

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE

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

In re) Chapter 11
)
FURR'S SUPERMARKETS, INC.,)
) Case No. 11 01-10779 SA
Debtor.)
)

**FINOVA CAPITAL CORPORATION'S OBJECTION TO
DEBTOR'S MOTION TO REJECT CERTAIN UNEXPIRED
REAL ESTATE LEASES, SUBLEASES AND EQUIPMENT
LEASES AND LIMITED OBJECTION TO DEBTOR'S AMENDED
MOTION ALLOWING CLAIMS OF SECURED LENDERS**

FINOVA Capital Corporation ("FINOVA") respectfully submits this Objection to the Debtor's Motion to Reject Certain Unexpired Real Estate Leases, Subleases and Equipment Leases filed August 17, 2001 (the "Motion") and its Limited Objection to Debtor's Amended Motion Allowing Claims of Secured Lenders, and states as follows:

A. Introduction

1. FINOVA objects to the Debtor's Motion to partially reject FINOVA's multi-store Lease to the extent that the Debtor attempts to reject portions of the Lease without complying with Section 365 of the Bankruptcy Code.

2. FINOVA leased certain store equipment to the Debtor pursuant to the terms and conditions of a single unexpired lease of personal property entitled Equipment Lease No. 5645900 dated December 29, 1995 (the "Master Lease") together with all addenda, amendments, schedules and other ancillary documents. Specifically, the Lease includes Master Lease Schedule No. 5645900 dated as of December 29, 1995, Master Equipment Lease Schedule No. C060700101 dated as of December 4, 1997, Master Equipment Lease Schedule No. C022200301 dated as of November 1, 1999 and Master Equipment Lease Schedule No. C022200101 dated as

of August 29, 1998. The Master Lease, addenda, amendments, schedules and other ancillary documents are collectively referred to as the "Lease". (See Exhibit A to the Declaration of Anthony Holland in Support of FINOVA Capital Corporation's Objection to Debtor's Notice Relating to § 365(f)(2) Adequate Assurance Requirements For Assignment of Equipment Leases, Lease Estoppel, and Final Hearing filed on August 14, 2001.

3. Pursuant to the Master Lease, each lease schedule is an indivisible part of the Lease.

4. The Lease is an unexpired lease subject to the provisions of Section 365 of the Code.

5. On December 29, 2000, pursuant to Agreement No. R5645900, the Debtor financed the purchase of the equipment originally subject to Master Lease Schedule No. 5645900. FINOVA acknowledges that Agreement No. R5645900 is a secured financing arrangement and is not part of the Lease.¹

6. According to the Debtor's records, the equipment leased pursuant to FINOVA's Master Equipment Lease Schedule No. C022200301 is located at Store Nos. 811, 862, 881, 936 and 944; the equipment leased pursuant to FINOVA's Master Equipment Lease Schedule No. C0607001 is located at Store No. 952; and the equipment leased pursuant to FINOVA's Master Lease Schedule No. C022200101 is located in Store No. 879.

7. On August 17, 2001, the Debtor filed its Motion seeking authority to reject or conditionally reject the real property leases, subleases and equipment leases at thirty-one grocery stores (the "Rejected Stores"). However, if any equipment lease also included equipment located

¹ FINOVA's collateral for Agreement R5645900 is located at Store Nos. 932, 934, 936 and 950. FINOVA is entitled to all proceeds from the sale of any equipment in which FINOVA has security interest.

at stores other than the Rejected Stores, the Debtor desires to reject only that portion of the equipment lease related to equipment located at the Rejected Stores.

8. Specifically, the Debtor's Motion seeks to reject only that portion of FINOVA's Lease where the equipment is located at Store Nos. 811, 862 and 952.²

B. The Lease May Not Be Rejected On A Store-By-Store Basis.

9. The Debtor's attempt to reject only part of FINOVA's Lease does not comport with the requirements of § 365. The Bankruptcy Code does not allow a Debtor to partially assume or reject a lease. It is a matter of black letter law that an executory contract or unexpired lease must be assumed or rejected "*cum onere*, with all of its benefits or burdens" and "cannot be assumed in part and rejected in part." Leslie Fay Companies, Inc. v. Corporate Property Assocs. 3 (In re Leslie Fay Companies, Inc.), 166 B.R. 802, 808 (Bankr. S.D.N.Y. 1994). The Debtor essentially asks this Court to re-write an unexpired lease to provide the Debtor with more favorable terms than originally bargained for under the Lease. This is a power not granted to the Court under the Bankruptcy Code.

