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

In re: : Chapter 11
FURRS SUPERMARKETS, INC.. : Case No. 01-11-10779-SA
Debtor. :

**MOTION OF PINNACLE LOGISTICS, INC. AND COUNTRYWIDE
LOGISTICS, INC. TO COMPEL DEBTOR TO (1) ASSUME OR
REJECT CERTAIN EXECUTORY CONTRACTS AND/
OR ALTERNATIVELY (2) REQUIRING THE DEBTOR
TO TENDER WEEKLY PAYMENTS ON A CASH DEMAND BASIS**

Pinnacle Logistics, Inc. ("Pinnacle") and its affiliate Countrywide Logistics, Inc. ("Countrywide"), through their attorneys, hereby submit their Motion to Compel the Debtor to (1) Immediately Assume or Reject Pursuant to 11 U.S.C. §365 the Warehousing Agreement and the Transportation Agreement (as hereinafter defined) and/or alternatively (2) Requiring the Debtor Pursuant to Bankruptcy Code sections 363 and 105 to provide Pinnacle and Countrywide with adequate protection pending assumption or rejection of the Warehousing Agreement and the Transportation Agreement in the form of weekly cash payments (the "Motion"). In support thereof, Pinnacle and Countrywide respectfully represent and show as follows:

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Preliminary Statement

Pinnacle and Countrywide, pursuant to the terms of certain executory contracts described below and the terms of the Replacement Lien Order (as hereinafter defined), continue to provide post-petition warehousing and transportation services, respectively, to the Debtor. As parties to such executory contracts, and as required by the Replacement Lien Order, Pinnacle and Countrywide have no choice but to continue to render services and incur significant obligations to third parties notwithstanding the Debtor's ability to satisfy its post-petition obligations thereunder. For the reasons noted below, Pinnacle and Countrywide request that the Debtor be compelled to immediately assume or reject the Warehousing Agreement and the Transportation Agreement which govern the respective relationships between the parties. Alternatively, Pinnacle and Countrywide request that pending such determination, the Debtor be compelled to provide weekly cash deposits to Pinnacle and Countrywide as adequate protection, rather than the current monthly cash deposit.

Facts

1. Furr's Supermarket, Inc. ("Furr's" or the "Debtor") is a regional supermarket chain with operations in New Mexico and Western Texas. On or about February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") with this Court.

2. Pinnacle operates warehouse and distribution centers and provides related operational services to its clients. On or about September 23, 1998, Pinnacle and Furr's entered into a Warehousing and Distribution Agreement (the "Warehousing

Agreement”) whereby Furr’s agreed to retain Pinnacle to provide Furr’s with certain warehousing and related services at a warehouse facility located in El Paso, Texas (the “El Paso Warehouse”). A copy of the Warehousing Agreement is annexed hereto as Exhibit A.

3. Countrywide is a common carrier and trucking firm providing transportation of goods and related services to its clients. On or about March 26, 1999, Countrywide and Furr’s entered into a Transportation Services Agreement (the “Transportation Agreement”) whereby Furr’s agreed to retain Countrywide to provide Furr’s with certain transportation and related services. A copy of the Transportation Agreement is attached hereto as Exhibit B.

4. Pinnacle and Countrywide are among the Debtor’s largest secured and unsecured creditors. As of the Petition Date, Pinnacle was owed approximately \$2.1 million by the Debtor which represents unpaid expenses and charges incurred by the Debtor for warehousing and related services during the ten (10) week period prior to the Petition Date.

5. As of the Petition Date, Countrywide was owed approximately \$2.4 million by the Debtor which represents unpaid expenses and charges incurred by the Debtor for transportation and related services during the ten (10) week period prior to the Petition Date.

6. As of the Petition Date, the Debtor had inventory valued at approximately \$9.0 million stored in the El Paso Warehouse. Pinnacle, as warehouseman for the El Paso Warehouse, asserts a first priority Warehouseman’s Lien pursuant to Texas Business and Commerce Code Section 7.209 against such inventory for all unpaid

pre-petition and post-petition amounts due from the Debtor for warehousing and related services arising from the Warehousing Agreement.¹

7. As of the Petition Date, the Debtor had inventory valued at approximately \$700,000 in containers being transported by Countrywide to various stores owned and/or operated by the Debtor. Countrywide, as carrier of Furr's inventory, asserts a first priority Carrier's Lien pursuant to Section 7-307 of the Uniform Commercial Code, as adopted by Texas in Tex. Bus. & Comm. Code. Ann. §7.307 and as adopted by New Mexico in NM Stat. Ann. §55-7-307, for all unpaid pre-petition amounts due from the Debtor for transportation and related services arising from the Transportation Agreement.² Accordingly, Countrywide possesses a first priority Carrier's Lien, up to the amount of the value of the inventory being transported on the Petition Date, for the pre-petition amounts due from the Debtor for transportation and

¹ Section 7.209 of the Texas Business and Commerce Code provides in relevant part that:

A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law.

