

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

**Clerk's Minutes**

Before the Honorable James Starzynski

James Burke, Law Clerk  
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters  
(505) 242-2809

Irene Delgado X

**Date:**  
TUESDAY, APRIL 3, 2001

**In Re:**  
FURRS SUPERMARKETS, INC.  
No. 11-01-10779SA

**FH on Motion for Extension of Time to Assume or Reject Lease (pldg. #157)**

**(vacated) PH on UNM Motion to Compel Acceptance or Rejection of Corporate Sponsorship Agreement**

Atty for Debtors: Peter Clapp and Robert Jacobvitz  
Atty for UCC: William Davis  
Atty for Broadway Vista: Robert Johnson  
Atty for Heller Financial: William Keleher  
Atty for Los Lunas Shopping Center: Duncan Scott  
Atty for Millard Refrigeration: Linda Bloom  
Atty for Rick Johnson & Co., et al: Dan Behles  
Atty for LSF: Kevin White  
Atty for International Food Service: George Moore  
Atty for Tri-State Commercial: George Giddens  
Atty for Furrs 1, 2, 4 - 9: John Farrow  
Atty for Earthgrains Baking: Don Fenstermacher  
William Dyer, President of Cruz Alta Plaza: Pro Se

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Summary of Proceedings:

Exhibits   X  

Testimony   X  

**MOTION GRANTED - EXTENDED TO AUG. 10, 2001; HOWEVER, TRI-STATE GIVEN TWO MOS. EXTENSION**

Ct: I went thru the list of factors that was set out explicitly. List on pgs 2 & 3 of Bassett obj. What I have been thinking about - terms with which I have been thinking about to determine this case.

CLOSING ARGUMENT:

Clapp: As you have read the cases.

Ct: I have not. Just list of factors.

C: One case that includes all 14 factors. Every case says the bankr. code should consider these factors to see if cause exists. This is a large and complex case. Sched. list \$164 mil in assets. 10<sup>th</sup> largest employer of the state. Co. is for sale. M/pending to obtain an invest. advisor. Article in Saturday's paper. Main goal is to sell the chain. Best chance to max. it's val.

Ct: Is that in evid. this afternoon?

C: No. May take judic. ntc of other pldgs. Talked about need to maintain flexibility.

Ct: Demand the co. market itself.

C: Yes. Puts a deadline w/which he must prepare his book. If dtrs succeed, the time to assume is next Monday. If it rejects a lease, it loses potential val. Could be saddled to damage clm for a 20 year period. Trying to decide whet. a 24 year lease is a gamble. Satisfy most of the factors in the list. 72 leases. Dtr has shown good cause. Order we drafted extends the time to Aug. 10. Date that our dip financing req. Furrs has a plan on file. Ext. is w/o prej. The order directs the dtr to pay post-pet. rent.

Ct: Assuming a hearing takes place.

C: If a post-pet. default, the dtr will consent to a final hrg w/in 20 days. Should prov. addit. comfort. Happy to put that in the provision.

Ct: One thing to get a hrg w/in 20 days.

C: I had not heard of this convention. Not in the obj. the lessor filed. If that critical, think the lease would expire 60 days before. Bet you leases expire around the year. Have test. that Furrs is attractive to others. Is a reasonably success. store for Furrs. Dtr needs the extens. of time.

Davis: UCC has started the process of analyzing the real estate leases to deter. if they are benef. of the estate. Committee needs more time to analyze the leases. Comm. is further informed from the test. today and other sources a req. of the lenders to market the asset. In this case it appears the sec. lenders may not be sec. to the leases bec. of some iss. that will be pres. to the court at a later date. It is very important that the dtr and the UCC have further time to eval. the leases and present those leases as an asset of the estate to potential purchasers. Max. val. of the estate and supports the dtrs motion.

Keleher: Test. has shown the dtr is intent on max. the val. of the estate. Maintaining flex. If make a mistake now, hurts val. of the estate. Test. shows by maintaining flex, won't harm estate. Expiration of the leases. Would think all would shift in May. Aug. and June expir., Mar., etc. Is

spread throughout the year. If want to lease in Stockton, will go to Stockton, not to Las Vegas.

White: As far as ea. of the factors the court has pointed to the only one I have heard today is we have a lot of leases to look at. Didn't prevent Congress from putting in Shopping Center amend.

