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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.,
Debtor.

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

NOTICE OF DEADLINE TO OBJECT TO THE DEBTOR'S SECOND MOTION FOR ORDER EXTENDING TIME WITHIN WHICH DEBTOR MAY ASSUME OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY AND NOTICE OF FINAL HEARING

On July 6, 2001, Furr's Supermarkets, Inc. (the "Debtor") filed the attached SECOND MOTION FOR ORDER EXTENDING TIME WITHIN WHICH DEBTOR MAY ASSUME OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY (the "Motion").

Any party who objects to the Motion must file its objection with the Clerk of the Bankruptcy Court, Federal Building and United States Courthouse, 421 Gold Ave. SW., Third Floor, Albuquerque, N.M. 87102 (or P.O. Box 546, Albuquerque, N.M. 87103), **WITHIN TWENTY DAYS AFTER THE DATE OF MAILING OF THIS NOTICE, PLUS THREE DAYS FOR MAIL FOR A TOTAL OF TWENTY-THREE DAYS (*i.e.*, on or before July 30, 2001),** and serve a copy of the objection on Robert H. Jacobvitz, Jacobvitz, Thuma &Walker, P.C., 500 Marquette Ave., N.W., Suite 650, Albuquerque, N.M. 87102 *and* Richard Levin, Skadden, Arps, Slate, Meagher & Flom LLP, 300 South Grand Avenue, Suite 3400 Los Angeles, California 90071-3144. **If any objections are timely filed, a final hearing will be held on August 7, 2001, at 1:30, p.m.** before the Honorable James S. Starzynski, Federal Building and United States Courthouse, 421 Gold Ave. SW., Second Floor, Albuquerque, N.M. 87102. If no objections are timely filed, an order granting the Motion will be presented for entry, and the Debtor will request that the hearing be vacated, without a hearing or further notice.

Date of Mailing: July 6, 2001
No. Notices Mailed: 328

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC., Debtor.

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

SECOND MOTION FOR ORDER EXTENDING TIME WITHIN WHICH DEBTOR MAY ASSUME OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY

Furr's Supermarkets, Inc. (the "Debtor") submits this second motion (the "Motion") for an order under 11 U.S.C. § 365(d)(4) extending the time within which the Debtor must move to assume or reject its unexpired leases of nonresidential real property.

1. On February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for relief under chapter 11 the United States Bankruptcy Code.[1] The Debtor continues to operate its business and manage its properties as debtor-in-possession under Bankruptcy Code §§ 1107(a) and 1108.

2. On April 6, 2001, the Court entered its Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Nonresidential Real Property (the "First Extension Order"), in which the Court extended the time within which Debtor must assume or reject the unexpired lease of nonresidential real property (the "Unexpired Leases") through August 10, 2001.[2]

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[1] 11 U.S.C. §§ 101-1330.

[2] The Court's order entered April 6, 2001 extended the deadline for Debtor to assume or reject the Unexpired Lease for Debtor's store in Fort Stockton, Texas through June 9, 2001. By an order entered June 13, 2001, the Court extended such deadline to August 10, 2001.

RELIEF REQUESTED

3. The Debtor seeks an order under Bankruptcy Code § 365(d)(4) extending until December 21, 2001 (the "Second Extension Period") the time within which it must move to assume or reject its unexpired leases of nonresidential real property.

4. The Debtor is the lessee under approximately 68 Unexpired Leases, excluding the seven described below. Most of the Unexpired Leases are for real estate on which the Debtor operates its stores. The Debtor has rejected two Unexpired Leases, and has moved to reject five additional Unexpired Leases for closed stores[3]. One Unexpired Lease is for the Debtor's headquarters. The Unexpired Leases are integral to the Debtor's continued operations, compliance with the terms of the approved sale of the Debtor's stores, and preservation of the value of the estate.

5. The extension requested in this Motion is based on the terms of the approved sale of the Debtor's assets to Fleming Companies, Inc. ("Purchaser"), and by Debtor's desire to maximize the value of its estate for the benefit of creditors.

THE ASSET PURCHASE AGREEMENT

6. On June 29, 2001, the Court held a final hearing on Debtor's Motion For Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief, filed June 1, 2001 (the "Sale Motion"), in which Debtor sought approval of its sale of assets to Purchaser pursuant to an Asset Purchase Agreement dated June 25, 2001 (the "APA"). The Court granted the Sale Motion, and entered a Sale Order (as defined in

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[3] By an order entered on May 30, 2001, the Court approved the Debtor's rejection of Unexpired Leases for stores 865 and 873. On June 25, 2001, Debtor filed a motion to reject the real property leases along with other unexpired leases and executory contracts for the following stores which were closed in May, 2001 (together, the "Closed Stores"): (a) 8100 Ventura NE, Albuquerque, NM (Store #871); (b) 810 East 21st Street, Clovis, NM (Store #903); (c) 115 Americas Ave. S, El Paso, TX (Store #944); (d) 6910 N Mesa Dr., El Paso, TX (Store #946); and (e) 10765 Kenworthy, El Paso, TX (Store #951).

