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BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF NEW MEXICO**

**In re:**

**FURR'S SUPERMARKETS, INC.  
SERVICES, INC.**

**Debtor.**

§  
§  
§  
§  
§  
§

**CASE NO. 11-01-10779 SA  
Chapter 11**

**MOTION TO COMPEL ASSUMPTION OR REJECTION OF  
NON-RESIDENTIAL REAL PROPERTY LEASE ON STORE #903  
AND TO COMPEL PAYMENT OF ADMINISTRATIVE EXPENSE**

Claus Dolling ("Dolling") comes before this Court on his Motion to Compel Assumption or Rejection of Non-Residential Real Property Lease on Store #903 and to Compel Payment of Administrative Expense (the "Motion") and would respectfully show to the Court the following:

**JURISDICTION**

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334 and § 157 of the Bankruptcy Code. This Motion has been filed pursuant to 11 U.S.C. §§ 365, 361, and 363.

**BACKGROUND**

2. On February 8, 2001 Furr's Supermarkets, Inc. (the "Debtor") filed its voluntary petition under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* The Debtor continues in possession and control of its assets pursuant to the provisions of §§ 1107 and 1108 of the Code.

3. The Debtor and Dolling are parties to a non-residential real property lease in Clovis, New Mexico (the "Lease" or "Store #903") to which Debtor is the lessee and Dolling is the lessor.

4. The Lease is a "triple-net" lease meaning that in addition to the rent, the Debtor is responsible for timely payment of any and all maintenance (including without limitation, building, landscaping, parking and common area maintenance), insurance and taxes. Dolling

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resides in the Republic of Germany and historically has relied solely upon the Debtor to properly and timely maintain and take care of Store #903 and other properties leased by the Debtor from Dolling. Additionally, all statements for taxes, insurance and common area maintenance with respect to Store #903 go directly to the Debtor. Dolling relies upon the Debtor to timely pay all such statements. Dolling receives no notices or statements for common area maintenance charges, insurance and/or taxes.

5. Debtor has failed to pay Dolling its lease payments in the amount of \$30,250.00 per month for Base Rent (as defined in the Lease) from August 1, 2001 through at least September 30, 2001, or until such later date that Debtor removes all of Debtor's property that it has an ownership interest in from the premises. In addition, Debtor has failed to pay all taxes, insurance and common area maintenance accruing and/or due subsequent to January 1, 2001.

6. To the extent that Debtor has an interest in property that still remains on Store #903 property as described in the Lease, Debtor continues to owe additional Base Rent, taxes, insurance and common area maintenance until the date that all such property is removed from Dolling's premises.

7. On or about June 25, 2001, Debtor filed its Motion to Reject Certain Unexpired Real Estate Leases, Subleases, and Equipment Leases. Notwithstanding such Motion, Debtor continues to enjoy the use and benefit of the premises.

8. On or about August 23, 2001, the Court entered an Order Granting Debtor's Motion to Reject Certain Unexpired Real Estate Leases, Subleases, and Equipment Leases with Respect to Non-Objecting Parties. The Order did not cover Store #903, and thus Debtor's lease for Store #903 has not yet been rejected.

9. It has been seven months since Debtor filed its voluntary petition and, although Debtor has closed Store #903, Debtor has neither rejected nor assumed the Lease and Debtor continues to own substantial property on the Lease.

10. As of September 1, 2001, most of the assets of the Debtor have been sold. Pursuant to a proposed wind-down budget, little if any money will be left for administrative claims and unsecured claims.

### **RELIEF REQUESTED**

#### **Compel Payment of Administrative Expense**

11. Since the Debtor continues to occupy Store #903, Dolling seeks an order from this Court compelling the Debtor to pay the amounts owed on the Lease from August 1, 2001, through at least September 30, 2001, or until such time that the Debtor removes all property to which it retains an ownership interest in, and pays any taxes, insurance and common area maintenance accrued since January 1, 2001 through the date Debtor removes all of its property from Dolling's premises.

12. Dolling is entitled to payment of Base Rent, taxes, insurance and common area maintenance as an administrative expense so long as Debtor continues to occupy the lease pursuant Section 503(b)(1) of the Bankruptcy Code.

13. The last monthly lease payment Dolling received from the Debtor was payment of the July, 2001 rent. The Debtor has failed to pay to Dolling the Base Rent for the months of August and September 2001. The Debtor is obligated to timely pay all of its post-petition rent, taxes, insurance and common area maintenance from August 1, 2001, forward. *See* 11 U.S.C. § 365(d)(3); *see also In re Childworld, Inc.*, 161 B.R. 571 (S.D.N.Y. 1993).

**Compel Assumption or Rejection of Non-Residential Real Property Lease on Store #903**

14. 11 U.S.C. § 365(a) governs the assumption or rejection of executory contracts and unexpired leases. Section 365(a) of the Bankruptcy Code provides as follows:

Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. § 365(a)(2000). Case law makes it clear that the Bankruptcy Court need only give the Debtor a "reasonable time" in which to make the decision to assume or reject executory contracts. *See e.g., In re Braniff, Inc.*, 118 B.R. 819, 845 (Bankr.M.D.Fla. 1990) (citing *Theater Holding Corp. v. Mauro*, 681 F.2d 102 (2<sup>nd</sup> Cir. 1982); *In re Dunes Casino Hotel*, 63 B.R. 939 (Bankr.D.N.J. 1986)). What constitutes a "reasonable time" is left to the sound discretion of the court in light of the particular circumstances of the case. *Id.* (citing *Dunes*); *In re GHR Energy Corp.*, 41 B.R. 668, 670 (Bankr.D.Mass. 1984) (citing *In re Lionel Corp.*, 23 B.R. 224 (Bankr.S.D.N.Y. 1982) and *In re New England Carpet Co.*, 18 B.R. 514 (Bankr.D.Vt. 1982); *In re Anderson*, 36 B.R. 120, 125 (Bankr.D.Haw. 1983).

15. In determining what constitutes a reasonable time, the Court should take into consideration the following exigent circumstances (i) the Debtor has had seven months to decide whether to assume or reject the Lease; (ii) subsequent to the sale, there is very little property remaining in the Debtor's estate; (iii) pursuant to the proposed wind-down, it does not appear that the Debtor will reopen Store #903; and (v) the <sup>burden of additional</sup> ~~increasing~~ administrative expenses owed by the Debtor so long as it has not rejected the Lease and removed all property owned by the Debtor from the Lease.

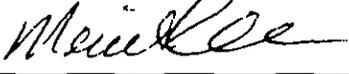
<sup>Dolling</sup>  
WHEREFORE, DRI respectfully requests, upon expedited hearing hereof, the Court grant the entry of an order directing the Debtor to assume or reject the Lease pursuant to § 365(a)

and order the Debtor to pay Dolling post-petition rent, taxes, insurance and common area maintenance under the Lease as an administrative expense pursuant to 11 U.S.C. §§ 365(d)(3) and 503(b)(1) and for such other and further relief as this court deems just and proper.

DATED: September 6, 2001.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 6, 2001, a copy of the foregoing Motion was mailed by first class United States mail, postage prepaid, to all persons shown on Exhibit A, a copy is attached to the original of this Motion that will be filed with the Clerk of the Bankruptcy Court.

  
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