Ct: Have info. if LSF rents in a shopping center.

White: It is in a shopping center.

Ct: 8/1 ratio. Vast major. are shopping center stores.

C: Was Mr. Klein's test. We will stip. that it is in a shopping center.

W: Look at factors and the financial data. Desirable or undesirable location. Don't think Congress intended to grant that kind of extens. Important to remember the reas. 365 (b) (4) was to relieve landlord's to assume or reject a lease. More uncertainty. 4 mos. isn't an inordinate amt of time. What I am concerned about is the decis. to treat certain items as those that they don't have to pay. Lang. in parag. 5. Mech. of what happens if dtr does not make post-pet. pymts. Agreed to have it heard w/in 20 days. I would prefer seeing some drop dead lang. If 10 days late, the landlord can come in and file an affidavit w/the court as to the dtrs default. Could have a mech. where the dtr could req. a hrg on it. Gets the iss. resolved more quickly. Uncertainty and delay.

Ct: Iss. of pymts being missed, your thought a pymt gets adminis. treatment.

W: Yes.

Ct: You are saying not good enough.

W: Like a drop dead order. Not just a ques. of whet. we got rent this mo. Uncertainty.

Ct: W/drop dead you have uncertainty.

W: They could drag it out. Have adminis. clm at that point.

Ct: Is the risk of admin. clms. When this case was filed and had first day orders when m/came up about emp. prof. I recalled asking about a budget. Said the overall strategy was to have the case wrapped up w/in 270 days. If that is what they are talking about, would req. filing of plan in order to meet that deadline. Those decis. would have to be made about whet. to assume or reject by the 10<sup>th</sup>. Not at all clear there would be further extens. beyond Aug. 10. Appears dtr has been moving rather vigorously. Come Aug. 10 if LSF Bassett has not heard or no motion on file that might call for a reject. unless an agmt otherwise. What is running thru the back of my mind. Want to add anything else?

W: All I have.

Ct: Found your listing to be helpful.

G: I have one landlord w/one lease. Only 9 obj. Two are now happy w/their extension. My clients lease is differ. than everyone else's. Exh. A. Closest term. date is over a year from now. Ends Aug. 28. Want an addit. time to assume or reject. 5 yr. tenant or no tenant which they won't know until that time period. Look at differ. Big reject. damages. Fits none of the factors. Not the central asset of this dtr. Didn't test. there is a

buyer here. Already eval. these leases.

Ct: I didn't hear that test. Heard they were still looking at it. Didn't hear Mr. Dennison say they had all the info. they needed.

G: Came back on redirect and talked about this lease. Said it is fair market for the neighborhood. Knows all the factors. Congress put this provis. in the code for a reas. Before the enactment of sect. (d) (4) it was all over the code. Case law - Re: Perfect Light Co. Only when the dtr estab. cause. Just hoping to find a buyer someday. My client has a lease. Could be gone 18 days before the end of the term. Dragging it out, hoping to find a buyer.

Ct: Differ. between your client - done post-pet.?

G: Pre-pet. Feb. 27.

C: Filed Feb. 8.

G: Sorry. Could not find case law on it. So much uncertainty here. One lease to deal w/.

Ct: If you assume for argum. the lease exten. was valid, that doesn't put your client in a signif. differ. posture?

G: If the option is valid, this is a small market, hard to find a tenant for the space. Under the Perfect light case and others cases cited in it. Have to look at both. Is a balance. Got a bunch of leases. May be some element that is relevant. Have to bal. it against this landlord's right. Signif. differ. than all the other landlord's. Look at \$ involved. Differ. than everyone else's. On other hand, the way they are treating oblig. won't pay these folks. Will spin this off and clms will be meaningless.

Ct: Listed in Exh. A. Adminis. clm.

G: Assum. it was valid. Not sure it was valid.

Ct: W/respect to claim of Tri-State Commercial. Huge iss. that is sitting there that effects the facts signif. May be a legal iss. that can be decided. Don't know.

G: If that is the best I can do, what I have. If not valid, my client is in a truly differ. position than all these others. Small market. Lose oppor. to go to big trade show in making deals.

Ct: Still struggling w/big trade show test.

