

**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.	)	Hearing Date: 4/21/03 at 12:30 p.m.
_____	)	Obj. Deadline: 4/14/02 at 4:00 p.m.

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO  
DEBTORS' MOTION FOR ORDER PURSUANT TO SECTION 365(A) OF THE  
BANKRUPTCY CODE AUTHORIZING THE DEBTORS TO REJECT CERTAIN  
UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY  
AND AVIATION EQUIPMENT  
(Re Docket No. 13)**

The Official Committee of Unsecured Creditors of Fleming Companies, Inc., (the "Committee"), by its attorneys, Pepper Hamilton LLP and Milbank Tweed Hadley & McCloy LLP, files this objection (the "Objection") to Debtors' Motion for Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property and Aviation Equipment (the "Motion") filed on April 2, 2003. In support of its Objection, the Committee respectfully states as follows:

**FACTUAL BACKGROUND**

1. On April 1, 2003 (the "Petition Date"), each of the Debtors filed a voluntary petition for bankruptcy relief under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §101, et. seq. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors are continuing to operate their business and manage their property as debtors-in-possession.

2. Subsequent to the Petition Date, the United States Trustee appointed the Committee pursuant to 11 U.S.C. § 1102(a)(1).

3. By way of the Motion, the Debtors request Court authorization to reject two-hundred fourteen (214) nonresidential real property leases and four (4) aviation equipment leases (collectively, the “Leases”), pursuant to section 365(a) of the Bankruptcy Code.

### **OBJECTION**

4. The Committee objects to the Debtors’ requested relief because the Debtors have failed to provide or even identify in the Motion what specific information they relied upon in formulating their decision to reject the Leases. As a result, the Committee is unable to properly determine whether granting Debtors’ request to reject the Leases is in the best interests of this Estate and/or its creditors.

5. To support the requested relief, the Debtors assert that they have exercised sound business judgment in determining that the Leases are unprofitable and are not necessary for the Debtors’ restructuring efforts. The Debtors reason that, by rejecting the Leases at this time, the Estate will avoid administrative expenses being incurred if the Debtors attempted to market and assign the Leases to third parties. The Debtors contend that to incur those expenses would be more costly than any potential value that would be realized by any future sale, assignment, or sublease.

6. Nevertheless, merely alleging that the rejection of the Leases is beneficial to this Estate by no means satisfies the burden imposed on the Debtors under section 365 of the Bankruptcy Code. See In re Diamond Manufacturing Company, 164 B.R. 189, 199 (Bankr. Ga. 1994) (holding that the decision to assume or reject an executory contract or unexpired lease must be done after a trustee or debtor has reviewed all pertinent information). Under the business judgment test, the Debtors are required to provide some showing that the rejection will indeed benefit the Estate or the reorganization. See In re Myklebust, 26 B.R. 583, 584 (Bankr. W.D. Wis. 1983).

7. Based on the information provided in the Motion, or lack thereof, the Debtors have not satisfied their burden in showing that the rejection of the Leases would be more beneficial to this Estate as opposed to the value that the Debtors would receive from marketing the Leases to third parties. Presumably, such information would consist of: (i) an analysis of prevailing lease rates for similar property by lease by market; (ii) an analysis of above or below market lease cost in comparison to prevailing lease rates; (iii) a review of lease terms such as, rent, taxes, CAM, termination date, etc.; (iv) an analysis of rejection claims arising under section 502 of the Bankruptcy Code; and/or (v) all materials or analysis illustrating Debtors' efforts to market the Leases to third parties. Without such information, the Committee is deprived of assessing whether the Debtors' business judgment in rejecting the Leases is well-founded and in the best interests of the Estate and its creditors.

8. The Committee agrees with the Debtors that this Court should apply the "business judgment" standard in assessing whether the Estate can reject the Leases. This Court, however, is precluded from making such a determination given the absence of any meaningful information in the Motion to support Debtors' contention that they have exercised sound business judgment with respect to this matter.

9. As explained in In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2<sup>nd</sup> Cir. 1993), the court's role in the assumption/rejection process is "as an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession . . . ." Specifically, the Orion Court held that "a bankruptcy court reviewing a trustee's or debtor-in-possession's decision to assume or reject an executory contract should examine a contract and the surrounding circumstances and apply its best "business judgment" to determine if it would be beneficial or burdensome to the estate to assume it." Id. at 1098. A motion to assume or reject is a summary proceeding, "intended to efficiently review the trustee's or debtor's decision to

adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate.” Id.

10. In this case, because the Debtors have failed to provide any information to support their decision to reject the Leases, this Court is prevented, as is the Committee, from properly reviewing whether the Debtors’ determination constitutes the exercise of sound business judgment.

11. Given the lack of information to support the Debtors’ requested relief, the Motion should be denied.

WHEREFORE, for all the foregoing reasons, the Committee respectfully requests that this Court deny the Motion and grant such further relief as is appropriate under the circumstances.

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Dated: April 17, 2003



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