

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

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| In re | : | Chapter 11 |
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| FLEMING COMPANIES, INC., et al., | : | |
| | : | Case Nos. 03-10945 (MFW) |
| Debtors. | : | (Jointly Administered) |
| | : | |
| | : | Objection Date: June 20, 2003, at 4:00 p.m. |
| | : | Hearing Date: June 25, 2003 at 2:00 p.m. |
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**OBJECTION OF COMDISCO, INC. TO THE DEBTORS' MOTION FOR AN ORDER
PURSUANT TO SECTION, 365 OF THE BANKRUPTCY CODE AUTHORIZING AND
APPROVING PROCEDURES FOR (i) THE ASSUMPTION AND ASSIGNMENT AND
(ii) REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES OF
NONRESIDENTIAL REAL PROPERTY OF THE DEBTORS**

Comdisco, Inc. ("Comdisco"), by its counsel Moritt Hock Hamroff & Horowitz LLP and Ballard Spahr Andrews & Ingersoll, LLP, as and for its objection to the motion of Fleming Companies, *et al.*, Debtors and Debtors-in-Possession (collectively, the "Debtors") seeking an Order pursuant to Sections 365 of the Bankruptcy Code Authorizing and Approving Procedures for (i) the Assumption and Assignment and (ii) Rejection of Executory Contracts and Unexpired Leases of Nonresidential Real Property of the Debtors (the "Motion") respectfully represents as follows:

BACKGROUND

1. On April 1, 2003 (the "Filing Date"), the Debtors commenced these Chapter 11 cases by the filing of voluntary petitions for relief under Chapter 11 of 11 U.S.C. §101 *et seq.* (the "Bankruptcy Code").

2. Prior to the Filing Date, the Debtors entered into a Master Lease Agreement and several Schedules thereto with Comdisco (collectively the "Master Lease"), which provided for the rental of certain equipment more specifically defined therein (the "Equipment"). (A copy of the Master Lease is available upon written request.)

3. On May 19, 2003, at a hearing on the Debtors' Motion for an Order Pursuant to Sections 363(b), 363(f), 554(a) and 1146(c) of the Bankruptcy Code Authorizing and Approving Procedures for the Sale or Abandonment of the Debtors' De Minimis Assets, and in settlement of Comdisco's limited objection thereto, it was agreed on the record between the Debtors and Comdisco that, inter alia, the Debtors would provide Comdisco's New York counsel with information as to whether any of Comdisco's Equipment had been moved from the original location identified under the Master Lease (the "Agreement"). Pursuant to the terms of the Agreement, the Debtors had until June 2, 2003 to provide such information; to date the Debtors have not provided such information.

4. Comdisco's objection to the Motion is with respect to both its interests in the Master Lease and the Equipment covered thereunder.

LIMITED OBJECTION

5. The Motion seeks approval of procedures (the "Procedures") for: (i) rejecting executory contracts and unexpired leases; and (ii) assuming and assigning executory contracts and unexpired leases contracts (collectively the "Contracts").

THE REJECTION PROCEDURES

6. The Procedures proposed by the Debtors in the Motion for rejection of Contracts would entitle only the following parties to notice of rejection of the Contracts: (i) the

counterparty to the Contracts; (ii) other interested parties to the Contracts (which parties are not defined in the Motion); (iii) counsel to the Creditors Committee; (iv) counsel to the Agent to the Senior Secured Lenders; and (v) the Office of the United States Trustee (collectively, the “Service Parties”). In the event of a real property lease, the Notice will also include information as to the real estate contract, but nothing regarding personalty located thereto.

7. Accordingly, Comdisco objects to the Motion on the grounds that the Procedures fail to provide Comdisco and its counsel with adequate notice on the proposed rejection of the Contracts in two instances. First, in the event that a real property lease is rejected, neither Comdisco nor its counsel will get notice of the rejection, despite having filed a Notice of Appearance. Notice in this instant is important as the Motion fails to identify what, if anything, will happen to the Master Lease or the Equipment if the same is located at the affected property. Second, in the event that a personal property lease is rejected, only Comdisco will get notice, not its counsel, despite properly filed Notices of Appearance leading to a delay in recovering the Equipment.

ASSUMPTION/ASSIGNMENT PROCEDURES

8. Insofar as the Procedures proposed for assumption and assignment of the personal property leases, the Debtors again propose to give notice just to the Service Parties, thereby once again precluding Comdisco and its counsel from receiving notice of the assumption/assignment of any real property Contracts and providing only Comdisco with notice of the assumption/assignment of the Master Lease.

9. Further, the Procedures do not include any requirement for showing of “adequate protection of future performance” under the Contracts, thereby ignoring the

requirements of Section 365(b)(1)(C) of the Code. Instead, the Debtors essentially have set up a mechanism to shift the burden of proof to the other parties to the Contracts, requiring them to raise this issue in an objection (thereby increasing the number of objections filed in this case and leading to further costs and delay).

