

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

40-7580

In re: )  
 )  
FANSTEEL INC., *et al.*,<sup>1</sup> )  
 )  
Debtors. )  
 )  
 )  
 )

Case No. 02-10109(JJF)

Chapter 11  
(Jointly Administered)

Objection Deadline: July 3, 2002 at 4: 00 p.m. EST  
Hearing Date: TBD (Only If Objections Are Filed)

**DEBTORS' OPPOSITION TO MOTION OF WELLS FARGO FOR AN ORDER  
(1) PURSUANT TO SECTIONS 365(d)(2) AND 365(b)(1) COMPELLING THE DEBTOR  
TO IMMEDIATELY ASSUME OR REJECT LEASES, OR SHORTENING THE TIME  
TO ASSUME OR REJECT, (2) PURSUANT TO SECTION 365(d)(10), 363(e) AND  
503(a) AND (b)(1)(A) DIRECTING THE DEBTOR TO PAY FOR ITS POST-  
PETITION USE OF EQUIPMENT AND DEEMING WELLS FARGO TO  
HAVE AN ALLOWED ADMINISTRATIVE CLAIM AND (3) PURSUANT TO  
SECTION 362(d)(1) AND (2) VACATING THE AUTOMATIC STAY**

The captioned debtors and debtors in possession (each a "Debtor" and collectively, the "Debtors") hereby file this opposition (the "Opposition") to the motion (the "Motion")<sup>2</sup> of Wells Fargo for an order (1) compelling the Debtors to immediately assume or reject the leases (the "Leases/Contracts"); and/or, alternatively, shortening the time in which the Leases/Contracts shall be assumed or rejected, and directing that upon assumption, Debtors cure all lease defaults and compensate Wells Fargo for its pecuniary losses, or that upon rejection, the Debtors immediately and peacefully surrender the equipment; (2) directing the Debtors to pay

<sup>1</sup> The Debtors are the following entities: Fansteel Inc., Fansteel Holdings, Inc., Custom Technologies Corp., Escast, Inc., Wellman Dynamics Corp., Washington Mfg. Co., Phoenix Aerospace Corp., American Sintered Technologies, Inc., and Fansteel Schulz Products, Inc.

<sup>2</sup> Capitalized terms not otherwise defined have the same meaning as ascribed to them in the Motion.

Nmssol  
Public Add Oge Mail Center

for their post-petition use of the equipment, and deeming Wells Fargo to have an allowed administrative claim; and (3) vacating the automatic stay for cause, including the lack of adequate protection, and upon the ground that the Debtors do not have any equity in the equipment or the Leases/Contracts, and the equipment and the Leases/Contracts are not necessary for an effective reorganization. In opposition to this Motion, the Debtors respectfully represent as follows:

1. There are two Leases/Contracts at issue in the Motion: the Norstar Lease and the Conseco Lease both of which provide the Debtors with certain business equipment. Wells Fargo has provided the Debtors with a copy of a UCC-1 Financing Statement for the equipment related to the Norstar Lease. However, Wells Fargo has not provided, and the Debtors have not been able to locate, a UCC-1 Financing Statement with respect to the property related to the Conseco Lease.

**The Leases/Contracts Are Disguised Security Agreements**

2. The Court should deny the Motion because the Leases/Contracts are, in fact, merely disguised security agreements. *In re Edison Brothers Stores*, 207 B.R. 801 (Bankr. D.Del 1997). The determination of whether a transaction constitutes a true lease or a disguised secured transaction should be governed by state law. *Id.* at 807, citing *In re Continental Airlines, Inc.*, 932 F.2d 282, 294 (3d Cir. 1991). The Norstar Lease is governed by Iowa state law. Iowa Code §554.1201(4) provides that a contract is not a true lease when consideration has been paid for the goods and the lessee (a) may not terminate the contract and (b) may purchase the equipment for nominal consideration at the end of the contract. The Norstar Lease required an

initial payment of \$4422.54 and provides that it may not be terminated and that the equipment may be purchased for \$1.00 at the end of the lease period, as shown on **Exhibit A** hereto. Under Iowa law, the Norstar Lease is not a lease, but a financing device.

3. The Conseco Lease is governed by New Jersey law. Pursuant to N.J. Stat. §12A:1-201(37), the Conseco Lease is not a lease, but a financing device. N.J. Stat. §12A:1-201(37) provides that a contract is not a true lease when consideration has been paid for the goods and the lessee (a) may not terminate the contract and (b) may purchase the Equipment for nominal consideration at the end of the Conseco Lease. Here, the Conseco Lease has a \$1.00 purchase option, as shown on **Exhibit B** hereto. Under New Jersey law, the economic result of the Conseco Lease was that the Debtors bought the Equipment at the time that the Contract was entered into.

4. Under the controlling law for each of the Leases/Contracts, neither of them is a “true lease”. Both are disguised financing agreements that resulted in the Debtors purchasing the equipment described therein. Consequently, assumption or rejection of the Leases/Contracts is inapplicable.