G: Face to face contact w/potential lessors. May plant idea in their head. Create an interest. Didn't mean to say you will have no down time. What I think is the import of his test.

Ct: Still doesn't seem to be your most persuasive test. That's fine. All else have settled except Mr. W. client. No reas. they have to wait. Pack deal up and sell it. If it turns out their suitor who doesn't exist yet doesn't want this store, they can make that decis. My req. for relief.

REBUTTAL:

Ct: Addr. whet. we need more info.

C: Dtr exercised the option post-pet. Wanted to retain the flex. for five more years.

Ct: Was the idea to preclude an argument down the road.

C: Excluded the argument. Dtrs view it did exercise the option. Part of that bus. is renewing leases when they become due.

Ct: Doesn't need court approval?

C: Not out of ordinary. That being the case, the dtrs view they are in the same boat as everyone else. Will be assumed and signed and all cured or will be rejected. Will know - I wanted to say that is an outside date. Won't necess. wait til Aug. 10. Just an outside date. If it is the landlord's view that option was not properly exercised, not sure if invalid or not permitted to do so while in bankr., should either initiate a proceeding. If the option didn't exist, lease will term. in Aug. of this year and they know it. Don't know why we should make a special rule for them. No individual lease is central or critical to the case. Potential val. in everyone of these. I wasn't here, but I do remember you asking Mr. Goffman and he said the dtr does not intend to be a long case. Cited Victoria's Station case. Service Merchandise case rec'd two years to assume or reject. Our proposed order says if in def. can file a m/for relief from stay. Will consent w/in 20 days. His proced. was the lessor would file an affidavit of default. We would be req. to respond. Same procedure. Call the pldg. Will either pay right away or the lease will be gone. Same procedure.

Ct: I hear Mr. Clapp saying the dtr is w/in the normal course of bus. to exercise the 5 yr. extens. post-pet. Didn't need to do anything more than that. Runs out to year 2006. What is your position? Disagree and if so how?

G: My brief off the cuff answer is I don't think it is out of the ordinary. Like to do more research on it.

Ct: Okay. Will take about a 15 min. break. Will come back in.

C: Like to see a copy of the order?

Ct: Sure.

RECESS

Ct: Court has juris. 1334 and 157. Core proc. Sec. 157 of title 28. Oral find. of fact as delivered on the record. Rule 7052. Iss. is the dtrs m/to extend time to accept or reject real estate leases beyond 60 days. No later than Aug. 10, 2001. Dtr has concern about case law if not entered w/in first 60 days would deem rejected. Set for fh today and I am issuing an oral ruling now. Will have an order entered w/in a day or two. April 9 is the deadline. Get entered by this Friday. Analyzed these motions and thought about them. Obj. raised by LSF Bassett and the obj. filed by Klein and Co. on behalf of Tri-State. First factor is whet. the lease is a primary asset. If I should inquire into all leases as a whole is a differ. ques. That partic lang. is addr. if you have a single store that files bankr. That would not be the situation here. Goes in favor of the landlord's in this instance. #2 - ques. whet. lessor has invis. interest. Not applic. No ques. ea. of these landlord's has envision. interest. Goes in landlord's favor. #3 - factor goes in favor of the dtr. Only 60 days into this case. Talking about 70 plus leases here. Mostly of stores. Seems to me from the test, the dtr is faced w/a differ. situation than when monitoring store. Signif. differ. decis. in context of ch. 11. Undertake all the oblig. Add to that incorp. running by suitors whet. oper. want to keep a partic. store. Impossible it seems to me for the dtr to make those decis. no later than April 9. Seems the notion talking to various suitors and negot. about the stores is the best way for the dtr to make this decis. Best person to cut a deal w/. Seems that makes

