

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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IN RE: §
§
FURR'S SUPERMARKETS, INC., §
a Delaware Corporation, §
§
Debtor. §

U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.
Case No. 11-01-10779-SA

**OBJECTION OF RIVER OAKS PROPERTIES TO
DEBTOR'S MOTION FOR ORDER APPROVING SALE OF
SOME OR ALL OF DEBTOR'S OPERATING ASSETS**

TO THE HONORABLE JAMES S. STARZINSKY, UNITED STATES BANKRUPTCY
JUDGE:

River Oaks Properties (f/k/a Supermarket Properties I, Ltd.) ("River Oaks"), a Lessor,
Creditor and Party-in-Interest in the above Chapter 11 case, hereby files this its *Objection to
Debtor's Motion for Order Approving Sale of Some or All of Debtor's Operating Assets* (the
"*Objection*"), and would show the Court as follows.

I. Factual & Procedural

1. The Debtor filed its *Voluntary Petition for Relief* under Chapter 11 of the United States
Code on February 8, 2001. The Debtor continues in possession of its property and
operation of its business as a debtor-in-possession under 11 U.S.C. §§1107 and 1108.
2. River Oaks Properties is the Lessor under three (3) unexpired leases for non-residential
real property (collectively, the "*Leases*") described as follows:

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<i>Furr's Store No.</i>	<i>Location</i>
874	13201 Lomas NE, Albuquerque, New Mexico
950	11705 Montwood, El Paso, Texas
952	951 N. Resler Drive, El Paso, Texas

3. On or about March 1, 2001, the Debtor filed its *Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Nonresidential Real Property* (the "*Motion to Extend*"). This instruments seeks an extension of time to assume or reject a number of unexpired leases of non-residential real property, including the *Leases*. An *Order* was signed and entered by this Court on April 6, 2001, extending the deadline under §365(d)(4) until August 10, 2001.

4. On or about June, 1, 2001, the Debtor filed the present *Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief* (the "*Sale Motion*").

The *Sale Motion* generally seeks an order:

(a) approving the sale of all or part of the Debtor's operating assets, including its licenses and permits, to a purchaser to be determined at an auction to be held on June 27, 2001 (as amended);

(b) determining that the purchaser will have purchased the assets in good faith, within the meaning of §§363(m) and (n) of the Bankruptcy Code;

(c) approving the assumption and assignment of such of the Debtor's executory contracts and unexpired leases as the purchaser agrees to take at the Auction and enjoining any non-debtor party to such a contract or lease form any attempt to terminate or modify the contract or lease solely because of the Debtor's Chapter 11 case or the relief requested in the *Sale Motion*;

(d) determining that the defaults set forth in the *Sale Motion* are the only defaults under the Debtor's executory contracts and unexpired leases that must be cured as a condition to assumption and assignment;

(e) determining that upon the assumption and assignment of such contracts and leases the Debtor shall be released from all obligations under such agreements.

II. River Oak's Objection to Sale Motion

5. River Oaks objects to the *Sale Motion* for the reason that it violates §363 by avoiding the fundamental notice and disclosure mechanisms in the Chapter 11 process. Though the Debtor may attempt to sell assets through §363 in lieu of the plan confirmation process, the Debtor must ensure that the notice and disclosure provided to affected parties are at the minimum, equivalent to those inherent in the disclosure statement and plan confirmation process.
6. Further, the *Sale Motion* ignores the basic protections of §365 afforded to lessors of non-residential real property such as River Oaks.

