

KENSINGTON & RESSLER L.L.C.
Attorneys for Comdisco, Inc.
400 Madison Avenue
New York, New York 10017-1910
(212) 838-6000
Michael J. Venditto (N.Y. Bar No. MV 6715)
Ira R. Abel (N.Y. Bar No. IA 1869)

Final Hearing Date: August 7, 2001
at 1:30 p.m.

NEWCORP FINAL HEARING DATE:
August 9, 2001
at 1:30 p.m.

Objection Deadline: August 3, 2001

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U.S. BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

----- X
In re : Chapter 11
FURR'S SUPERMARKETS, INC., : Case Nos. 11-01-10779-SA
: :
Debtor. :
----- X

**OBJECTION OF COMDISCO, INC. TO
PROPOSED ADEQUATE ASSURANCE OF FUTURE PERFORMANCE**

Comdisco, Inc. ("Comdisco"), a pre-petition and administrative creditor of the above captioned Debtor and Debtor-In-Possession (the "Debtor"), hereby states as follows:

SUMMARY OF RELIEF REQUESTED

1. By undated notice (the "Notice")¹, the Debtor gave notice of a deadline for objection to the Debtor's assignment of Comdisco's Lease (as defined below) on the grounds that (a) inadequate assurance of future performance as to the assignee has not been provided, and (b) each enclosed lease is not a true and correct copy. Comdisco objects on both grounds, and, in addition, objects to the partial assignment of its Lease.

¹ By amended notice, the hearing was adjourned to August 9, 2001 solely with respect to the assignment of leases to Newcorp.

2. Comdisco is a Chapter 11 Debtor². Accordingly, section 362(a) of the Bankruptcy Code prevents, among other things, any act "to exercise control over property of [Comdisco's] estate." 11 U.S.C. § 362(a)(3).

3. Comdisco is the owner and lessor of certain equipment (the "Equipment")³ used by the Debtor in its various businesses. The Debtor has not disclosed to Comdisco its intentions with respect to the Equipment, perhaps because there is not yet a single assignee for Comdisco's Lease (as defined below). Accordingly, Comdisco hereby objects to the Debtor's proposed actions to the extent that its ownership interest in the Equipment or the Debtor's tenancy under the Lease is affected.

4. The Equipment is subject to the Lease. The Debtor cannot sell the Equipment⁴ and it is required to fulfill its obligations pursuant to Section 365(d)(10) of the Bankruptcy Code⁵. The Equipment referenced in the Lease was clearly identified by serial number and description.

5. The Debtor seeks to assume and assign the Lease to nine (9) separate entities. Although the Debtor mentions 11 U.S.C. § 365, it only provided information on August 2, 2001

² On July 16, 2001, Comdisco filed a voluntary Chapter 11 case in the United States Bankruptcy Court for the Northern District of Illinois. The case is pending before United States Bankruptcy Judge Schmetterer and bears Case No. 01-24795. John Butler, Jr., Esq., of Skadden Arps Slate Meagher & Flom, 333 West Wacker Drive, Chicago, Illinois 60606, represents Comdisco as a debtor and debtor-in-possession. Kensington & Ressler L.L.C. has been retained as special counsel to Comdisco in its chapter 11 case.

³ The Equipment generally consists of network equipment, phone systems, test equipment, work stations, desktop computers, portable computers, peripherals, office furniture and other personal property.

⁴ The Equipment is subject to the Lease. Comdisco owns the Equipment. The Debtor can assume or reject the Lease, but cannot sell the Equipment.

⁵ Upon information and belief, the Debtor is current on administrative rent with the exception of five (5) invoices for personal property taxes.

regarding the prospective ability of one of the proposed assignees (Newcorp) to provide adequate assurance of future performance. Accordingly, Comdisco also objects to the relief sought by the Debtor to the extent that the Debtor seeks to assume and assign the Lease without full compliance with 11 U.S.C. § 365.

6. The copy of the Lease is not a true and correct copy of the Lease⁶.

BACKGROUND

7. On February 8, 2001 (the "Filing Date"), the Debtor filed a voluntary petition commencing its Chapter 11 case pursuant to Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"). Upon information and belief, the Debtor is continuing to manage and operate its businesses and properties as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

8. Comdisco is a technology services company. Comdisco is in the business of helping its customers maximize technology functionality, predictability and availability. Among the technology services offered is the leasing of communication, computer and data processing equipment.

9. Comdisco is a lessor of the Debtor pursuant to an unexpired master lease of personal property dated June 23, 1994 (the "Master Lease"⁷) together with certain addenda, equipment schedules and other related documents (collectively, the Master Lease, equipment schedules, addenda and related documents are referred to hereinafter as the "Lease"). The Lease governs the

⁶ Only every other page of the Lease was provided. Paragraphs 7.3 through 13.2 are missing.

⁷ The Master Lease was entered into between Comdisco as lessor and Furr's Supermarkets, Inc.

Debtor's use of the Equipment. The Lease is extremely voluminous, but will be provided to interested parties on request⁸.

10. Pursuant to the Lease, the Debtor leased from Comdisco the individual items of Equipment described in each of the Equipment Schedules and the Debtor commenced making rent payments pursuant to the terms of the Lease.

11. The Lease has not as yet been assumed or rejected. The automatic stay remains in effect. As a result, Comdisco is prohibited from recovering the Equipment.

12. The Debtor continue to incur an administrative claim for the use of the Equipment until the Lease is rejected. 11 U.S.C. § 365(d)(10)."