10. The Debtor may not reject that portion of FINOVA's unexpired Lease based on the location of the equipment rather than on the terms of the contract. The Bankruptcy Code does not provide authority for the Debtor to "cherry pick" the particular provisions of a contract it wishes to assume or reject. See, e.g., In re Nat'l. Gypsum, 208 F.3d 498, 506 (5th Cir. 2000); Cottman Transmissions, Inc. v. Holland Enters., Inc. (In re Holland Enters., Inc.), 25 B.R. 301, 302-303 (E.D.N.C. 1982). Thus, the Debtor cannot pick and choose the particular pieces of equipment it wants to reject on a store-by-store basis, irrespective of the Lease terms.

² On July 30, 2001, FINOVA filed its objection to the Debtor's attempt to reject only that portion of FINOVA's Lease where equipment was located at Store No. 944.

11. Further, FINOVA objects to the Debtor's Motion to the extent they allege the Lease is a secured financing rather than a true lease subject to Section 365. On March 7, 2001, FINOVA commenced a case under Chapter 11 of the Bankruptcy Code and operates as a debtor-in-possession in the United States Bankruptcy Court for the District of Delaware. The Lease is considered to be a substantial asset of FINOVA's estate. Any attempt to re-characterize the nature of the Lease would require that the Debtor file adversary proceeding against FINOVA. However, the Debtor may not commence an action to proceed against FINOVA or its property without obtaining an order modifying the automatic stay.³

12. Finally, FINOVA also submits its limited objection to the Debtor's Amended Motion Allowing Claims of Secured Lenders to the extent that the Debtor's Amended Motion does not provide that if it is determined, by agreement or otherwise, that FINOVA holds a secured claim rather than a claim as a true lessor, FINOVA would, in that instance, hold a purchase money secured claim senior to any other claims against FINOVA's collateral.

WHEREFORE, FINOVA Capital Corporation respectfully requests that this Court enter an Order:

1. Denying the Debtor's proposed store-by-store rejection of FINOVA's Lease;
2. Denying the Debtor's Amended Motion Allowing Claims of Secured Lenders to the extent the Motion does not recognize that in the event it is determined that FINOVA holds a secured claim rather than a claim as a true lessor, FINOVA would have a senior secured interest in its collateral; and

³ With respect to Agreement R5645900, FINOVA does not consent to the sale of its collateral pursuant to the provisions of Section 363(f) of the Code and arguably, any such attempted sale of its equipment is violative of the automatic stay imposed in FINOVA's Chapter 11 case.

3. Granting such other and further relief as this Court deems just and appropriate.

Dated: August 22, 2001

FINOVA CAPITAL CORPORATION

By: _____

Charles P. Schulman (IL Bar No. 6196461)
Allen J. Guon (IL Bar No. 6244526)
Sachnoff & Weaver, Ltd.
30 South Wacker Drive, Suite 2900
Chicago, IL 60606
Telephone: (312) 207-1000
Facsimile: (312) 207-6400

CERTIFICATE OF SERVICE

I, Allen J. Guon, hereby certify that I served a copy of the foregoing FINOVA Capital Corporation's Objection to the Debtor's Motion to Reject Certain Unexpired Real Estate Leases, Subleases and Equipment Leases on the following:

Robert H. Jacobvitz
David T. Thuma
Jacobvitz, Thuma & Walker
500 Marquette, NW #650
Albuquerque, NM 87102
Fax: (505) 766-9287

Richard Levin
Skadden, Arps, Slate, Meagher & Flom LLP
300 South Grand Avenue
Los Angeles, CA 90071
Fax: (213) 621-5642

via facsimile at the telephone numbers listed above on this 22nd day of August, 2001.



Allen J. Guon