

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)	Chapter 11
)	
FANSTEEL, INC., et al.,)	Case No. 02-10109 (JJF)
)	
Debtors.)	(Jointly Administered)
)	
)	Re: Docket Nos. 1167, 1267

**MOTION OF FISHER-ANDERSON, LC FOR LEAVE TO FILE REPLY
TO DEBTORS' OPPOSITION TO ITS MOTION FOR RELIEF FROM
AUTOMATIC STAY OR, ALTERNATIVELY, FOR ADEQUATE PROTECTION**

Fisher-Anderson, LC, ("Fisher"), by and through its undersigned counsel, pursuant to Del. Bank. L.R. 9006-1(d) hereby requests authority to file a reply (the "Reply") to the responsive pleading filed by the Debtors in response to the Motion of Fisher-Anderson, LC For Relief From Automatic Stay or, Alternatively, For Adequate Protection ("Motion") [D.I. 1167] which is not currently scheduled for a hearing as of the date of this application. In support of this motion, Fisher respectfully represents as follows:

1. On August 5, 2003, Fisher filed the Motion seeking a modification of the automatic stay or, alternatively, for adequate protection.
2. On August 20, 2003, Fisher filed the Affidavit of Laticia Hill in support of the Motion (D.I. 1200).
3. On August 28, 2003, the Debtors filed their Opposition to the Motion ("Opposition") [D.I. 1267] and raised certain legal and factual issues regarding the relief sought in the Motion.

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4. Fisher seeks to file a reply to the Opposition in the form attached hereto as Exhibit A to address the legal issues and clarify certain factual issues. Fisher respectfully submits that the Reply is necessary to fully and accurately appraise the Court of the legal issues involved and the factual background.

WHEREFORE, Fisher-Anderson, LC respectfully requests the entry of an Order granting Fisher-Anderson, LC the authority to file its Reply, a copy of which is attached hereto as Exhibit "A."

FERRY, JOSEPH & PEARCE, P.A.



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Dated: October 13, 2003

TJT/ald

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EXHIBIT "A"

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In Re:)	Chapter 11
)	
FANSTEEL, INC. et al.,)	Case No. 02 – 10109 (JJF)
)	
)	Jointly Administered
Debtors.)	

**REPLY TO DEBTOR'S RESPONSE TO MOTION OF FISHER – ANDERSON, LC
FOR THE ENTRY OF AN ORDER TO MODIFY THE AUTOMATIC STAY
OR, ALTERNATIVELY, FOR ADEQUATE PROTECTION**

Fisher – Anderson, LC, (“Fisher”), by and through its undersigned counsel, for its reply to the Debtor’s Opposition to Motion of Fisher-Anderson, LC for the Entry of an Order to Modify the Automatic Stay or, alternatively, for Adequate Protection (hereinafter Debtor’s “Response”) and Fisher respectfully states as follows:

I. BACKGROUND

1. Fisher moved pursuant to 11 U.S.C. § 362(d), to modify the automatic stay to permit Fisher to enforce all available state law remedies against its collateral, or in the alternative, for adequate protection payments.

2. The Debtor filed a Response to the Motion opposing the request for modification of the automatic stay. The Response raises three issues. First, the Debtor argues that the Equipment Lease Agreement (the “Lease Agreement”) is not a “true lease”, but is in fact a disguised financing agreement. Second, the Debtor alleges that Fisher is not entitled to adequate protection, because Fisher cannot prove the value of its collateral and Fisher does not have an “interest” in the collateral. Third, the Debtor alleges that Fisher does not have a

valid, perfected security interest in licensed computer software. The Debtor argues that it did not have a property interest in the licensed software and therefore, could not grant Fisher a lien in property rights retained by the Licensor. This Reply will address each of these issues.

II. ARGUMENT

A. Introduction

3. It is undisputed that the Debtor entered into a Lease Agreement with Fisher on or about June 5, 2001, to finance the purchase of licensed computer software and bar code guns (the "Collateral"). It is also undisputed that on June 12, 2001, Fisher properly filed a UCC financing statement with the Secretary of State of Iowa, where the Debtor's operations are located. While Fisher has not directly conceded that the Agreement is not a "true lease", given the one dollar buy-out provision, Fisher has elected to bring a motion to modify the automatic stay, as opposed to a motion to compel the assumption or rejection of the Lease Agreement pursuant to 11 U.S.C. §365 of the Bankruptcy Code.

4. If the Lease Agreement between Fisher and the Debtor constitutes a financing agreement, then Fisher is entitled to adequate protection for the continued use and depreciation of the Collateral. Fisher is entitled to adequate protection because (i) the value of the Collateral continues to decline; (ii) the Debtor has no equity in the Collateral; and (iii) Fisher possesses a valid, perfected security interest in the Collateral.