BASIS FOR THE LIMITED OBJECTION

10. Section 363, 365 and 554 of the Bankruptcy Code provide the parameters under which a debtor may sell and/or otherwise dispose of assets of the estate. Section 363(b)(1) of the Bankruptcy Code states that a debtor may, "after notice and a hearing," sell property of the estate in the ordinary course of business. 11 U.S.C. §363. Section 365(a) of the Bankruptcy Code provides that a debtor's ability to reject an executory contract or unexpired lease is subject to Court approval. 11 U.S.C. §365. Similarly, Section 554 provides that a debtor may not abandon any property of the estate without notice and a hearing. 11 U.S.C. §554.

11. It is clear that the Procedures that the Debtors have proposed completely disregard the mandates of these core sections of the Bankruptcy Code, which were enacted to provide interested parties with notice of a debtor's intention to sell and/or otherwise dispose of estate assets to allow such parties a reasonable opportunity to be heard on issues relating thereto. *See, e.g.,* H.R. REP. NO. 95-595 (1977). By the proposed Procedures, the Debtors essentially seek to circumvent the Bankruptcy Code and take away the very mechanisms put in place by the legislature that afford Comdisco and other similarly situated creditors the right and ability to protect their interests in their Equipment within the context of the Debtors' Chapter 11 cases.

12. Should the Procedures be approved as proposed, neither Comdisco or its counsel will receive notice of either the rejection, or assumption and assignment of the real estate

Contracts for the locations where its Equipment is located thereby precluding Comdisco from acting timely to recover the Equipment. Admittedly, while the Equipment is leased, and the Debtors are unable to transfer the same absent the assumption and assignment of the Master Lease, but it is possible that if the lease for the real property where the Equipment is located is either rejected or assumed and assigned, the Equipment could be deemed to be either the Landlord or the assignee to have been abandoned by the Debtors. Further, the Procedures for rejection and assumption/assignment of the Contracts will not in all instances afford Comdisco's counsel notice despite it having filed a Notice of Appearance in this case.

13. Accordingly, Comdisco submits that to ensure that its interests are adequately protected and to allow ample time for objections to be filed, notice of any proposed rejection, assumption or assignment of the Contracts must be provided to counsel for Comdisco, Attn: Leslie A. Berkoff, Moritt Hock Hamroff & Horowitz LLP, 400 Garden City Plaza, Garden City, New York 11530, not just to Comdisco and any notice providing for the assumption and assignment of the Master Lease must comply fully with the provisions of Section 365(b) of the Code.

CONCLUSION

Based on the foregoing, Comdisco, Inc. respectfully requests that this Court deny the Motion seeking approval of the Procedures, and grant such other and further relief as the Court deems just and proper.

Dated: June 19, 2003
Wilmington, Delaware

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

By: /s/ Jennifer A. L. Kelleher
Tobey M. Daluz, Esquire (No. 3939)
Jennifer A. L. Kelleher, Esquire (No. 3960)
919 Market Street, 17th Floor
Wilmington, DE 19801
Phone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: daluzt@ballardspahr.com
kelleherj@ballardspahr.com

and

Leslie A. Berkoff, Esquire
MORITT HOCK HAMROFF & HOROWITZ LLP
400 Garden City Plaza
Garden City, NY 11530
Phone: (516) 873-2000
Facsimile: (516) 873-2010

Attorneys for Comdisco, Inc.

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| | : | CASE NO. 03-10945 (MFW) |
| Debtors. | : | |
| _____ | : | |

CERTIFICATE OF SERVICE

I, Jennifer A. L. Kelleher, Esquire, certify that on this 19th day of June, 2003, I caused a true and correct copy of the Objection to the Debtors' Motion for an Order Authorizing and Approving Procedures for (i) the Assumption and Assignment and (ii) Rejection of Executory Contracts and Unexpired Leases of Nonresidential Real Property of the Debtors, to be served on the attached service list in the manner indicated.

BALLARD SPAHR ANDREWS &
INGERSOLL, LLP

By: /s/ Jennifer A. L. Kelleher
Jennifer A. L. Kelleher, Esquire (No. 3960)
919 Market Street, 17th Floor
Wilmington, DE 19801
Phone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: kelleherj@ballardspahr.com

HAND DELIVERY

Laura Davis Jones, Esquire
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub, P.C.
919 Market Street, 16th Floor
Wilmington, DE 19801

Julie Compton, Esquire
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2313
Wilmington, DE 19801

Scott Cousins, Esquire
Greenberg Traurig LLP
The Brandywine Building
1000 West Street, Suite 1540
Wilmington, DE 19801

David Fournier, Esquire
Pepper Hamilton LLP
1201 Market Street, Suite 1600
Wilmington, DE 19801

VIA FACSIMILE AND FIRST CLASS MAIL

Richard L. Wynne, Esquire
Kirkland & Ellis
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8500

James H.M. Sprayregen, P.C.
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2200

Scotta E. McFarland, Esquire
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub, P.C.
10100 Santa Monica Blvd., 11th Floor
Los Angeles, CA 90067
(310) 201-0760

Andrew P. DeNatale, Esquire
White & Case
1155 Avenue of the Americas
New York, NY 10036
(212) 354-8113

Paul Aronzon, Esquire
Milbank, Tweed, Hadley & McCoy LLP
601 South Figueroa Street, 30th Floor
Los Angeles, CA 90017
(213) 629-5063