III. Arguments

7. The basis of the Chapter 11 plan process is to negotiate a bargain for the debtor's financial rehabilitation after full disclosure, and then to obtain the bankruptcy court's approval to make it binding on all of the creditors and parties-in-interest. Disclosure is the key concept in reorganization or liquidation practice under the Bankruptcy Code when set in the Chapter 11 context.
8. While §363(b) allows the sale of a chapter 11 debtor's assets outside the ordinary course of business prior to confirmation of a Chapter 11 plan, this option has limitations. To obtain approval under §363, the debtor must also demonstrate a sound business reason for conducting a sale out of the ordinary course of business, especially one of substantially all of its assets prior to confirmation. Moreover, the debtor must

demonstrate that there has been adequate and reasonable notice of the sale, that the sale has been proposed in good faith, and that the purchase price is fair and reasonable. Section §363 does not authorize a debtor to short circuit the strict requirements of the reorganization process by establishing the terms of reorganization plan *sub rosa* in connection with a proposed §363 sale.

9. Based on a review of the pleadings on file with the Bankruptcy Court, River Oaks believes that the Debtor has failed to show a valid business reason for the sale of its assets outside the context of a plan or reorganization or formal liquidation. Moreover, the Debtor has failed to show why it is necessary to in essence, liquidate its assets through a quick-sale bid and/or auction procedure. Though the Debtor cites various reasons in the *Sale Motion*, these reasons are circumstances which are common in most Chapter 11 cases.
10. Specifically, the Debtor recites that “several parties have recently expressed interest in an acquisition of all or a part of the assets. In light of these expressions of interest and for the other reasons set forth below, the Debtor believes that a prompt sale of its assets will realize the best value for its creditors.” The Debtor further states that the proposed sale procedure will preserve the going concern value of its operations. The Debtor also states that the sale of the assets under the proposed bid/auction procedure will prevent the accrual of further administrative expenses.
11. River Oaks believes that the Debtor’s reasons for the proposed sale are flawed. Procedurally, and as further discussed below, it does not believe that the Debtor has

adequately satisfied the notice and disclosure requirements under §363. Further, the proposed sale of the Debtor's assets through a bid/auction procedure to any number of different purchasers defeats the Debtor's argument that the going concern value of its operations will be preserved or maximized by the proposed sale procedure. The proposed sale procedure will result in the *de facto* piece-meal liquidation of the Debtor's estate. The reduction of administrative expenses the Debtor claims will result from approval of the *Sale Motion* will most likely be offset by the lower price typically received in a quick-sale scenario. Thus, assuming that the Debtor can demonstrate sound business reasons for a quick sale, it has failed to demonstrate any compelling facts of circumstances which would justify averting the disclosure, solicitation and balloting processes which are the basis of the Chapter 11 process. For these reasons, the *Sale Motion* should be denied.

12. River Oaks further objects to the *Sale Motion* because it denies the protections afforded by §365 as a lessor under an unexpired shopping center lease. Section 365 provides lessors of non-residential real property a number of protections in the form of limitations as to how an unexpired lease can be assumed and assigned.
13. Section 365(a) provides that the trustee or debtor-in-possession, subject to the Court's approval, may assume or reject any executory contract or unexpired lease of the debtor. One of the restrictions the debtor's right to assume a lease is the debtor's obligation to cure any default under the lease. Section 365(b)(1) provides a guarantee to the non-debtor party such as River Oaks, who may be forced to continue a relationship it would

rather terminate, that as a condition to the forced continuation of the contractual relationship, any defaults existing at the time will be satisfied either through the timely cure of prepetition arrearages or through reasonable assurances of future payment.

14. The *Sale Motion* does not provide for curing all defaults under the *River Oaks Leases*. Though the Debtor sets forth in Schedule 2 attached to the *Sale Motion* the amounts it believes are necessary to cure, assume and assign, those figures are incorrect and/or incomplete with respect to River Oaks. On June 19, 2001, River Oaks received the Debtor's *Notice of Revision of Exhibits to Debtor's Motion for Order Approving Sale or Some or All of Debtor's Operating Assets and Granting Relief Requested* (the "Revised Notice").
15. According to River Oaks' records, the current amounts which would have to be paid to allow assumption of its *Leases* are as follows with the differences noted in Debtor's Schedule 2 (as amended by the *Revised Notice*):

