

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE, NM

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779-SA

Chapter 11

Debtor.

**DEBTOR'S MOTION TO EMPLOY REAL ESTATE BROKER FOR EL PASO
DISTRIBUTION CENTER**

The Debtor in Possession Furr's Supermarkets, Inc. (the "Debtor"), pursuant to 11 U.S.C. §327, requests that the Court approve its employment of RJL Real Estate Consultants ("RJL") to market the Debtor's leasehold interest in the El Paso Distribution Center. In support of this Motion (the "Motion"), the Debtor states:

1. On February 8, 2001 (the "Petition Date"), the Debtor commenced this bankruptcy case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pursuant to Bankruptcy Code §§1107(a) and 1108, the Debtor has retained possession of its assets, as Debtor in Possession, and is continuing to operate its business.

2. The Debtor is a tenant, under a long-term lease, of certain improved real estate in El Paso, Texas, with a street address of 9820 Railroad Drive and 9601 Railroad Drive (the "Distribution Center").

3. The Debtor wishes to employ RJL as a real estate broker to sell the Debtor's interest in the Distribution Center. RJL is well qualified to broker the Distribution Center. RJL has represented in its disclosure filed pursuant to Bankruptcy Rules 2014 and 2016 (the "RJL Disclosure") that except for its representation of clients in matters wholly unrelated to Furr's or

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this bankruptcy case, to RJL's knowledge it does not have any interests that are materially adverse to the Debtor.

4. The professional services RJL will render on behalf of the Debtor are the listing and marketing of the Debtor's leasehold interest in the Distribution Center. A copy of RJL's listing agreement with the Debtor is attached hereto as Exhibit A and incorporated herein by reference. RJL seeks a determination that the commission set forth in the listing agreement is reasonable and appropriate and meet with this Court's approval.

5. To the best of Debtor's knowledge, information and belief, employment of RJL would be in the best interest of the estate, and RJL has no interest that is, for the matters that are the subject of RJL's employment, adverse to the Debtor, its creditors, or any other party in interest or their respective attorneys, other than any interests set forth in the RJL Disclosure.

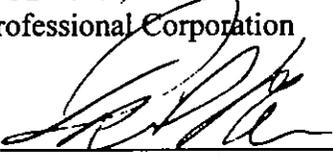
6. The fees, costs, and gross receipts tax that RJL will charge Debtor are set forth in the listing agreement.

7. RJL requests that the Debtor be authorized to pay RJL its commission upon entry of an order approving any proposed sale of the Debtor's leasehold interest in the Distribution Center.

8. RJL's employment is in the best interest of the estate and should be made effective as of the date hereof.

WHEREFORE Debtor requests approval of the Court to employ RJL as its broker for the Distribution Center pursuant to 11 U.S.C. § 327(e) under the terms of the listing agreement and this Motion, effective as of the date hereof, and for all other just and proper relief.

JACOBVITZ, THUMA & WALKER
A Professional Corporation

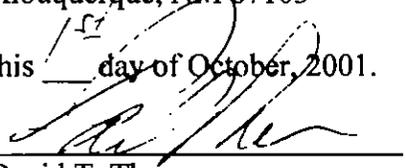
By: 

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500 Marquette N.W., Suite 650
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(505) 766-9272
(505) 766-9287 (fax)
Attorneys for the Debtor-in-Possession

This certifies that a copy of the foregoing was
served by first class mailed on:

United States Trustee
P.O. Box 608
Albuquerque, NM 87103

this 1st day of October, 2001.


David T. Thuma



COMMERCIAL

TEXAS ASSOCIATION OF REALTORS®

COMMERCIAL REAL ESTATE LISTING AGREEMENT



REALTOR®

EXCLUSIVE RIGHT TO LEASE

THIS FORM IS FURNISHED BY THE TEXAS ASSOCIATION OF REALTORS FOR USE BY ITS MEMBERS. USE OF THIS FORM BY PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS IS NOT AUTHORIZED.

