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

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

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

Debtor.

MOTION OF PUEBLO OF SANTA CLARA TO COMPEL DEBTOR TO PAY POST-PETITION PERCENTAGE RENT UNDER UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY

COMES NOW, Creditor, Pueblo of Santa Clara, by and through its attorneys, and hereby moves this Court under 11 U.S.C. § 365(d)(3) to compel Debtor to pay percentage rent owing under an unexpired lease of nonresidential real property, and in support of the motion states as follows:

PARTIES, JURISDICTION AND VENUE

1. Movant Pueblo of Santa Clara ("Pueblo") is a creditor and party-in-interest in the above-styled and numbered bankruptcy case.

2. This Court has jurisdiction of this contested matter pursuant to 28 U.S.C. § 1334. This is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

3. Venue is properly in this Court pursuant to 28 U.S.C. § 1409.

FACTUAL BACKGROUND

4. Furr's Supermarkets, Inc. ("Debtor") filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code on February 8, 2001. Debtor continues in possession of its property and operation of its business as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

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5. Pursuant to Debtor's "Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Nonresidential Real Property," this Court signed and entered an order granting such extension to assume or reject unexpired leases until August 10, 2001.

6. Pursuant to Debtor's "Second Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Nonresidential Real Property," this Court extended again the time in which Debtor must assume or reject unexpired leases to December 21, 2001.

7. The Pueblo, a federally-recognized Indian tribe, is the lessor under an unexpired lease of non-residential real property ("Lease") identified in Debtor documents as Furr's Lease No. 893, located in the Big Rock Shopping Center in Española, New Mexico. A true and correct copy of the Lease is attached as Exhibit "A" and incorporated herein by reference.

8. Debtor has neither assumed or rejected the Pueblo's Lease under its authority granted by 11 U.S.C. § 365.

9. Pursuant to the Lease, the Debtor is obligated to pay a percentage rent, calculated as the amount of 1.25 % of "gross sales" made in each calendar year exceeding a set base rent, currently $49,480 per year, minus the amount of property tax increase and common area maintenance paid by Debtor.

10. Pursuant to section 2(b) of the Lease, the percentage rent for each year is due forty-five days after December 31st of the relevant term.

11. Pursuant to the Lease, the percentage rent for year 2000 was due to the Pueblo on or about February 14, 2001, after the Debtor filed its petition.

12. Debtor has not paid the percentage rent due under the Lease.

13. Upon information and belief, the amount owed to the Pueblo for percentage rent is $44,677, though the amount is subject to adjustment upon the acquisition of further information from Debtor.

LEGAL AUTHORITY

14. Under 11 U.S.C. § 365(d)(3) Debtor is obligated to "timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title."

15. Under the plain language of 365(d)(3), the percentage rent, due the Pueblo after the filing of Debtor's petition, is a post-petition obligation, requiring Debtor to pay the Pueblo immediately. *See, e.g.*, *In re DeCicco of Montvale, Inc.*, 239 B.R. 475, 479-482 (Bankr.D.N.J. 1999); *In re F & M Distributors, Inc.*, 197 B.R. 829, 831 (Bankr.E.D.Mich. 1995); *In re R.H. Macy & Co.*, 152 B.R. 869, 872-73 (Bnkr.S.D.N.Y. 1993); *In re Appletree Markets, Inc.*, 139 B.R. 417, 420 (Bankr.S.D.Tex. 1992).

POSITION OF DEBTOR

16. Pursuant to Local Rule 9013-1(b) the Pueblo contacted the office of David Thuma, attorney for Debtor to discover whether Debtor opposes the motion. Mr. Thuma did not indicate whether or not Debtor opposes the motion, but the Pueblo assumes Debtor will file an objection.

WHEREFORE, Movant Pueblo of Santa Clara, respectfully requests that this Court compel Debtor to pay the full amount of percentage rent owed.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Motion was mailed to the following on the 11th of September, 2001.

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SHOPPING CENTER LEASE

THIS LEASE is made this 11th day of May, 1972, between BIG ROCK DEVELOPMENT COMPANY, a New Mexico corporation, lessor, and SAFEWAY STORES, INCORPORATED, a Maryland corporation, lessee, on the following terms and conditions:

REMISES
ERM

1. Lessor hereby leases to lessee a portion of the following described real property in the City of Espanola, County of Rio Arriba, State of New Mexico:

(See Exhibit "B" attached hereto and made a part hereof) Replaced 3-1-73

on which property lessor is to construct the Big Rock Shopping Center (herein called the "shopping center") as shown on the plan dated November 19, 1971, attached hereto as Exhibit "A". The portion of the shopping center hereby leased (herein called the "leased premises") is designated "Safeway - Proposed Repeat #935" and outlined in red on Exhibit "A", and includes the building, or portion of building and related improvements to be constructed thereon by lessor in accordance with the provisions of this lease.

