

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

Sara Edmonds X

**Date:**  
THURSDAY, AUGUST 9 and 10, 2001

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

Continuation of FH on 365 (f) (2) Adequate Assurance Requirement for  
Assignment of Leases (as to Supermarket Enterprises, LLC only)

Attorney for Debtor: David Thuma, Wallach and Steve Mortenson  
Attorney for Fleming: Louis Price  
Attorney for Finova: Allen Guon  
Attorney for UCC: William Davis  
Attorney for Heller and Fleet: Paul Fish  
Attorney for Weingarten Realty Investors: Emily Franke  
Attorney for G.E. Capital: David Thomas  
Attorney for Safeway: D. Michael Dalton  
Attorney for Greenleaf: Louis Puccini  
Attorney for Intl. Food Services Holding: George Moore  
Attorney for Werner Kindermann: James Jacobsen  
Attorney for Eisenbach and Prado  
Attorney for Compaq Financial: James Prince  
Attorney for River Oaks Properties: Carlos Miranda

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Summary of Proceedings:

Exhibits   X  

Testimony   X  

ADEQUATE ASSURANCE REQ. AS TO ASSIGNMENT OF LEASES AS TO SUPERMARKET  
ENTERPRISES, LLC - DENIED

T: Lengthy discuss. w/counsel of MDFC. We agreed Furrs would w/draw its applic. to transfer MDFC license to Supermarket Enterprises. No longer seeking to assign. Reserve rights between MDFC and Furrs. Only one store subj. to MDFC license. Mr. Moore's client Intl. Food Holdings - store 812. Not to be assigned to Supermarket Enterprises.

Ct: Mean no longer a req. to assign the lease that belongs to Mr. Moore's client?

P: Yes. May subseq. be a req. to assign to another purch.

Ct: Your understanding Mr. Moore.

M: Very suddenly.

T: Thought you had gotten that notice.

M: I have been on the court mailing matrix. Apparently some things have gone to client and not to me.

T: My preliminary iss.

F: Heller and Fleet have leased equip. in all the stores. We are arguing next week about separability. Not on table today. Is an iss. that is of concern to my clients. Iss. whet. these equip. leases are truly being assigned. Are being paid off. My understanding from the contract. Iss. whet. they have to pay off. Doesn't matter if solvent or not. Is immaterial. Not concerned w/solvency. Stop talking about equip. leases when that is not the deal. Iss. I wanted to raise. Sent buyout figures to the dtr. Not an assign. of those.

Ct: W/respect to all the equip. lessors?

F: Yes. No idea the dtr would contend it would buyout the leases. That is the iss.

T: I agree w/most of what he says. Will attempt to buyout free and clear. If we are not able to buyout we have an alternative. Will have to negot. that. Assign to Fleming if makes more sense. Escape clause. How we look at this is if cheaper to assume and assign, it is an option. If we can get a fair deal, first choice of dtr and Fleming. Part A of Mr. F. objection. Part B is you can't sever and can't assign it. Will argue that on Mon. or will come back and say you can't sever it. If you hold they are sever., then we can proceed.

Ct: Did you understand that Mr. Fish. I think I did. Reserve right to assume and assign.

F: The contract - sec. 4.4 (a) says if unable to sell free and clear - I think I understand his point. Not sure I agree w/it. I understand the dtr is not conceding the point now.

Eisenbach: The iss. that I have is very similar. Slight twist. I'm informed the dtr did file a motion on sever. w/others, but not Petroleum Capital. Not on calendar for next week. Puzzled whet. I do have a stake in today's hearings. Third party purchasers that we were informed. Filed obj. to Supermarkets Enterprises, LLC. IF not seek to sever Petroleum Capitals lease, not sure I care. That is the current status. Not sure I need to take the court's time. Truly confused. Attempted to find out the answer thru his

firm, but unable to get one.

T: If we could wait til the first break I could talk to my client.

E: Either approach is fine w/me.

Ct: My inclin. would be to go forward and consult at break. Mr. E. will still be avail. on the phone. Why don't we do the following. Brief opening stmts. Putting on test.?

T: Yes. Need to put on Mortenson. Might need to do it again bec. not everyone was here on Tues.