Texas Association of REALTORS® 1999

- 1. **PARTIES:** The parties to this agreement (this Listing) are Furrs Supermarkets Inc. (Landlord) and RJL Real Estate Consultants (Broker). In consideration of services to be performed by Broker, Landlord appoints Broker as Landlord's sole and exclusive real estate agent and grants to Broker the exclusive right to lease the Property for the price and on terms described below.
- 2. **PROPERTY:** The Property is legally described as Land Description to be Attached in the City of El Paso, El Paso County, Texas, known as Property Address to be Attached El Paso, Texas (address and zip code), and/or as described on an attached exhibit, together with all its improvements including the following non-real estate items: N/A (Note: If the Property is a condominium see Condominium Addendum) All property described above is called "the Property."
- 3. **LISTING PRICE:** Landlord lists the Property for: See Attached Schedule.
 - (a) base rent of \$ _____ per _____ per _____ net of taxes, insurance, maintenance (common areas, utilities, custodial services, and the like) with percentage rent equal to _____ % of the tenant's monthly gross sales over \$ _____ in addition to the base rent. only if the percentage rent exceeds the base rent.
 - (b) gross rent of \$ _____ per _____ per _____.
 - (c) base rent of \$ _____ per _____ per _____ with adjustments to base rent on a basis for increases in building operation expenses that exceed \$ _____ per _____ per _____.

or for any other price Landlord may accept. Landlord shall lease the property for a term of not less than _____ months and not more than _____ months, or any other term Landlord may accept.
- 4. **TERM:** This Listing shall commence on September, 2001 (Commencement Date) and shall terminate at 11:59 p.m. on July 31, 2002 (Termination Date).

5. ASSOCIATION AND FILINGS:

- (a) Broker is a member of the N/A Association of Board of REALTORS® (the Association) and is bound by its rules.
- (b) **Filing of Listing (choose (1) or (2)):**
 - (1) Broker shall file this Listing with Loop Net & CCIM.Com within the earlier of: (i) the time required by the rules and regulations of the named service. Landlord authorizes Broker to place the Property on a computerized system of public access through other listing services. Landlord authorizes Broker, after the Property is leased, to submit information about this Listing, the lease of the Property, and terms of the lease, to the named listing service for publication to subscribers for market evaluation or appraisal purposes and for disclosure of such information to such persons as Broker deems appropriate, including the appraisal district. Any information or data, including information about a lease, shall become the property of the listing service for all purposes. **NOTICE: Submitters of information to these services insure that persons who benefit from the service also contribute information.**
 - (2) Broker shall not file this Listing with a Multiple Listing Service.
- (i) **Cooperation with other brokers:** Cooperating with and compensating other brokers means Broker will allow other brokers to show the Property to prospective tenants and if another broker procures an acceptable offer, Broker will pay the other broker part of the Broker's Fee described in paragraph 7(a). Broker shall offer cooperation and compensation (choose only one): only to tenant agents; only to subagents of Broker; to both tenant agents and Broker's subagents. Broker will determine the terms and conditions of offers to cooperate with and compensate other brokers.

6. AGENCY RELATIONSHIPS:

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Initials for Identification: _____ Landlord and _____ Broker/Associate

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EXHIBIT

A

- (a) Landlord acknowledges receipt of the attached exhibit entitled "Information About Brokerage Services", which is incorporated in this Listing for all purposes.
- (b) Broker shall exclusively represent Landlord in negotiations for the lease of the Property unless Landlord authorizes Broker, as set forth below, to act as an intermediary in the event Broker also represents a tenant who offers to lease the Property (choose (1) or (2)).
- (1) Intermediary Relationship Authorized: Landlord authorizes Broker to show the Property to prospective tenants Broker has agreed to represent. If Broker represents a tenant who offers to lease the Property, Landlord authorizes Broker to act as an intermediary between the tenant and Landlord, to present any offer such tenant may wish to make, and to assist both Landlord and tenant in negotiations for the lease of the Property. If Broker acts as an intermediary between Landlord and a tenant, Broker:
 - (i) may not disclose to the tenant that the Landlord will accept a price less than the asking price (Listing Price) unless otherwise instructed in a separate writing by the Landlord;
 - (ii) may not disclose to Landlord that the tenant will pay a price greater than the price submitted in a written offer to the Landlord unless otherwise instructed in a separate writing by the tenant;
 - (iii) may not disclose any confidential information or any information Landlord or the tenant specifically instructs Broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose the information by the Real Estate License Act or a court order or if the information materially relates to the condition of the Property;
 - (iv) shall treat all parties to the transaction honestly; and
 - (v) shall comply with the Real Estate License Act.

If Broker acts as an intermediary, Broker may appoint a licensed associate(s) of Broker to communicate with, carry out instructions of, and provide opinions and advice during negotiations to Landlord and appoint another licensed associate(s) for the same purposes to the tenant.

