

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

**FILED**  
12:00 MIDNIGHT  
OCT 16 2002

In re:

FURR'S SUPERMARKETS, INC.,

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

**DROP BOX**  
United States Bankruptcy Court  
Albuquerque, New Mexico

Debtor.

**TRUSTEE'S FIRST AMENDED MOTION TO ASSUME AND ASSIGN  
EL PASO WAREHOUSE LEASE TO SAFEWAY INC. AND  
REQUEST FOR STATUS CONFERENCE**

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 for the warehouse located at 9820 Railroad Drive and 9601 Railroad Drive in El Paso, Texas, a copy of which is attached hereto as Exhibit A (the "Warehouse Lease"), to Safeway Inc. ("Safeway"). In support of this Motion, the Trustee states:

**BACKGROUND**

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 (the "Initial Offer"). On July 3, 2002, the Trustee also filed her Motion to Assume and Assign El Paso Warehouse Lease to Safeway Inc. (the "Motion") in accordance with the Initial Offer.

1852-1853

4. Pursuant to the Initial Offer, Safeway was to pay \$1.4 million for an assignment of the Warehouse Lease, free and clear of any liens, claims, or encumbrances. Accordingly, any cure amounts under 11 U.S.C. § 365(b) were to be paid by the Trustee, and it was contemplated that the \$1.4 million paid by Safeway would fund the cure amounts, with the resulting net amount retained by the bankruptcy estate.

5. On July 22, 2002, El Paso Properties Corp. and Janus Financial Corporation (the "Landlord") filed its Response in Opposition to the Trustee's Motion. In the Response, the Landlord asserted that the cure amounts totaled between \$2.5 million and \$3 million and thus, that the Initial Offer was uneconomic and not an appropriate exercise of the Trustee's business judgment. While certain of the defaults asserted by the Landlord are easily ascertainable and not subject to dispute (*i.e.* the amounts owing for back rent and taxes), the Landlord also asserted that significant repairs to the premises were necessary, including roof repairs of \$1,188,900 and other structural repairs of \$185,600. Under the Initial Offer, the Trustee thus had the burden of hiring experts and rebutting the Landlord's evidence regarding the allegedly required repairs under the Warehouse Lease in order to determine the resulting net amount that would be retained by the bankruptcy estate, if any, by virtue of the Initial Offer.

6. One of the conditions of the Initial Offer was a 90 day due diligence and inspection period by Safeway, which was to expire on October 7, 2002. During this period, Safeway inspected the premises and attempted to locate a potential subtenant. To date, Safeway has been unsuccessful in locating a subtenant.

7. In addition, during Safeway's due diligence period, the Trustee and Landlord engaged in discovery related to the repairs asserted by the landlord. As the discovery went on, Safeway became concerned that if the Trustee believed that the total cure amounts might exceed the

Initial Offer, the Trustee would terminate the Initial Offer in accordance with its terms. Safeway also became aware of legal precedent concluding that it was improper to try the state law repair issues in the Section 365 assumption context and that any findings by the bankruptcy court would not be binding in any subsequent proceeding between Safeway and the Landlord. See, e.g., Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993) (holding that a motion to assume is a “summary proceeding” in which the court only evaluates the trustee’s “business judgment,” and thus, that the underlying breach of “contract issues may not be decided as part of a motion to assume”; also explaining that a business judgment decision is “[i]n no way . . . a formal ruling on the underlying disputed issues, and thus will receive no collateral estoppel effect”), cert. dismissed, 114 S.Ct. 1418 (1994).

8. In addition, Safeway became concerned about the impracticality of any court attempting to determine a punchlist for repairs and/or the price of any required repairs. While the contractors hired by the Landlord and Trustee may be able to identify certain repairs that could or should be made to the premises, Safeway asserted that there was still the separate issue of what repairs are necessary, if any, to cure alleged defaults under the Warehouse Lease, which lease was entered into by the Landlord and Safeway in 1973 and only requires the lessee to “put, keep, replace and maintain in thorough repair and good, safe and substantial order and condition, *except for reasonable ordinary wear and tear under the circumstances*, all buildings and improvements.”

9. Based on the foregoing, Safeway withdrew its Initial Offer prior to October 7, 2002 and entered into a new agreement with the Trustee on the following terms, subject to bankruptcy court approval and appropriate documentation (the “New Offer”):

- a) Safeway will pay \$200,000 to the estate for the assignment of the Warehouse Lease;

- b) Upon the assignment, Safeway will pay the cure amounts for taxes and back rent;
- c) Upon the assignment, Safeway will agree to perform all obligations of the lessee under the Warehouse Lease (including bringing the premises in compliance with the Warehouse Lease);
- d) The assignment must be free and clear of any liens, claims, or encumbrances against the Warehouse Lease or demised premises;
- e) The lease must not have been modified; and
- f) Safeway will pay (or reimburse the estate) for the prorated rent, taxes, utilities, and insurance from the date of the Trustee's acceptance of this offer (which acceptance occurred on October 8, 2002).

#### RELIEF SOUGHT

10. By this amended motion, the Trustee requests approval under 11 U.S.C. §§365(a) and (f) of her assumption and assignment to Safeway of the Warehouse Lease in accordance with the New Offer. The Trustee asserts that the New Offer is in the best interests of the estate and creditors and an appropriate exercise of her business judgment, because the New Offer will result in a payment of \$200,000 to the estate, irrespective of any cure amounts. See In re Mile Hi Metal Systems, Inc., 899 F.2d 887, 896 n.13 (10th Cir. 1990) (Scymour, 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).

