

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

*In re* :  
 : Chapter 11  
FLEMING COMPANIES, INC., *et al.*, :  
 :  
 : Case Number 03-10945 (MFW)  
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 :  
Debtors. : **Objections Due: 4/14/03 at 4:00 p.m.**  
 : **(extended for UST)**  
 : **Hearing Date: 4/21/03 at 12:30 p.m.**

**OBJECTION OF THE UNITED STATES TRUSTEE TO  
APPLICATION OF DEBTORS AND DEBTORS-IN-POSSESSION FOR AN ORDER  
PURSUANT TO 11 U.S.C. §§ 327(a) AND 328(a) AND FED. R. BANKR. P. 2014(a), 2016  
AND 5002 AUTHORIZING THE RETENTION AND EMPLOYMENT OF GLEACHER  
PARTNERS LLC AS FINANCIAL ADVISOR AND INVESTMENT BANKER TO THE  
DEBTORS AND DEBTORS IN POSSESSION NUNC PRO TUNC TO THE PETITION  
DATE (Re: Docket No. 87)**

In support of her Objection to Application of Debtors and Debtors-in-Possession for an Order Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Fed. R. Bankr. P. 2014(a), 2016 and 5002 Authorizing the Retention and Employment of Gleacher Partners LLC as Financial Advisor and Investment Banker to the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date (the "Application"), Roberta A. DeAngelis, the Acting United States Trustee for Region 3, by and through undersigned counsel, avers:

1. This Court has jurisdiction to hear the above-referenced Objection.
2. Pursuant to 28 U.S.C. § 586, the United States Trustee is charged with overseeing the administration of Chapter 11 cases.
3. Pursuant to 11 U.S.C. § 307, the United States Trustee has standing to be heard with regard to the above-referenced Objection.
4. The Debtors herein filed their petitions under Chapter 11 of the Bankruptcy Code on or about April 1, 2003.

5. On or about April 5, 2003, the Debtors filed their Application to retain Gleacher Partners LLC (“Gleacher”) as financial advisors and investment bankers to the Debtors.

6. According to the Application and the terms of the engagement letter between Debtors and Gleacher (the “Engagement Letter”), Gleacher will receive: a monthly fee of \$200,000; an Amendment Fee of \$2 million payable upon the consummation of an amendment to the Debtors’ existing bank credit facility; a Restructuring Fee of \$10 million payable upon any restructuring, reorganization (whether or not pursuant to Chapter 11 of the Bankruptcy Code), refinancing or recapitalization of the Debtors; an Arrangement Fee of an unknown amount, and a Divestiture Fee of an unknown amount. Some of these fees are subject to certain credits as described in the Engagement Letter.

7. Debtors seeks to have this Court determine at the time of Gleacher’s retention that the fees they have agreed to pay are reasonable under the standards set forth in Section 328(a) of the Bankruptcy Code.

8. Section 328(a) of the Bankruptcy Code provides, in pertinent part:

The trustee . . . with the court’s approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. §328(a).

9. The United States Trustee objects to the pre-approval under 328(a) of the fees the Debtors have agreed to pay Gleacher under certain circumstances, in that such a determination is premature and inconsistent with 11 U.S.C. §§ 330 and 331, and merely serves to limit the Court's later review of the reasonableness of Gleacher's fees as contemplated by those sections. Instead, as contemplated by the Bankruptcy Code, review and approval by the Court of Gleacher's fees should be made at the final fee application hearing, or at least after the closing of a transaction that would trigger the accrual of certain of the fees. The benefit of Gleacher's services and the reasonableness of the fees can be better evaluated at that time, with all rights of interested parties fully preserved until then. This is especially true where, as in this case, the value of any potential transaction is unknown at this time (and thus there is no "benchmark" against which to evaluate the reasonableness of the fees), and the amounts of certain of the fees (such as the Divestiture Fee and the Arrangement Fee) are not even disclosed.

10. The Engagement Letter also provides that in the event of a termination of Gleacher, the Amendment Fee and the Restructuring Fee will be payable if any Amendment or Restructuring is completed within 12 months of the termination. It appears that Gleacher will receive these fees regardless of its contribution in causing or procuring any Amendment or Restructuring, regardless of the circumstances surrounding termination of the engagement, and regardless of whether the Debtors are required to compensate any other professional persons for their role in causing or procuring these transactions. The United States Trustee objects to approval of this provision unless it is amended to provide that Gleacher must establish a causal connection between the work it performed for the Debtors and the post-termination transactions which might give rise to payment of a fee.

11. The definition in the Engagement Letter of “Restructuring” is unduly broad. Gleacher should only be entitled to payment of the Restructuring Fee in the event of either (1) the Court confirming a plan of reorganization, or (2) the consummation of a sale of substantially all of the Debtors’ assets.

12. The United States Trustee has also informally raised other objections with the Debtors regarding the terms of the engagement with Gleacher, and understands that those objections have been resolved, subject to revisions of the proposed form of order. The United States Trustee reserves her right to raise such objections at the hearing in the event the terms of the revised form of order do not, in fact, resolve such objections.

13. The United States Trustee leaves the Debtors to their burden of proof and reserves her discovery rights.

WHEREFORE the United States Trustee requests that this Court deny the relief requested in the Application and/or grant such other relief that this Court may deem appropriate and just.

Respectfully submitted,

**ROBERTA A. DEANGELIS**  
**ACTING UNITED STATES TRUSTEE**

**BY: /s/ Julie L. Compton**

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