

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

FILED
OFFICE OF THE CLERK
2001 JUL -6 PM 3:29

In re:

FURR'S SUPERMARKETS, INC.,

No. 11-04-10779-~~SA~~ COURT

Debtor,

**LESSORS' OBJECTIONS TO DEBTOR'S MOTION
TO REJECT CERTAIN UNEXPIRED REAL ESTATE LEASES,
SUBLEASES AND EQUIPMENT LEASES**

COMES NOW Furr's 5 LLC and Furr's 7 LLC (hereinafter, Furr's 5, Furr's 7 or Lessors, as the case may be), by and through their attorneys of record, FAIRFIELD, FARROW, FLOWERS, & STROTZ, P.C. (John E. Farrow) and hereby objects to the Debtor's Motion to Reject Certain Unexpired Real Estate Leases, Subleases and Equipment Leases, and as grounds would show the Court as follows:

1. Furr's 5 is a Texas limited liability company and is the lessor of that certain parcel of real property located at 6910 N. Mesa, El Paso, Texas, upon which the Debtor operates its store number 946.

2. Furr's 7 is a Texas limited liability company and is the lessor of that certain parcel of real property located at 115 Americas Avenue, El Paso, Texas, upon which the Debtor operates its store number 944 (collectively, the Leases).

3. On July 3, 2001, following a hearing, the Court entered an Order that, among other things, approved an Asset Purchase Agreement between the Debtor and Fleming Companies, Inc. (Fleming), and which provides, in Section 2.1, that the Debtor shall unconditionally transfer, and Fleming shall purchase on an "as is" and "where is" basis, all of the Debtor's right, title and interest

220

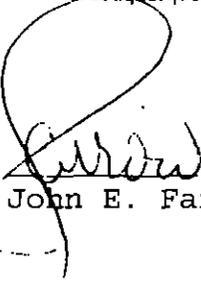
I HEREBY CERTIFY that a true copy of the foregoing pleading was mailed

to the following counsel this 6th day of July, 2001:

JACOBVITZ, THUMA & WALKER, P.C.
Robert H. Jacobvitz, David T. Thuma
500 Marquette NW, Suite 650
Albuquerque, New Mexico 87102

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Jay M. Goffman, Alan J. Carr
Four Times Square
New York, New York 10036-6522

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Richard Levin, Peter W. Clapp, Stephen J.
Lubben
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144



John E. Farrow, Esq.

Pleading Separator Sheet USBC NM

jackie Case Number: 01-10779

Furr's Supermarkets, Inc.,

Document #: 721



01-10779+721+2001-07-06

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
OFFICE OF THE CLERK

01 JUL -6 PM 3:43

In re:

FURR'S SUPERMARKETS, INC.

No. 11-01-10779-SA

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

Debtor.

**OBJECTION OF HELLER FINANCIAL LEASING, INC. TO THE DEBTOR'S
MOTION TO REJECT CERTAIN UNEXPIRED REAL ESTATE LEASES,
SUBLEASES, AND EQUIPMENT LEASES**

Heller Financial Leasing, Inc. ("Heller") hereby submits this objection (the "Objection") to the Motion to Reject Certain Unexpired Real Estate Leases, Subleases, and Equipment Leases (the "Rejection Motion") of the above-captioned debtor and debtor-in-possession (the "Debtor"). In support of this Objection, Heller respectfully states as follows:

1. On September 30, 1999, General Electric Capital Business Asset
Funding Corporation ("GE Capital Corp.") entered into a Master Equipment Lease

Agreement (the "Master Lease") with the Debtor. Pursuant to the Master Lease, GE Capital Corp. agreed to lease equipment to the Debtor.

2. On September 30, 1999, pursuant to the Master Assignment Agreement, GE Capital Corp. assigned the Master Lease to Heller. Heller, as Assignee, continued to lease equipment to the Debtor pursuant to the Master Lease.

3. On February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtor has retained possession of its assets and continued to operate and manage its business, including multiple grocery stores throughout the

321

Southwest. Heller continues to lease equipment to the Debtor under the Master Lease for use at the various stores the Debtor continues to operate.

4. In May 2001, the Debtor closed five of its 71 grocery stores (the "Closed Stores").

5. On June 25, 2001, the Debtor filed the Rejection Motion seeking to reject certain real property leases, subleases and equipment leases and requesting that it be allowed to reject only those portions of its equipment leases which included personal property located at the Closed Stores.

6. Specifically, the Debtor seeks to reject a portion of the Master Lease for floor cleaning equipment located at the Closed Stores. At the same time, however, the Debtor seeks to maintain other portions of the Master Lease for equipment located at stores which the Debtor continues to operate.

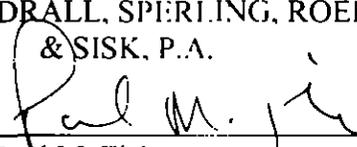
7. It is a basic tenet of bankruptcy law, that a debtor must reject an executory contract or lease in its entirety. In re Storage Corp., 53 B.R. 471, 175-76 (Bankr. D. Colo. 1985); In re Rovine Corp., 6 B.R. 661, 666 (Bankr. W.D. Tenn. 1980). A debtor "may not have its cake and eat it too." In re Holland Enterprises, Inc., 25 B.R. 301, 303 (Bankr. E.D.N.C. 1982). A debtor must assume all the benefits and burdens of a contract or lease and can not cherry-pick which portions of a contract or lease it wishes to honor. Id. Further, a debtor can not seek to avoid this elementary bankruptcy principal by attempting to construe various parts of a transaction as separate agreements. In re Storage Corp., 53 B.R. at 476. Every piece of equipment of Heller used at the Debtor's various stores was provided as part of the Master Lease. Thus, the Debtor simply can not reject the portions of the Master Lease involving equipment at the Closed

Stores while attempting to maintain the remaining portions of the Master Lease. Although a debtor can use its business judgment to determine whether to reject an unexpired lease in its entirety, it can not choose to reject only a portion of such lease because to do so would allow a debtor to enjoy greater rights and powers under a lease in bankruptcy than it would under the same lease outside of bankruptcy. See In re Holland, 25 B.R. at 303.

8. Rejection is an all or nothing concept. If the Debtor wishes to reject the portion of the Master Lease involving equipment at the three Closed Stores, it must seek to reject the Master Lease in its entirety.

Dated: July 6, 2001

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: 

Paul M. Fish

Attorneys for Heller Financial, Inc., Bank of
America, N.A., Metropolitan Life Insurance
Company and Fleet Capital Corporation
Post Office Box 2168
Bank of America Centre, Suite 1000
500 Fourth Street, N.W.
Albuquerque, New Mexico 87103-2168
Telephone: (505) 848-1800

and

David S. Heller
LATHAM & WATKINS
Sears Tower, Suite 5800
Chicago, IL 60606
(312)876-7700
(312)993-9767

This certifies that on July 6, 2001,
A copy of this Motion was mailed by
First Class United States Mail to:

Robert H. Jacobvitz
500 Marquette NW, Suite 650
Albuquerque, NM 87102

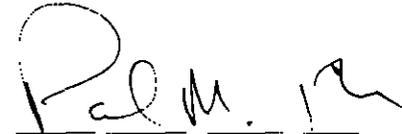
United States Trustee
Post Office Box 608
Albuquerque, NM 87103

Skadden, Arps, Slate, Meagher &
Flom, LLP

William F. Davis
Post Office Box 6

300 South Grand Avenue, Suite 3400
Los Angeles, CA 90071-3144

Albuquerque, NM 87103



PAUL M. FISH