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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,
a Delaware Corporation,

Case No. 11-01-10779 SA
Chapter 11

Debtor.

MOTION FOR ORDER EXTENDING TIME
TO ASSUME OR REJECT UNEXPIRED LEASE WITH
TRI-STATE COMMERCIAL ASSOCIATES

Furr's Supermarkets, Inc. (the "Debtor") requests that the Court enter an order, under Bankruptcy Code § 365(d)(4), extending until August 10, 2001, the time to assume or reject a lease with Tri-State Commercial Associates for a supermarket in Fort Stockton, Texas.

1. Following an April 3, 2001 hearing, this Court entered an order (Document No. 326), extending until August 10 the time for the Debtor to assume or reject all unexpired real property leases, except the lease with Tri-State. The Court extended the time to assume or reject the Tri-State lease to June 9, 2001, without prejudice to the Debtor's right to request a further extension.

2. At the April 3 hearing, the Court stated that the Debtor needed time to evaluate each of its 70-plus store leases intelligently, to allow potential suitors to evaluate the leases, and to incorporate its decision with respect to the leases in its reorganization

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plan. The Court said that there could be a "big downside" if the Debtor were forced to make a premature decision and decided wrongly, and that the extension to August 10, 2001 posed no real damage to landlords so long as the Debtor remained current on all post-petition obligations.

3. The Court granted a shorter extension for the Tri-State lease for two reasons: First, by its terms, the Tri-State lease expires on August 28, 2001, although on February 27, 2001, the Debtor exercised an option to renew the lease for an additional five years. At the hearing, counsel for Tri-State and the Debtor disagreed as to the effect of this action: Tri-State suggested that the exercise of the option required court approval, the Debtor argued that the exercise was an "ordinary-course" transaction. The Court concluded that Tri-State should have the opportunity to seek a determination of that issue before the Court extended the time to assume or reject the lease for more than two months.

4. Second, Tri-State argued that the proximity of August 10 – the extension date for all other leases – to the August 28 lease termination date was prejudicial. The Court did not rule on this issue. It stated that it would consider the issue if the Debtor sought a further extension.

THE COURT SHOULD EXTEND THE TIME TO ASSUME OR REJECT THE TRI-STATE LEASE TO THE SAME DATE AS ALL OTHER LEASES

5. In coming weeks, the Debtor expects to move to reject certain leases for unprofitable supermarket properties. But the Fort Stockton store is a profitable store, and the Debtor believes that the lease with Tri-State is on or better than market terms. It wishes to retain the option to assume or reject the lease through August 10 - the same date as all other leases – to preserve maximum flexibility in negotiating with potential acquirers and in formulating its reorganization plan.

A. Tri-State Has Not Sought a Determination as to the Exercise of the Option

6. Importantly, since the April 3, 2001 hearing, Tri-State has chosen to seek a determination as to the effectiveness of the Debtor's post-petition exercise of the renewal option. Tri-State can raise the issue if the Debtor moves to assume and assign the lease. If the Debtor elects to reject the lease, the issue will be moot.

B. An Extension Will Not Prejudice Tri-State More than Any Other Landlord

7. Whether or not the Debtor effectively exercised the renewal option, an extension to August 10, 2001 will not prejudice Tri-State more than any other landlord. Each landlord will know, on or before August 10, whether the Debtor intends to vacate its

property and whether to look for a replacement tenant. The landlord may receive short notice of the Debtor's decision, but that result is not unique here–it is a function of the Bankruptcy Code and the operation of § 365. And the effect on Tri-State will be no different than that on any other landlord.

C. The Same Factors Considered by the Court for Other Leases Apply to Tri-State

8. At the April 3, 2001 hearing, the Court considered the factors listed by the bankruptcy court in *In re Service Merchandise Co., Inc*, consisting of: (1) whether the lease is the primary asset of the debtor; (2) whether the lessor has a reversionary interest in the building built by the debtor on the landlord's land; (3) whether the debtor has had time to intelligently appraise its financial situation and potential value of its assets in terms of the formulation of a plan; (4) whether the lessor continues to receive rental payments and whether the debtor fails to pay the rent reserved in the lease; (5) whether the lessor will be damaged beyond compensation available under the Bankruptcy Code due to the debtor's continued occupation; (6) whether the case is exceptionally complex and involves a large number of leases; (7) whether need exists for judicial determination of whether the lease is a disguised security agreement; (8) whether the debtor has failed or is unable to formulate a plan when it has had more than enough time to do so; and (9) any other relevant factors.[1]

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[1] *In re Service Merchandise Co., Inc.*, 256 B.R. 744, 748 (Bankr. M.D. Tenn. 2000).

