

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779 SA **DROP BOX**
Chapter 11
United States Bankruptcy Court
Albuquerque, New Mexico

JUL 17 2001

Debtor.

**AMENDED MOTION FOR ORDER APPROVING PROCEDURE
RELATING TO THE §365(b)(1) CURE AND ADEQUATE ASSURANCE
REQUIREMENTS FOR ASSUMPTION OF LEASES**

Furr's Supermarkets, Inc., debtor and debtor in possession ("Debtor") moves the Court for an order approving the procedure relating to the §365(b)(1) requirement for assumption of leases set forth below in paragraph 3 below. In support of this Amended Motion, Debtor states:

1. On June 29, 2001, the Court held a final hearing on Debtor's Motion For Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief, filed June 1, 2001 (the "Sale Motion"), in which Debtor sought approval of its sale of assets to Purchaser pursuant to an Asset Purchase Agreement dated June 25, 2001 (the "APA"). The Court granted the Sale Motion, and entered a Sale Order (as defined in the APA), on July 3, 2001. Capitalized terms in this Motion, not otherwise defined, are as defined in the APA.

2. The APA provides generally, with respect to the assignment of Leases (defined in the APA as limited to interests in Leased Real Property) and Equipment Leases (together, "Unexpired Leases") relating to Store Properties, as follows:

(a) Purchaser will purchase up to 66 Store Properties. Purchaser may elect not to purchase up to 26 of the Store Properties by giving notice within 45 days after entry of the Sale Order (*i.e.* by August 17, 2001), subject to the terms and conditions set forth in the APA. If a property carved out of the APA (in the APA, called a "Rejected Property") is Leased Real Property (the term "Leased Real Property" includes 65 of the

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66 operating Store Properties), the Debtor will not assign the respective Unexpired Leases to Purchaser and the Purchaser will not assume the obligations thereunder. Leased Real Property does not include the Debtor's headquarters.

(b) The Closing Date for the purchase of Debtor's assets is expected to be the later of August 31, 2001 or satisfaction or waiver of conditions to Closing set forth in the APA. The APA provides that either party may terminate the APA if Closing has not occurred by October 1, 2001 (defined as the "Outside Date").

(c) Purchaser has the right to direct that Debtor assign Leases and Equipment Leases (if Debtor cannot convey title to the leased equipment) directly to Third Party Purchasers designated by Purchaser, by giving Debtor a Third Party Purchaser Notice; and with respect to Equipment Leases, by making an election set forth in Section 4.4 of the APA (the "§4.4 Notice"). Upon receipt from Purchaser of a Third Party Purchaser Notice designating a Third Party Purchaser, and a §4.4 Notice, if applicable, Debtor is to seek to assume and assign the relevant Unexpired Leases to the designated Third Party Purchaser.

(d) Debtor is to operate those Store Properties that have not been assigned to third parties for up to 60 days following the Closing Date under a Management Agreement. Purchaser has until three days prior to expiration of the Management Agreement (the "Assignment Deadline") to designate Third Party Purchasers.

(e) On the Assignment Deadline, all Leases for Store Properties not previously rejected, assigned or transferred to a Third Party Purchaser or designated for transfer to a Third Party Purchaser in a timely delivered Third Party Purchaser Notice are to be transferred to Purchaser, together with Equipment Leases subject to the terms and conditions specified in the APA.

(f) The following chart summarizes the anticipated deadlines and time frame for consummation of the transactions contemplated by the APA and Sale Order:

Sale Order	First Deadline to designate Rejected Properties (30 days)	Final Deadline to designate Rejected Properties (45 days)	Closing Date (or earlier)	Outside Closing Date	Management Agreement Expiration (60 days after closing)	Outside date for Management Agreement Expiration
7/3/01	8/02/01	8/17/01	8/31/01	10/01/01	10/30/01	11/30/01

3. Debtor proposes the following procedure with respect to the determination by the Court what is required for the Debtor to satisfy the requirements under Bankruptcy Code §365(b)(1) for assumption of Unexpired Leases in connection with Debtor's request to assume and assign such leases to Purchaser or to Third Party Purchasers designated by Purchaser:

(a) Not later than two business days after the expiration of the 30-Day Period (*i.e.* by August 6, 2001), Debtor would serve a notice upon all lessors of Unexpired Leases (or their counsel), by overnight courier service (the "Cure Amount Notice"), in substantially the form attached hereto as Exhibit "I."