the APA), on July 3, 2001. Copies of the APA and Sale Order are available to parties in interest. Capitalized terms in this Motion, not otherwise defined, are as defined in the APA.[4]

7. The APA provides generally, with respect to the assignment of Unexpired Leases relating to Store Properties, as follows:

(a). Purchaser will purchase up to 66 Store Properties. Purchaser may elect not to purchase up to 26 of the Store Properties by giving notice within 45 days after entry of the Sale Order (*i.e.* by August 17, 2001), such properties being referred to as the "Rejected Properties," although Purchaser may reject only up to 6 Store Properties within the last 15 days of such 45-day period. If a Rejected Property is Leased Real Property (the term "Leased Property" includes 65 of the 66 operating Store Properties), the Debtor will not assign the respective Unexpired Lease to Purchaser and the Purchaser will not assume the obligations thereunder. Leased Real Property does not include the Debtor's headquarters.

(b) The Closing Date for the purchase of Debtor's assets is expected to be the earlier of August 31, 2001 or satisfaction or waiver of conditions to Closing set forth in the APA. The APA provides that either party may terminate the APA if Closing has not occurred by October 1, 2001 (defined as the "Outside Date").

(c) Purchaser has the right to direct that Debtor assign Unexpired Leases relating to Store Properties directly to Third Party Purchasers designated by Purchaser, by giving Debtor a Third Party Purchaser Notice. Upon receipt from Purchaser of a Third Party Purchaser Notice designating a Third Party Purchaser, Debtor

[4] The APA and Sale Order supercede any discrepancies between the provisions of the APA and the Sale Order, on one hand, and the summary of the terms of the Order and APA as set forth in this Motion.

is to seek to assume and assign the relevant Unexpired Lease to the designated Third Party Purchaser.

(d) Debtor is to operate those Store Properties that have not been assigned to third parties for up 60 days following the Closing Date under a Management Agreement. Purchaser has until three days prior to expiration of the Management Agreement (the "Assignment Deadline") to designate Third Party Purchasers. As soon as practicable after Debtor receives a Third Party Purchaser Notice from Purchaser, Debtor is to seek to assume and assign to the Third Party Purchaser the Unexpired Lease(s) designated by Purchaser.

(e) On the Assignment Deadline, all Unexpired Leases for Store Properties not previously assigned or transferred to a Third Party Purchaser or designated for transfer to a Third Party Purchaser in a timely delivered Third Party Purchase Notice are to be transferred to Purchaser.

(f) The following chart summarizes the anticipated deadlines and time frame within which Debtor is required to operate under the APA and Sale Order:

Sale Order	First Deadline to designate Rejected Properties (30 days)	Final Deadline to designate Rejected Properties (45 days)	Closing Date (or earlier)	Outside Closing Date	Management Agreement Expiration (60 days after closing)	Outside date for Management Agreement Expiration
7/3/01	8/02/01	8/17/01	8/31/01	10/01/01	10/30/01	11/30/01

8. There may be significant value to the Debtor and its estate in the Rejected Properties. Debtor should have a reasonable opportunity to evaluate and, if appropriate, to market any Rejected Properties to others for the benefit of Debtor's estate.

9. Following receipt of a Rejected Property Notice, Debtor will promptly inform the applicable landlord, the U.S. Trustee, and the Unsecured Creditors Committee

of Purchaser's designation of a Rejected Property. Thereafter, Debtor will evaluate the Rejected Property and determine whether (i) to seek to reject the Unexpired Lease associated with the Rejected Property without marketing the property, or (ii) to market the Rejected Property for the benefit of the estate. If Debtor determines it will seek to reject the Unexpired Lease associated with the Rejected Property without marketing the property, Debtor promptly will move to reject the Unexpired Lease associated with such property. On the other hand, if Debtor determines it will market the Rejected Property for the benefit of the estate, Debtor requires an extension of time to assume or reject the Unexpired Lease in question to give Debtor a reasonable time to market the property after it receives notice that the property is a Rejected Property.

10. The requested Second Extension Period gives Debtor time after the Assignment Deadline to assume and assign Unexpired Leases to Third Party Purchasers designated by Purchaser toward the end of the period in which it may make such designations, and to evaluate the Rejected Properties for possible marketing by Debtor to other third parties. As a practical matter, Debtor anticipates that assumption/assignment decisions will be made well prior to the expiration of the requested Second Extension Period with respect to most of the Unexpired Leases.