<i>No.</i>	<i>Location</i>	<i>Prepetition Arrearages</i>	<i>Postpetition Arrearages</i>	<i>Taxes</i>	<i>Penalty on Taxes</i>	<i>Total</i>
874	13201 Lomas NE, Albuquerque, NM	\$10,925 (Schedule 2 - \$10,925)	\$6,550.00 ¹ (Schedule 2 - \$0.00)	\$15,334.95 (Schedule 2 - \$15,335)	\$613.00 (Schedule 2 - \$0.00)	\$33,428.33
950	11705 Montwood, El Paso, TX	\$14,337.23 (Schedule 2 - \$9,422)	N/A	\$100,651.38 (Schedule 2 - \$100,651)	\$13,084.78 (Schedule 2 - Omitted)	\$128,073.39
952	951 N. Resler, El Paso, TX	\$10,875.00 (Schedule 2 \$10,875)	N/A	\$97,802.02 (Schedule 2 - \$97,802)	\$14,670.30 ² (Schedule 2 - \$0.00)	\$123,347.32

¹ Pursuant to the underlying *Lease*, a rent increase became effective June 1, 2001 at the Albuquerque Store in the amount of \$6,555.00.

² Effective July 1, 2001, there will be an additional property tax penalty of \$20,245.02 added to the current tax balance for Store #952, and likely additional penalties to Store #950.

16. In addition to the above figures, the Debtor is required to pay River Oaks' reasonable attorneys fees and expenses incurred in this bankruptcy case as provided in the underlying *Leases*, as well as prorated 2001 taxes, to cure the defaults. River Oaks objects to the *Sale Motion* as it does not reflect the correct cure amounts.
17. Further, River Oaks objects to the *Sale Motion* because it does not state when the defaults will be cured. The *Sale Motion* refers to a *Form Asset Purchase Agreement* and states that all sales will provide for the cure of defaults under any leases to be assumed and assigned, but does not state when under the *Form Purchase Agreement* the default will be cured. A review of the *Form Asset Purchase Agreement* does not clarify matters as it contains only boilerplate provisions. To the extent that the Debtor's proposed sale contemplates cure of all defaults other than immediately upon assignment of the *Leases* through a cash payment, River Oaks objects to the assumption and assignment.
18. Another critical requirement under §365 of the Bankruptcy Code on a debtor's right to assume an unexpired lease is the debtor's obligation to provide adequate assurance of future performance under the lease. Similarly, as a condition to assigning an unexpired lease of the debtor, adequate assurance of future performance by the assignee of such contract or lease must be provided. In an assignment, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance of:
 - (a) the source of rent and other consideration due under such lease;

(b) that the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the debtor as of the time the debtor became the lessee under the lease;

(c) that assumption and assignment is subject to all the provisions of the lease, including provisions such as use or exclusivity provisions;

(d) that the assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

19. Satisfaction of the requirements of both §§365(b)(1)(C) and 365(f)(2)(B) depends on whether the prospective assignee can provide adequate assurance of future performance.
20. River Oaks objects to *Sale Motion* because it fails to provide even basic assurances of future performance under the *Leases*. Since the bid and auction process is not scheduled until June 27, 2001, the identity of the proposed assignee(s) or bidder(s) are not currently known to River Oaks. Procedurally, the *Sale Motion* is defective and denies River Oaks due process and adequate notice of the identity of the proposed assignee. The *Sale Motion* purports to provide for the selection of the winning bidder(s) sometime after the auction on June 27, 2001, and immediate presentation to the Court of approval of the sale less than 48 hours later on June 29, 2001. This procedure fails to provide River Oaks adequate notice of the proposed assignee and adequate opportunity to evaluate the assignee's financial and other qualifications under §365. With respect to the undisclosed assignee, no business or financial information of any kind has been furnished to River Oaks. This is particularly troublesome because the *Form Asset Purchase Agreement* appears to contemplate that the winning bidder(s) may

acquire leases through a subsidiary that may not be well- capitalized. River Oaks, as well as all other similarly situated lessors, are unaware as to whether their properties will even be bid upon or auctioned off. Further, the Debtor has offered no assurances that the assignment will even be subject to the use restrictions contained in the current *Leases* or comply with the tenant mix and balance requirements of §365.