TO HAVE AND TO HOLD the leased premises, together with all appurtenances, for a term of twenty (20) years commencing May 1, 1973, and ending April 30, 1993.

ENT

2. Lessee agrees to pay the following rents by checks or drafts payable to and mailed to Big Rock Development Company - P.O. Box TT, Espanola, New Mexico 87103, or as otherwise designated in writing by lessor:

(a) A fixed minimum annual rental of Forty-Four Thousand Dollars ($44,000.00), divided into twelve (12) equal monthly installments of Three Thousand Six Hundred Sixty-Six and 67/100 Dollars ($3,666.67) each, payable in advance on or before the first day of each calendar month during the term hereof. The minimum rent for any fractional calendar month shall be prorated.

It is understood that the minimum annual rentals recited in this subparagraph (a) are based upon a total floor area of twenty-two thousand (22,000) square feet ($2.00 per square foot). In the event the completed floor area on the leased premises is increased or decreased from the base of twenty-two thousand (22,000) square feet, the fixed minimum annual rent shall be proportionately increased or decreased at a rate of $2.00 per square foot.

(b) A percentage rent in the amount, if any, by which one and one-quarter percent (1 1/4%) of gross sales made by lessee in the leased premises in each calendar year of the lease term exceeds the minimum rent for the same calendar year. If lessee occupies the leased premises for a fractional calendar year, percentage rent for such period shall be the amount, if any, by which said per cent of gross sales during said period exceeds the minimum rent for said period.

On or before the forty-fifth day following each December thirty-first during the term and the last day of the term, lessee shall mail to lessor, at the place where rent is payable, a statement showing gross sales made by lessee in the leased premises during the term of this lease for the calendar year or portion thereof last preceding

[illegible] shall be allowed to deduct therefrom the total of the following:

(i) Prorata share of real property tax increase paid by lessee pursuant to paragraph 27.

(ii) Prorata share of common area maintenance paid by lessee pursuant to paragraph 28.

The term "gross sales" as used herein shall not include any of the following: (1) credit or refunds to customers for merchandise returned or exchanged; (2) transfers of merchandise from the leased premises to other stores or warehouses of lessee or its affiliated companies; (3) any sales taxes or other taxes imposed under any laws, ordinances, orders or regulations, whether now or hereafter in force, upon or based upon the gross receipts of lessee or the sale or sales price of merchandise and which must be paid by lessee, whether or not collected by lessee from its customers; (4) returns of merchandise to shippers or manufacturers; (5) the net amount of discounts allowed to any customer pursuant to any customary and reasonable policy adopted by lessee, including in such discounts, but not by way of limitation, the net amount of any discounts allowed by way of or resulting from the issuance to customers of trading stamps or other evidences of purchase for immediate or future exchange for merchandise or other things of value; and (6) merchandise or other things of value issued in redemption of such trading stamps or other evidences of value, or issued as a premium or otherwise in connection with any sales promotion program of lessee. Lessor agrees to hold in confidence all sales and related information furnished by lessee. Lessee makes no representation or warranty as to the sales which it expects to make in the leased premises.

All references in this lease to a proportionate reduction of rent shall apply only to the minimum rent.

LESSOR'S TITLE. ZONING. SUBORDINATION.

3. Lessor covenants that lessor has lawful title to the shopping center and full right to make this lease and that, within thirty (30) days after receipt of lessee's request, lessor will provide lessee with current evidence satisfactory to lessee from a reponsible title insurance company of the status of lessor's title to the shopping center. Lessor further covenants that, at the commencement of the term, the shopping center will be free from encumbrances except those agreed to in writing by lessee, and that there will be no zoning or other ordinances, or title or other matters, except those agreed to in writing by lessee, which will restrict lessee's operation of a general mercantile business (including the sale of alcoholic beverages if not prohibited by law and if lessee obtains all necessary licenses and/or permits at lessee's expense) in the leased premises or the use of the common areas of the shopping center as provided for in this lease, and that so long as lessee is not in default lessee shall have quiet and peaceful possession of the leased premises and enjoy all of the rights herein granted without interference. Lessee agrees that this lease shall be subordinate to any mortgages or trust deeds placed upon the shopping center after commencement of the term provided that, in the event of any foreclosure or other suit, sale or proceedings thereunder, lessee, if not then in default, will not be made a party to any suit or proceeding, and the same shall not affect the rights of lessee under this lease. Lessee

