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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

In re

Case No. 11-01-10779-SA  
Chapter 11

FURR'S SUPERMARKETS, INC.,

Debtor.

**MOTION FOR ORDER EXTENDING TIME  
WITHIN WHICH DEBTOR MAY ASSUME  
OR REJECT UNEXPIRED LEASES  
OF NONRESIDENTIAL REAL PROPERTY**

Furr's Supermarkets, Inc. (the "Debtor") submits this motion (the "Motion") for an order under 11 U.S.C. § 365(d)(4) extending the time within which the Debtor must move to assume or reject its unexpired leases of nonresidential real property.

1. On February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for reorganization relief under chapter 11 the United States Bankruptcy Code.<sup>1</sup> The Debtor continues to operate its business and manage its properties as debtor-in-possession under Bankruptcy Code §§ 1107(a) and 1108.

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<sup>1</sup> 11 U.S.C. §§ 101-1330.

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### RELIEF REQUESTED

2. The Debtor seeks an order under Bankruptcy Code § 365(d)(4) extending until August 10, 2001 (the "Extension Period") the time within which it must move to assume or reject its unexpired leases of nonresidential real property, subject to the rights of each lessor to request, upon appropriate notice and motion, that the Court shorten the Extension Period and specify a period of time in which the Debtor must determine whether to assume or reject an Unexpired Lease.

### BASIS FOR RELIEF

3. The Debtor is the lessee under approximately 75 unexpired leases of nonresidential real property (collectively, the "Unexpired Leases"). Most of the Unexpired Leases are for real estate on which the Debtor operates its stores. The Unexpired Leases are integral to the Debtor's continued operations as it seeks to reorganize.

4. The Debtor will soon move to reject the Unexpired Leases related to certain unused property, and it expects that it may move to reject other Unexpired Leases. But many (if not most) of the Unexpired Leases may prove necessary or desirable to the continued operation of its business.

5. The Debtor will likely seek to assume these Unexpired Leases. Still other Unexpired Leases, while not necessary to the Debtor's operations, may prove to be "below market" leases that may yield value to the estate through their assumption and assignment to third parties. Until the Debtor has had the opportunity to complete a thorough review of all of the Unexpired Leases, it cannot determine exactly which Unexpired Leases should be assumed, assigned, or rejected.

6. The Debtor simply has not yet been able to complete this review. The Debtor believes that, because of the number of leases and its immediate, primary focus on stabilizing its business, it will be impossible to determine, within the 60-day period specified in Bankruptcy Code § 365(d)(4), whether to assume or reject the Unexpired Leases

7. Moreover, the Debtor's decision when and whether to assume, assign, or reject particular Unexpired Leases may depend in large part on its formulation of a reorganization plan. Under its post-petition credit facility, the Debtor is required to file a reorganization plan no later than August 10, 2001. The Debtor seeks to extend the 60-day period specified in § 365(d)(4) to the same date, ensuring its ability to consider each Unexpired Lease in light of the proposed plan.

## APPLICABLE AUTHORITY

8. Bankruptcy Code § 365(d)(4) provides that if the trustee (or debtor in possession) does not assume an unexpired lease within 60 days of the case's commencement, the lease is deemed rejected. That section also provides, however, that the Court may extend the 60-day period for "cause."<sup>2</sup>

9. Although there is no Tenth Circuit authority directly on point, the Second, Fifth, and Ninth Circuits have acknowledged that in large cases, courts routinely extend § 365(d)(4)'s 60-day period for deciding whether to assume or reject.<sup>3</sup> In determining whether "cause" exists for an extension, courts have relied on several factors, including the following:

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[I]n a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (emphasis added).

<sup>3</sup> See, e.g., Legacy, Ltd. v. Channel Home Centers (In re Channel Home Centers), 989 F.2d 682, 688-89 (3d Cir. 1993) (affirming second § 365(d)(4) extension to allow debtor to evaluate unexpired leases); In re American Healthcare Management, 900 F.2d 827, 830 (5th Cir. 1990) (affirming third extension); In re Victoria Station, Inc., 875 F.2d 1380, 1384-85 (9th Cir. 1989) (affirming second extension).

- (a) whether the case is complex and involves a large number of leases;
- (b) whether the leases are primary among the debtor's assets; and
- (c) whether lessors continue to receive postpetition rental payments.<sup>4</sup>

10. All three factors are present here. First, this is a large and complex case. As of the Petition Date, the Debtor had assets worth hundreds of millions of dollars, more than 4,500 employees, and operated 71 stores, virtually all of which are located in leased premises that are the subject of Unexpired Leases.

11. Second, these Unexpired Leases constitute an integral component of the Debtor's strategic business plan. The Debtor plainly cannot continue to operate without its stores.

12. Finally, with the exception of certain dishonored prepetition February rent checks, that the Debtor has since reissued or is now reissuing in prorated amounts, the Debtor is and will remain current on all postpetition rent obligations.

13. The relief requested herein will not prejudice landlords under the Unexpired Leases. Indeed, through the operation of Bankruptcy Code § 365(d)(3), landlords enjoy a preferred position that belies any notion that they

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<sup>4</sup> See South St. Seaport L.P. v. In re Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2d Cir. 1996); see also Channel Home Centers, 989 F.2d at 689 ("[I]t is permissible for a bankruptcy court to consider a particular debtor's need for more time in order to analyze leases in light of the plan it is formulating.").

could be prejudiced. Under that section, a debtor-in-possession is required to pay the reserved rent for all postpetition periods before rejection.<sup>5</sup> Indeed, § 365(d)(3) grants the landlord's postpetition claims under the lease "automatic" administrative expense status, without the requirement of notice and a hearing.<sup>6</sup> Given this protection, the potential for prejudice to any landlord by an extension of the Debtor's time to assume or reject the Unexpired Leases is remote.

14. In contrast, if the Court does not extend 60-day period, the Debtor will have to determine prematurely whether to assume substantial, long-term liabilities under the Unexpired Leases (potentially creating administrative expense

15. Similarly, in Channel Home Centers the Third Circuit stated that:

nothing prevents a bankruptcy court from granting an extension because a debtor needs additional time to determine whether the assumption or rejection of particular leases is called for by the plan of reorganization that it is attempting to develop.<sup>8</sup>

16. The Debtor presently seeks similar relief – to be allowed to consider the Unexpired Leases in conjunction with the formulation of a plan of reorganization. Since, under the post-petition credit facility, the Debtor must file a plan no later than August 10, 2001, the Debtor asks that this Court extend the time within which the Debtor may assume or reject any Unexpired Lease to that date.

17. The Debtor has served a copy of this Motion on the United States Trustee, Counsel for the Unsecured Creditors' Committee, the Debtor's secured creditors, the DIP Lenders, the landlords under the Unexpired Leases, and all parties who filed requests for inclusion on the limited mailing list in this case as of the date of this Motion.

WHEREFORE, the Debtor respectfully requests that this Court enter an order (i) extending the time within which the Debtor must move to assume or reject its unexpired leases of nonresidential real property until August 10, 2001, and

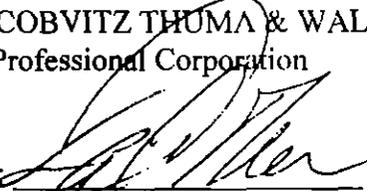
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<sup>8</sup> 989 F.2d at 689.

(ii) granting such other and further relief as is just and proper.

Dated: Albuquerque, New Mexico  
March 1, 2001

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