21. Moreover, the *Sale Motion* seeks an order “enjoining any non-debtor party to such a contract or lease from any attempt to terminate or modify the contract or lease solely because of the Debtor’s Chapter 11 case or the relief requested in the *Sale Motion*.” This relief violates §365(l) which permits the lessor of an assigned lease to require a deposit or other security for the performance of the debtor’s obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant. Of course, this assumes that Furr’s assignee is even a similar tenant. For these reasons, the *Sale Motion* should be denied.
22. Assignment of an executory contract or unexpired lease assumed under §365 generally relieves the debtor and the estate from any liability for breach of such lease occurring after such assignment. The Debtor attempts to expand the reach of the releases under §365(k) by relieving the Debtor of liability for prepetition defaults as well. The *Sale Motion* seeks an order determining, as provided by §365(k) of the Bankruptcy Code, that upon the assumption and assignment of any agreements under this *Motion*, the Debtor shall be released from all obligations under such agreements without regard to when such obligations accrue. The difference between the relief requested by the

Debtor and that afforded by §365(k) is significant in a case such as this, in which the Debtor has not stated the time frame in which lease defaults will be cured and has not offered adequate protection of performance by the assignee. If this Court enters an order allowing the Debtor to assume and assign its leases and providing that the assignee is to cure any defaults under the leases, and the assignee neglects to do so, then the lessors under such lease have no claim against the estate or the debtor for any liabilities existing as of the date of the assumption and assignment. River Oaks therefore objects to the *Sale Motion* to the extent it seeks to expand the scope of §365(k).

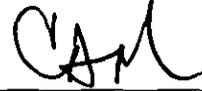
23. Sections §363(m) and (n) inject a good faith requirement into any transaction under §363. The *Sale Motion* in its present form cannot satisfy the good faith requirement as River Oaks is without any information, and could not possibly engage in any due diligence to determine the nature, of the assumption and assignment of the *Leases* because the Debtor has not disclosed who the potential or actual assignees are. For this reason, the *Sale Motion* should be denied.

WHEREFORE, PREMISES CONSIDERED, River Oaks Properties requests that this Court deny the Debtor's *Motion for Order Approving the Sale of Some or All of Debtor's Operating Assets and Granting Related Relief*, or alternatively, condition the relief granted therein to address the all objections more fully raised herein, and enter such other and further orders are as just.

RESPECTFULLY SUBMITTED,

KRAFSUR GORDON MOTT P.C.

By:

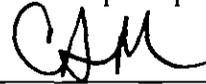


Carlos A. Miranda, Esq.
Texas State Bar No. 14199582
H. Christopher Mott 14596430
Texas State Bar No.
4696 N. Mesa, Ste. 100
El Paso, Texas 79912
(915) 545-1133
(915) 545-4433 (fax)

Attorneys for River Oaks Properties

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of June, 2001, a true and correct copy of the foregoing *Objection* was mailed overnight priority mail, return receipt requested to the parties on the attached list.



CARLOS A. MIRANDA

United States Trustee:

Office of the U.S. Trustee
P.O. Box 608
Albuquerque, NM 87103

Debtor:

Jacobitz, Thuma & Walker, P.C.
attn: David Thuma, Esq.
500 Marquette NW, Ste. 650
Albuquerque, NM 87102

Skadden, Arts, Slate, Meagher & Flom, LLP
attn: Richard Levin and Stephen J. Lubben
300 South Grand Ave., Ste. 3400
Los Angeles, CA 90071-3144

