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D. NEW MEXICO

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re: )  
 ) Case No. 11-01-10779-SA  
FURR'S SUPERMARKETS, INC., )  
 ) Chapter 7  
Debtor )

**RESPONSE OF EL PASO PROPERTIES CORP. AND  
JANUS FINANCIAL CORPORATION IN OPPOSITION TO CHAPTER 7  
TRUSTEE'S SECOND MOTION TO EXTEND TIME WITHIN WHICH THE  
TRUSTEE MAY ASSUME OR REJECT THE EL PASO WAREHOUSE LEASE**

El Paso Properties Corp. and Janus Financial Corporation (together, the "Lessor") respectfully submit this response in opposition to the "Chapter 7 Trustee's Second Motion to Extend Time Within Which the Debtor [*sic*] May Assume or Reject the El Paso Warehouse Lease". The Lessor objects to any further extension of the time within which to assume or reject the lease for the following reasons:

**History of the Case**

This is the fourth application made to this Court for an extension of time to assume or reject the Debtor's lease of the El Paso Distribution Center (the "Lease"). The Debtor, Furr's Supermarkets, Inc., filed its petition for relief under Chapter 11 of the Bankruptcy Code on February 8, 2001. On April 6, 2001, this Court granted the Debtor's first request for an extension, and set August 10, 2001 as the deadline for assumption or rejection of all the Debtor's unexpired leases of non-residential real property.

The Debtor requested and received a further extension, until December 21, 2001, of the period to assume or reject the Lease (the "Assumption/Rejection Period"). On December 19, 2001, immediately prior to the end of this second extension period, the Debtor converted its

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Chapter 11 case to a case under Chapter 7, and the Trustee was appointed. The Trustee asked for and received a third extension, until June 30, 2002, of the Assumption/Rejection Period. The Trustee now comes to the well a fourth time, seeking to extend the Assumption/Rejection Period to December 31, 2002. If this relief is granted, the Assumption/Rejection Period, which has already been enlarged to over 14 months, will be extended to almost 23 months after the commencement of the case. So far as the Lessor has been able to determine, there is no precedent for an extension period anywhere near this long.

**The Trustee Has Not and Cannot Establish "Cause"  
For an Extension of the Assumption/Rejection Period**

Section 365(d)(4) provides that, unless the court grants an extension "for cause," a trustee or debtor in possession must assume or reject its nonresidential real property leases within 60 days after the order for relief. Specifically, section 365(d)(4) states in relevant part:

...[I]f the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

The Code does not define "cause" in this context. However, the legislative history to section 365(d) indicates that this provision is intended to "prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-à-vis the estate." *House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 348-9 (1977)*. See *Chapman Investment Associates v. American Health Care Management (In re American Health Care Management, Inc.)*, 900 F.2d 827, 830 (5<sup>th</sup> Cir. 1990) ("It is now well established that the primary purpose of section 365(d)(4) is 'to protect the lessors ... from delay and uncertainty by forcing a trustee or a debtor in possession to decide quickly whether to assume unexpired leases.' See *Harvest Corp.*

*v. Riviera Land Co.*, 868 F.2d 1077, 1079 (9<sup>th</sup> Cir. 1989).” The burden is on the trustee to show why an extension should be granted. *In re Wedtech Corporation*, 72 B.R. 464 (Bankr. S.D.N.Y. 1987).

The *Wedtech* court went on to state: “Congress obviously did not intend the cause requirement to be lightly dismissed or blindly applied. Examination of the legislative history reveals that the requirement of cause was Congress’ focus.” [citation omitted]. In general, an evidentiary hearing is required, and “judges are expected to sift the evidence, examine applicable precedent and make informed rulings.” *Id.* at 469. *See also South Street Seaport Limited Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.)*, 94 F. 3d 755, 762 (“... [T]he determination of whether cause existed for an extension of time required not just resolution of questions of law, but findings on factual issues that are disputed by the parties, such as whether [the lessee] already had been given sufficient time to make a decision.”).

