

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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ALBUQUERQUE, N.M.

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

El Paso Properties Corp. and Janus Financial Corporation (together, the "Lessor") respectfully submit this response in opposition to the "Trustee's Motion to Assume and Assign El Paso Warehouse Lease to Safeway Inc." (the "Assignment Motion"). The grounds for this objection are as follows:

1. The Trustee seeks approval of this Court pursuant to 11 U.S.C. § 365(a) and (f) to assume the Warehouse Lease and assign it to Safeway Inc. ("Safeway") in return for a payment of \$1,400,000 pursuant to a letter agreement between dated July 3, 2002 between the Trustee and Safeway. She alleges in paragraph 7 of the Assignment Motion that she "has exercised her business judgment and determined that the Warehouse Lease should be assumed and assigned to Safeway" and that a transaction "is in the best interests of creditors and the estate ...". She acknowledges, however, that she must exercise her business judgment "reasonably". *Assignment Motion* at ¶7, page 3. The Lessor, on the other hand, believes that the Trustee's actions in entering into the letter agreement are not an exercise of sound business judgment because the proposed assignment clearly cannot be consummated on its own terms, and even if it could be

consummated on its own terms, the Trustee would be unable to satisfy the requirements of 11 U.S.C. § 365.

2. Although the letter agreement styles itself as a “counteroffer” for the Warehouse Lease, it is not really not an offer at all. Rather, it is merely an expression of interest. It falls far short of a binding undertaking by Safeway.

(a) First of all, Safeway’s “counteroffer” is subject to (among other things) “the approval of the governing Real Estate Committee for Safeway in its sole discretion ...”. There is no evidence that this approval has been granted, or will ever be forthcoming.

(b) Moreover, the letter agreement provides for a 90 day “Inspection Period”, during which “Safeway will have the right to withdraw and terminate this offer for any reason ...”. Under the provisions of paragraph 3 of the letter agreement, this “Inspection Period” will not begin until the later of (a) the date of Safeway’s receipt of the Trustee’s written acceptance of Safeway’s “offer,” and (b) “the date of hearing at which the deadline to assume or reject the Distribution Center Lease is extended.” That hearing has been postponed to September 25, 2002, with the result that, under the terms of the letter agreement, the “Inspection Period” will not end until Christmas eve, 2002.

(c) The Lessor is advised by counsel for the Trustee that the Trustee and Safeway have agreed that the 90-day “Inspection Period” began on Tuesday, July 9, 2002. No amendment to the letter agreement has been served on the Lessor or (so far as appears) filed with the Court. In any event, even if the agreement regarding the commencement of the “Inspection Period” is effective, Safeway will be perfectly free to walk away from the transaction without cost at any time up to and including October 7, 2002, well beyond the scheduled hearing on the Assignment Motion. In the meantime, the Trustee and the Lessor will incur substantial expense

to litigate the issue whether the Warehouse Lease could in fact be assumed and assigned in accordance with the letter agreement. Safeway, by its unilateral decision to withdraw from the transaction, may render this entire exercise a meaningless waste of time.

(d) In any event, Safeway's "offer is expressly conditioned upon confirmation ... that no options under the Distribution Center Lease have been pre-exercised." This condition cannot be satisfied because Safeway itself "pre-exercised" all the renewal options under the Lease by an instrument dated September 21, 1987, made and delivered by Safeway Stores Incorporated (Safeway's predecessor in interest) at a time when it was the lessee under the Warehouse Lease.

3. Although the letter agreement provides that Safeway will be responsible for paying the carrying costs for the Distribution Center commencing on the 46th day of the Inspection Period, this responsibility is capped at a monetary level below the Trustee's carrying cost obligations under this Court's "Order Extending Time Within Which Trustee May Assume or Reject Unexpired Lease of El Paso Distribution Center" (Document #1567).

4. Subsection (b) of section 365 of the Bankruptcy Code, 11 U.S.C. § 365(b) provides in part:

(1) if there has been a default in an ... unexpired lease of the debtor, the trustee may not assume such ... lease unless, at the time of assumption of such ... 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 ... lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such ... lease.

Manifestly, the Trustee cannot satisfy these requirements. The letter agreement provides that Safeway will pay only \$1,400,000.00 in return for an assignment of the Lease. However, the amounts necessary to cure all the defaults under the Lease, including unpaid tax obligations totaling in excess of \$610,000.00; roof repairs costing as much as \$1,188,900.00; other structural repairs costing \$185,600.00; environmental remediation costs; delinquent rent; and attorney's fees and other expenses incurred by the Lessor, will total between \$2.5 and \$3 million. The amount to be paid by Safeway for the assignment of the Lease clearly does not come close to covering these cure amounts, and, so far as appears, the Trustee has no other funds she can tap to pay these expenses. Moreover, even if she had such resources, it is very difficult to understand why it would be an exercise of sound business judgment to pay \$2.5 to \$3 million to cure defaults under a lease with a market value of only \$1.4 million.

5. The Trustee asserts in paragraph 7 of the Assignment Motion that the transaction is in the best interests of creditors and the estate because, in addition to the \$1.4 million Safeway payment, "the estate will avoid incurring any rejection damages for the Warehouse Lease ...". However, since it appears that the estate is administratively insolvent, the benefit to creditors and the estate of avoiding a claim for rejection damages is far from clear. The Trustee herself may benefit from the 3% commission she would earn on the proceeds of the assignment, but there is no apparent benefit to any other party in interest from the proposed transaction.

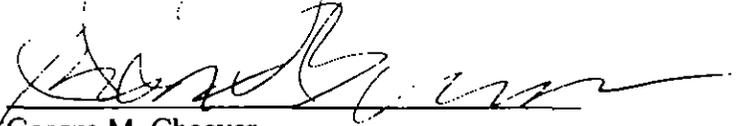
6. The Trustee also asserts that "adequate assurance of future performance" is provided by Safeway, because Safeway was the tenant under the Warehouse Lease prior to the Debtor, and Safeway is financially capable of performing in accordance with the terms of the Warehouse Lease." *Assignment Motion* at 8. However, the historical fact that Safeway was once the tenant of the property has no bearing whatsoever on its ability to provide "adequate assurance

of future performance" under the Lease, as required by 11 U.S.C. § 365(f)(2)(B). As to whether "Safeway is financially capable of performing in accordance with the terms of the Warehouse Lease," that remains to be seen. The Trustee has supplied nothing to support this bare, conclusory allegation.

WHEREFORE, the Lessor respectfully requests that the "Trustee's Motion to Assume and Assign El Paso Warehouse Lease to Safeway Inc." be denied, and the Trustee be directed to reject the Lease forthwith.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP



George M. Cheever
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
(412) 355-6500; (412) 355-6501(fax)

Attorneys for El Paso Properties Corp.
and Janus Financial Corporation

July 22, 2002

The undersigned certifies that a copy of the foregoing "Response of El Paso Properties Corp. and Janus Financial Corporation in Opposition to Trustee's Motion to Assume and Assign El Paso Warehouse Lease to Safeway Inc." was served by fax and first-class mail on the following persons :

David T. Thuma, Esq.
Jacobvitz Thumas & Walker
500 Marquette N.W., Suite 650
Albuquerque, NM 87102

United States Trustee
P. O. Box 608
Albuquerque, NM 87103
(505) 248-6558

Paul M. Fish
P. O. Box 2168
Albuquerque, NM 87102
(505) 848-1882 (fax number)

Jennie D. Behles
P. O. Box 849
Albuquerque, NM 87103
(505) 243-7262 (fax number)

this 22nd day of July, 2002


George M. Cheever