deleted 3-5-73 Amends

existing mortgage on the shopping center with Great Southern Life Insurance Company, Houston, Texas, a mortgagee, provided said mortgagee will furnish lessee with a nondisturbance agreement in recordable form providing that in the event of any foreclosure or other suit, sale, or proceedings thereunder lessee, if not then in default, will not be made a party to any such suit or proceedings, and the same shall not affect the rights of lessee under this lease. In the event of any violation of any of the covenants made by lessor in this paragraph, lessee may cancel this lease by notice to lessor.

If said mortgage is 3-5-73

ION AREA.
PLETION OF
PPING CENTER.

4. All those portions of the shopping center not shown as building areas on Exhibit "A" shall be common areas for the joint use of all tenants, their customers, invitees and employees, and lessor hereby grants to lessee and its customers, invitees and employees the right to use all of said common areas and any enlargement thereof. Lessor agrees that, at lessor's expense, all common areas will be maintained in good repair, kept clean and clear of snow and ice and adequately lighted when stores are open for business. Lessor further agrees that all buildings in the shopping center other than the building on the leased premises will be completed as shown on Exhibit "A", and ready for occupancy by not later than May 1, 1973, that, following completion of construction of any portion of the shopping center, the sizes and arrangements of said buildings and common areas (including parking areas) will not be changed without lessee's written consent, and that if said buildings are not so completed or if said sizes or arrangements are changed without lessee's written consent, lessee may cancel this lease by notice to lessor. Lessor further agrees that if the shopping center is expanded by ownership, control of lessor, or agreement with a third party, all of the provisions of this lease with respect to the shopping center and the leased premises shall apply to the expanded area, and the parking to building ratio in the expanded area of the shopping center will not be less than the ratio shown on Exhibit "A". Nothing in this paragraph shall be construed so as to prevent lessor from erecting other buildings and improvements in the area on Exhibit "A" immediately to the north of the premises herein leased.

STRUCTION OF
MON AREAS AND
SSEE'S BUILDING.
NS AND SPECI-
ATIONS.

5. Lessor agrees, at lessor's sole cost, risk and expense, to construct on the common areas a sign tower for lessee, all parking and service areas, sidewalks, driveways and related improvements shown on Exhibit "A" and to construct on the leased premises a building or portion of a building, all in accordance with plans and specifications to be prepared at lessor's expense by Kruger, Lake and Associates (architect), and approved in writing by lessor and lessee. Lessee shall furnish lessor with drawings and/or specifications setting forth lessee's requirements to be incorporated in the plans and specifications to be prepared by the architect. Upon approval by the parties, the plans and specifications shall become a part of this lease as though set out in full herein. If, for any reason whatsoever, the parties fail to agree on plans and specifications on or before the 1st day of September, 1972, either party may cancel this lease by notice to the other party within ninety (90) days thereafter. If the parties are unable to arrive at an agreement by reason of the fact that lessee itself will not accept the plans and specifications of lessor, lessee will, provided lessor is not in default hereunder, reimburse lessor up to a maximum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) for necessary expenses incurred by lessor in the preparation of the plans and specifications and other attendant expenses thereto incurred by lessor up to the time that negotiations are discontinued

[illegible] sentence. Lessee may [illegible] the plans and specifications revised, at lessor's expense, if more than one hundred and twenty (120) days elapse between the date of approval of plans and specifications and the date of commencement of construction of the building on the leased premises. Lessor agrees to complete said construction work (which shall include lessor's obtaining and furnishing to lessee of any certificate of [illegible]

[illegible]

lease specified in paragraph 1. Lessee may enter upon the leased premises during the course of construction to inspect the construction work and to install its fixtures and equipment and such entry shall not constitute acceptance of possession of the leased premises by lessee.

ACCEPTANCE OF POSSESSION.

