

IN THE UNITED STATE BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
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02 MAR 22 PM 12:43

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

**APPLICATION FOR PAYMENT OF
ADMINISTRATIVE CLAIM AND MEMORANDUM IN SUPPORT**

NOW COMES General Electric Capital Corp. ("GE Capital"), by its counsels, on its Application for Payment of Administrative Claim and Memorandum in Support pursuant to 11 U.S.C. § 503(B)(1)(A) and § 507(a), and in support thereof respectfully states the following:

PROCEDURAL AND FACTUAL BACKGROUND

1. On February 8, 2001 (the "Petition Date"), Furr's Supermarket, Inc. (the "Debtor") filed a Voluntary Petition for relief under Chapter 11 of the United States Bankruptcy Code and an Order for Relief was entered on that date.

2. Prior to the Petition Date, on or about May 18, 1999, GE Capital and the Debtor entered into a Master Lease Agreement (the "Lease"), whereby the Debtor agreed to lease from GE Capital certain Computer Software (the "Equipment"), which is more fully described in the Lease. A Declaration of Lawrence Kovacs in support of this Application is attached hereto as Exhibit "A" and incorporated herein by referenced.

3. Prior to conversion of this case a Stipulation between the Debtor and GE Capital rejecting the Lease and granting relief from stay, subject to court approval, was filed with the Court. The Stipulation was approved by the Court pursuant to its Order Approving Stipulation Between the Debtor and Creditor, General Electric Capital Corporation, Rejecting Lease and Granting Relief From the Automatic Stay ("Order") entered by the Bankruptcy Court on February 19, 2002.

4. On December 20, 2001, the case was converted to one under Chapter 7 of the Bankruptcy Code. Also on December 20, 2001 Yvette Gonzales was appointed the Chapter 7 Trustee.

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5. The Equipment was recovered by GE Capital, pursuant to the request of the Debtor, post-petition.

6. Since the Petition Date, the Debtor has failed to make its required monthly lease payments to GE Capital as required under the Lease for the Equipment notwithstanding its continued use thereof. From the Petition Date to the Date of Conversion the Debtor incurred \$167,621.37 in post-petition rental charges under the Lease for the use of the Equipment. That amount represents lease payments due for February 8, 2001 to December 19, 2001 plus taxes and other charges.

ARGUMENT AND LEGAL ANALYSIS

7. Section 507 of the U.S. Bankruptcy Code provides that:

(a) The following expenses and claims have priority in the following order:

First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under Chapter 123 of Title 28.

8. Section 507 "affords first priority to administrative expenses 'to encourage the provision of goods and services to the estate, and to compensate those who expend new resources attempting to rehabilitate the estate.'" *In re Carpet Center Leasing Co.*, 991 F.2d. 682 (11th Cir. 1993).

9. Section 503(b) of the U.S. Bankruptcy Code states that:

(a) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under Section 502(f) of this title, including:

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

10. Claims allowed under Section 507(b) and, in turn, Section 503(b) are entitled to superpriority status as long as the expenses are for "the actual, necessary cost or expense of preserving the (debtor's) estate." *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 895-66 (4th Cir. 1994); *In Re Carpet Center Leasing Co.*,

991 F.2d at 686-90 (creditor entitled to administrative claim for the diminution in value of the collateral due to inadequate and insufficient adequate protection payments).

ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSES

11. Section 503(b)(1)(A) of the Bankruptcy Code allows a party to recover "the actual, necessary costs and expenses of preserving the estate" as administrative expenses. Pursuant to this provision, a "debtor must pay the lessor a reasonable administrative expense for actual use of property which benefits the bankruptcy estate during the pendency of that decision to assume or reject the lease." In re Cardinal Indus., Inc., B.R. 838, 841 (Bankr. S.D. Ohio 1992) (citing N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 541 (1986); Philadelphia Co. v. Dipple, 312 U.S. 168, 174-75 (1941)).

12. Upon information and belief, the Debtor has used the Equipment during the post-petition period, and such use has benefitted the Debtor's estate.

13. Accordingly, GE Capital is entitled to receive as an allowed administrative expense under 11 U.S.C. § 503(b)(1)(A) all payments due and owing under the Lease or otherwise for the post-petition period. See Burlington N.R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc., 853 F.2d. 700, 707 (9th Cir. 1988) (recognizing a presumption that the payment terms of the lease are a reasonable measure of the administrative expenses to be allowed); Farber v. Wards Co., 825 F.2d 684, 689-90 (2d Cir. 1987)(same); Litho Specialties, Inc. v. Fleet Credit Corp. (In re Litho Specialties, Inc.), 154 B.R. 733, 736 (D. Minn. 1993) (finding that this presumption of reasonableness can only be rebutted by "substantial and convincing proof by the Debtor that the imposition of the lease terms would be unwarranted").

14. Although there is a narrow construction as to the administrative claims allowed under § 503(b)(1)(A), the debtor's "actual use" of the creditor's property will result in a corresponding benefit to debtor's estate which is sufficient for the creditor's claim to achieve administrative expense status. Ford Motor Credit v. Dobbins, *Supra* at 866; In re Carpet Center Leasing Co., *Supra* 687 ("When a debtor-in-possession uses a creditor's expense of providing that equipment is an actual and necessary cost of preserving the estate

under § 503(b)."); *In re John's Meat Emporium, Inc.*, 176 B.R. 700, 707 (Bankr. E.D.N.Y. 1995) (a creditor is entitled to an administrative expense when the debtor uses the creditor's equipment to carry on its business).