- (2) Intermediary Relationship not Authorized: Broker shall exclusively represent Landlord and may not act as an intermediary between Landlord and a tenant. Landlord understands (choose (i) or (ii)).
 - (i) Broker exclusively represents landlords of real property and does not represent tenants.
 - (ii) Broker represents both tenants and landlords of real property. However, Broker shall not show the Property to any tenant Broker
- (c) Broker shall not knowingly, during the term of this Listing or after its termination, disclose information obtained in confidence from Landlord, except as authorized by Landlord or required by law. Broker shall not disclose to Landlord any information obtained in confidence regarding any other person Broker represents or may have represented, except as required by law.

7. BROKER'S FEE:

- (a) Broker's Fee shall be:
 - Five percent (5%) of the lease rent received for the Lease term as stipulated in 7(b)(ii) below, or
 - Five percent (5%) of the monthly gross scheduled rent on a sub-lease as stipulated in 7(b)(iii) below.
- (b) Landlord shall pay Broker's Fee to Broker in cash in Harris County, Texas, when Broker's Fee is earned and payable.
- (1) Earned: Broker's Fee shall be earned when any one of the following events occurs during the term of this Listing: (i) Broker individually or in cooperation with another broker procures a tenant who enters into a lease with Landlord to lease the property; (ii) Broker individually or in cooperation with another broker procures a tenant ready, willing and able to lease the Property at the Listing Price and on terms stated in paragraph 3 or any other price and on terms acceptable to Landlord; (iii) Landlord leases, sells, exchanges, agrees to lease or sell, or agrees to exchange the Property to anyone at any price on any terms; or (iv) Landlord breaches this Listing.
- (2) Payable: Once earned, Broker's Fee shall be payable (choose only one):

- (i) in one payment upon _____
- (ii) in two payments, the first payment equal to One Percent (1%) % of the total amount of the Broker's Fee upon initial lease execution and the remainder upon first payment of any funds as provided for in the agreement / lease agreement.
- (iii) in a number of installments equal to the number of rental periods in the lease. The amount of each installment is to be calculated by multiplying the percentage of all rents stated as the Broker's Fee in paragraph 7(a) by the rent collected. Each installment is due and payable upon Landlord's receipt of each rental payment.
- (iv) _____

Broker's Fee shall be immediately payable in full if Landlord refuses to lease the Property to a prospective tenant at the Listing Price on terms stated in paragraph 3 or at any other price and on terms acceptable to Landlord or if Landlord breaches this Listing.

(i) If Landlord subsequently extends or renews a lease or rental agreement (including new leases for more, less or different space in the Property) with a tenant procured by Broker under the terms of this Listing, Landlord shall pay Broker (complete (i) or (ii)):

- (i) \$ _____
- (ii) Three Percent (3%) of all rents payable for the term of the extension or renewal; in cash in Harris County, Texas, at the time Such extension or renewal commences, in accordance with the same schedule in paragraph 7(b)(2), as an additional fee for the renewal or extension.

(d) If Landlord, during the term of this Listing or during the term of any lease or rental of the Property by a tenant procured by Broker under this Listing, including any renewal or extension (including new leases for more, less, or different space in the Property), or within days after the termination of any such lease or rental, including any renewal or extension, whichever occurs later, executes a contract or option for the sale of the Property, or sells, exchanges, or otherwise transfers a legal or equitable interest (excluding a lease or rental) in the Property to a tenant procured by Broker or any person with whom Broker, any other broker, or Landlord has had negotiations for such sale, exchange, or transfer under the terms of this Listing, Owner shall pay Broker (complete (i) or (ii)):

- (i) \$ _____ or
- (ii) (1%) of the sales price or exchange value of the Property; in cash in Harris County, Texas at closing, as an additional fee for procuring a purchaser for the sale of the Property.