#### **Wells Fargo Is Not Entitled To Adequate Protection Payments**

5. Section 362(d)(1) of title of 11 of the United States Code (the “Bankruptcy Code”) provides that the Court may grant relief from stay, “for cause, including the lack of adequate protection of an interest in property of such party in interest.” Because there is no clear definition of what constitutes “cause” within the meaning of Bankruptcy Code § 362(d)(1), relief

from stay on this basis is discretionary and must be determined on a case by case basis. *See In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985).

6. What constitutes “adequate protection” is set forth in Bankruptcy Code §361, which provides:

[W]hen adequate protection is required . . . of an interest of an entity in property, such adequate protection may be provided by --

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the . . . use . . . under section 363 of this title . . . results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such . . . use . . . results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent in such entity's interest in such property.

11 U.S.C. §361.

7. Neither Bankruptcy Code § 361 nor any other provision of the Bankruptcy Code defines the nature and extent of the “interest in property” for which Wells Fargo is entitled to be adequately protected. However, the statute plainly provides that a qualifying interest demands protection only to the extent that the use of the creditor’s collateral will result in a decrease in “the value of such entity's interest in such property.” 11 U.S.C. §§ 361, 363(e). *See also, In re South Village, Inc.*, 25 B.R. 987, 989-90 & n.4 (Bankr. D. Utah 1982); O’Toole, *Adequate Protection and Post-Petition Interest in Chapter 11 Proceedings*, 56 Am. Bankr. L.J. 251, 263 (1982).

8. The phrase “value of such entity’s interest,” although not defined in the Bankruptcy Code, was addressed by the Supreme Court in the landmark decision of *United*

*Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S.Ct. 626 (1988). For the meaning of “value of such entity’s interest,” the Supreme Court was guided by Bankruptcy Code § 506(a), which defines a creditor’s allowed secured claim:

The phrase “value of such creditor’s interest” in § 506(a) means “the value of the collateral.” We think the phrase “value of such entity’s interest” in § 361(1) and (2), when applied to . . . means the same.

*Id.* at 630 (citations omitted). *Timbers* teaches that a secured creditor is entitled to “adequate protection” only against diminution in the value of the collateral securing the creditor’s allowed secured claim. Under *Timbers*, therefore, where the “value of the collateral” is not diminishing by its use, sale, or lease, the creditor’s interest is adequately protected. Accordingly, to obtain relief from stay under Bankruptcy Code § 362(d)(1), the secured creditor has the burden of proving that its collateral is declining in value, and the amount of that decline. 11 U.S.C. §362(d)(1).

9. The Leases/Contracts are disguised security agreements, yet Wells Fargo has not provided any evidence of alleged diminution of the value of the equipment. Absent such an allegation and a prima facie case establishing such diminution, the Motion should be denied. *Understanding the Basics of Bankruptcy & Reorganization 2001*, Practising Law Institute (2001) at 250.

**Wells Fargo Failed to Establish a Security Interest in the Conseco Lease**

10. Wells Fargo bears the burden of proving that it has a valid security interest in the equipment subject to the Conseco Lease pursuant to Bankruptcy Code § 362(g)(1). *See also In re U.S. Physicians, Inc.*, 263 B.R. 593, 605 (Bankr. E.D. Penn. 1999)(“The alleged

secured party bears the burden of proving the validity of its security interest in the debtor's property.”). Wells Fargo failed to provide any evidence that it filed a UCC-1 Financing Statement with respect to its alleged interest in the equipment “leased” pursuant to the Conseco Lease. Without first establishing that it has a properly perfected security interest in the equipment, Wells Fargo is not entitled to any relief.

11. In sum, the Motion is deficient of any of the evidence necessary to warrant the relief requested therein. Wells Fargo failed to prove that the Leases/Contracts were “true leases”, failed to provide any evidence of alleged diminution of the value of the equipment, and failed to provide any evidence that it has an interest in the property subject to the Conseco Lease. Therefore, the Debtors respectfully submit that the Motion should be denied in its entirety.

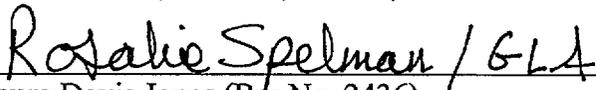
**WHEREFORE**, the Debtors respectfully request that the Court deny the Motion and grant the Debtors such other and further relief as the Court may deem just and proper under the facts and circumstances of these cases.

Dated: July 3, 2002

SCHULTE, ROTH & ZABEL LLP  
Jeffrey S. Sabin (JSS 7600)  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 756-2000  
Facsimile: (212) 593-5955

and

PACHULSKI, STANG, ZIEHL, YOUNG & JONES P.C.