Courts have identified several factors which should be considered in determining whether to grant an extension of the Assumption/Rejection Period. At bottom, these factors reflect the reality that extensions of the Assumption/Rejection Period are most often sought in Chapter 11 reorganization cases, and the circumstances that might justify a prolonged extension are rarely found outside of the Chapter 11 context. The Debtor’s case is a good example of this. In the early spring of 2001 when the Debtor was in the preliminary stages of its attempt to reorganize under Chapter 11, the Debtor was a lessee under several dozen leases, and the outlines of its proposed reorganization had not yet come into focus. Under those circumstances, almost all the factors that courts have historically identified as bearing on the question militated in favor of an extension. However, while the law has not changed, the facts of the case have changed radically. The Debtor has abandoned all hopes of reorganization and converted its case to Chapter 7. All

the Debtor's other leases have been disposed of, and the Trustee is in the very last stages of liquidating the assets of the estate. Under these radically changed circumstances, the facts militate against granting any further extension.

The first factor considered by the courts is whether "the lease is a primary asset and the 'decision to assume or reject the lease would be central to any plan of reorganization' in the Chapter 11 proceeding, *In Re Wedtech Corporation*, 72 B.R. 464, 472, quoting *Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 106 (2d Cir. 1982). This factor weighs against the Trustee. If the lease is a "primary asset" of the estate it is only because the Trustee has already disposed of everything else of value. Certainly, the decision to assume or reject the lease is in no sense "central to any plan of reorganization" because no plan of reorganization is contemplated; the case is a straight forward Chapter 7 liquidation. Indeed, any proceeds from the assumption and assignment of the lease are already earmarked for the Debtor's secured bank lenders, who are perfectly capable of assuming the Debtor's obligations under the Lease at any time if they so choose.

The second factor considered by the courts is "[w]hether the lessor has a revisionary interest in the building built by the Debtor on the landlord's land." *In Re Muir Training Technologies, Inc.*, 120 B.R. 154, 158 (Bankr. S.D. Cal. 1990). This factor also weighs against the Trustee. The Debtor did not build the structures on the property. They were built many years before the Debtor became the Lessor's tenant. There would be no injustice in returning control of the buildings to the Lessor at this time.

The third factor is "[w]hether the Debtor has had time to intelligently appraise its financial situation and potential value of its assets in terms of the formulation of a plan." *Id.* at 158; *In Re Wedtech Corporation, supra.*, 72 B.R. at 471; *Theatre Holding Corp. v. Mauro*,

*supra.*, 681 F.2d at 106. This factor also weighs against the landlord. First of all, there is no need to assess the potential value of the Lease in terms of “the formulation of a plan,” since no plan is contemplated. In any event, the Trustee has had plenty of time to make a business judgment as to the value of the Lease. Indeed, as the testimony at the hearing on the Trustee’s prior motion to extend the Assumption/Rejection Period demonstrated, she has already made that judgment, as have the secured creditors who are funding the payments that the Trustee is currently making to the Lessor. These bank lenders are perfectly capable of shouldering the burdens of the Lease. At this stage in the case, over fourteen months after the petition date, it is hardly unfair to ask these parties either to act on their business judgment and assume the Lease, or to reject it and relieve the Lessor of its “doubt concerning [its] status vis-à-vis the estate.”

The next factor considered by the courts is “[w]hether the Lessor continues to receive rental payments and whether the Debtor fails to pay the rent reserved in the Lease.” *In Re Muir Training Technologies, Inc.*, *supra.*, 120 B.R. at 158-159. This factor also weighs against the Trustee. It is true that, in accordance with this Court’s Order granting the Trustee’s prior application for an extension of the Assumption/Rejection Period, the Trustee is paying base rent and taxes prorated for the period following the conversion of the case from Chapter 11 to Chapter 7. However, the Trustee is not paying any rent or tax obligations that came due after the conversion date, but are apportionable to prior periods. Nor is the Trustee paying current interest on delinquent obligations under the Lease. These delinquent obligations include unpaid real estate taxes that (together with applicable interest, penalties and collection costs) now total \$610,871.77. To collect these taxes, the City of El Paso has commenced foreclosure proceedings against the El Paso Distribution Center.