(b) Except for cure amounts to which the Debtor and lessor have agreed upon and Unexpired Leases where the leased property is located only at Store Properties that the Cure Amount Notice states were carved out from the purchase on or before August 2, 2001, within seven (7) days after the lessors' receipt of a the Cure Amount Notice, any lessor who objects to any proposed cure amounts ("Proposed Cure Amounts") set forth in an amended and updated version of Exhibit 2 to the Motion for Order Approving Sale of Some or All of debtor's Operating Assets and Granting Related Relief, filed June 1, 2001 (a copy which will be enclosed with the Cure Amount Notice), would be required to transmit to counsel for the Debtor, by email (to rjacobvitz@jtwlawfirm.com, with a copy to slubben@skadden.com) or by facsimile (to 505-766-9287), or by overnight mail (to Jacobvitz, Thuma & Walker P.C. 500 Marquette, NW, Suite 650, Albuquerque, New Mexico 87102), an objection setting forth the amount the lessor asserts is required for the Debtor to provide a cure under

Bankruptcy Code §363(b)(1), and would be required to file the objection promptly thereafter.

(c) If such an objection is filed and served within the seven (7) day period specified in paragraph 3(b), the Court would hold a final hearing, on short notice to the Debtor, lessor in question, the DIP lenders, Committee and United States Trustee, to determine the cure amount required by Bankruptcy Code §365(b)(1) as a condition to assumption of the Unexpired Lease(s).

(d) If such an objection is not filed and served within the seven (7) day period specified in paragraph 3(b), the lessor in question would be deemed to have waived any objection to the proposed cure amount.

(e) The Debtor believes that some of the Unexpired Leases, specifically certain Equipment Leases, are not executory contracts or unexpired leases subject to the requirements of section 365 of the Bankruptcy Code. Instead, the Debtor believes that these Equipment Leases are non-executory, secured lending arrangements (the "Secured Leases"). The Cure Amount Notice for these leases will indicate a cure amount of "N/A," and will be accompanied by a memorandum of law explaining the Debtor's position with respect to why such Equipment Leases are Secured Leases. Attached to the memorandum will be a copy of the Equipment Lease in question. The Cure Amount Notice also will indicate a provisional proposed cure amount ("Provisional Proposed Cure Amount") that would apply only if the Court determines that an Equipment Lease the Debtor's claims is a Secured Lease is subject to the requirements of section 365 of the Bankruptcy Code.

(f) All lessors under Equipment Leases that the Debtor claims are Secured Leases would be subject to the objection deadline set forth in paragraph 3(b) above for such lessors to object to the Debtor's characterization of the Equipment Lease as a Secured Lease and for any objections to the Provisional Proposed Cure Amounts. If a lessor objects to the Debtor's characterization of an Unexpired Lease as a Secured

Lease, however, the lessor would have an additional seven days after such objection deadline to serve a memorandum of law in support of the lessor's position on Debtor's counsel, by the means provided in paragraph 3(b). The Debtor would then have an additional five days to serve a reply. The Debtor would file the three briefs with Court concurrently, and would request a determination that the Equipment Lease at issue is a Secured Lease not subject to the requirements of Bankruptcy Code §365. The Debtor believes that the proper characterization of each Equipment Lease as a Secured Lease may be determined as a question of law, without the need for evidence (other than a copy of the lease itself) or oral argument.

(g) In addition, in the Cure Amount Notices for some Equipment Leases the Debtor may list the Proposed Cure Amounts (or Proposed Provisional Cure Amounts) on a store-by-store or other basis, reflecting the Debtor's proposed assignment of interests in Equipment Leases to more than one Third Party Purchaser or the assignment of interests in an Equipment Lease of less than all of the equipment covered by a particular master lease. To the extent an equipment lessor objects to any of the Debtor's Proposed Cure Amounts (or Proposed Provisional Cure Amounts) on a store-by-store or other basis set forth in the Cure Amount Notice, and the subsequent corresponding proposed assignment of the Debtor's interests in the Equipment Leases, the lessor would be required to assert such an objection as set forth in paragraph 3(f), or such an objection would be deemed waived, and the objection (if timely made) would be resolved under the briefing schedule and procedures set forth in paragraph 3(f).

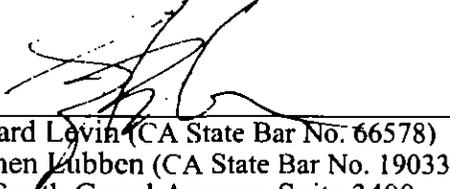
(h) The Debtor would provide each lessor under an Equipment Lease the Debtor claims is a Secured Lease, or under Equipment Leases in which Debtor proposes to assign interests to more than one Third Party Purchaser or to assign interests in less than all of the equipment covered thereby, with notice of the objection deadline and briefing schedule set forth in paragraph 3(f) by separate notice, served concurrently with the Debtor's first memorandum of law. If a lessor under such an Equipment Lease

does not timely file and serve an objection to the proposed treatment of the Equipment Lease at issue, or if the lessor fails to file and serve a responding memorandum within the time described in paragraph 3(f), the lessor in question would be deemed to have waived any objection to the Debtor's proposed treatment of the Equipment Lease and to have waived any objection that the Equipment Lease attached to the Debtor's initial memorandum of law is not a true and complete copy of such Equipment Lease.