Ct: Yes. Concern I had coming out of boxes I may have seen a pkg of doc. that was subm. to the various lessors on behalf of Supermarket, LLC. Was by tender of Ms. Franke's office. Said how come this is being filed w/o permission. Reminded me of what I had prev. ordered. 4 or 5 pgs of stuff. Is that going to be an iss. this afternoon w/the lessors. Mr. Tucker is nodding his head.

Schlagel: Yes. Iss. we bel. will be part of today.

Ct: How dealing w/it.

T: Asking about documentation.

Ct: There was a proced. that was set out w/prov. doc. to folks. By and large seem satisfied. W/Supermarket Enterprises, LLC was a whole lot less doc. You are saying there wasn't doc., we gave them all there was.

T: We prod. all we had. Mailed out nothing. Supplemental mail out. I got an expanded pro forma from Mr. Dennison and mailed it. The universe of what they've gotten. Not that hard to digest. I don't think anyone is here to say Mr. T. didn't give me enough time to look at them, just don't think it is adeq.

S: Have looked at them. Just don't agree to adequacy.

Ct: Do need to deal w/fact that ComDisco's is viol. auto. stay. Want to make a brief stmt.

T: Will call 3 witnesses. S. Mortensen will testify. 3 princ. of Supermarket Enterprises. As w/So. Carolina, Erica they are happy to find financing. Assign this co. 10 grocery stores. Drew obj. from two. Down to two stores. Both of those locations were orig. Safeway stores. Safeway remains liable. Great source of comfort to the landlord. Because of that the economics and increased flex. that you will find there is a strong likelihood of future performance. A lot easier - is case law.

Ct: For those of you who weren't at 8:30 hrg this morning. Dealt w/LSF Bassett Shopping Center in El Paso and one of Mr. Claus Doelling stores. Had oral argument this morning and made oral ruling permitting the assign. Made ruling that the shopping center req. of 365 (b) (3) were met to Big 8 stores and Mr. C. Doelling's store. 39.13 said there doesn't have to be a precise showing. Needs to be a practical bus. assess. Likely future perf. will be met. Ought to describe how I made this decis. What I cited this morning.

Schlagel: Repres. Weingarten Realty Investors. Wyoming Mall and Northtown. Rec'd info. last night. Will show financing is inadeq. Will call Johnny Hendricks who has exper. in eval. this type of info. Mr. H. will test. about the historical background and the dealings they have had w/Furrs. Not mgmt team that has chance of success. Lack of adeq. assur. of future perf. on

these leases.

Davis: On behalf of UCC. In this partic. proc. counsel for UCC may have information w/regard to Rubus Bankruptcy. The committee fully supports the dtrs attempts to assume and assign. leases. It has analyzed the asset purch. agmt and the proced. the dtr has been going thru. The comm. bel. these proced. are approp. and wants to supp. the dtr. To the extent the iss. touch on Rubus. Want to be avail. to facil. in any way.

Dalton: On behalf of Safeway. Not a party today. Safeway may be conting. and liable. Will get agmt on counsel for Weingarten and dtr that Safeway is liable. Not in position to agree or not. Safeway has not focused, but we can't agree or disagree w/Safeway's liab.

Ct: Safeway has come up and dtrs position that there is not much ques. that Safeway does cont. to be liable. Prov. comfort w/assum. and assigning. No ruling this court makes is binding on Safeway in one way or the other. In hrg this morning I did say the cont'd liab. of Safeway as contingent guarantor added supp. for the allowed assign. of the lease to Big 8 or So. Carolina, Erica, Inc. Was in context of hrg and not binding on Safeway one way or the other.

Eisenbach: I might want to make a comment after the break.

Ct: We have had on occasion had people ques. people on the phone. Like to know ahead of time. If want to ask ques. of the witnesses, lets consider that.

E: I would concur w/stmts of other lessors that this assign. hasn't prov. suffic. info. and the info. that has been prov. leaves open iss. and concerns.

Guon: We did not need to make an opening stmt, but were left out of people who did make an obj. We are attempting to find out if there are adeq. assur. Would like to ask ques. if necess.