5. Whether or not the Court determines the Lease Agreement to be a "true lease" or a financing arrangement, the Debtor needs and continues to use the Collateral in the operation of its business, and has failed and refused to make any payments to Fisher for over a year.

6. The Court should note, however, that the Debtor makes a circular argument in that regard. The Debtor asserts in the second half of its Response that the licensed software

was never truly “owned” by Fisher or the Debtor. Therefore, the licensed software cannot not be subject to a security interest. However, in the context of the dispute over whether the Lease Agreement is a “true lease”, the Debtor claims that it will become the “true owner” of the Collateral for nominal additional consideration at the end of the Lease Agreement. The Debtor’s claim to ownership rights in the licensed software belies its argument that no one but the Licensor of the software will ever truly “own” the rights to its use.

7. The current value of the Collateral is \$45,000, and Debtor owes Fisher \$95,944.13 under the Lease Agreement. Since the value of the Collateral does not exceed the Debtor’s liability to Fisher, the Debtor does have any equity in the Collateral, and its continued use subjects the Collateral to ongoing depreciation.

B. Fisher - Anderson, LC Possesses a Valid, Perfected Security Interest in the License to the Software

1. Fisher-Anderson, LC's Interest is a Property Right

8. In its Response, the Debtor claims that in order for adequate protection to be justified, the movant must have an “interest” in the property. The Debtor cites In re Golden Books Family Entertainment, Inc., 269 B.R. 300 (Bankr.D.Del. 2001) for the proposition that under copyright law, intellectual property interests cannot be assigned. The Golden Books case is distinguishable on several grounds. First, the instant case does not involve the sale of the computer software to a third party. Second, the Golden Books case does not involve the issue of UCC or perfection of security interests for intangibles.

9. The Debtor, in Paragraph Fifteen of its Response, cites two cases in support of its contention that a license is a personal right and not a property right that can be used as collateral. However, in two Eighth Circuit cases, courts permitted creditors to acquire a security interest in a liquor license. The creditors perfected these interests by filing UCC

Financing Statements. Wegner v. Grunewaldt, 821 F.2d 1317 (8th Cir. 1987), and In re: O'Neill's Shannon Village, 750 F.2d 679 (8th Cir. 1984).

2. Iowa Law Protects Security Interests in Intangibles, Including Software Licenses

10. Fisher's security interest in the software license is valid under both Iowa statutory and case law. Section 554.9408 of the Iowa Statutory Code prohibits restrictions on the creation of security interests in software. This Section states that, "a term in a promissory note or in an agreement between an account debtor and a debtor which relates to... a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated... is ineffective to the extent that the term would impair the creation, attachment, or perfection of a security interest." Iowa Code § 554.9408(1)(a) (2003). Note that under Section 554.9102, the definition of a general intangible includes computer software. Iowa Code § 9102 (2003). Therefore, Section 554.9408(1)(a) voids restrictions on the creation or perfection of a security interest in computer software.

3. Iowa Courts Recognize Security Interests in Intangibles

11. A court interpreting Iowa law recognized a bank's security interest in intangibles in Chemical Bank v. Comm. Data Services, Inc., 765 F.Supp. 1401 (S.D. Iowa 1991). In this case, the court was faced with the issue of determining the priority of two competing lien claims. The claims were made by two entities, and each claimed a lien on goods that included computer software. However, as an initial matter, the court needed to examine whether both entities held a valid lien on the goods. When discussing the bank's lien, the court held the lien to be valid stating, "Chemical duly filed Uniform Commercial Code financing statements with the secretaries of state and local filing offices in New York, Illinois, and North Carolina. The

financing statements described Chemical's collateral as including the subscription list." *Id.*, at 1402.

4. Licensor Consented to Fisher-Anderson, LC's Financing of the Software License

12. In Paragraph Fourteen of its Response, the Debtor states that Fisher could not take a lien on the licensed software without Global Shop's consent. This is not true a statement under Iowa statutory and case law, as discussed above. However, even if Debtor's contention was accurate, Global Shop knew of and consented to Fisher's security interest in the Software.

13. When Debtor purchased the Software from Global Shop, Global Shop knew that Fisher was providing the financing and consented to Fisher's security interest. Evidence of this knowledge and consent is indicated on the invoice from Global, where Fisher is stated as the purchaser on the invoice and shipping of the Collateral directed to Fansteel Washington. A copy of the invoice is attached hereto as Exhibit A.

C. Conclusion

14. In conclusion, Fisher is entitled to adequate protection for the continued use and depreciation of its Collateral. Fisher perfected its security interest in the Collateral, including the license to the software by filing a UCC Financing Statement. Iowa recognizes security interests in intangibles such as licenses. The value of the Collateral will only continue to decline and the Debtor has no equity in Fisher's Collateral. This Motion should be granted in order to protect Fisher's security interest in the Collateral.

