UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	
	:	Chapter 11
FLEMING COMPANIES, INC.,	:	
et al.,	:	Case Number 03-10945 (MFW)
	:	
Debtors.	:	**Objections Due: 4/29/03 at 4:00 p.m.** **Hearing Date: 5/6/03 at 12:30 p.m.**

OBJECTION OF THE UNITED STATES TRUSTEE TO APPLICATION PURSUANT TO 11 U.S.C. §§ 327(a) AND 328 AND FED. R. BANKR. P. 2014(a), 2016 AND 5002 AUTHORIZING THE EMPLOYMENT AND RETENTION OF DELOITTE & TOUCHE LLP AS INDEPENDENT AUDITORS, ACCOUNTANTS AND PROPERTY TAX SERVICE PROVIDERS *NUNC PRO TUNC* TO APRIL 1, 2003
(Re: Docket No. 454)

In support of her Objection to the Application Pursuant to 11 U.S.C. §§ 327(a) and 328 and Fed. R. Bankr. P. 2014(a), 2016 and 5002 Authorizing the Employment and Retention of Deloitte & Touche LLP as Independent Auditors, Accountants and Property Tax Service Providers *Nunc Pro Tunc* to April 1, 2003 (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 18, 2003, the Debtors filed the Application, requesting authority to employ Deloitte & Touche LLP ("Deloitte") as independent auditors, accountants

and property tax service providers for the Debtors.

6. Edward Crater, a partner of Deloitte, submitted an affidavit in support of the Application (the "Affidavit").

7. According to the Application, Deloitte will provide auditing, accounting and tax services to the Debtors, including, among other things, certain services described in the Application as "research, advice and consultation regarding accounting or tax estimates, principles, methods, alternatives, interpretations, or implementation" and "assisting the Debtors with internal control system research and consultation."

8. Absent additional disclosure, the United States Trustee objects to Deloitte providing certain consulting services to the Debtors if it will also be providing audit services. In particular, but without limitation, it is unclear whether the proposed engagement complies with Sections 201 and 202 of the Sarbanes-Oxley Act of 2002 (the "Act"). More information is needed regarding the nature of the consulting services to be provided, and/or whether certain preapproval requirements of the Act have been met, before the appropriateness of the engagement can be properly evaluated.

9. Additional information is also required regarding certain disclosures in the Application and Affidavit to determine whether any conflicts of interest exist which may disqualify Deloitte from representing the Debtors in these cases pursuant to Section 327(a) of the Bankruptcy Code. Specifically, it is disclosed that certain shareholders of the Debtors have commenced litigation against Deloitte pertaining to certain of Deloitte's pre-petition services for the Debtors. More information is needed to determine whether Deloitte's interests may be adverse to the Debtors in this litigation.

10. More information is also needed with respect to the disclosure that Deloitte is represented by Baker Botts LLP, who also represents the Debtors in litigation in which Deloitte is also a defendant. It is not clear whether Baker Botts' representation of Deloitte is also related to this litigation.

11. More information is needed with respect to payments (of approximately $2.123 million) made to Deloitte within 90 days of the Petition Date to determine whether such payments may constitute a preference under Section 547(b) of the Bankruptcy Code, and whether Deloitte satisfies the requirements set forth in Section 327(a) of the Bankruptcy Code, which provides that the Debtors may employ only those professionals who are "disinterested persons." 11 U.S.C. §327(a).

12. The engagement letter attached to the Application provides that "it is understood and agreed that each of the parties hereto is an independent contractor and that neither party is, nor shall be considered to be, an agent, partner, fiduciary, joint venturer, or representative of the other." To the extent this provision attempts to waive any fiduciary duties to the Debtors and their estates, such a provision is inconsistent with the Bankruptcy Code. A professional employed on behalf of a debtor-in-possession under 327(a) owes fiduciary obligations to the debtor and its creditors to act solely in the best interests of the estate. See *In re JLM, Inc.*, 210 B.R. 19, 26 (2d Cir. BAP 1997); *In re Brennan*, 187 B.R. 135, 150 (Bankr. D.N.J. 1995)("It is axiomatic that professionals employed by a trustee or debtor-in-possession have a fiduciary duty to the estate.").

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

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