6. The term of this lease shall [illegible] commence until lessee accepts possession of the leased premises. Lessee shall accept possession of the leased premises when they are ready for occupancy, the words "ready for occupancy" being defined for this purpose to mean the date [illegible] which the construction work referred to in paragraph 5 is fully completed in accordance with the plans and specifications and exclusive possession of the leased premises is delivered to lessee. If lessee accepts possession of the leased premises on a date other than the commencement date specified in paragraph 1, the term shall commence on the date lessee accepts possession but the expiration date specified in paragraph 1 shall remain unchanged. If, for any reason whatsoever, the leased premises are not ready for occupancy within ninety (90) days after the commencement date specified in paragraph 1, lessee may cancel this lease by notice to lessor. Notwithstanding the provisions of paragraph 2 the rent shall not commence, become due, or be payable until thirty (30) days after the term of this lease commences or until the date lessee opens for business in the leased premises

premises caused by lessee's use other than ordinary wear and tear and [illegible] as covered in paragraph 7 and the on surrendering possession it will leave the leased premises in good condition, allowance being made for ordinary wear and tear, damage by fire, the elements or other casualty, or resulting from the acts of persons other than lessee, or from defects therein being excepted. Lessee may make such repairs, alterations, and improvements to the leased premises as lessee deems desirable but lessee agrees not to permit any liens to stand against the leased premises for work done or materials furnished; provided, that lessee will not materially change or alter the architectural style or design of the leased premises without prior written consent of the lessor, which consent shall not be unreasonably withheld. Lessee may paint the interior of the building on the leased premises in such colors as lessee elects. Lessee shall have the exclusive right to erect or authorize signs in, on, or about the building on the leased premises and may, at any time remove signs and color effects installed by lessee. On surrendering possession lessee shall not be required to restore the leased premises to their condition at the commencement of the term, and lessor agrees to accept the leased premises with alterations and improvements made by lessee. Lessee agrees to pay all charges for electricity, gas, heat, water, telephone and other utility services including, but not limited to, trash and garbage used by lessee on the leased premises.

LESSEE'S FIXTURES.

9. Lessee may install in the leased premises such fixtures and equipment as lessee deems desirable and all of said items shall remain lessee's property whether or not affixed or attached to the leased premises. Lessee may remove said items from the leased premises at any time, but shall repair any damage caused by removal.

COMPLIANCE WITH LAWS.

10. Lessee agrees not to violate any law, ordinance, rule or regulation of any governmental authority having jurisdiction of the leased premises and, if required solely by reason of lessee's type of business, to make nonstructural repairs, improvements and alterations to the interior of the building on the leased premises required by such authority. Lessor agrees to make all other repairs, improvements or alterations to the leased premises and the common areas required by such authority.

DAMAGE BY CASUALTY.

11. If the leased premises are damaged by fire, the elements or other casualty, lessor shall promptly repair all damage and restore the leased premises to their condition just prior to the damage. If lessee is deprived of the use of any substantial portion of the leased premises either by reason of said damage or during restoration, the rent shall be abated or proportionately reduced according to the extent to which lessee is deprived of such use. Lessor agrees to keep in effect on the leased premises fire insurance with extended coverage endorsement in an amount not less than eighty percent (80%) of the insurable value of the building improvements thereon. If lessor's insurance policy permits the release of others from liability for loss from casualties insured against, such release from liability is hereby granted to lessee to the extent of lessor's actual recovery of loss under such policy. If the leased premises are damaged by fire, the elements or other casualty to the extent of seventy-five percent (75%) or more of the insurable value thereof, lessee may terminate this lease as of the date of the damage by notice to lessor within thirty (30) days after said date.

CONDEMNATION.

12. If any portion of or interest in the shopping center including, without limitation, the leased premises, the common areas, and the other buildings in the shopping center, shall be taken or damaged under any right of eminent domain or any transfer in lieu thereof, and such taking or

[illegible] taking or [illegible] deprives lessee of possession of any portion of the [illegible] leased premises or of any other rights of lessee under this lease. If this lease is not so terminated, lessor shall promptly restore the shopping center to an architectural unit as nearly as [illegible] as practicable to the unit existing just prior to such taking or damage and this lease shall continue, but, commencing with the date on which lessee is deprived of the use of any portion of the leased premises or of any rights under this lease, the rent shall be abated or proportionately reduced according to the extent to which lessee is deprived of such use or rights. Nothing contained herein shall prevent lessor and lessee from prosecuting claims in any condemnation proceedings for the values of their respective interests; provided, however, lessee shall be entitled only to that portion of any award allocated to the taking of leasehold improvements by lessee and not paid for by lessor and to the taking of lessee's fixtures and equipment (including costs of moving same).

