

**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)
)
Debtors.) Related Docket Nos. [1906, 2002, 2034]
)

**OBJECTION, AND RESERVATION OF RIGHTS, BY CONOPCO, INC. D/B/A
UNILEVER HPC NA IN CONNECTION WITH POTENTIAL ASSUMPTION
AND ASSIGNMENT OF MILITARY DISTRIBUTOR AGREEMENT**

Conopco, Inc. d/b/a Unilever HPC NA (“Unilever”), by and through its counsel, objects and reserves its rights with respect to any proposed assumption and assignment of that certain Military Distributor Agreement, dated as of August 1, 2002, by and between Fleming Hawaii and Unilever. In support of its objection and reservation of rights, Unilever respectfully states as follows:

1. Fleming (the “Debtor”) and Unilever are parties to that certain Military Distributor Agreement (the “MDA”), pursuant to which Unilever engaged Fleming as an agent to provide distribution and delivery of products manufactured by Unilever to military customers in Hawaii.¹ Copies of the MDA are in the possession of the Debtor and can also be obtained by written request to Unilever’s undersigned counsel.

2. By notice (the “Cure Notice”) dated July 11, 2003, the Debtor purported to notify all parties to contracts related to the Debtor’s wholesale business that such contracts might be assumed and assigned in connection with the Debtors’ Motion For Order (A) Approving Asset Purchase Agreement With C&S Wholesale Grocers, Inc. And C&S Acquisition, LLC (B)

¹The Debtor and Unilever were also parties to a similar Military Distributor Agreement covering various military locations in the Midwest and Southwest regions of the United States. Pursuant to the terms of a Stipulation and Order Terminating the Automatic Stay and Granting Other Related Relief, which was approved by the Court on July 21, 2003, that Agreement has been terminated.

Authorizing (I) Sale Of Substantially All Of Selling Debtors' Assets Relating To The Wholesale Distribution Business To Purchaser Or Its Designee(s) Or Other Successful Bidder(s) At Auction, Free And Clear Of All Liens, Claims, Encumbrances And Interests And (II) Assumption And Assignment Of Certain Executory Contracts, License Agreements And Unexpired Leases, And (C) Granting Related Relief (the "Sale Motion").

3. The MDA does not appear on the Cure Notice.²

4. To the extent that the omission of the MDA from the Cure Notice is an oversight by the Debtor, Unilever objects to the assumption and assignment of the MDA because the Debtor has failed to timely and properly perform its obligations under the MDA, including, but not limited to, failing to reach and maintain the service/fill levels at the commissaries and other military installations covered by the MDA. Such failures constitute material defaults under the MDA. These defaults are historical facts, which are incapable of being cured. The Debtor's defaults under the MDA have caused substantial economic detriment to Unilever.

5. Even if the MDA is assumable (which Unilever disputes)³, the Debtor has failed to compensate, or to provide adequate assurance that it will promptly compensate, Unilever for the defaults and losses which Unilever has suffered as a result of the Debtor's material defaults under the MDA. The amount necessary to cure the Debtor's defaults under the MDA is at least \$843,590.52 (relating to open invoices and invalid deductions), plus additional amounts relating to lost profits and damage to Unilever's good will. Although the Debtor failed to list the MDA

²However, the Debtor's agreements with the Defense Commissary Agency (Contract Assignment # 806) covering "FIELD CONTRACTS Hawaii" and other "MILITARY DISTRIBUTOR AGREEMENTS" are among the agreements the Debtor is proposing to assume and assign.

³The Debtor's material default under the MDA "is a 'historical fact' and by definition cannot be cured." Worthington v. General Motors Corp. (In re Claremont Acquisition Corp.), 113 F.3d 1029, 1033 (9th Cir. 1997). See also In re New Breed Realty Enters., 278 B.R. 314, 321 (Bankr. E.D.N.Y. 2002) ("Where the default is non-monetary and is not curable, the debtor is precluded from assuming an executory contract . . . if the default was material or if the default caused 'substantial economic detriment'.").

on the Cure Notice and, therefore, Unilever has been denied proper notice of the Debtor's intent to assume and assign the MDA, or notice of the proposed cure amount, to the extent the Court authorizes the Debtor to assume and assign the MDA over the objection of Unilever, all amounts currently due Unilever (together with those resulting from Fleming's failures to perform under the MDA once established) must be paid in full.

6. Unilever reserves the right to supplement this objection with a statement of (i) additional reasons why the MDA cannot be assumed and assigned; (ii) additional defaults under the MDA; and (iii) additional pecuniary losses suffered by Unilever.

WHEREFORE, Unilever objects to the entry of any Order in connection with the Sale Motion, or otherwise, which provides for the assumption and assignment of the MDA.

Dated: July 28, 2003

HERRICK, FEINSTEIN LLP

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