Tex. Bus. & Com. Code Ann. §7.209(a)(1) (Vernon 1999). Section 7.209 further provides that "[T]he warehouseman's specific lien for charges and expenses under Subsection (a)(1) is effective against any security interest." Tex. Bus. & Com. Code Ann. §7.209(c)(emphasis supplied).

² Section 7-307 of the Uniform Commercial Code provides in relevant part that

A carrier has a lien on goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law.

U.C.C. §7-307(1). A Carrier's Lien confers upon a carrier a specific lien similar conferred to that of a warehouseman's lien. See 7A Anderson, Uniform Commercial Code, §7-307:3 through §7-307:4 at p. 704 (3d ed. 1995).

related services arising under the Transportation Agreement, as well as a post-petition Carrier Lien.

8. On or about February 23, 2001, shortly after these proceedings were commenced, Pinnacle, Countrywide, the Debtor and Heller Financial, Inc., as agent for Furr's prepetition senior lenders (the "Prepetition Senior Lenders") and for a group of lenders that have made certain loans and advances to Furr's as a debtor-in-possession (the "DIP Lenders"), agreed to and submitted an Order that, among other things, granted Pinnacle and Countrywide first priority replacement Warehouseman's and Carrier's liens, respectively, to the extent that such pre-petition liens are valid, on the Debtor's post-petition inventory for all charges and expenses due and owing by the Debtor pre-petition, and to the extent valid, continued their post-petition liens as well (the "Replacement Lien Order"). This Court signed and entered the Replacement Lien Order on March 2, 2001, effective as of February 9, 2001. The Prepetition Senior Lenders and DIP Lenders assert that their liens are senior to some or all of Pinnacle and Countrywide's pre and post-petition liens. If they are correct, Pinnacle and Countrywide only may have, in whole or part, unsecured and/or administrative claims.

9. In addition to granting Pinnacle and Countrywide certain replacement liens in respect of their pre-petition statutory lien claims, the Replacement Lien Order further provides as follows:

Further Relief. Except as otherwise provided by the contracts, and as provided that neither Furr's nor Pinnacle or Countrywide (as the case may be) is in default of any post-petition obligation under their respective contracts, Furr's, Pinnacle and Countrywide must continue to perform their

respective obligations under the contracts, unless otherwise ordered by the Court.

10. Subsequent to entry of the Replacement Lien Order, on or about March 15, 2001, the Court entered the Final Order (1) Authorizing Debtor To Obtain Secured Financing (2) Granting Adequate Protection and (3) Granting Other Relief (the "Final DIP Order"). Pursuant to the terms of the Final DIP Order, the DIP Lenders made available to the Debtor a \$33 million revolving credit facility pursuant to which the Debtor could borrow funds to pay for inventory and other day to day operating costs (the "DIP Credit Facility"). It is not clear how much, if any, of that facility remains undrawn or available to the Debtor.

11. Pursuant to the Replacement Lien Order and the contracts, Pinnacle and Countrywide have continued to perform and render services to the Debtor post-petition under the terms of the Warehousing Agreement and the Transportation Agreement.

12. Under the terms of the Warehousing Agreement and the Transportation Agreement, the Debtor is required to tender monthly payments to Pinnacle and Countrywide for services provided under the respective agreements. In general, Pinnacle and Countrywide invoice the Debtor ten days prior to the beginning of each monthly "accounting period" based on a mutually agreed budget. Thereafter, the Debtor is required to tender payment of the invoiced amount no later than the 15th day of such accounting period. At the end of the accounting period, the parties reconcile, or "true-up", amounts due for the actual expenditures of Pinnacle and Countrywide. The net effect of this is that for any given accounting period the Debtor is ahead for

two weeks and Pinnacle and Countrywide are ahead for two. The average monthly charges under the Warehousing Agreement are approximately \$1,050,000 and under the Transportation Agreement are \$650,000. Thus, for two weeks each period Pinnacle and Countrywide are owed approximately \$1,700,000.

Relief Requested

13. Pinnacle and Countrywide are concerned with the Debtor's ability to continue to pay its post-petition obligations incurred under the Warehousing Agreement and the Transportation Agreement and assert that the current circumstances justify requiring the Debtor to immediately assume or reject the Warehousing Agreement and the Transportation Agreement and provide Pinnacle and Countrywide with adequate assurance of future performance of all of the Debtor's obligations. Alternatively, pending such a determination, the Debtor must insure that all post-petition obligations be paid in full by providing (a) either weekly payments on Wednesday of each week rather than monthly payments, so that the maximum exposure (or advance) is reduced to a period of several days, rather than weeks, or (b) a binding commitment to fund from the DIP Lenders and, if necessary, the Prepetition Senior Lenders

14. The Debtor should advise the Court and all parties in interest as to its availability, if any, under the DIP Credit Facility. Moreover, the Debtor should advise the court and all parties in interest as to whether it has achieved the financial targets contained in its post-petition business plan and whether it is making or losing money. Pinnacle and Countrywide should not be forced to incur post-petition claims if the Debtor is not administratively solvent.