  
\_\_\_\_\_  
Laura Davis Jones (Bar No. 2436)  
Rosalie L. Spelman (Bar No. 4153)  
919 North Market Street, 16th Floor  
P.O. Box 8705  
Wilmington, Delaware 19899-8705 (Courier 19801)  
Telephone: (302) 652-4100  
Facsimile: (302) 652-4400

Counsel for Fansteel, Inc., et al.,  
Debtors and Debtors in Possession

# Exhibit A



**Wells Fargo Financial Leasing**

Route 17 South  
NJ 07652

*copy*

*61.50 purchase*

**Documentation Sheet**

X TO: Keith Napier  
X #:   
# of Pages: 6  
REPLY REQUESTED

Lease Account: 41982718  
Term (Months): 72  
Monthly Payment: \$1,474.18  
Purchase Option: \$1

Following this fax are the documents for the above noted account. Please copy onto plain paper, and sign all places marked with an "X". Return the documents with your original signature and advance payment/ security deposit, if requested, to WELLS FARGO FINANCIAL LEASING at the address noted below.

Lease Agreement signed by: CORPORATE OFFICER

Lease pages 1 - 6 initialed by: CORPORATE OFFICER

Personal Guaranty(s) signed by:

Personal Guaranty(s) witnessed by another party.

Signed Certificate of Acknowledgement and Acceptance of Leased Equipment.

Schedule "A" Attachment.

Advance Rental / Security Deposit made payable by company check to Wells Fargo

Financial Leasing, Inc. in the amount of : \$4,422.54

Federal Tax ID Number.

Other:

Thank you for leasing through WELLS FARGO FINANCIAL LEASING. Return all documents and payment / security deposit to:

WELLS FARGO FINANCIAL LEASING, INC.  
95 Route 17 South

# Exhibit B

# DocuSource

The Future of Office Technology  
 282 Murphy Road  
 Hartford, Connecticut 06114  
 Phone: 860 560-4293 Fax: 860 560-4296

*Plantsville #ac*

## SALES ORDER

**No 2838**

DATE ORDERED: \_\_\_\_\_

SHIP TO:

BILL TO:

FANSTEEL VR WESSON  
389 MARION  
PLANTSVILLE CT 06489  
 PHONE # 860-628-4705 FAX # 860-621-6918  
 CONTACT NAME: Rob STAGIS

STAGE  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 MAINTENANCE AGREEMENT: YES  NO

ORDERED ITEMS AND RATES CUSTOMER WILL ACCEPT AND PAY FOR THE FOLLOWING MERCHANDISE:

ITEM NUMBER PRODUCT CODE	DESCRIPTION	SERIAL NUMBER	QTY	UNIT PRICE	TOTAL AMOUNT
	AR 505				
	FBZ				
	FN3				
	NETWORK HOURS				
	LCT / ABD				
	FO 5700 w/ controller				
TRADE IN:	Nevox				
SPECIAL INSTRUCTIONS: <u>Comeco \$1 purchase 60 mos \$484.60 per month</u>					
NO TERMS OR CONDITIONS, EXPRESS OR IMPLIED, ARE AUTHORIZED UNLESS THEY APPEAR ON "ORIGINAL" OF THIS ORDER.				SUB TOTAL	
TERMS: THE EQUIPMENT INDICATED ABOVE IS PURCHASED UNDER THE DOCUSOURCE STANDARD TERMS WHICH ARE: 1. THE SELLER RETAINS A SECURITY INTEREST IN ALL EQUIPMENT AND SUPPLIES DESCRIBED IN THIS AGREEMENT UNTIL THE PURCHASE PRICE IS PAID IN FULL. 2. IN THE EVENT BUYER MAKES DEFAULT IN PAYMENT THE BUYER WILL BE LIABLE FOR THE PAYMENT OF ANY LEGAL FEES OR COSTS INCURRED IN SUSTAINING OR PROTECTING THE SECURITY INTEREST, OR IN ENFORCING THE TERMS OF THE SECURITY AGREEMENT AND UPON DEMAND THE BUYER AGREES TO MAKE THE EQUIPMENT AVAILABLE TO THE SELLER AT A LOCATION TO BE DETERMINED BY THE SELLER. 3. THE BUYER HEREBY WAIVES HIS OR HER RIGHT TO A NOTICE AND HEARING UNDER SECTION 52-276 ET SEQ OF THE CONNECTICUT GENERAL STATUTES.				DELIVERY	
A PHOTOCOPY OF THIS AGREEMENT SHALL BE SUFFICIENT TO SERVE AS A FINANCING STATEMENT. THIS IS A BINDING ORDER, NOT SUBJECT TO CANCELLATION. NO TRIALS ACCEPTED. THIS ORDER CANNOT BE CHANGE EXCEPT IN WRITING BY A DOCUSOURCE OFFICE.				TAX	
				TOTAL	
				LESS DEPOSIT	
				TOTAL DUE	

ACCEPTED DOCUSOURCE  
[Signature]  
 AUTHORIZED SIGNATURE REQUIRED  
9/26/00  
 DATE  
GALEN FERRIS  
 Print Name

ACCEPTED CUSTOMER  
[Signature]  
 AUTHORIZED SIGNATURE REQUIRED  
9/26/00  
 DATE  
ROBERT STAGIS  
 Print Name