ASSIGNMENT AND SUBLETTING.

13. Subject to all other provisions in this paragraph hereinafter appearing, including lessee's continuing liability for payment of rental herein, lessee may assign this lease or sublease the whole or any part of the leased premises. However, in the event lessee, or an affiliated or successor company desires to assign this lease or sublet the whole or any part of the leased premises to other than an affiliated or successor company or a grocery supermarket operator, lessee agrees to offer to sublease the whole of the leased premises to T. G. & Y., said sublease to be on the same terms and conditions as provided in this lease, including the rent for the remainder of the original lease term. Lessee's offer to sublease the whole of the leased premises to T. G. & Y. as hereinabove set forth shall be by written notice to T. G. & Y. at least sixty (60) days prior to the date that lessee intends to assign this lease or sublet the whole or any part of the leased premises to other than an affiliated or successor company a grocery supermarket operator. T. G. & Y. shall have thirty (30) days from the date of lessee's notice to forward to lessee its notice in writing either accepting or rejecting lessee's offer to sublease. In the event T. G. & Y. accepts lessee's offer to sublease the whole of the leased premises, the sublease shall provide for T. G. & Y. to occupy and use the subleased premises solely for the operation of a grocery supermarket business, said occupancy and use to commence no more than one hundred and twenty (120) days following lessee's notice offering to sublease the leased premises to T. G. & Y. In the event T. G. & Y. does not accept lessee's offer within the period hereinabove specified, the requirement that lessee offer to sublease the leased premises to T. G. & Y. shall be of no further force and effect and lessee may assign this lease or sublet the whole or any part of the leased premises for any purpose which is not in violation of any exclusive agreement which lessor may have with any other tenant in the shopping center provided that lessor has supplied lessee with a complete list of all exclusive agreements and restrictive clauses contained in the leases in effect within the shopping center. Any provision of this paragraph to the contrary notwithstanding, in the event of an assignment by lessee herein to any party, affiliated with lessee or otherwise, lessee shall remain liable for the payment of rentals hereof for the full term of this lease or any renewal hereof if a renewal term be then effective, unless the lessor specifically waives in writing the liability for payment of rentals to lessor herein.

COMPETITIVE BUSINESS.

14. Lessor covenants not to permit over 1500 square feet of sales area (including aisle space adjacent thereto) in any one store in the shopping center, other than lessee's to be devoted to the sale of food for off-premises consumption; provided, that nothing in this paragraph shall be construed as restricting lessor's right to permit the sale of intoxicating liquors for on-premises and off-premises consumption, non-intoxicating beverages, candies, confections and other related

Aside from the foregoing, lessor covenants that it will not permit the sale, by any other than lessee located within the shopping center, of frozen foods, milk, fresh meat or poultry, fresh fruit or fresh vegetables, for off-premises consumption, nor will lessor permit any space within the shopping center to be used or occupied as a junk yard. In the event of a violation of any of the foregoing covenants, lessee may cancel this lease by notice to lessor, on thirty (30) days notice to correct.

INDEMNIFICATION. 15. Lessee agrees to indemnify lessor against and save lessor harmless from all demands, claims, causes of action or judgments, and all reasonable expenses incurred in investigating or resisting the same, for injury to person, loss of life or damage to property occurring on the leased premises and arising out of lessee's use and occupancy, except if caused by the act or neglect of lessor, its contractors, agents or employees, or occurring on the common areas if caused by the act or neglect of lessor, its contractors, agents or employees. Lessor agrees to indemnify lessee against and save lessee harmless from all demands, claims, causes of action or judgments, and all reasonable expenses incurred in investigating or resisting the same, for injury to person, loss of life or damage to property occurring on the common areas, except if caused by the act or neglect of lessee, its contractors, agents or employees, or occurring on the leased premises if caused by the act or neglect of lesser, its contractors, agents or employees, or occurring anywhere within the shopping center prior to the commencement of the term. The parties shall maintain adequate insurance covering their obligations under this paragraph in respect of injury to person and loss of life and furnish each other with evidence of such coverage.

DEFAULT. 16. If lessee shall be in default for more than twenty (20) days after receipt of lessor's notice specifying such default, lessor may declare the term ended and re-enter the leased premises with or without process of law. If lessor shall be in default for more than twenty (20) days after receipt of lessee's notice specifying such default, lessee may incur any expense necessary to perform any obligation of lessor specified in such notice and deduct same expense from the rents thereafter to become due. The performance of each and every covenant and agreement by lessor herein contained shall be a condition precedent to lessor's right to collect rents or enforce this lease.