11. The Trustee also asserts that the New Offer is in the best interests of the estate, because it relieves the Trustee of any burden to rebut the Landlord's asserted necessary repairs. Rather, as part of the New Offer, Safeway has agreed to perform all obligations of the lessee under the Warehouse Lease (which includes bringing the premises in compliance with the Warehouse Lease and which performance would be subject to the Landlord's rights and remedies under the Warehouse Lease). Since Safeway was not only the original tenant under the Warehouse Lease but also built the Warehouse in a sale-leaseback transaction with the Landlord, Safeway asserts that it has particular expertise with respect to the premises and the Warehouse Lease and can and will bring the premises in compliance with the Warehouse Lease. Further, Safeway is a publicly-traded company with readily available financial statements evidencing its financial wherewithal not only to perform its future obligations under the Warehouse Lease but also satisfy any cure obligations.

12. In addition, the New Offer does not require any findings by this Court quantifying or otherwise determining what repairs, if any, are necessary to cure any alleged repair defaults under the Warehouse Lease. Instead, the Court simply can and should approve the New Offer under Orion after finding that it is an appropriate exercise of the Trustee's business judgment, that there is adequate assurance that Safeway, in place of the Trustee, will promptly cure any defaults in accordance with 11 U.S.C. § 365(b)(1), and that there is adequate assurance of future performance by Safeway in accordance with 11 U.S.C. § 365(f)(2)(B).

13. In In re F.W. Restaurant Assoc., Inc., 190 B.R. 143, 149 (Bankr. D. Ct. 1995), the Court explained the analysis that a bankruptcy court should use under Orion, as follows:

a bankruptcy court does not make finding and/or conclusions which are *final*, or in the words of *Orion*, "formal" and conclusive" -- i.e. possessing collateral estoppel effect -- with respect to the Section 365(b) issues of "default," "cure," etc. Rather, those issues, if present in a given case, are collapsed into the Court's "business judgment"

analysis. For example, if the bankruptcy court *preliminarily* determines that there is a debtor default under a subject contract, the *likely* existence, extent and impact of that default, together with the perceived ability and/or intention of the debtor-in-possession to cure and continue to perform under the contract, will weigh as salient factors informing the court's business judgment.

Here, the estate will receive \$200,000 irrespective of any cure amounts. Further, Safeway will assume the obligation of bringing the premises into compliance with the Warehouse Lease and has the ability to perform. Thus, the Trustee's business judgment is unaffected by the possible existence, extent, and impact of alleged defaults for repairs. Accordingly, the Court should approve the assumption and assignment of Warehouse Lease to Safeway in accordance with the New Offer in a summary proceeding and without making any specific determinations on the repair issues. See Sentry Operating Co. v. Billings (In re Sentry Operating Co.), 273 B.R. 515, 524 (Bankr. S.D. Tex. 2002) (citing Orion and explaining that bankruptcy court can "in a summary proceeding authorize the debtor to assume or to reject an executory contract, while leaving to subsequent adjudication the validity, enforceability, rights of parties, and other contract issues").<sup>1</sup>

### **REQUEST FOR STATUS CONFERENCE**

14. Because of the fundamental change in the structure of Safeway's offer, and because it no longer appears necessary or beneficial for the Trustee to participate in currently scheduled depositions under the Court's Order Arising from Status Conference on Warehouse Lease Motions.

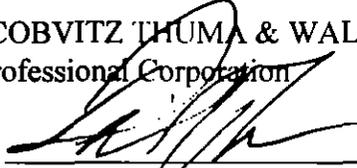
---

<sup>1</sup> If Safeway and the Landlord have a dispute in the future regarding whether the warehouse was brought into compliance with the Warehouse Lease, the parties can resort to their rights and remedies under the Warehouse Lease and the appropriate state court. The only alternative to this based on Orion and Sentry is to combine the assumption motion with the contract dispute litigation in a plenary adversary proceeding, preserving jury trial rights, or with a claim objection proceeding. Sentry, 273 B.R. at 524. Safeway has indicated that it objects to this Court making any findings on the underlying repair/default issues in the absence of an adversary proceeding in which Safeway is a party and can fully and fairly litigate the issues. However, both the Trustee and Safeway would like to avoid the delay and expense of additional litigation (particularly since the estate has no interest in the outcome of such litigation) and thus, assert that this Court should proceed to approve the New Offer pursuant to a summary proceeding.

the Trustee requests a status conference at the Court's earliest convenient time to consider how the hearing on the New Offer should proceed, including any objections by the Landlord to the procedures proposed in this Motion.

WHEREFORE, the Trustee respectfully requests that the Court enter an order approving the Trustee's assumption and assignment of the Warehouse Lease to Safeway on the terms and condition of the New Offer, and granting the Trustee all other just and proper relief.

JACOBVITZ THUMA & WALKER  
a Professional Corporation

By: 

David T. Thuma  
500 Marquette N.W., Suite 650  
Albuquerque, New Mexico 87102  
(505) 766-9272  
(505) 766-9287 (fax)

Attorneys for the Chapter 7 Trustee

This certifies that a copy of the foregoing was served by e-mail and first class on:

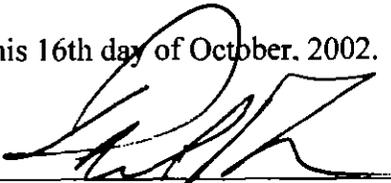
United States Trustee  
P.O. Box 608  
Albuquerque, NM 87103  
(505) 248-6558

Harrel L. Davis III  
Krafsur Gordon Mott, P.C.  
P.O. Box 1322  
El Paso, Texas 79947-1322  
(915) 545-4433

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

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

this 16th day of October, 2002.



---

David T. Thuma