4. This procedure would provide for an efficient, orderly and fair mechanism for the Court to decide any objections to the proposed cure amounts required by Bankruptcy Code §365(b)(1) for assumption of Unexpired Leases -- or whether such cure amounts are owing in the first instance -- while at the same time permitting Debtor to comply with its obligations under the APA.

WHEREFORE, the Debtor respectfully requests that this Court enter an order (i) approving the procedure described above, and (ii) granting such other and further relief as is just and proper.

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UNITED STATES BANKRUPTCY COURT
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In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779 SA
Chapter 11

Debtor.

**CURE AMOUNT NOTICE, INCLUDING DEADLINE
TO OBJECT TO PROPOSED CURE AMOUNTS**

This notice is given pursuant to paragraph __ of the Order Approving Procedure Relating to the §365(B)(1) Cure and Adequate Assurance Requirements for Assumption of Leases, filed July __, 2001. This Notice applies to all leases (whether for real property or personal property, including store leases and equipment leases) that are in effect and that Debtor has not rejected in this bankruptcy case ("Unexpired Leases").

PLEASE TAKE NOTICE THAT within seven (7) days after the lessors' receipt of a this Notice.

any lessor who objects to any proposed cure amounts set forth in Exhibit 2 to the Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief, filed June 1, 2001 (a copy of which is enclosed), shall transmit to counsel for the Debtor, by email (to rjacobvitz@jtwlawfirm.com, with a copy to slubben@skadden.com) or by facsimile (to 505-766-9287), or by overnight mail (to Jacobvitz, Thuma & Walker P.C. 500 Marquette, NW, Suite 650, Albuquerque, New Mexico 87102), an objection setting forth the amount the lessor asserts is required for the Debtor to provide a cure under Bankruptcy Code §363(b)(1), and shall file the objection promptly thereafter; PROVIDED, HOWEVER SUCH OBJECTION REQUIREMENT AND DEADLINE DOES NOT APPLY TO (i) cure amounts to which the Debtor and any lessor have agreed upon, (ii) cure amounts under Leases of interests in real property (including leases, subleases and other rights of occupancy) where the leased property is located only at Store Properties summarized in Category 4 below, and (iii) any Equipment Leases if and to the extent that all of the equipment subject to such leases is located only at one or more Store Properties summarized in Category 4 below.¹

If such an objection is filed and served within the seven (7) day period specified above, the Court would hold a final hearing, on short notice to the Debtor, lessor in question, the DIP lenders, Committee and United States Trustee, to determine the cure amount required by Bankruptcy Code §365(b)(1) as a condition to assumption of the Unexpired Lease(s).

If such an objection is not filed and served within the seven (7) day period specified above, the lessor in question would be deemed to have waived any objection to the proposed cure amount.

Attached to this Notice as Schedule A is a list of (i) the Leases (defined as leases of interests in real property) within the Categories 1, 2, 3 and 4 described below, designating which category is applicable to such Lease; and (ii) the Equipment Leases, designating the Store Property(ies) where

¹ Under the Asset Purchase Agreement ("APA") between Debtor and Fleming Companies, Inc. ("Purchaser"), dated August 25, 2001, approved by the Court by an order entered July 3, 2001 (the "Sale Order"), Purchaser has the right to reject (or carve out from its purchase) up to 26 of the Store Properties by giving notice within 45 days after entry of the Sale Order (*i.e.* by August 17, 2001), subject to the terms and conditions set forth in the APA.

the equipment subject to such leases is located and the Category applicable to each such Store Properties.

As of August 2, 2001, the status of Purchaser's rejection of store properties is as follows:

Category 1 Store Properties for which the Debtor has received from Purchaser on or prior to August 2, 2001 a Third Party Purchaser Notice (i.e. a notice that Purchaser designates the store to be transferred directly to a third party purchaser):

Store # Store Location Third Party Purchaser

Category 2 Store Properties that Purchaser on or prior August 2, 2001 has designated to be transferred directly to Purchaser:

Store # Store Location

Category 3 Store Properties that Purchaser still has the right to purchase or carve out from the purchase, as of August 2, 2001:

Store # Store Location

Category 4 Store Properties for which the Debtor has received from Purchaser on or prior to August 2, 2001 a Rejection Notice (i.e. a notice that Purchaser carved out the store from its purchase under the APA).

Store # Store Location

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Attorneys for the Debtor-in-Possession

This certifies that the foregoing Notice was served by placing the Notice with an overnight courier service on August ___, 2001 for delivery on August ___, 2001 to the persons set forth on Exhibit "A" hereto.
