

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re)	Chapter 11
)	Case No. 03-10945 (MFW)
FLEMING COMPANIES, INC., et al.,)	Jointly Administered
)	Objection deadline: Oct. 13, 2003 at 4:00 p.m.
Debtors.)	Hearing Date: Oct. 20, 2003, at 2:00 p.m.

**PROTECTIVE OBJECTION OF TRANSAMERICA EQUIPMENT FINANCIAL
SERVICES CORPORATION TO THE MOTION FOR ORDER AUTHORIZING
THE DEBTORS TO REJECT CERTAIN PERSONAL PROPERTY LEASES
AND EXECUTORY CONTRACTS (OCTOBER 20, 2003 MOTION) [D.I. 3917]**

Transamerica Equipment Financial Services Corporation (“Transamerica”), by and through its undersigned counsel, hereby objects to the Motion for Order Authorizing the Debtors to Reject Certain Personal Property Leases and Executory Contracts (October 20, 2003 Motion) (“Motion”) [D.I. 3917], filed by the above-captioned debtors (“Debtors”). In support of its Objection, Transamerica respectfully states as follows:

1. Fleming Companies, Inc. (“Fleming”), one of the Debtors, leases certain computer equipment from Transamerica, including, but not limited to, two (2) IBM zSeries machine type 2064 model 1C6, serial nos. 186FA and 1870A, and related equipment (collectively, “Equipment”) under a Term Lease Master Agreement No. 3410000 between IBM Credit Corporation and Fleming (“Lease”). Transamerica owns the Equipment, which the Debtors utilized in their Wholesale Distribution Business.

2. Pursuant to the Motion, the Debtors seek to reject certain leases set forth on Exhibit A to the Motion effective as of September 30, 2003. On October 1, 2003, the Debtors filed an amended Exhibit A to the Motion, which lists two equipment leases with IBM Corporation. The amended Exhibit A does not provide sufficient information for Transamerica to determine whether these two equipment leases with IBM Corporation are part of its Lease.

3. Accordingly, in the event that the Debtors are seeking to reject the Lease through the Motion, Transamerica hereby objects to the proposed effective date of rejection.

4. The Debtors concede in the Motion that they retain possession and control of the Equipment, and state that such Equipment “will be returned or made available to the lessors on or before October 20, 2003.” This is almost one full month after the proposed effective date of rejection. Rejection of the Lease should not be effective until the date the Debtors return the Equipment to Transamerica upon the terms and conditions set forth in the Lease,¹ and it certainly should not be effective where the Debtors admit that such return will not be effected until almost a full month after the proposed date of rejection.

5. Additionally, in the event that the Debtors seek to reject less than all of the Equipment governed by the Lease, Transamerica hereby objects to a piecemeal rejection of the Lease. The law on assumption and rejection of executory contracts is clear: a debtor must either assume the entire contract, *cum onere*, or reject the entire contract. *See* 3 COLLIER ON BANKRUPTCY ¶365.03[1] at 365-22 (Lawrence P. King et. al. eds., 15th ed. 2000). The Debtors may not “cherry-pick” among the Equipment, rejecting unwanted portions of the Equipment, while keeping the valuable portions thereof.

6. Transamerica hereby reserves all of its rights under the Lease and 11 U.S.C. § 365, and reserves the right to make any further objection to the relief requested in the Motion after more information regarding the Lease is provided.

¹ Debtors must comply with all prerequisites and conditions for such return, including the requirement that all re-delivery be fully insured for the benefit of Transamerica.

WHEREFORE, for all of the foregoing reasons, Transamerica respectfully requests that, to the extent that the Debtors are seeking to reject the Lease through the Motion, the Court deny the Motion or condition the relief granted so that any rejection of the Lease is (i) a rejection of all of the Equipment governed by the Lease, and (ii) not effective until the later of (a) the date the Debtors return the Equipment to Transamerica in accordance with the terms of the Lease, or (b) the date the Court enters an order approving rejection of the Lease.

Dated: October 13, 2003

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