9. At the conclusion of the April 3, 2001 hearing, after hearing evidence and argument of counsel, the Court determined, after evaluating the above factors based on the circumstances of this case, that the Debtor should be granted an extension of time to August 10, 2001 to decide whether to assume or reject the leases, except as to the Tri-State lease the extension should expire on June 9, 2001 without prejudice to the Debtor seeking a further extension. Although some of these factors are irrelevant here, almost all militate in favor of extending the Debtor's time to assume or reject the Tri-State lease. These include Factor (1) – the Debtor's leases, collectively, are its most important asset, and the Debtor has already identified the Ft. Stockton store asw a profitable store and its lease as an at-market lease; Factor (3) – the Debtor and its professionals continue to analyze all leases, including the Tri-State lease, and are actively engaged in formulating a plan that will incorporate the decision with respect to each lease; Factor (4) – Tri-State continues to receive all post-petition rent; Factor (5) – Tri-State will not be damaged by the Debtor's continued occupation; Factor (6) – the case is complex, and there are more than 70 leases; and Factor (8) – the Debtor is working diligently to formulate its plan within the time limit imposed by its lenders, and that the Debtor promised to try to meet at its "first-day" hearings.

10. Factor (9) may be most significant. As the Court explained at the April 3 hearing, a premature, incorrect decision whether to assume or reject could be costly to the estate. If the Debtor rejects the lease, it may lose a valuable asset. If it assumes the lease,

it may incur unnecessary administrative expense - here, five-years' rent, based on its exercise of the option. So long as Tri-State continues to receive post-petition rent, there is no reason to treat it differently from all the Debtor's other leases. The Debtor should have the same time as with other leases to analyze the Tri-State lease, "run it past" potential suitors and obtain their views, and incorporate its decision in its plan.

11. *Tri-State should be treated no differently that the other store landlords with* respect to the time to assume or reject its lease.

(a) The only fact that distinguishes Tri-State from the other store landlords is that Tri-State's lease would expire on August 28, 2001, if the Debtor's exercise of its option to renew the lease were invalid. This fact is irrelevant to the Court's evaluation of the *Service Merchandise* factors.

(b) If the exercise of the renewal option is valid (as the Debtor asserts), Tri-State is in the same position as the other landlords. If the exercise of the renewal option is invalid, then it makes little difference whether the Debtor assumes or rejects the lease, as the lease would expire August 28, 2001. The only reason Tri-State does not know whether its lease expires on August 28, or has been validly renewed, is because Tri-State has chosen to assert that renewal of the lease is a non-ordinary course transaction. The Court limited its initial extension of the assumption/rejection period for the Tri-State lease to give Tri-State the opportunity to obtaining a ruling on this issue. Tri-State chose not to do so.

(c) Moreover, any uncertainty as to when the lease expires, which arises from the lease renewal issue, qualitatively is no different from the inherent uncertainty to a landlord as to when the leasehold term will end prior to assumption or rejection of the lease.

Counsel for Tri-State has advised the undersigned that Tri-State opposes the relief requested by this Motion.

WHEREFORE, the Debtor requests that the Court enter an Order extending the time within which the Debtor may assume or reject the Tri-State lease to August 10, 2001, and that the Court grant the Debtor such other relief as is just and appropriate.

JACOBVITZ THUMA & WALKER
A Professional Corporation

By: _____
Robert H. Jacobvitz and David T. Thuma
500 Marquette N.W., Suite 650
Albuquerque, New Mexico 87102
(505) 766-9272
(505) 766-9287 (fax)

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Richard Levin (CA State Bar No. 66578),
Peter W. Clapp (CA State Bar No. 104307)
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
(213) 687-5000

Attorneys for the Debtor in Possession

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

George "Dave" Giddens

I. William Cohen
Pepper Hamilton, L.L.P.
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243-1157

William F. Davis
Davis & Pierce, P.C.