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BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

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

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

**AMENDED PREHEARING BRIEF OF EL PASO PROPERTIES CORP.  
REGARDING THE TRUSTEE'S OBLIGATIONS UNDER 11 U.S.C. § 365(d)(3)**

At the conclusion of the hearing held on February 11, 2002, on the "Chapter 7 Trustee's Motion to Extend Time Within Which the Debtor May Assume or Reject the El Paso Warehouse Lease," this Court scheduled a hearing for Wednesday, February 13, 2002, to determine the Trustee's obligations under 11 U.S.C. § 365(d)(3) in respect of the Lease. El Paso Properties Corp., as lessor ("Lessor"), agent for the owners of the Distribution Warehouse, respectfully submits this prehearing brief to address the nature and extent of those obligations.

Section 365(d)(3) provides in relevant part:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for the relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

There is a split of authority as to the interpretation of the words "obligations of the debtor ... arising from and after the order for relief ...". Specifically, courts are divided on the question whether a specific obligation, such as rent or taxes, that comes due on or before a specific date after the order for relief, is payable at its full face amount, even though some portion of this obligation may relate to a period prior to the order for relief; or, alternatively, whether obligations of this character should be prorated, so that the trustee need only pay the

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portion of the obligation relating to the period after the order for relief. The former view, which is sometimes referred to as the “billing date approach,”<sup>1</sup> is the rule espoused by the majority of the Courts of Appeal that have considered the question, as well as by the only appellate court in the Tenth Circuit that has ruled on the issue. *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001); *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (6<sup>th</sup> Cir. 2000); *Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.)*, 27 F.3d 401 (9<sup>th</sup> Cir. 1994); *In re Duckwall-ALCO Stores*, 150 B.R. 965, 976 n.23 (D.Kan. 1993); *contra*, *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (7<sup>th</sup> Cir. 1998). The *Koenig* and *Montgomery Ward* cases are the two most recent Courts of Appeal cases addressing this issue. In view of these authorities, and the District Court’s decision in the *Duckwall-ALCO Stores* case, Lessor submits that the “billing date approach” is the correct rule to apply in this case.

Under the “billing date approach” the obligations of the Trustee under subsection (d)(3) include the following items: (i) the rental installment due and owing on December 31, 2001 (\$66,000.00), together with interest at the statutory rate of 6% per annum, commencing on January 30, 2002;<sup>2</sup> (ii) taxes for the 2001 tax year, first coming due in January, 2002 and last payable without interest or penalty on January 31, 2002, together with interest, penalties, and attorneys fees accruing thereafter (for a total of \$270,466.91 as of February); (iii) premiums for insuring the property; (iv) current utility charges; (v) current maintenance and repair costs; and (vi) interest, penalties, and attorneys fees accruing after the petition date on the taxes for the 2000 tax year. The parties have stipulated to the precise amounts of some of these items; the precise amounts of other items have not yet been determined.

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<sup>1</sup> See *DeCicco of Montvale, Inc.*, 239 B.R. 475 (Bankr. D.N.J. 1999), holding that the “billing date approach,” rather than the “accrual approach,” reflects the proper interpretation of subsection (d)(3).

<sup>2</sup> See Tex. Fin. Code Ann. § 302.002 (Vernon 1999), amended by Acts 1999, 76<sup>th</sup> Leg., ch. 62, § 7.18(a), eff. Sept. 1, 1999 and Article Nineteenth of the Lease.

In addition, there are substantial charges that are currently accruing under the Lease but that are not yet due and payable under the terms of the Lease. These charges include rent for the current and future calendar quarters, and taxes for the current and future tax years.

In the *Montgomery Ward Holding Corp.* case, which is the most recent decision by any Court of Appeals on the issue, the Court observed:

Finally, we acknowledge that the result we reach [*i.e.* adoption of the “billing date approach”] may in some cases leave room for strategic behavior on the part of landlords and tenants. ... [However], strategic behavior even in the area of tax reimbursement can be constrained by forethought and careful drafting. [*Id.* 268 F.3d at 212]

In this case, we believe some “forethought and careful drafting” is particularly appropriate because the estate is administratively insolvent, and even if the proposed settlement between the Trustee and the secured creditors is approved, the secured creditors can cut off their funding of obligations under the Lease in their unfettered discretion at any time. To protect the Lessor in these circumstances, Lessor suggests that the Lease should be put on a “pay as you go” basis, and that pro rata portions of the rent and taxes should be payable monthly in advance, subject to a refund of any such amounts that are allocable to periods following the Trustee’s rejection of the Lease. A specific proposal along these lines will be presented to the court at Wednesday’s hearing.

Respectfully submitted,

KIRKPATRICK & LOCKHART LLP



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February 13, 2002

The undersigned certifies that a copy of the foregoing "Amended Prehearing Brief of El Paso Properties Corp. Regarding the Trustee's Obligations Under 11 U.S.C. § 365(d)(3)" was served on the following persons by facsimile transmittal, on February 13, 2002:

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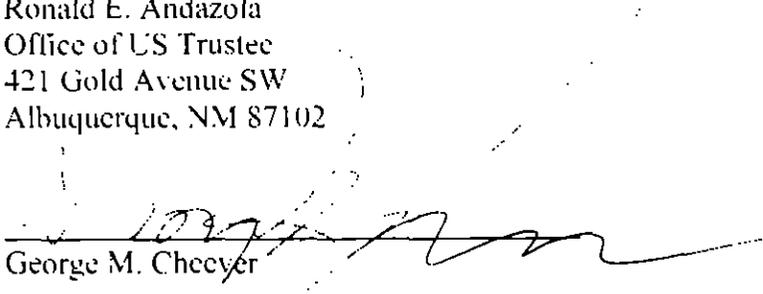
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