T: Call Steve Mortensen.

TESTIMONY OF STEVE MORTENSEN (sworn)

TESTIMONY OF GENE DENNISON (sworn)

Ct: Talking about \$128 mil for one store?

D: No, 10 stores.

Ct: EBITDA was 8%.

D: Yes.

TEST. CONT'D

Recess

T: Reserve our right to other designees, but not to Newcorp.

Ct: Does that answer your ques. Mr. Eisenbach?

E: Yes.

Prince: This iss. also effects Compaq. We do have equipment located in the

stores which Newcorp wants to buy. Based on my understanding is it in that box? Not seeking to assume or assign to Newcorp.

T: Not had a chance to talk to my client about it. Like to wait til next break. Not oppor. to review w/status as to Compaq.

Ct: Need to get thru this. Go forward w/the hearing. Have one ques. for Mr. Dennison? Heard something referred to crown jewels. Are these the crown jewels?

D: Wouldn't characterize them as the crown jewels.

Ct: Thank you.

CROSS EXAMINATION BY SCHLAGEL

CROSS EXAMINATION BY GUON

TESTIMONY OF VON FRIEDERICH (sworn)

CROSS EXAMINATION BY SCHLAGEL

Guon: No ques.

T: No redirect. Make sure I have my exhibits into evid. I will rest. Exh. 1 and 2 and by stip. admitted 3 and 4. Won't introduce exh. 5. Got in #6. Obj. to 6.

S: No. We will not be recalling Mr. Mortenson. Like to call Johnny Hendricks to the stand.

TESTIMONY OF JOHNNY HENDRICKS(sworn)

T: Sounds like expert testimony and not personal knowledge.

Ct: Want to qualify him. Said he is familiar w/supermarket finances by virtue of what he does. Seeking to qualify him as an expert?

S: Talk about specific facts here. Wasn't intending for him to test. as an expert.

Ct: Not sure where you draw the line. Close to expert test. May want to qualify him as an expert.

TEST. CONT'D

S: Tender Mr. H. as an expert.

T: Don't want to waste a lot of time. If admit him as expert, he is emp. of obj.

Ct: I will qualify him as an expert. W/in Fed. Rules of Evid. the bar is low. Can go from there. I thought I heard him talk about fact that he used to be part of group that qualified folks.

TEST. CONT'D

T: Obj. Calls for legal conclusion.

Ct: Yes. Test. that is a waste of time.

TEST. CONT'D

CROSS EXAMINATION BY THUMA

S: Obj. Calls for speculation.

Ct: I think using somebody in nature of Bill Gates I think the ques. is answerable.

CROSS CONT'D

G: No ques.

S: No redirect.

Ct: Need to think about this a little bit. Mr. Schlagel and Mr. Guon and Mr. Thuma do you want to do closing argument.

S: I would.

T: I would.

G: Do by phone.

Ct: Ques. about when. 8:15 tomorrow.

S: Fine.

T: Fine.

Ct: Looked at case law already. Want to be in person. Phone # Mr. Guon. 312-207-6446

Price: 405-552-2553

D. Thomas: 883-8787

James Tucker for Weingarten 299-9099

James Prince: Have a conflict. May have another colleague sit in. Judy Ross

Jacobsen: 346-1309 Estoppel on leases. Have option agmt that has to be included by Sept. 15.

T: I'm almost sure what he is telling is true. Looked at modif. and wouldn't try and get modif. out of it. Haven't seen it yet.

**ORAL ARGUMENT - Aug. 10, 2001**

Ct: Oral findings. I have spent a certain amt of time working on this last night. I had pretty much decided on evid. what direction I ought to be going. Use oral argument to make sense my thoughts. I will deny this assignment to Supermarkets Enterprises, LLC. There was no test. about the Wyoming Mall mix or Northtown mix. These are shopping centers and w/in the reach of sec. 365 (b) (3) and 365 (b) (3) for shopping centers is a higher standard to assume and assign a lease. The point is there is no test. about that. Hard to reach conclus. about burden of proof. Most of the test. was on Supermarkets Enterprises, LLC. I think if SE, LLC if they went into these stores would make it work. I think w/Mr. F. background and Mr. D. background that they would make it work out. Had a thought when Mr. D. was test. was eliminate headquarters and have heads of stores take on the same action. Fleming was