15. The Debtor has publicly announced its intention to try to sell its business. It is not clear what the value of the business is, but that may depend on whether it is sold as an asset sale or going concern sale. If the value of the business is less than the amount of the secured debt, then the estate may be administratively insolvent. There is no carve out for administrative expenses (other than for certain professionals), so creditors continuing to provide goods or services are at risk.

16. Moreover, Pinnacle and Countrywide have been contacted by third parties interested in acquiring the Debtor's inventory and entering into wholesale supply agreements with the Debtor. To the extent that involves the early termination of either the Warehousing Agreement or Transportation Agreement, the estate faces potentially large additional claims. In that regard, we note that the inventory level at the warehouse, although initially increasing since the filing, has over the past few weeks been steadily declining. In order to render performance under the Warehousing and Transportation Agreements, Pinnacle and Countrywide are required to employ over 260 people (including 161 union personnel) dedicated to servicing Furr's, and has significant obligations to third parties relating to dedicated warehouse and transportation equipment. In addition, the value of goods being transported by Countrywide on the Petition Date only totaled approximately \$700,000. Presently, Pinnacle and Countrywide estimate that their aggregate damages, resulting from pre and post-petition amounts owed for services provided plus damages resulting from any early termination of the Warehousing and Transportation Agreement, will result in a total pre and post-petition claim against the estate of approximately \$16 million. Therefore, even if Pinnacle's Warehouseman's lien and Countrywide's Carrier's lien

are valid and of first priority as we believes them to be, the liens will not likely be covered for the full amount of exposure.

17. In any event, notwithstanding the statutory liens asserted by Countrywide and Pinnacle, the DIP Lenders and Prepetition Senior Lenders continue to assert a lien senior to the Warehouseman's and Carrier's liens asserted by Countrywide and Pinnacle, and have refused to provide a carve out for Pinnacle and Countrywide, or any other trade creditor. Pinnacle and Countrywide have attempted to resolve its issues relating to adequate protection with representatives of the Debtor and the DIP Lenders but, to date, no resolution has been achieved.

18. As a consequence of the foregoing, to the extent Pinnacle's and Countrywide's statutory liens are adjudicated to be senior to that of the pre-petition lenders, the depletion of inventory and/or rejection of the Warehousing Agreement and Transportation Agreement could give rise to significant claims for which there may be insufficient protection, particularly if the post-petition amounts for services rendered increase in an unprotected manner. Moreover, in the event that Pinnacle's and Countrywide's Warehouseman's and Carrier's liens are subsequently adjudicated to be subordinate to the liens of the pre-petition or DIP lenders, any recovery by Pinnacle and Countrywide are at substantial risk.

19. Bankruptcy Code section 365 does not specify a time by which an executory contract such as the Warehousing Agreement and Transportation Agreement must be assumed or rejected by a debtor. However, Bankruptcy Rule 6006 permits the Court, upon request of the other party to the contracts, to compel the

Debtor to determine whether to assume or reject the Warehousing Agreement and Transportation Agreement.

20. Based on the foregoing, including the facts and circumstances that will be more fully set forth at the hearing on this motion, Pinnacle and Countrywide assert that the Court should compel the Debtor to immediately assume or reject both the Warehousing Agreement and the Transportation Agreement.

21. Alternatively, pending the assumption or rejection of the Warehousing Agreement and the Transportation Agreement, and in order to provide reasonable adequate protection for post-petition services being rendered absent a funding commitment from the DIP Lenders, Pinnacle and Countrywide request the Court to direct the Debtor to make weekly advance payments to Pinnacle and Countrywide as described above.

CONCLUSION

WHEREFORE, Pinnacle and Countrywide respectfully request that this Court enter an Order directing the Debtor to assume or reject the Warehousing Agreement and the Transportation Agreement with seven (7) days of entry of the date hereof, and/or to require the Debtor to provide Pinnacle and Countrywide adequate protection of its interest in the respective contracts by making weekly cash advances each Wednesday and to grant Pinnacle and Countrywide such other relief as this Court deems fair and proper.

Dated: April 24, 2001

Respectfully submitted.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.C.

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CERTIFICATE OF SERVICE:

I hereby certify that I mailed a true and correct copy of the foregoing pleading, by U.S. Mail, first class, postage prepaid, on this 24th day of April, 2001 to the following:

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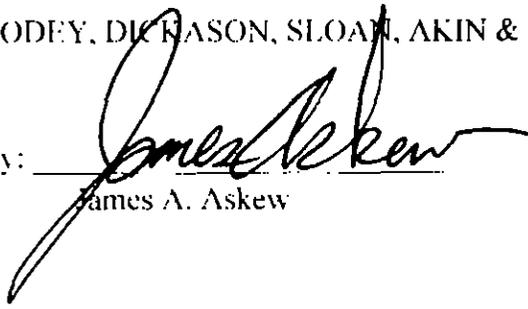
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By: _____

A handwritten signature in black ink, appearing to read "James A. Askew", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

James A. Askew