sense. Obj. raised by party that signed off on this trans. was Intl. Food Service. Raised the obj. was the dtr was cherry picking. It does seem to me w/the perfect. Congress put in the code perhaps evid. the various sponsors of those amend. W/all those protect. for landlords the fact of the matter is the bankr. code embodies this cherry picking. Is what the bus. is. Seems the dip is talking about what the code contemplates. #4 - whet. lessor is getting rental pymts. Are getting rental pymts. Is a ques. about whet. the taxes are being paid. Got to be a fairly dimin. #. Are prov. in the order which deal w/that resol. of that iss. #5 - whet. landlord will be damaged due to cont'd occup. Not seen any evid. the landlord will be damaged w/except. Tri-State. If expires in Aug., Tri-State needs to make a decis. soon. If in position of not extend. lease thru Aug. is about same of everyone else. Understand more about convention in Las Vegas, but don't give much weight to it. If a lease that runs out to 2006, Tri-State won't be signif. damaged. Factor folds out. #6 - is this case except. complex. This is a good size # of leases. No plan in place. Dtr is struggling to negot. financing. Entire team isn't in place that I know of in getting the oper. up for sale. Complex. that meet the standards for factor #6. #7 - need a deter. of whet. a sec. interest or not. In favor of landlord. #8 - has dip failed to formulate a plan when it has had time to do so. Plan not due for another 60 days. Assume there will be a req. for an ext. Perhaps already filed. I will tell you that in terms of paper we are in vol. 8 of the pldg. file. Not read the docket lately. The dtr meets this factor hands down. Been no lack of dilig. on behalf of the dtr. Is a signif. down side of a hurried decis. or whet. assum. a lease. Has been no real damage shown by the ext. of time. Lessors are getting paid. Tri-State has a lease - getting paid market rate. I don't recall contrary test. Potential damage would have to be if in fact this post-pet. ext. was not valid, Tri-State would need to know soon. Admin. clm is only good if money to back it up. Reas. Congress decided Yale Express would no longer be applic. law. Is some addit. protect. Where I come down w/this decis. on the dtrs motion. Mr. G. how much time do you need whet. the dtrs post-pet. ext. was timely under the lease needed to have court approval. Sure you will bal. your decis. w/notion that if you decide you don't want that 5 yr. ext. to be valid will be bound by that decis. down the road. No such thing as judic. estoppel. Re: Golf Land. Cited by the 10<sup>th</sup> circ. Dewey vs. Dewey. Throw that out bec. in terms of Mr. G. figuring that out what it's position might be. I prob. made all that prob. incomprehensible. Want time to think about the ext.?

G: Like two weeks.

Ct: Not unreasonable. Will enter this order that is binding on everybody and leaving this one iss. open.

C: I can understand Tri-State may be concerned about exer. of motion, but not as to your decis. Either will conclude that lease is gone Aug. 28 or if you decide the option was validly exer. are in boat of everyone else. Don't see how it effects the ruling on our motion w/respect to Tri-State.

Ct: Maybe I am missing something. Tri-State ought to know whet. they have a lease. If Tri-State's lease expires Aug. 2001, ought to know that right away. You are saying if it turns out it expires in 2001, you won't assume it anyway.

C: Want ext. til Aug. 10.

Ct: My prob. is this. Is unfair to Tri-State to say if it expires end Aug. 2001 they have to wait til Aug. 10 to find out whet. you will sue them.

C: As soon as you decide, everybody will know we are out of there by Aug. 10. Don't want it to auto. term. 60 days after. Boat we will all be in. All for a prompt deter. of the fact.

Ct: You may be right Mr. Clapp. Want to give Mr. Giddens a couple of weeks, but maybe it is the end of the day and a jam packed day. My brain isn't reaching that conclus. yet. Let Mr. G. have two weeks from today to make that decis. Depending on what that decis. is assume there will be a resp. fairly quickly. Decis. might be that it makes sense to put them in the same boat as everyone else.

C: Fine. Have deadline of April 9. Like deadline ext. to some reas. period.

Ct: Does need to be an ext. specifically. I will allow - grant motion as to all the other leases. As to Tri-State lease, I will extend by a couple of mos. subject to a further ext. of time on whatever ruling gets made. Ask dtr to ask for a hrg on short ntc.

C: Could say if Mr. G. elects not to file a req. w/in two weeks that they have the same Aug. 10 deadline. Too complicated. Wait to see if he files something.

Ct: Differ. thoughts Mr. G.?

G: No.

Ct: Want to take this form of order and revise it and run it by Mr. White and recite the court made addit. find. of fact?

C: Yes. Will make that change and refer. the rule. Chg. parag. as to Tri-State lease the time to assume or reject is ext. to two mos. Will lease it like that.

G: Two mos. from April 9.

C: Fine.

Ct: Have Mr. Davis sign off on behalf of UCC.