(e) **Broker's Service Fees for Repairs or Maintenance:** Landlord does does not authorize Broker to make or cause to be made any necessary and reasonable repairs or alterations to the Property, including redecorating and general maintenance, not to exceed a total cost of \$ _____ unless Landlord authorizes Broker otherwise. Landlord shall promptly reimburse Broker for any and all costs incurred by Broker for any repairs or alterations. Upon completion of such repairs or alterations, and promptly upon receipt of Broker's invoice, Landlord shall pay Broker a service fee of _____

(f) If within one hundred twenty (120) days after the termination of this Listing (the Protection Period), Landlord leases or rents or agrees to lease or rent the Property to any person whose attention has been called to the Property by Broker, any other broker, or Landlord during the term of this Listing, Landlord shall pay Broker the Broker's Fee and any additional fees as provided in this paragraph 7, provided Broker, prior to or within five (5) days after the termination of this Listing, has sent to Landlord written notice naming the persons whose attention has been called to the Property during the term of this Listing. If during the term of the Protection Period such lease, sale, exchange or transfer occurs while the Property is listed exclusively with another Texas licensed real estate broker, this subparagraph shall not apply and Landlord shall not be obligated to pay Broker's Fee. The term "person" as used herein shall be broadly construed to include any individual or entity in any capacity.

B. BROKER'S AUTHORITY: Broker shall make reasonable efforts and act diligently to lease the Property. Landlord authorizes Broker or Broker's associates to: (a) advertise the Property by means and methods as Broker determines; (b) place a "For Lease" sign on the Property in compliance with any State and local laws, rules, ordinances, restrictions, or covenants; (c) remove from the Property all other signs offering the Property for lease; (d) furnish comparative marketing and lease information about other properties to prospective tenants; (e) disseminate information about the Property to other brokers and their associates; (f) enter the Property at reasonable times to show the Property to prospective tenants; (g) authorize other brokers and their associates, inspectors, appraisers, and repair personnel to enter the Property at reasonable times to show the Property to prospective tenants or for other pertinent purposes; and (h) after execution of a lease to disclose the lease price and terms of lease to other brokers, appraisers, or other real estate professionals. Broker is not authorized to execute any document in the name of or on behalf of Landlord with respect to the Property unless authorized to do so by a separate property management agreement or power of attorney.

9. LANDLORD'S REPRESENTATIONS AND ADDITIONAL PROMISES:

(a) Landlord represents that: (1) Landlord has fee simple title to and peaceable possession of the Property and all improvements and fixtures thereon, unless rented, and the legal capacity to lease the Property; (2) Landlord is not now a party to a listing agreement with another broker for the sale or exchange lease of the Property; (3) no person or entity has any right to purchase, lease, or acquire the Property by virtue of an option, right of first refusal, or other agreement; (4) there are no delinquencies or defaults under any deed of trust, mortgage, or other encumbrance on the Property; (5) the Property is not subject to the jurisdiction of any court; and (6) all written information relating to the Property provided to Broker by Landlord is true and correct.

(b) Landlord shall: (1) cooperate fully in good faith with Broker to facilitate the showing and marketing of the Property; (2) not negotiate with any prospective tenant who may contact Landlord directly, but refer all prospective tenants to Broker; (3) not enter into a listing

agreement with another broker for the sale of the Property without Broker's permission; and (5) provide Broker with copies of all leases or rental agreements, a rent roll, current operating statement, architectural plans, and site plan, if any, pertaining to the Property and advise Broker of any tenants moving in or out of the Property.

10. LANDLORD'S DISCLOSURE OF PROPERTY CONDITION (choose (a) or (b)).

(a) **PROPERTY CONDITION STATEMENT** is attached. Landlord authorizes Broker to furnish prospective tenants and other brokers with a copy of the attached Property Condition Statement. Landlord represents that the attached Property Condition Statement was completed to the best of Landlord's knowledge and belief and that Landlord has disclosed all known material defects and material facts affecting the Property in the attached Property Condition Statement. Landlord agrees to amend the Property Condition Statement if any material change occurs during the term of this Listing.

(b) **DEFECTS TO PROPERTY:**

- (1) Landlord is not aware of any material defect to the Property except: _____
- (2) Landlord is not aware of any environmental hazards or conditions affecting the Property which would violate any federal, state or local statutes, regulations, ordinances or other requirements and more specifically, but without limitation, that: (i) the Property is not now and never has been used for the storage or disposal of hazardous substances or materials or toxic waste, a dump site or landfill, or the housing of any underground tanks or drums; (ii) no radon, asbestos insulation or fireproofing, ureaformaldehyde foam insulation, lead-based paint or other pollutants or contaminants of any nature now exist or have ever existed on the Property; (iii) no wetlands, as defined by federal or state law or regulation are on the Property; and (iv) no threatened or endangered species or their habitat, as defined by the Texas Parks and Wildlife Department or the U.S. Fish and Wildlife Service, are on the Property except as follows: _____
- (3) Landlord is not aware that any part of the Property lies in a flood hazard or flood prone area except _____
- (4) Landlord is not aware of any item, system, or component on or in the Property that does not comply with the Americans with Disabilities Act (42 U. S. C. §12181) or the Texas Architectural Barrier Statute (Art. 9102, VTCS) except Landlord shall protect, defend, indemnify and hold harmless Broker, Broker's associates and any other brokers or their associates, of and from any damages, costs, attorney's fees or expenses arising from Landlord's failure to disclose any material or relevant information or the giving of any incorrect information to Broker, Broker's associates, any other brokers or their associates, or prospective tenants or buyers.