15. Here, the Debtor used the Equipment post-petition in the operation of its business, thus conferring a benefit upon the Debtor, while the value of GE Capital's property continued to decrease.

16. The Equipment was used by the Debtor, thus creating a clear and direct benefit to the bankruptcy estate. Therefore, the claim was for "the actual necessary costs and expenses of preserving the estate," and GE Capital is entitled to a claim for administrative expense equal to the amount of post-petition rent accrued and unpaid in the amount of \$167,621.37 from the Petition Date to the Date of Conversion.

17. On January 4, 2002 a Notice of Chapter 7 Bankruptcy Case ("Notice") was mailed to creditors. The Notice described a deadline of January 20, 2002 for the filing of administrative claims. However, the Order rejecting GE Capital's Lease was not entered until February 19, 2002, after the administrative claim deadline had already passed. Pursuant to Rule 3002(c)(4), a claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct. Further, the Order approved a Stipulation which provided GE Capital may file "a request for payment of super-priority administrative expenses".

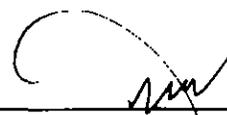
WHEREFORE, GE Capital respectfully requests that his Honorable Court grant GE Capital's post-

petition administrative priority claim in the amount of \$167,621.37.

DATED: March 22, 2002

Respectfully submitted,

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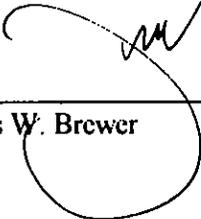
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CERTIFICATE OF CONFERENCE

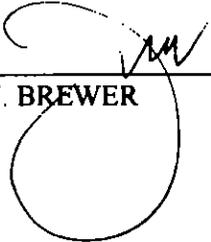
I certify that I have discussed this Application with David Thuma, an attorney for the Debtor. The Debtor opposes the relief requested in this Application. I also discussed the Application with the Chapter 7 Trustee's office, who referred me to Mr. Thuma.



James W. Brewer

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2002, I mailed a true and correct copy of the foregoing Application by first class, U.S. Mail to the parties listed on the attached list.



JAMES W. BREWER

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CASE NO. 01-10779-SA
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Albuquerque, NM 87103

Whitmire Distribution Corporation
c/o Sherri Blank Lazear
65 East State Street, Suite 2100
Columbus, OH 43215

Whitmire Distribution Corporation
c/o James C. Jacobsen
P.O. Drawer AA
Albuquerque, NM 87103

Wilger Enterprises, Inc.
c/o Michael F. Menicucci
P.O. Drawer 6305
Albuquerque, NM 87197-6305

Wisconsin's Finest, Inc.
c/o Michael Wile
3908 Carlisle Blvd., NE
Albuquerque, NM 87107-4504

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO
[ALBUQUERQUE]**

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

**DECLARATION OF LAWRENCE KOVACS IN SUPPORT OF
APPLICATION FOR ALLOWANCE OF ADMINISTRATIVE
CLAIM AND TO COMPEL PAYMENT OF ADMINISTRATIVE CLAIM**

I, Lawrence Kovacs, do hereby declare:

1. I am employed by General Electric Capital Corporation ("GE Capital") as a Litigation Specialist. I make this declaration based upon my personal knowledge, except as to matters stated herein on my information and belief, and as to those matters, I believe my information to be true and correct. If called as a witness, I could and would competently testify to the matters contained herein.

2. As a Litigation Specialist, I oversee the monitoring of leases where: (a) the lessee is in default under the terms of the leases; and (b) the lessee has filed a petition for relief under the Bankruptcy Code.

3. Based upon my review of documents under my supervision and control, I know of my own knowledge that:

(a) On February 8, 2001 (the "Petition Date"), Furr's Supermarket, Inc. (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code and an Order for Relief was entered on that date.

EXHIBIT
 A

(b) Prior to the Petition Date, on or about May 18, 1999, GE Capital and the Debtor entered into a Master Lease Agreement (the "Lease"), whereby the Debtor agreed to lease one (1) certain Computer Software (the "Equipment"), which is more fully described therein, from GE Capital.

(c) Prior to the conversion, of the case the Stipulation between the Debtor and GE Capital rejecting the Lease and granting relief from the Stay was filed with the Court and is currently pending.

(d) On or about December 19, 2001, the case was converted to one under Chapter 7 of the Bankruptcy Code.

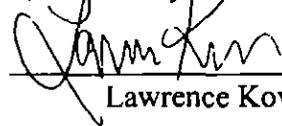
(e) On or about December 19, 2001, Yvette Gonzales was appointed the Chapter 7 Trustee in the above-referenced case.

(f) The equipment was recovered by GE Capital, pursuant to the request of the Debtor, post conversion.

(g) Since the Petition Date, the Debtors have failed to make its required monthly lease payments to GE Capital as required under the Lease for that certain Equipment notwithstanding its continued use thereof. From the Petition Date to the Date of Conversion, the Debtor incurred \$167,621.37 in post-petition rental charges under the Lease for the use of the Equipment.

(h) That amount represents lease payments due for February 8, 2001 to December 19, 2001 plus taxes and other charges.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 6, 2002, at Danbury, Connecticut.



Lawrence Kovacs

Sworn to before me this 6 day
of March, 2002



Notary Public

DAWN AZZARITO
NOTARY PUBLIC
MY COMMISSION EXPIRES 2/28/2005