OPTIONS FOR RENEWAL. 17. Lessee, at lessee's option, by giving lessor sixty (60) days written notice before the expiration of the term or option term then in effect, may extend the term of this lease for six (6) separate and additional periods of five (5) years each on the same terms and conditions as contained herein for the initial term hereof.

HOLDING OVER. 18. If lessee remains in possession of the leased premises after the expiration of this lease, such continued possession shall, if rent is paid by lessee and accepted by lessor, create a month-to-month tenancy on the terms herein specified, and said tenancy may be terminated at any time by either party by thirty (30) days notice to the other party.

NOTICES. 19. Any notice provided for herein shall be given by registered or certified United States mail, postage prepaid, addressed, if to lessor, to the person to whom the rent is then payable at the address to which the rent is then mailed, and, if to lessee, to it at P. O. Box 1452, El Paso, Texas, 79948. The person and the place to which notices are to be mailed may be changed by either party by notice to the other party.

set forth for a [illegible] plans and specifications, pursuant to paragraph 5, lessor will furnish lessee with a copy of a fully executed lease and all amendments thereto with the following tenant for space in the shopping center in the location shown on Exhibit "A", and in an amount not less than the amount set opposite such tenant's name, for a term not less than the number of years set opposite its name.

T. G. & Y. 25,000 ± sq. ft. 20 years.

Lessor covenants that said tenant's lease will be noncancellable except for cancellation rights based on default, casualty damage or condemnation which are substantially similar to such cancellation rights set forth in this lease, the words "substantially similar" being defined for this purpose to mean that the event, act or inaction, which gives said tenant a right to cancel its lease would also under the terms of this lease give the herein lessee the right to cancel this lease if such event, act or inaction was experienced by the herein lessee rather than by said tenant. If any of said covenants are not fulfilled, lessee may, at its option, either (a) notwithstanding the provisions of paragraph 6 refuse to accept possession of the leased premises until said covenants are fulfilled; or (b) accept possession of the leased premises and open for business without incurring any obligation for minimum rent until said covenants are fulfilled. Lessor covenants that said tenant will have opened its store to the general public for business by not later than thirty (30) days following the lease commencement date specified in paragraph 1, as may be adjusted by paragraph 6 hereof. If said tenant has not opened its store to the general public for business by not later than the expiration of said thirty (30) day period, lessee's obligation to pay minimum rent shall cease as of the expiration of said thirty (30) day period, and lessee's obligation for minimum rent shall not resume until said tenant shall have opened its store to the general public for business. If said tenant has not opened its store to the general public for business by not later than an additional forty-five (45) days after the expiration of said thirty (30) day period, lessee may, at its option, cancel this lease by notice to lessor.

If the lease referred to above is cancelled prior to the expiration of the term prescribed for that lease, except pursuant to a cancellation right substantially similar (as defined above) to the cancellation rights contained in this lease for default, casualty damage or condemnation, lessee's obligation to pay minimum rent shall cease as of the date of such cancellation and lessee's obligation for minimum rent shall not resume until (a) lessor shall have furnished lessee with a copy of a fully executed lease and all amendments thereto with a similar tenant acceptable to lessee for the same space in the shopping center and for a term of not less than the remainder of the term specified in such cancelled lease and (b) such similar tenant shall have opened its store to the general public for business. The name of such similar tenant shall then be deemed to be named as a principal tenant as listed above and be subject to the provisions of this paragraph. If such similar tenant has not opened its store to the general public for business within one hundred eighty (180) days after such principal tenant's lease is cancelled, lessee may at its option cancel this lease by notice to lessor.

REMEDIES CUMULATIVE.

21. No remedy herein conferred upon or reserved to lessor or lessee shall exclude any other remedy herein or by law provided, but each shall be cumulative and in addition to every other remedy given hereunder or not or hereafter existing at law or in equity or by statute.

AUTOMATIC TERMINATION.

22. Notwithstanding anything herein to the contrary, if this lease has not previously been terminated and the term of this lease has not commenced by five (5) years from the date of this lease, this lease shall thereupon automatically terminate.

[illegible]. This lease shall not be recorded but it is agreed that, upon request by either party, the parties will execute a short form of this lease which may be recorded by either party.

