fleming Companies, Inc. ("Fleming" or the "Debtor") and certain of its affiliates filed Voluntary Petitions for relief under Chapter 11 of the Bankruptcy Code (the "Code"). Since the Petition Date, the Debtors have operated their businesses as debtors-in-

possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. The Debtor is continuing in possession of its property and is operating and managing its business as a Debtor-in-Possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

### **Background**

4. IFG is a wholesaler of grocery and restaurant related goods.

5. IFG and the Debtor are parties to a long-standing agreement (the "Agreement") whereby the Debtor emails orders for goods to IFG and, when and if the goods become available, IFG fills the orders. Pursuant to the Agreement, upon delivery of the goods, IFG also delivers an invoice requiring the Debtor to pay for goods received and accepted within 30 days of receipt. Also pursuant to the Agreement, goods were considered delivered upon acceptance, and IFG maintains the risk of loss and the right to interrupt delivery until receipt by the Debtor.

6. As of the Petition Date, the Debtor's schedules indicate that it owed an outstanding balance to International Food of \$138,267.08; this balance remains unpaid.

7. The Debtor continued to receive and accept goods from IFG after the Petition Date.

8. The Debtor has failed to remain current on its post-petition indebtedness to IFG, and in fact has never made a single post petition payment to IFG. As of the date of this Motion, the Debtor owes IFG \$54,067.35, for post-petition indebtedness; this balance remains unpaid. A true and correct copy of the Debtor's Calculated Reclamation Claims Report, detailing and acknowledging the receipt of good post petition, is attached hereto as Exhibit A.

### **Requested Relief and Authorities**

9. Pursuant to §503 of the Bankruptcy Code, IFG is entitled to an administrative claim in an amount equal to the invoiced amount for good received for the period covering the Petition Date through the date of this Motion. Section 503(b) of the Bankruptcy Code provides, in pertinent part, as follows:

"After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under §502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case..."

11 U.S.C. §503(b).

10. It is generally recognized that goods received post-petition by a Debtor constitute a basis for a valid and allowable administrative expense. *See 3 Collier on Bankruptcy*, ¶503.05 (15th Ed. Revised). Courts have determined that a supplier of post-petition goods is entitled to an administrative expense claim under 11 U.S.C. § 503 when: i) the transaction is between the creditor and the debtor; and ii) the Estate receives a benefit from the transaction. *In re: Muma Services Inc.*, 279 B.R. 478, 489 (Bankr. Del. 2002).

11. In the instant case, the Debtor has admitted that it received the goods post-petition. See Exhibit A. As noted above, the terms between the Debtor and International Food were such that the Agreement was binding upon receipt and acceptance of the goods. Further, the Debtor has stated that the good received were immediately commingled into the Estate or otherwise used in the operation of the Debtors business, thus the goods produced a benefit to the Estate by increasing the total value of the Estate and enabling the Debtor to continue its operations.

12. Additionally, "[i]f the Debtor-in-Possession elects to continue to receive benefits from the other party to an executory contract ...the Debtor-in-Possession is obligated to pay for the reasonable value [of goods received]." *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531 (1984).

13. Courts have held that when a supplier of goods retains the ability to stop shipment before receipt by a debtor, the contract is executory. *In re: Coast Trading Company, Inc.*, 744 F.2d 686 (9th Cir. 1984). Further, the Court in *Coast Trading* held that when a supplier of goods retains the ability to stop shipment before receipt by a debtor, but elects not to stop shipment after the filing of a bankruptcy petition, such supplier of goods is entitled to an administrative claim pursuant to Code § 503. In *Coast Trading*, a supplier of grain was under contract to supply several carloads of grain. The final carload was received post-petition. The Court held that since the supplier was contractually able to stop the shipment of the final carload before delivery, the contract was executory and the supplier was entitled to an administrative claim for the invoice value of goods received post petition.

14. In the instant case, IFG had the right to interrupt the shipment prior to delivery, but elected not to. Since IFG had the contractual right to interrupt delivery, the contract was executory. Since the contract was executory, and the goods were received and accepted post-petition, IFG is entitled to payment of an administrative claim in the amount of the value of the goods.

WHEREFORE, International Food Group, Inc. respectfully requests the Court enter an Order substantially in the form attached hereto allowing an administrative expense claim for the

payments due and owing under the contract pursuant to 11 U.S.C. 503 and compelling payment thereof.

Dated: January 15, 2004  
Wilmington, DE

BUCHANAN INGERSOLL PC

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