APPLICABLE AUTHORITY

11. Bankruptcy Code § 365(d)(4) provides that if the trustee (or debtor in possession) does not assume an unexpired lease within 60 days of the case's commencement, the lease is deemed rejected. That section also provides, however, that the Court may extend the 60-day period for "cause."[5]

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[5] [I]n a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order

12. Although there is no Tenth Circuit authority directly on point, the Second, Fifth, and Ninth Circuits have acknowledged that in large cases, courts routinely extend § 365(d)(4)'s 60-day period for deciding whether to assume or reject.[6] In determining whether "cause" exists for an extension, courts have relied on several factors, including the following:

(a) whether the case is complex and involves a large number of leases;

(b) whether the leases are primary among the debtor's assets; and

(c) whether lessors continue to receive postpetition rental payments.[7]

13. All three factors are present here. First, this is a large and complex case. The Court has approved a sale of the majority of Debtor's assets for approximately $110 million dollars; Debtor has more than 4,500 employees, and continues to operate 66 stores in New Mexico and Texas, virtually all of which are located in leased premises that are the subject of Unexpired Leases.

14. Second, these Unexpired Leases constitute an integral component of the Debtor's assets, are critical to Debtor's ability to perform its obligations under the APA and to the sale of its stores while operating, for the highest return to creditors.

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for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (emphasis added).

[6] See, e.g., Legacy, Ltd. v. Channel Home Centers (In re Channel Home Centers), 989 F.2d 682, 688-89 (3d Cir. 1993) (affirming second § 365(d)(4) extension to allow debtor to evaluate unexpired leases); In re American Healthcare Management, 900 F.2d 827, 830 (5th Cir. 1990) (affirming third extension); In re Victoria Station, Inc., 875 F.2d 1380, 1384-85 (9th Cir. 1989) (affirming second extension).

[7] See South St. Seaport L.P. v. In re Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2d Cir. 1996); see also Channel Home Centers, 989 F.2d at 689 ("[I]t is permissible for a bankruptcy court to consider a particular debtor's need for more time in order to analyze leases in light of the plan it is formulating.").

15. Finally, the Debtor expects to remain current on post-petition rent obligations under the Unexpired Leases.

16. The relief requested herein will not prejudice landlords under the Unexpired Leases. Indeed, through the operation of Bankruptcy Code §365(d)(3), landlords enjoy a preferred position that belies any notion that they could be prejudiced. Under that section, a debtor-in-possession is obligated to pay the reserved rent for all postpetition periods before rejection.[8] Indeed, §365(d)(3) grants the landlord's postpetition claims under the lease "automatic" administrative expense status, without the requirement of notice and a hearing.[9] Further, under the APA the Debtor is required to cure all leases arrearages, including post-petition arrears, for all but the Rejected Properties. Given these protections, the potential for prejudice to any landlord by an extension of the Debtor's time to assume or reject the Unexpired Leases is not significant relative to burden to the estate from a premature assumption/rejection decision.

17. In contrast, if the Court does not extend deadline, the Debtor will have to determine prematurely whether to assume substantial, long-term liabilities under the Unexpired Leases (potentially creating enormous administrative expense claims) or forfeit benefits associated with some leases, to the detriment of its ability to comply with the APA and preserve the estate's value for the benefit of creditors and other parties-in-interest. To prevent this difficult choice, in *Nostas Assocs. v. Costich* (In re Klein Sleep

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[8] Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401 (9th Cir. 1994).

[9] In re Wingspread Corp., 116 B.R. 915, 926 (Bankr. S.D.N.Y. 1990).

Prods.), the Second Circuit suggested that bankruptcy courts should, in appropriate cases, extend the §365(d)(4) deadline until confirmation.[10]

18. Similarly, in *Channel Home Centers* the Third Circuit stated that: nothing prevents a bankruptcy court from granting an extension because a debtor needs additional time to determine whether the assumption or rejection of particular leases is called for by the plan of reorganization that it is attempting to develop.[11]

19. For the reasons set forth in paragraphs 9 and 10, an extension of time within which the Debtor may move to assume or reject any Unexpired Lease to December 21, 2001 is reasonable and appropriate in the circumstances.

20. The Debtor has served a copy of this Motion on the United States Trustee, Counsel for the Unsecured Creditors' Committee, the Debtor's secured creditors, the DIP Lenders, the landlords under the Unexpired Leases, and all parties who filed requests for inclusion on the limited mailing list in this case as of the date of this Motion.

WHEREFORE, the Debtor respectfully requests that this Court enter an order (i) extending the time within which the Debtor must move to assume or reject its unexpired leases of nonresidential real property through December 21, 2001, and (ii) granting such other and further relief as is just and proper.

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[10] 78 F.3d 18, 29-30 (2d Cir. 1996) (suggesting extension until confirmation at which time the debtors' chances of rehabilitation would be clear); see also Burger Boys, 94 F.3d at 760-61 (explaining that a decision to extend time is within the discretion of the bankruptcy court).

[11] 989 F.2d at 689.

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