

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779-SA  
Chapter 7

Debtor.

**TRUSTEE'S MOTION TO ASSUME AND ASSIGN EL PASO WAREHOUSE LEASE  
TO SAFEWAY INC.**

Yvette J. Gonzales, the Chapter 7 Trustee in the above-captioned bankruptcy case (the "Trustee") moves for an order under 11 U.S.C. §§365(a) and (f) approving her assumption and assignment of the unexpired lease of the warehouse located at 9820 Railroad Drive and 9601 Railroad Drive in El Paso, Texas (the "Warehouse Lease") to Safeway Inc. ("Safeway"). In support of this Motion, the Trustee states:

1. On February 8, 2001, Furr's Supermarkets, Inc. (the "Debtor") filed a voluntary petition in this Court under chapter 11 of title 11 of the United States Bankruptcy Code.
2. On December 19, 2001, the Debtor converted the Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code. The Trustee was appointed on that date.
3. On July 3, 2002, the Trustee and Safeway entered into a letter agreement pursuant to which, subject to certain conditions, the Trustee agreed to assign to Safeway, and Safeway agreed to assume, the Warehouse Lease. A copy of the letter agreement is attached hereto as Exhibit A.
4. The Trustee requests approval under 11 U.S.C. §§365(a) and (f) of her assumption and assignment to Safeway of the Warehouse Lease.
5. As part of the proposed assumption and assignment of the Warehouse Lease,

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the Trustee proposes that the defaults under the Warehouse Lease be cured as follows:

a. Rent: Paying \$80,000, or such other amount, whether greater or lesser, as may be found by the Court or agreed to by the parties;

b. Real Property Taxes: Paying \$610,000, or such other amount, whether greater or lesser, as may be found by the Court or agreed to by the parties; and

c. Repair and Maintenance. Completing all repairs or maintenance, if any, needed to bring the estate in compliance with the repair and maintenance obligations under the Warehouse Lease, the nature and extent of which obligations would be determined by the Court or agreed to by the parties.

The Trustee asserts that the foregoing would cure all defaults under the Warehouse Lease that must be cured under 11 U.S.C. §365(b)(1)(A).

6. Under 11 U.S.C. §365(f), the Trustee may assign unexpired leases if the leases are assumed and adequate assurance of future performance is provided by the assignee. Under 11 U.S.C. §365(a), a trustee "subject to the court's approval, may assume or reject an executory contract or an unexpired lease." Most courts hold that a trustee's decision whether to assume or reject a lease is subject to review under the business judgment standard. See In re Mile Hi Metal Systems, Inc., 899 F.2d 887, 896 n.13 (10th Cir. 1990) (Seymour, J. concurring) (so-called "business judgment" test applies to ordinary executory contracts); In re Federated Dept. Stores, Inc., 131 B.R. 808, 811 (S.D. Ohio 1991) ("Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases"); Commercial Fin., Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (D. Haw. 1985) ("Under the business judgment test, a court should approve a debtor's proposed rejection if such

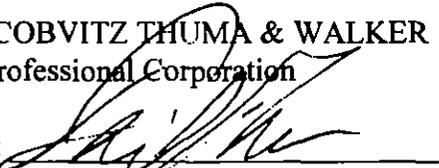
rejection will benefit the estate." (citation omitted)). If a trustee has exercised her business judgment reasonably, the court should approve the proposed assumption or rejection. Sharon Steel Corp. v. National Fuel Gas Distribution, 872 F.2d 36, 39-40 (3d Cir. 1989).

7. The Trustee has exercised her business judgment and determined that the Warehouse Lease should be assumed and assigned to Safeway. The Trustee asserts that assumption and assignment of the Warehouse Lease is in the best interests of creditors and the estate, because the estate will avoid incurring any rejection damages for the Warehouse Lease and Safeway will pay the estate \$1,400,000 in consideration for the assignment of the Warehouse Lease to Safeway.

8. The Trustee also asserts that adequate assurance of future performance is provided by Safeway, because Safeway was the tenant under the Warehouse Lease prior to the Debtor, and Safeway is financially capable of performing in accordance with the terms of the Warehouse Lease.

