

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

**IN RE:
FURR'S SUPERMARKETS, INC.,
Debtor.**

NO. 7-01-10779 SA

**ORDER ESTABLISHING WERNER KINDERMANN'S
ADMINISTRATIVE CLAIM**

THIS MATTER having come before the Court on Werner Kindermann's motion for payment of cure amount, Kindermann ("Kindermann") being represented by his attorneys Keleher & McLeod, P.A. (James L. Rasmussen) and the Chapter 7 trustee ("Trustee") being represented her attorneys by Jacobvitz, Thuma & Walker (David Thuma), the Court being informed in the premises,

FINDS AND CONCLUDES:

1. Only the Trustee filed a timely objection to the Motion. Kindermann and the Trustee are in agreement as to this Order as shown below.
2. Furr's Supermarkets, Inc. was Lessee under the terms of two Supermarket Leases with Kindermann, dated December 5, 1986, of supermarkets at 3301 Southern Blvd., Rio Rancho, New Mexico, Furr's Supermarkets' Store 881, and 111 Coors Road NW, Albuquerque, New Mexico, Furr's Supermarkets' Store 884.
3. The Leases to both stores were assumed and assigned under the terms of the Estate's transaction with Fleming Company, Store 881 to Raleys of New Mexico and 884 to Smith's Food and Drug.
4. The Leases were triple net leases, and required Furr's Supermarkets to pay all Common Area Maintenance ("CAM") and utility charges. CAM charges were billed

directly by the property manager to Furr's under the terms of the applicable Easements, Covenants and Restrictions Agreements, see, e.g., Bates stamped pages 02297-02355 of the Estoppel Packet for Store 881. Water and sewer charges were billed directly to Furr's and paid by Furr's directly to the city.

5. On or about April 3, 2001, under the provisions of ¶ 2 of the Court's "Order Approving Procedure Relating to the §365(B)(1) Cure and Adequate Assurance Requirements for Assumption of Leases" entered July 23, 2001, the Debtor gave its "Notice of Proposed Cure Amounts, Objection Deadline and Final Hearing", setting forth the amounts the Debtor claimed were required to cure lease defaults, and giving creditors a limited period to contest the amounts specified.

6. With respect to Store 881, the Notice listed CAM charges totaling \$12,217.00 due, but noted an unspecified dispute. The order establishing cure amounts approved the amounts stated in the notice and did not preserve a dispute. Because CAM charges were paid by Furr's directly to the property manager, (the various Lease-related agreements provide that all notices from Pan Pacific would be given to Furr's, and vice-versa), Kindermann had no knowledge of any dispute. Similarly, Kindermann had no notice that Furr's was not paying water and sewer charges.

7. Following assumption and assignment of the Leases, Kindermann received wire transfers on September 5, 2001 and September 26, 2001 of the funds required to cure monthly rent defaults and pay real estate taxes. CAM charges should have been, and historically were, paid directly to the property manager, and Kindermann reasonably did not suspect anything amiss when no CAM cure payment was made to Kindermann.

8. In May, 2002, Kindermann was contacted by Pan Pacific Development (New Mexico) and informed that Furr's had not paid CAM charges with respect to Store 881 incurred after December 1999, through the assignment to Fleming/Raley's.

9. The payment required to satisfy the CAM charges is a cure amount which should have been paid by the Estate to Pan Pacific Development in September 2001, but was not. Instead, Furr's paid only \$3,439.42 (booked September 5, 2001 by Pan Pacific) of the \$12,217.00 stated in its Notice of Cure Amount.

10. In June, 2002 Kindermann received notice from Smith's Food & Drug, assignee of the Lease of Store 884, that water and sewage charges, in the amount of \$4,191.62, incurred prior to September 2001, had not been paid, and that the City of Albuquerque was threatening to terminate service.

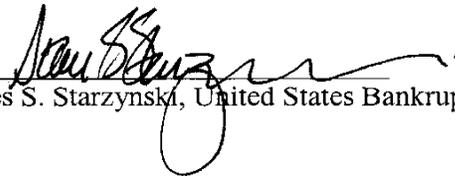
11. The payment to the City of Albuquerque is a cure amount, the existence of which was known or should have been known by Furr's. The fact that Furr's was not paying for water and sewage billed directly to it was unknown to Kindermann.

12. The payment required to satisfy the water and sewer charges is a cure amount which should have been paid by the Estate to the City of Albuquerque in September 2001, but was not. Kindermann paid the \$4,191.62 to the City of Albuquerque.

13. The Furr's bankruptcy proceeding was converted to Chapter 7 following Furr's failure to pay cure amounts and prior to Kindermann's discovery of that failure.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Werner Kindermann has a Chapter 11 administrative claim in the Furr's Supermarkets, Inc.

bankruptcy proceeding in the amount of \$12,969.20, and that a copy of this Order to the Trustee is sufficient to establish that claim without any further filing.


James S. Starzynski, United States Bankruptcy Judge

Agreed:

KELEHER & McLEOD, P.A.

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I hereby certify that a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and parties on:

OCT 06 2003

Mary B. Anderson