Jay Goffman
Skadden, Arps, Slate
Four Times Square
New York, NY 10036

Ronald E. Andazola
Assistant U.S. Trustee
421 Gold St., SW, Suite 112
Albuquerque, NM 87102

Jennie Deden Behles
J.D. Behles & Associates
400 Gold Avenue SW, Suite 400
Albuquerque, NM 87103-0849

George Davies
3300 South Parker Road
Suite 500
Aurora, CO 80014

Robert J. Bothe, Esq.
McGrath, North, Mullin & Kratz, P.C.
One Central Park Plaza, Suite 1400
222 South Fifteenth Street
Omaha, NB 68012

David R. Mayo
Benesch, Friedlander, Coplan & Aaronoff
LLP
2300 BP Tower - 200 Public Square
Cleveland, OH 44114

Kyle S. McKay
Corporate Counsel
Smith's Food & Drug Centers, Inc.
1550 South Redwood Road
Salt Lake City, UT 84104

Paul Fish
Modrall, Sperlin, Roehl, Harris & Sisk
500 Fourth Street, NW
Bank of America Centre, Suite 1000
Albuquerque, NM 87103-2168

Julia B. Rose
The Law Firm of Julia B. Rose
1227-B South St. Francis Drive
Santa Fe, NM 87505

Phillip Bohl
Gray, Plant, Mooty, Mooty & Bennet
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402

Richard B. Levin
Skadden, Arps, Slate, Meagher & Flom
300 South Grand Avenue
Los Angeles, CA 90071-3144

Donald R. Fenstermacher, P.C.
The Earthgrains Baking Companies, Inc.
P.O. Box 70
Albuquerque, NM 87103-0700

Charles P. Schulmann
Allen J. Guon
Sachnoff & Weaver, Ltd.
30 South Wacker Drive, Suite 2900
Chicago, IL 60606

Andrew J. Simmons
Sutin, Thayer & Browne
P.O. Box 1945
Albuquerque, NM 87103

Louis J. Price
McAfee & Taft
10th Floor, Two Leadership Square
211 N. Robinson
Oklahoma City, OK 73102

Ronald R. Del Vento
Assistant Attorney General
P.O. Box 12548
Austin, TX 78711-2458

Jay D. Hertz
Sutin, Thayer & Browne
P.O. Box 1945
Albuquerque, NM 87103

Alexander D. Crecca
Butt Thorton & Baehr PC
P.O. Box 3170
Albuquerque, NM 87190

Daniel J. Behles
320 Gold SW, Suite 1001
P.O. Box 415
Albuquerque, NM 87103-01415

Patrick L. Hayden
McGUIREWOODS LLP
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510

Furr's Supermarkets, Inc.
c/o Chief Financial Officer
4411 The 25 Way NEW, Suite 100
Albuquerque, NM 87109

Gordon S. Little, P.A.
40 First Plaza, NW
Suite 620
Albuquerque, NM 87102

Michael W. Bishop', Esq.
Arter & Hadden LLP
1717 Main Street, Suite 4100
Dallas, TX 75201

Gail Gottlieb
Sutin, Thayer & Browne
P.O. Box 1945
Albuquerque, NM 87103

Market Logistics, Inc.
c/o Michael J. Cadigan
6400 Uptown Boulevard NE
Suite 570-W
Albuquerque, NM 87110

Andrew B. Krafsur
Krafsur Gordon Mott, P.C.
4695 North Mesa
El Paso, TX 79912

James C. Jacobsen
Keleher & McLeod
PO Drawer AA
Albuquerque, NM 87103

David H. Thomas, III
Dave Thomas & Associates, P.C.
3915 Carlisle
Albuquerque, NM 87107

Duncan Scott
Scott & Kienzle
Box 587
Albuquerque, NM 87103-0587

Gregory Hesse, Esq.
Jenkins & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, TX 75202-2799

Victor A. Sahn
Sulmeyer, Kupetz, Baumann & Rothman
300 South Grand Avenue, 14th floor
Los Angeles, CA 90071