11. BACK-UP OFFERS: Broker shall not be obligated to continue to market the Property after Landlord has entered into a binding lease of the Property. If a subsequent or back-up offer to lease the Property is submitted to Broker after Landlord has entered into a binding lease of Property but prior to the commencement date of the lease, Broker shall shall not submit the subsequent or back-up offer to Landlord. If Broker is to submit subsequent or back-up offers, Landlord shall specifically provide in any lease of the Property that Landlord may receive and negotiate subsequent or back-up offers.

12. BROKERAGE FEE AND CIVIL RIGHTS NOTICE:

(a) Broker's fees, or the sharing of fees between brokers are not fixed, controlled, recommended, suggested, or maintained by the Association of REALTORS®, MLS, or any listing service. The amount Landlord agrees to pay a broker is negotiable.

(b) The law requires that the Broker be shown and made available for review by all persons with a proposed or proposed real estate transaction.

14. **ESCROW AUTHORIZATION:** Landlord authorizes Broker to accept money for security deposit(s) or rent from a tenant and to deposit the money in trust in accordance with the terms of the lease and to make authorized deductions and offsets for Broker's Fee, reimbursements, and other authorized purposes.

15. **LEASE REQUIREMENTS BY LANDLORD:** Landlord instructs Broker to market the Property for Lease specifying the following (specify any specific requirements; e.g., amount of security deposit, payment of utilities, maintenance, etc.).

16. **SPECIAL PROVISIONS:** Landlord and Broker agree that the following entities are excluded from this listing agreement.

- 1. Fleming Corporation
- 2. Affiliated Grocers
- 3. Safeway Corporation
- 4. Janna Financial Corporation

17. **MEDIATION:** The parties agree to negotiate in good faith in an effort to resolve any dispute related to this Listing that may arise between the parties. If the dispute cannot be resolved by negotiation, the dispute shall be submitted to mediation before resorting to arbitration or litigation. If the need for mediation arises, the parties to the dispute shall choose a mutually acceptable mediator and shall share the cost of mediation equally.

18. **ATTORNEYS' FEES:** If Landlord or Broker is a prevailing party in any legal proceeding brought as a result of a dispute under this Listing or any transaction related to or contemplated by this Listing, such party shall be entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorneys' fees.

19. **NOTICES:** All notices shall be in writing and effective when hand-delivered, mailed, or sent by facsimile transmission to:

Broker RJL Real Estate Consultants
725 South Mesa Hills, Suite 1, El Paso, Texas 79912
 Phone (915) 587-8311
 Fax (915) 587-8311

Landlord at
 Phone
 Fax

20. **AGREEMENT OF PARTIES:** Addenda and other related documents which are part of this Listing Agreement include: Information About Brokerage Services;

This Listing contains the entire agreement between Landlord and Broker and may not be changed except by written agreement. This Listing may not be assigned by either party without the written approval of the other party. This Listing is binding upon the parties, their heirs, administrators, executors, successors, and permitted assigns. All Landlords executing this Listing shall be jointly and severally liable

for the performance of all its terms. The laws of the State of Texas shall govern the interpretation, validity, performance, and enforcement of this Listing. Should any clause in this Listing be found invalid or unenforceable by a court of law, the remainder of this Listing shall not be affected and all other provisions of this Listing shall remain valid and enforceable to the fullest extent permitted by law.

21. **ADDITIONAL NOTICES:**

(a) Broker cannot give legal advice. This is intended to be a legally binding agreement. **READ IT CAREFULLY.** If you do not understand

the effect of this Listing, consult your attorney **BEFORE** signing.

BROKER'S PRINTED NAME _____ LICENSE NO. _____

LANDLORD'S PRINTED NAME _____

By: _____

By: _____

BROKER'S or ASSOCIATE'S SIGNATURE

DATE
DATE

LANDLORD'S SIGNATURE