

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re
FLEMING COMPANIES, INC.,

Debtor.

AFCO CREDIT CORPORATION,

Movant,

Chapter 11
03-10945

v.

FLEMING COMPANIES, INC.,

Respondent.

MOTION BY AFCO CREDIT CORPORATION TO VACATE THE
AUTOMATIC STAY

Afco Credit Corporation, by its attorneys, CARLUCCI & LEGUM, LLP, *of counsel* to TYBOUT REDFEARN & PELL, moves this Court for relief from the automatic stay and alleges and shows:

1. This Court has jurisdiction to entertain this motion in that the petition by virtue of which Afco Credit Corporation has been stayed, has been filed in this Court.
2. Afco Credit Corporation (“Afco”) and the debtor, Fleming Companies, Inc., entered into a premium finance agreements on February 21, 2003 and August 23, 2002. Afco is licensed by the State Board of Insurance of Texas as a premium financing company. It is one of the largest such institutions in the country. Last year Afco and its affiliates financed approximately four billion dollars in insurance premiums. Its business, however, is limited solely to premium financing. It does not underwrite or procure insurance. Rather, it acts as a lending institution, financing insurance premiums for insureds who seek it out. The premium finance agreements between the parties, ex-

24.11.

3. It is the obligation of the insured, the party borrowing from Afco, the debtor herein, to make monthly payments to repay the debt. The agreements which Fleming Companies, Inc., executed are promissory notes obligating it to make such payments. Here, the debtor, Fleming Companies, Inc. financed the sums of \$751,200.00 and \$5,490,541.52. The payment records of Afco (exhibit "B" annexed hereto) reflect that the debtor is now in default and that the sum of \$680,316.88 and \$1,534,161.52 inclusive of finance charges, is open. That sum represents finance charges which have been earned and are to be earned over the life of the loan.

4. Under normal practice, upon a default by a borrower, Afco would cancel the underlying insurance. Both the premium finance agreement (§ 10) and Insurance Code, art. 24.17 of the Texas Insurance Code give Afco this right. However, by virtue of the filing in this Court, the automatic stay [11 U.S.C. § 362 (a)] bars Afco from taking such action.

5. Afco is a secured creditor. As the accompanying memorandum of law sets forth, Afco maintains a security interest in the unearned or return premiums (those premiums which would be returned upon cancellation of the insurance). The Texas statutes and the cases thereunder further establish that the security interest is perfected even without any UCC filing. Accordingly, Afco is and should be treated as a secured creditor.

6. Afco's security interest diminishes daily. As each day goes by, the amount of return premiums to be paid upon cancellation diminishes. In this case that amount is diminishing by \$16,849.34 per day. Therefore, if the Court does not grant an expedited hearing and order immediate relief from the statutory stay, Afco's security interest will be dissipated. Afco is entitled to adequate protection under Bankruptcy Code §§ 361, 362 (d) (1), and 363 (e).

7. It is a condition precedent to the cancellation of insurance that a Notice of Intent to Cancel

be served. This is mandated by State law. Cancellation cannot be effected until after the Notice of Intent has been served and the statutory waiting period has passed.

8. In sum, all that is requested is the opportunity for the movant not to suffer and sustain any further diminution of its collateral than is absolutely required by virtue of the schedule of the Court. The critical issue is that, if the movant is not entitled to vacatur of the stay, the debtor will not be caused to suffer and sustain any injury and the insurance will never be canceled.

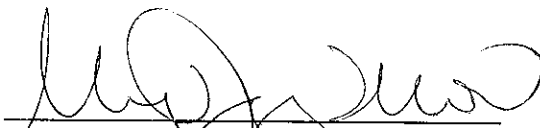
9. As an oversecured creditor at the time of filing, Afco also moves for reasonable attorneys' fees pursuant to Rule 506. Such fees are sought in the sum of \$25,000.00. The parties have agreed thereto pursuant to 17 of the agreement of February 21, 2003 and August 23, 2002.

WHEREFORE, movant Afco Credit Corporation respectfully prays for an order relieving it from the statutory stay, or, in the alternative, ordering the posting of other adequate protection to secure the debt.

Respectfully submitted,

Dated: Wilmington, Delaware
April 10, 2003

TYBOUT, REDFEARN & PELL



SHERRY RUGGIERO FALLON, ESQUIRE
Bar I.D. No. 2464
300 Delaware Avenue, Suite 1110
Wilmington, DE 19899
(302) 658-6901 telephone
(302) 658-4018 facsimile
sfallon@trplaw.com

of counsel:

CARLUCCI & LEGUM, LLP
170 OLD COUNTRY ROAD
MINEOLA, NEW YORK 11501-4307
(516) 873-9300