

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

IN RE:

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

Debtor.

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Case No. 11-01-10779-SA

**LA FERIA PARK N SHOP, INC'S OBJECTION TO DEBTOR'S MOTION
FOR ORDER EXTENDING TIME WITHIN WHICH DEBTOR MAY
ASSUME OR REJECT UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

Comes now LA FERIA PARK & SHOP, INC. ("La Feria"), a Lessor, creditor and party-in-interest in the above Chapter 11 case and files its *Objection to Debtor's Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Non-Residential Real Property (the "Objection")*, and in support thereof, would respectfully show the Court as follows:

I. Factual & Procedural Background

1. *La Feria* is a lessor under a *Supermarket Lease* for non-residential real property dated January 11, 1999 (the "*Lease*") whereby Furr's leases from *La Feria* to operate a store located at 319 S. Main, in Anthony, Texas. A copy of the *Lease* is available from *La Feria's* counsel upon request.
2. The Debtor's *Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Non-Residential Real Property (the "Motion to Extend")* states that most of its unexpired leases are for real estate on which the Debtor operates its stores and that it requires additional time to determine whether such leases should be assumed or rejected. The Debtor specifically seeks until August 10, 2001 (the "*Extension Period*") as the new deadline by which

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it must assume or reject its non-residential real property leases, and is apparently attempting to tie such extension to the plan confirmation process.

3. *La Feria's* lease term with the Debtor is for twenty years and represents the main source of income to *La Feria*. There are approximately eighteen (18) years remaining on the *Lease*.
4. It is *La Feria's* position that the Debtor has had sufficient time to decide whether to assume or reject the *La Feria Lease* and that no extension under §365(d)(4) should be allowed.

II. Applicable Authority

5. Section 365(d) of the Bankruptcy Code provides in relevant part:

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in 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 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.

6. Courts have recognized that the purpose of §365(d) is to protect commercial lessors from the delay and uncertainty caused by a tenant's bankruptcy filing. *In re American Healthcare Management, Inc.*, 900 F.2d 827, 830 (5th Cir. 1990) (also noting that open-ended extensions of time to assume or reject real property leases, such as until conclusion of confirmation hearings, are not appropriate). The Legislative History of §365 provides that it was enacted to address

concerns confronting lessors of shopping centers that faced extended period of vacancy due to the debtor's failure to decide whether to assume or reject a lease. *In re Victoria Station, Inc.*, 875 F.2d 1380, 1383 (9th Cir. 1989), cited with approval by the Fifth Circuit in *American Healthcare*, 900 F.2d at 830. The court recognized that debtors must quickly decide whether to assume or reject commercial leases, and has advised bankruptcy courts to closely monitor the activities of a debtor-lessee to ensure that they resolve the status of their leases in a diligent manner. *American Healthcare*, 900 F.2d at 830.

7. The factors examined by a Bankruptcy Court in determining whether an extension of time to assume or reject a commercial lease is appropriate include:
 - (i). Whether the debtor is paying postpetition rent obligations;
 - (ii). Whether the Debtor's continued occupation without assumption could damage the lessor beyond the compensation available under the Bankruptcy Code;
 - (iii). Whether the lease is the Debtor's primary asset; and
 - (iv). Whether the debtor has had sufficient time to formulate a plan of reorganization.See *In re Burger Boys, Inc.*, 94 F.3d 755, 761 (2nd Cir. 1996).

III. Basis for Objection

8. In the present case, the *La Feria Lease* is not the Debtor's primary asset. It is only one of approximately 75 non-residential real property leases. Moreover, since the Petition Date, the Debtor has had sufficient time to analyze whether the *La Feria Lease* is one which should be assumed or rejected.
9. Extending the deadline by which to assume or reject until the date of the submission of a reorganization plan is prejudicial to *La Feria*. Even if the Debtor were to ultimately assume

the *Lease* under its reorganization plan, *La Feria* would still have to wait to review how arrearages would be cured so that assumption could occur. Moreover, if the Debtor were not able to assume the *Lease* because of its failure to cure arrearages or adequately assure *La Feria* that arrearages would be cured within a reasonable period of time, then the *Lease* would have to be rejected.

10. If the *Lease* was rejected because of inability to assume, or if the Debtor rejected the *Lease* outright on August 10, 2001, then the Debtor would have had use of the *Lease* premises for approximately 210 days without making a commitment. This delay would be detrimental to *La Feria's* long-term business planning because it would not be until that point that it could begin seeking a replacement tenant for a large supermarket location in a semi-rural community.
11. Further, the Debtor's *Motion* fails to plead or establish a basis for "cause" to extend the time period under §365(d)(4) of the Bankruptcy Code, and accordingly should be denied.
12. *La Feria* reserves the right to raise other objections to the *Motion* at the hearing.

IV. Conclusion

13. If the Bankruptcy Court determines that cause exists to grant an extension, *La Feria* requests the Court to condition such extension on the lifting of the automatic stay immediately upon default by the Debtor in postpetition rent payments or other lease obligations during the extension period, so that *La Feria* could proceed to immediately terminate the *Lease*.

WHEREFORE, PREMISES CONSIDERED, *La Feria Park & Shop, Inc.*, respectfully prays that the Court enter an order denying the Debtor's *Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Non-Residential Real Property*, and grant such further relief as is just.

Respectfully submitted,

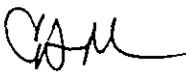
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By: 

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CERTIFICATE OF SERVICE

This is to certify that on the 20th day of March, 2001, a true and correct copy of the foregoing *Objection* was mailed via certified mail, return receipt requested to the parties on the attached list.



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