⁸ A copy of a portion of the Lease was filed with the Court on May 7, 2001 as an exhibit to Comdisco's Request for Payment of Administrative Expense, together with a list of certain Equipment in which Comdisco asserts an interest.

" Section 365(d)(10) of the Bankruptcy Code states as follows:

The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

OBJECTION TO RELIEF SOUGHT

13. If the Debtor intends to assume and assign the Lease, it must comply with sections 365 (b) and (f) (2)(B)¹⁰. Comdisco is owed a total of \$107,861.73¹¹ for its prepetition cure amount and \$3,800.94¹² as its postpetition cure amount. The Debtor has previously asserted that the total prepetition and postpetition cure amount is \$77,908.76. See Exhibit 1 to Notice dated June 1, 2001.

14. The Debtor has proposed to assume a portion of the Lease and assign it to nine (9) separate entities at 46 different locations. Nevertheless, the Debtor does not propose to part with the entirety of its interest in the Lease, since, upon information and belief, Equipment is still located at

¹⁰ Section 365(b) of the Bankruptcy Code states in relevant part as follows:

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

Section 365(f)(2)(B) states in relevant part as follows:

(f)(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

- (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

¹¹ Rent for the period from January 1, 2001 through February 7, 2001 is \$98,574.21 and personal property taxes due under the Lease total \$9,287.52.

¹² The Debtor paid \$119,692.01 on May 18, 2001, which appears to represent rent due from February 8, 2001 through March 31, 2001.

several of the Debtor's store locations¹³. Even if the locations have been closed and the real estate leases rejected, the Debtor remains subject to the Lease.

15. If the Debtor intends to assume and assign the Lease, it must assume and assign the entire Lease. In re Steaks To Go, Inc., 226 B.R. 35, 38 (Bankr. E.D. Mo.1998)("As a general principle, assumption or rejection by a debtor in possession or a trustee is an assumption or rejection of the entire executory contract."); In re Metro Transp. Co., 87 B.R. 338, 342 (Bankr. E.D. Pa. 1988)("We recognize that assumption or rejection of an executory contract requires an all-or-nothing commitment going forward, and that hence a debtor cannot assume part of an executory contract in the future while rejecting another part.")

16. The specific items of Equipment to be assigned to each assignee are not specified.

17. The amount proposed as rent under the Lease by each of the proposed assignees is not specified, so it is impossible to determine whether there can be adequate assurance of future performance, notwithstanding any financial information provided.

18. One of the proposed assignees, Newcorp, the proposed assignee of 14 store properties, is not yet in existence, and accordingly cannot provide adequate assurance.

19. The Debtor does not even begin to address the issues raised by the automatic stay in Comdisco's case. Any assumption and assignment that purports to affect Comdisco's interest in the Lease is void.

20. Accordingly, to the extent that the Debtor seeks to assume and assign Comdisco's Lease, Comdisco opposes such transaction to the extent that the Debtor seeks to do so without full

¹³ See Exhibit 2 to Notice dated June 1, 2001, which lists locations 801, 811, 860, 865, 871, 875, 879, 886, 891, 894, 896, 897, 899, 903, 905, 911, 913, 932, 944, 946, 949, 952, and 953.

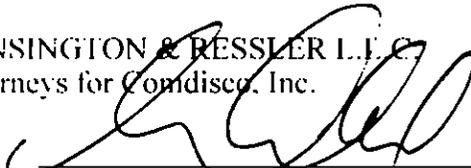
compliance with Section 365 (b) and (f) of the Bankruptcy Code, including full payment of all sums due and adequate assurance of future performance under the Lease.

21. In any event, Comdisco demands that the Debtor maintain appropriate security, protection and insurance for the Equipment until the Equipment is returned to Comdisco, all as is required under the Lease.

WHEREFORE, Comdisco respectfully requests that (a) the Motion be denied, or, in the alternative (b) modified to direct the Debtor to comply fully with 11 U.S.C. § 365 (b) and (f) and (c) Comdisco be granted such other and further relief as is just and proper, for all of which no other request has been made to this or any other Court except as is otherwise set forth herein.

Dated: New York, New York
August 2, 2001

KENSINGTON & RESSLER L.L.C.
Attorneys for Comdisco, Inc.

By: 
Michael J. Venditto (MV 6715)
Ira R. Abel (IA 1869)
400 Madison Avenue
New York, New York 10017-1910
(212) 838-6000

TO: William F. Davis, Esq.
Counsel for Creditors' Committee
P.O. Box 6
Albuquerque, NM 87102
Fax: 505-247-3185

Jacobovitz Thuma & Walker, P.C.
Local Counsel to Debtor
Att: Robert H. Jacobovitz, Esq. or
David T. Thuma, Esq.
500 Marquette N.W.
Suite 650
Albuquerque, NM 87102
Fax: 505-766-9287
EMail: rjacobvitz@jtwlawfirm.com

Latham & Watkins
David S. Heller, Esq. or
Josef S. Athanas, Esq.
Counsel to Heller Financial
Suite 5800
Sears Tower
233 South Wacker Drive
Chicago, IL 60606
Fax: 312-993-9767

Skadden Arps Slate Meagher & Flom LLP
Richard Levin, Esq. or Stephen J. Lubben, Esq.
Counsel to Debtor
300 South Grand Avenue
Suite 3400
Los Angeles, CA 90071-3144
Fax: 213-687-5600
EMail:slubben@skadden.com