WHEREFORE, the Trustee respectfully requests that the Court enter an order approving the Trustee's assumption and assignment of the Warehouse Lease to Safeway as set forth above, and granting the Trustee all other just and proper relief.

JACOBVITZ THUMA & WALKER  
a Professional Corporation

By: 

David T. Thuma  
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Attorneys for the Chapter 7 Trustee

This certifies that a copy of the foregoing was served by fax and first class mailed on:

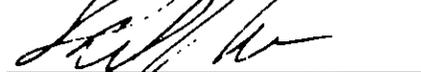
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this 3d day of July, 2002.



David T. Thuma

ANDREWS & KURTH  
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July 2, 2002

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*Via Facsimile*

David Thuma, Esq.  
Jacobvitz, Thuma & Walker  
500 Marquette NW, Suite 650  
Albuquerque, New Mexico 87102

Re: Case No. 11-01-10779-SA; *In re: Furr's Supermarkets, Inc., Debtor*; In the United States Bankruptcy Court, District of New Mexico (the "Bankruptcy")

Lease from El Paso Properties Corp., Lessor, To Safeway Stores, Incorporated, Lessee, Dated as of March 1, 1973 (the "Distribution Center Lease")

Dear David:

Safeway Inc. ("Safeway") has authorized us to make the following counteroffer for the Distribution Center Lease in response to your email, dated June 24, 2002, subject to i) any necessary bankruptcy court approval, ii) the approval of the governing Real Estate Committee for Safeway in its sole discretion, and iii) the preparation of appropriate documentation containing terms and conditions satisfactory to both the Trustee and Safeway.

1) Safeway will pay the sum of One Million Four Hundred Thousand Dollars (\$1,400,000) for an assignment of the Distribution Center Lease, which assignment shall be free and clear of any liens, claims, and encumbrances against the Distribution Center Lease or the demised premises.

2) This offer is expressly conditioned upon confirmation (a) that the Distribution Center Lease has not been modified and (b) that no options under the Distribution Center Lease have been pre-exercised.

3) Safeway will be allowed a ninety (90) day period (the "Inspection Period") to inspect the premises and conduct due diligence. The Inspection Period shall commence upon the later to occur of (a) date of our receipt of the Trustee's written acceptance of this offer, or (b) the date of the hearing at which the deadline to assume or reject the Distribution Center Lease is extended.

David Thuma, Esq.  
July 2, 2002  
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4) Safeway will have the right to withdraw and terminate this offer for any reason during the Inspection Period.

5) Safeway will be responsible for paying the carrying costs for the Distribution Center, in an amount not to exceed \$22,000/month for rent, \$18,000/month for taxes, and \$13,000/month for utilities, commencing on the 46<sup>th</sup> day of the Inspection Period and continuing through the end of the Inspection Period, unless Safeway withdraws and terminates this offer sooner as provided in Section 4) above, in which case Safeway's responsibility will terminate on the date of such withdrawal and termination.

6) Within five (5) business days after the Trustee's written acceptance of this offer, Safeway will tender One Hundred Dollars (\$100.00) to the Trustee as independent consideration for the option to inspect the premises under item 3) above and to terminate or withdraw this offer as provided in item 4) above.

7) Closing will occur within ten (10) business days after the order approving the assignment by the bankruptcy court becomes final.

8) See Below

If the terms contained in this letter are acceptable, please so indicate by signing at the place indicated below and return a fully-executed copy of this letter to the undersigned. Upon our receipt of the Trustee's acceptance, Chad Otten with Safeway will seek formal management approval and commence the inspection activities.

This offer will otherwise expire on July 15, 2002. We look forward to the Trustee's response.

Very Truly Yours,



Jennifer M. Gore

cc: *Via Facsimile*  
Chad Otten  
Denise M. Roman, Esq.  
D. Michael Dalton, Esq. (firm)

Insert:  
The Trustee will have the right to terminate this agreement without damages or penalty, at any time before assumption, if the costs of assuming the lease, together with the "carrying costs" through the date of assumption and assignment, are such that the trustee, in her sole discretion, determines that it is not beneficial to the estate to proceed.

ACCEPTED:

By:



Printed Name:

David T. Thuma

Title:

Attorney for the Trustee

Date:

7/2/02