ATTORNEY'S FEES.

24. If lessor or lessee files a suit against the other which is in any way connected with this lease, the unsuccessful party shall pay to the prevailing party a reasonable sum for attorney's fees, which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

PARAGRAPH HEADINGS.

25. The paragraph headings of this lease are inserted only for reference and in no way define, limit, or describe the scope or intent of this lease nor affect its terms and provisions.

RIGHTS OF SUCCESSORS.

26. All of the rights and obligations of the parties under this lease shall bind and inure to the benefit of their respective heirs, personal representatives, successors and assigns.

REAL PROPERTY TAXES.

27. Lessor agrees to pay all real property taxes on the entire shopping center and all improvements thereon with possible reimbursement by lessee of a portion thereof as hereinafter provided. For the purposes of this paragraph, the second tax year in which the buildings and common areas shown on Exhibit "A" are fully completed and are included in the real property tax bill is hereinafter referred to as the "base year". If the real property taxes on the fully completed buildings and common areas as shown on Exhibit "A" for any tax year while this lease remains in effect exceed such real property taxes for the base year, lessee shall reimburse lessor for lessee's prorata share of such excess provided lessor requests such reimbursement not later than sixty (60) days after the delinquent date for such taxes. Lessee's share shall be a fraction of such excess, the numerator of which fraction shall be the building floor area on the leased premises and the denominator of which shall be the total building floor area in the shopping center, including the building on the leased premises as shown on Exhibit "A". Lessee shall so reimburse lessor within thirty (30) days after receipt of satisfactory evidence of lessor's payment of such taxes and the amount due from lessee. Lessee shall not be obliged to pay any portion of any penalty for a delinquent payment by lessor of such taxes. Any tax reimbursement by lessee hereunder shall be prorated as of the termination or expiration date of this lease.

In the event any percentage rent shall be payable to lessor under paragraph 2 of this lease for any calendar year, all sums paid by lessee under this paragraph during the same calendar year shall be deducted from the percentage rent otherwise payable to lessor.

COMMON AREA MAINTENANCE.

28. Lessee agrees to reimburse lessor for lessee's share of the actual costs incurred by lessor in lighting the common areas, in keeping same clean and cleared of snow and ice and in maintaining the common areas in good repair, excluding, however, the costs of any capitalizable improvements or additions to the common areas. Lessee shall so reimburse lessor after receipt of satisfactory evidence of said costs and the amount due from lessee, but not more often than once each month. Lessee's shares shall be a fraction of said costs, the numerator of which fraction shall be the building floor area on the leased premises and the denominator of which shall be the total building floor area in the shopping center, including the building on the leased premises as shown on Exhibit "A". Lessor agrees that in no event shall the amounts payable by lessee under this paragraph in any calendar year exceed the sum of ten cents (10¢) per calendar year for each square foot of the building floor area on the leased premises.

under paragra, 2 of is lease for any lendar year. paid by lessee under this paragraph during the same calendar year shall be deducted from the percentage rent otherwise payable to lessor.

DAMAGE BY CASUALTY OF OTHER BUILDINGS IN SHOPPING CENTER.

29. If any building improvements in the shopping center other than the building on the leased premises are damaged by fire, the elements, or other casualty, lessor shall promptly repair all damage and restore said improvements to their condition just prior to the damage. If damage renders untenantable more than 25% of the rentable floor space of said building improvements then comprising the shopping center (excluding the building on the leased premises from the computation) and said improvements are not restored and made tenantable within six (6) months after the date of damage, allowance being made for delays caused by strike, riot, fire, Act of God, or operation of law beyond the control of lessor, lessee may cancel this lease by notice to lessor.

FUTURE EXPANSION.

30. It is understood and agreed that lessee at the end of the first five (5) years of the lease term, may have an addition made to the leased premises. Said addition is to be located within the area shown on Exhibit "A" as "Safeway Expansion". Said addition shall be constructed under the following terms and conditions: (1) If lessee desires said addition, it shall give notice ("Notice of Request") to lessor and request lessor to build said addition according to plans and specifications which shall be prepared by lessee and approved by lessor, said approval not to be unreasonably withheld. (2) Upon completion of said addition by lessor in accordance with the plans and specifications, the monthly minimum rent payable by lessee under the provisions of paragraph 2 (a), shall be increased by an amount to be agreed upon by lessor and lessee prior to the commencement of construction. (3) If lessor and lessee cannot agree on a rental within sixty (60) days from the date of lessee's notice of request, then lessee may, at its sole cost and expense, make such addition to the leased premise ; provided, however, that (a) said addition is in accordance with the above and that all plans for the addition must be approved in writing by the lessor before construction commences, such approval not to be unreasonably withheld, (b) there shall be no additional minimum rental payable for said addition made by the lessee except as may be payable under clause 2 (b) hereof, and (c) the lessee will indemnify and save harmless the lessor from and against any and all manner of claim for liens for wages or materials or for damage to persons or property caused during the making of or in connection with the aforesaid addition which the lessee shall make or cause to be made.

