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Albuquerque, New Mexico

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re

FURR'S SUPERMARKETS, INC.,

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

Debtor.

**Memorandum of Law in Support of Debtor's
Separate Treatment of Certain Equipment Leases**

Furr's Supermarkets, Inc., debtor and debtor in possession in this Chapter 11 case ("Debtor"), asserts that certain of its equipment leases (the "Equipment Leases") are comprised of several independent agreements, each of which the Debtor may separately assume and assign, or reject. True and correct copies of the Equipment Leases will be filed and served on August 6, 2001.

Background

In its motion dated May 31, 2001 (the "Sale Motion"), the Debtor sought Court authorization to sell all or part of its operating assets to a purchaser to be determined at an Auction to be held on June 25, 2001, a date later postponed to June 27. The Sale Motion also requested certain other relief to facilitate the sale. At a hearing held on June 29, the Court granted the Sale Motion and approved the sale of substantially all of the Debtor's operating assets to Fleming Companies, Inc. ("Fleming").

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Under the Fleming Transaction, the Debtor will be assigning certain stores to various third-party operators. The Debtor also may be closing certain other stores. As part of this process, the Debtor's equipment leases will be assigned or rejected on a store-by-store basis, or by combinations of stores consistent with Fleming's Third Party Purchaser Notices. Several equipment lessors have indicated that they may object to this treatment of their equipment leases.

At the outset, the Debtor notes that it believes that some of the Equipment Leases addressed below are disguised secured financings, which are not subject to the requirements of section 365. The Debtor has commenced adversary proceedings to resolve this issue and addresses these leases in this Memorandum of Law in the event that the Court rules against the Debtor in the adversary proceedings or does not rule on the issue prior to the closing of the Fleming Transaction. Nothing contained herein constitutes the Debtor's concession of any issue raised in the adversary proceedings.

Applicable Authority

The Debtor does not dispute the general proposition that a debtor must assume or reject an executory contract or unexpired lease in its entirety.¹ Rather, the present issue turns on whether each Equipment Lease consists of several

¹ See *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531-32 (1984).

distinct contractual agreements subject to independent assumption or rejection by the Debtor.²

Whether certain documents constitute one or more agreements "depends upon the parties' intention, and where that intention may be gathered from the four corners of the instrument, interpretation of the contract is a question of law."³ Agreements reflecting distinct transactions among the parties are generally presumed to be separable, even if the transactions may be closely related.⁴

In *Gardinier*, the Eleventh Circuit considered whether a single document, which called for the sale of a parcel of land and the payment of a brokerage commission, could be treated as two distinct executory contracts under the Bankruptcy Code.⁵ The Eleventh Circuit developed a three-factor test to determine whether the parties intended one or multiple agreements for bankruptcy purposes.

² *Jewell v. Beeler (In re Stanton)*, 248 B.R. 823, 830 (B.A.P. 9th Cir. 2000) ("Contracts that are part of a single transaction may constitute one executory contract. If, however, the agreements can be "disaggregated" from each other, each contract should be considered separately for purposes of applying the provisions of § 365.").

³ *Nancy Neale Enterprises, Inc. v. Eventful Enterprises, Inc.*, 688 N.Y.S.2d 207, 208 (App. Div. 1999); *see also In re Plitt Amusement Co. of Washington Inc.*, 233 B.R. 837, 843 (Bankr. C.D. Ca. 1999).

⁴ *See National Union Fire Ins. Co. v. Clairmont*, 662 N.Y.S.2d 110, 111-12 (App. Div. 1997); *First Nat'l Bank v. Jarnigan*, 794 S.W.2d 54, 59 (Tex. App. 1990, writ denied).

⁵ *In re Gardinier*, 831 F.2d 974 (11th Cir. 1987).

Under this test, a court should consider (i) whether the nature and purpose of the obligations differ, (ii) whether the consideration for the obligations is separate and distinct, and (iii) whether the obligations of the parties are interrelated. The second factor - "separate and distinct" consideration – is a particularly important indicator of the parties' intent.⁶

In re Royster Co.,⁷ the bankruptcy court applied the Eleventh Circuit's test to an equipment lease. The court found each schedule to a lease of railroad cars to be a separate agreement. Each schedule was separately executed and listed the cars that were to be leased and the monthly service charges for that schedule. The Debtor's Equipment Leases contain virtually identical terms.