III. PRAYER FOR RELIEF

WHEREFORE, Fisher - Anderson, LC prays for the entry of an Order modifying the automatic stay to permit Fisher - Anderson, LC to enforce all available state law remedies against its Collateral, or in the alternative, for adequate protection payments, and for such other and further relief as this Court deems just and equitable under the circumstances.

Respectfully Submitted,

Dated: October __, 2003

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Counsel for Fisher-Anderson, LC, Movant

DOC ID.: 337994.2

EXHIBIT "A"

32366-1

INVOICE # 12866

SOLD TO:

Fisher Anderson, L.C.
1370 NW 114TH Street
#300
Des Moines, IA 50325-7065

SHIP TO:

Fansteel Washington
P.O. Box 486
Washington, la 32353

DATE:

55/25/01

CUSTOMER P.O. # 34943

TERMS:

DUE UPON INSTALL

1 20 - USER LICENSE FOR INFISY SOFTWARE: \$ 77,375.00

SHOP FLOOR MANAGEMENT
MATERIALS MANAGEMENT
ADV MATERIALS MANAGEMENT
SALES MANAGEMENT
ON LINE SOFTWARE FOR BAR
CODING AND TIME & ATTENDANCE
FINANCIAL MANAGEMENT
GRAPHICAL SCHEDULING
LOT/SERIAL TRACKING
FORECASTING MODULE
INTERNET PURCHASING
INNERNET MESSAGING
LASER FORMS SOFTWARE
EDI

10	ADV QUALITY MODULE	
	ADV ENGINEERING	
	ODBC SQL/UDD 03 USERS	
	INFISY LINK FOR 10 USERS	
	BAR CODE LASER GUNS	\$ 2,600.00
8	ON SITE CONSULTING	\$ 8,000.00
	PREPAID EXPENSES	\$ 825.00

Software License Number 024027

TOTAL AMOUNT DUE \$ 88,800.00

H R Alexander / SMB
H. R. ALEXANDER - PRESIDENT

Bar Code Laser Guns Serial Numbers as follows:

11000655; 11000656; 11000657; 11000659; 11000663; 11000668;

11000678; 11000682; 11000685; 11000703

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)	Re: Docket Nos. 1167, 1267

ORDER

Upon consideration of the Motion Of Fisher-Anderson For Leave To File Reply to the Debtors' Opposition to the Motion of Fisher-Anderson, LC For Relief From Automatic Stay or, Alternatively, For Adequate Protection ("Motion") and good and sufficient cause appearing therefor, it is

ORDERED THAT:

Fisher-Anderson, LC's Motion For Leave To File Reply to the Debtors' Opposition to the Motion of Fisher-Anderson, LC For Relief From Automatic Stay or, Alternatively, For Adequate Protection is GRANTED.

Dated: _____, 2003

UNITED STATES DISTRICT COURT JUDGE

File a Motion:**02-10109-JJF Fansteel Inc.****U.S. Bankruptcy Court****District of Delaware****Notice of Electronic Filing**

The following transaction was received from Tacconelli, Theodore J. entered on 10/13/2003 at 1:24 PM EDT and filed on 10/13/2003

Case Name: Fansteel Inc.**Case Number:** 02-10109-JJF**Document Number:** 1418**Docket Text:**

Motion for Leave to File Reply *To Debtors' Opposition To Motion Of Fisher-Anderson, LC For Relief From Automatic Stay Or, Alternatively, For Adequate Protection* (related document(s)[1267]) Filed by Fisher-Anderson, LC (related document(s)[1267]). (Attachments: # (1) Exhibit A# (2) Proposed Form of Order # (3) Certificate of Service # (4) Service List) (Tacconelli, Theodore)

The following document(s) are associated with this transaction:

Document description:Main Document**Original filename:**F:\Andrea\TJT\Fisher-Anderson, LC\MotForLeave.pdf**Electronic document Stamp:**

[STAMP bkecfStamp_ID=983460418 [Date=10/13/2003] [FileNumber=1977189-0]
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Document description:Exhibit A**Original filename:**F:\Andrea\TJT\Fisher-Anderson, LC\ExhibA.pdf**Electronic document Stamp:**

[STAMP bkecfStamp_ID=983460418 [Date=10/13/2003] [FileNumber=1977189-1]
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Document description:Proposed Form of Order**Original filename:**F:\Andrea\TJT\Fisher-Anderson, LC\OrderReply.pdf**Electronic document Stamp:**

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Document description:Certificate of Service**Original filename:**F:\Andrea\TJT\Fisher-Anderson, LC\CertofServ101303.pdf**Electronic document Stamp:**

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