putting stores into mix and taking them out. Gone to 3 differ. banks and present. #'s. Mr. F. said not going back to banks until we have #'s. Right approach to take. Wear out welcome. No specif. financing in place. Seems that the project. seems to make sense to me. Mr. D. w/his test. seems to have explained #'s well enough. Mr. F. test. was credible. Mr. H. test. was helpful. I do think that Safeway is prob. there. Bel. there is a Safeway guarantee. Don't know if Safeway is a single store anymore. Nothing in record and don't know anything about Safeway. Don't know if Safeway has substance behind it. Talk about Mr. Schalek. Mr. S. whose bus. was allowed to assume 6 of the stores. He had an ongoing bus. Already had 4 stores going for him that he had turned around. Had found a way to make the nitch work. Very cred. and graphic test. about what Furrs was doing wrong. How you market against Costco, etc. Also did financial stmts and tax returns from real co.'s. Differ. between having those real #'s and real life exper. where there is not a firm bank commitment by these individ. Such that there is a strong differ. compared to SE, LLC. It is not enough to condition funding to take place on closing. 365 (f) (2) has to mean more. Must be assur. that this store won't go dark. There is something fairly solid behind the assignee to make that assign. Seems approp. to have an order which denies assign. of these two leases of Weingarten Realty to Supermarket Enterprises, LLC. Ask Mr. Schlagel to prepare that form of order and run it by Mr. Thuma. Recite the court make oral finding of fact by rule 7052.

T: Order needs to addr. obj. by equip. lessors.

Ct: Yes. I'm not sure how I could enter an order that says it is o.k. for equip. lessors and not for the others. Lack of showing of adeq. assur. for future performance. If decide to disagree, can reach agmt on their own. Who wants to have a hand in doing this order. Mr. S. will do this order. Mr. Jacobsen you are repres. Kindermann.

J: Are 8 stores that did not rise to level of contested matter. Entering an order about those.

Ct: Not before me.

T: Will be a discuss. w/Fleming about those 8 stores.

Ct: Yes. This one w/Weingarten is the only one before me.

J: Loose thread.

Guon: I presume that this applies to more than the two stores. Should apply to all the stores. If no funding...

Ct: Applies to Supermarket Enterprises, LLC. I don't know why it wouldn't be applic. otherwise.

Thomas: How does this effect G.E. Capital? Raised obj. of stores at Lomas and Tramway which you can't hear.

Ct: Can't give you a ruling. I will talk to Judge McFeeley about getting you a hearing rather quickly. Can't give you a sugg. I own G.E. stock. Can't do that. I can tell Judge McFeeley. Already have I believe. Look at options. If have ques., call Judge McFeeley's office.

Guon: W/respect to the hearing coming up on 14<sup>th</sup>. Confusion as to what is happening on 14<sup>th</sup>.

T: My understanding is what is set is out motion to set cure amounts. Talk about iss. of severability. I don't think that is set for the 14<sup>th</sup>.

G: This process is happening so fast and this case is being run on back of equip. lessors. No time to negot. comprom. Seems to me there is a prob. when setting cure when we don't know if talking about same set of lease. Dtr is attempting to segment on store by store basis. Need to know we are comparing apples to apples.

Ct: Is moving fast. Economic circum. this dtr is finding themselves in. Court system should as much as possible conform to needs of parties. If need quick decis., it is my job to get those decis. out as quickly as possible. If don't come in same tradition as they usually do, can raise it by filing an obj. Seems that in itself is not an obj. that ought to stop process. As fast as things are moving and as pressed as some of the parties have been, some people might describe it as a boutique law firm. Call up people at Furrs and will be happy to negot. a deal w/you. Enough ears out there to negot. a deal. Need to do that. I've been impressed w/the caliber of counsel. You not excepted. As fast as things are moving, w/sophistic. clients there is the abil. to deal w/this stuff and make these decis. on a quick basis. While I would share your concern, that this is a sleepy ll, don't think that is the case.