If lessee constructs said addition the lessee may offset against any percentage rent payable under paragraph 2 (b) above the actual cost of said improvements amortized with interest at the local prime bank rate at the time of completion of said improvements, prorated over the remainder of the original term of this lease.

31. Both parties agree that this lease contains all of the terms, representations, covenants and conditions, oral and written, between the parties on the subject matter herein.

USE

32. Lessee agrees that the leased premises will not, when and if the same are used and operated, be used and operated for a purpose other than a grocery supermarket of the type and character operated from time to time by lessee, its successors or assigns, in its other stores during the term of this lease or any extensions thereof. Except as provided in paragraph 13

hereof, the provisions of this paragraph shall not be binding on lessee's assignees and/or sublessees. No provision in this paragraph or in this lease shall be deemed to constitute an express or implied covenant on the part of lessee to continuously operate a grocery supermarket in the leased premises.

33. It is understood between the parties that lessee is now leasing a building from lessor in the shopping center pursuant to the terms and provisions of that certain Shopping Center Lease between lessor and lessee dated January 7, 196[illegible], modified by Lease Modification Agreement dated April 10, 196[illegible], and a short form of which lease was recorded February 11, 19[illegible], Book 76, Page 497, Rio Arriba County, New Mexico (said Shopping Center Lease, as modified, and said Short Form Lease together hereinafter referred to as the "present lease"). It is agreed that at such time as lessee accepts possession of the leased premises as described in paragraph 1 hereof in accordance with the provisions of paragraph 6 hereof, lessee shall immediately remove its fixtures and equipment from the leased premises described in the present lease so as to deliver vacant possession of the leased premises under the present lease to lessor as soon as possible after the commencement of the term of this lease. In the event lessee fails to deliver vacant possession of the leased premises under the present lease within fifteen (15) days after the commencement of the term of this lease, the thirty (30) day period for the opening of T. G. & Y. provided in paragraph 20 hereof shall be extended one (1) day for each day that elapses from the date lessee should have delivered vacant possession of the leased premises under the present lease as aforesaid to the date lessee does deliver vacant possession. Upon delivery of vacant possession of the leased premises under the present lease as aforesaid, lessor and lessee further agree to enter into a lease cancellation agreement cancelling the present lease, which cancellation agreement shall provide that the present lease shall be and the same is to be cancelled and terminated and all obligations thereunder and in connection therewith are deemed satisfied as of the date vacant possession of the leased premises under the present lease is delivered to lessor as aforesaid.

IN WITNESS WHEREOF, the parties hereto have executed this lease.

BIG ROCK DEVELOPMENT COMPANY
(a New Mexico corporation)

(Corporate Seal)

By _____
Its President

By _____
Its Secretary

(Lessor)

SAFEWAY STORES, INCORPORATED
(a Maryland corporation)

(Corporate Seal)

By _____
Its Assistant Vice President

By _____
Its Assistant Secretary

(Lessee)

Part of a tract of land legally described as Exception No. 309, surveyed as private Claim No. 380, within the Pueblo of Santa Clara of section two in Township Twenty north of Range eight east of The New Mexico Meridian, New Mexico, containing twelve acres and seventy hundredths of an acre, according to the approved plat of survey of said land on file in the general land office.

Beginning at the north east corner of said tract, thence N. 59° 54'W. (701.0') seven hundred one feet, thence S. 30° 06'W. (639.83') six hundred thirty nine and 83/100 feet, thence S. 72° 28'E. (518.72') five hundred eighteen and 72/100 feet, thence N. 53° 16'E. (329.20') three hundred twenty nine and 20/100 feet, thence N. 46° 18'E. (233.60') two hundred thirty three and 60/100 to the place of beginning containing approx. 8.06 acres.

EXHIBIT "B"