The Equipment Leases

A. *MDFC Equipment Leasing*

MDFC is the lessor of all the furniture, fixtures, and equipment in five of the Debtor's stores. The master equipment lease, which provides a set of default terms for each MDFC Equipment Lease, was executed in September 1994. Each of the five stores is the subject of one or more separate lease schedules (each termed a "Individual Equipment Report" by MDFC). These schedules were executed on

⁶ See *Pieco, Inc. v. Atlantic Computer Systems, Inc. (In re Atlantic Computer Systems, Inc.)*, 173 B.R. 844, 850 (S.D.N.Y.1994).

⁷ 137 B.R. 530 (Bankr. M.D. Fla. 1992).

various dates between December 1994 and December 2000. Each schedule is separately executed, provides for a separate and distinct lease payment for the equipment covered by that schedule, and, in many cases, amends the terms of the master lease, so that each schedule has different terms. These terms evidence the parties' intent to enter into separate agreements, each consisting of a schedule and the incorporated terms of the master lease.

B. Finova Capital Corporation

Like the MDFC leases, the Finova Equipment Leases consist of a master lease agreement – signed on December 29, 1995 – and several equipment schedules separately executed between January 1997 and November 1999. Each schedule sets forth a separate and distinct lease payment for the equipment covered by that schedule, and provides for additional terms and conditions not contained in the master lease agreement. These terms also evidence the parties' intent to enter into separate agreements, each consisting of a schedule and the incorporated terms of the master lease.

C. Heller Financial, Inc.

Heller Financial, Inc. ("Heller") is the assignee of the original lessor (a G.E. Capital entity) under certain of the Equipment Leases. The Heller agreements cover two broad types of equipment: (a) all of the fixtures and equipment in two stores and the El Paso warehouse and (b) sixty eight floor cleaning machines that

are distributed throughout the Debtor's stores. The Heller agreements consist of a master equipment lease agreement, a document entitled "Equipment Lease No. One," which aggregates all of the foregoing equipment in a single document, and two separately executed closing schedules.

One closing schedule addresses the lease of the fixtures and equipment in the two stores and the El Paso warehouse and the other closing schedule sets forth the terms of the floor-cleaner lease. Each closing schedule sets forth the rent due, the equipment cost, the stipulated loss values, and, in one case, the lessee's options at the end of the lease term, for the equipment set forth on the particular schedule. The closing schedules contain differing terms, and modify both the master lease agreement and the "Equipment Lease No. One" document. The later document expressly notes that the terms of each closing schedule may modify the terms of the lease. In light of the foregoing, the Debtor submits that each closing schedule, together with the master lease agreement and the "Equipment Lease No. One" document, constitutes a separate Equipment Lease.

D. G.E. Capital Business Asset Funding Corp.

G.E. Capital is the assignee MetLife Capital, the original lessor under the Equipment Leases. These Equipment Leases cover substantially all of the furniture, fixtures and equipment in Store Nos. 874, 891, 898, and 899. Like the

Heller leases, the GE Capital agreements are comprised of a master lease and an "Equipment Lease No. One" document that aggregates four "closing schedules."

Each closing schedule sets forth a separate and distinct lease payment for the equipment covered by that schedule, and provides for additional terms and conditions not contained in the master lease agreement. These terms also evidence the parties' intent to enter into separate agreements, each consisting of a closing schedule and the incorporated terms of the master lease and "Equipment Lease No. One" document.

E. *Greanleaf Compaction, Inc.*

Greanleaf provides trash compactors and similar equipment at many of the Debtor's stores. The parties entered into a master lease agreement, with attached "exhibits" covering each store, each of which is numbered to correspond with the Debtor's store number. For example, Exhibit 801 applies to the rental of equipment at Store 801.

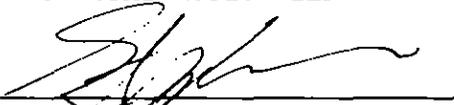
The exhibits set forth the monthly rent due at each store. Each exhibit is separately executed, and the exhibits were executed on varying dates. Each exhibit states that the monthly rent due under the schedule is payable for as long as the equipment covered therein remains at the stated store location. These terms again support a finding that each exhibit is a separate agreement between the Debtor and the lessor.

Conclusion

For the foregoing reasons the Debtor asserts that it may properly assume and assign, or reject, each of the Equipment Leases as discussed herein.

Dated: Los Angeles, California
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