Equally important is the Trustee's failure to meet any of her maintenance and repair obligations under the Lease. As the evidence will show, these obligations include an immediate overhaul of the sprinkler and fire protection system at an estimated cost of \$833,294; immediately required roof repairs at a cost of between \$833,200 and \$888,900; additional roof repairs that will be needed in the near future at the cost of between \$188,000 and \$200,000; other structural repairs totaling \$185,600; and environmental remediation measures, the cost of which has not yet been determined. *See Shapiro v. D.H. Overmyer Co., Inc. (Texas) (In Re D. H. Overmyer, Co. Inc. (Texas))*, 30 B.R. 823 (S.D.N.Y. 1983) (Debtor's failure to make timely rent payments and necessary repairs to warehouse property justified bankruptcy court order terminating lease).

The next factor considered by the courts is "[w]hether the lessor will be damaged beyond compensation available under the Bankruptcy Code due to the Debtor's continued occupation." *Id.* at 159. This factor also weighs against the Trustee. The Lessor, who has been held at bay for over fourteen months already, must run the risks that the condition of the property will continue to deteriorate and favorable marketing opportunities will be lost. This is precisely the kind of unfairness that Congress sought to prevent by enacting Section 365(d)(4).

The next factor considered by the courts is "[w]hether the case is exceptionally complex and involves a large number of leases." *Id.* at 159. Obviously, this factor weighs against the Trustee. All the rest of the Debtor's leases have long since been disposed of and there is nothing particularly complicated about the last stages of this Chapter 7 liquidation.

The next factor considered by the courts is "[w]hether need exists for judicial determination of whether the lease is a disguised security agreement." *Id.* at 159. This factor

weighs against the Trustee. No one has ever suggested that the Lease is anything other than a “true lease”.

The next factor considered by the courts is “[w]hether the Debtor has failed or is unable to formulate a plan when it has more than enough time to do so.” *Id.* at 159. Unquestionably, this factor weighs against the Trustee. The Debtor has indeed failed “to formulate a plan” and has abandoned all efforts to do so, converting its case to Chapter 7.

Finally, courts have considered “[a]ny other factors bearing on whether the Debtor has had a reasonable amount of time to decide to assume or reject the Lease.” *Id.* at 159. *In Re Wedtech Corporation, supra.* 72 B.R. at 471-472. The only such factors of which the Lessor is aware are the number of extensions of the assumption/rejection period that this Court has already granted (three); the length of time since the commencement in the case (over fourteen months); and the Trustee’s lack of success in finding an end user willing to take an assignment of the Lease at a price that would cure all of the existing defaults. The Lessor is advised that the Trustee has only received one significant inquiry in connection with the property: an expression of interest by Safeway Stores, Inc. to acquire the leasehold for a price in the range of \$1.4 million, conditioned on an undertaking by the initial Trustee to use these funds to cure all existing defaults under the Lease. The evidence will show that it will take between \$2.5 and \$3 million to cure the lease defaults. Hence, any offer at this level would simply not be viable.

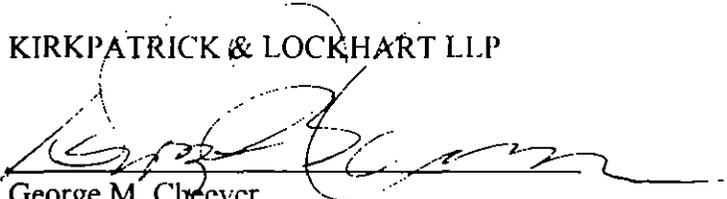
### **Conclusion**

All the factors traditionally considered by courts in determining whether to grant an extension of the Assumption/Rejection Period militate against granting such relief in this case.

The Trustee's motion should be denied and the Trustee should be directed to reject the Lease and surrender possession of the property to the Lessor forthwith.

Respectfully submitted,

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July 2, 2002

The undersigned certifies that a copy of the foregoing "Response of El Paso Properties Corp. and Janus Financial Corporation in Opposition to Chapter 7 Trustee's Second Motion to Extend Time Within Which the Trustee May Assume or Reject the El Paso Warehouse Lease" was served on the following persons by Federal Express on July 2, 2002:

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