

IN THE UNITED STATES BANKRUPTCY
FOR THE DISTRICT OF NEW MEXICO

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In re:

FURR'S SUPERMARKETS, INC.,

Debtor.

No. 11-01-10779 SA

**OBJECTION OF WEINGARTEN REALTY INVESTORS
TO ASSIGNMENT OF UNEXPIRED LEASES**

Weingarten Realty Investors, a creditor and party-in-interest in the above-styled bankruptcy case, through its attorneys of record, Butt Thornton & Bachr PC, objects to the assignment of its unexpired leases to the third party purchaser, NEWCORP, proposed in the Third Party Purchaser Notice and First Supplemental Third Party Purchaser Notice of Fleming Companies, Inc. served July 27, 2001 and July 31, 2001, as follows:

FACTUAL BACKGROUND

Weingarten Realty Investors is the Lessor under the Shopping Center Lease between La Cuesta Limited Partnership, lessor, and Safeway Stores, Incorporated, lessee, dated July 22, 1983, and Short Form Lease dated July 25, 1983, as modified by First Shopping Center Lease Modification Agreement dated March 8, 1984 and assigned to Furr's, Inc., as lessee, by the Second Shopping Center Lease Modification Agreement dated October 29, 1987, and assigned to Weingarten Realty Investors, as lessor, on March 31, 1995. The leased premises are located at 2280-B, Wyoming N.E., Albuquerque, New Mexico.

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On information and belief, the supermarket operated at the leased premises is known as debtor's store #878. The rent obligations of debtor are set out in paragraph 2 of the Shopping Center Lease. Under paragraph 27, debtor is also obligated to pay a pro-rata share of common area assessments. Debtor is similarly obligated to pay a pro-rate share of taxes under paragraph 26 of the Shopping Center Lease. The Shopping Center Lease does not contain a use restriction, but may be assigned under paragraph 13 only for retail or service purposes.

Weingarten is also the lessor Shopping Center Lease between Dale Ballamah Land Co., Inc., as lessor and Safeway Stores, Incorporated, as lessee dated July 29, 1975, as modified by Lease Modification Agreement dated February 9, 1976, a Second Lease Modification Agreement dated February 10, 1977, a Third Lease Modification Agreement dated May 24, 1977, a Fourth Lease Modification Agreement dated June 9, 1978, and a Fifth Lease Modification Agreement dated June 23, 1980. The lease was assigned to Furr's, Inc., as lessee by the Assignment and Assumption Agreement between Safeway Stores and Furr's, Inc., dated October 29, 1989. The leased premises are located at North Towne Shopping Center, 5901-N Wyoming N.E., Albuquerque, New Mexico, but is listed in the Third Party Notice as being located at 5815 Wyoming NE, Albuquerque, New Mexico.

On information and belief, the supermarket operated by the debtor at the leased premises is referred to as debtor's store #886. Paragraph 30 of the Shopping Center Lease limits the use of the leased premises to use for a general mercantile business. Under Paragraph 13, the lease may only be assigned to another grocery supermarket operator who operates a chain of not less than three other supermarkets. Debtor's rent obligations are as set forth in paragraph 2 of the Shopping Center Lease. In addition, under paragraph 27, debtor is obligated to pay a pro-rata

share of common area assessments and, under paragraph 26, to pay a pro-rata share of taxes.

Weingarten Realty Investors directly, and through its counsel, was served with the Third Party Purchaser Notice and the First Supplemental Third Party Purchaser Notice (the "Notices") and other related documents. These documents include a copy of all documents constituting the lease to be assigned and information for the lessor to contact a representative of the third party purchaser. In addition, subsequent to service of the Notices, Weingarten Realty Investors was provided with certain confidential information relating to the proposed third party purchaser. Pursuant to the terms of the Confidentiality Protective Order entered by the Court, the confidential information relating to the proposed third party purchaser is being filed under seal with this Objection.

OBJECTIONS OF WEINGARTEN REALTY INVESTORS

I. The Third Party Purchaser Notices Do Not Comply with the Order Approving Procedure Relating to the §365(f)(2) Adequate Assurance Requirement for Assignment of Leases.

The Order approving procedure relating to the §365(f)(2) adequate assurance requirement for assignment of leases (the "Order") specifies in detail the documents which are to be provided concerning the proposed assignment of an unexpired lease. The Order requires that documentation ("Documentation") be served by copy of the notice. The Documentation must consist of the following:

- (i) The Third Party Purchaser's (or Purchaser's, as applicable), two most recent year end financial statements (including both a balance sheet and income statement or their equivalent);
- (ii) The Third Party Purchaser's (or Purchaser's as applicable), interim financial statements issued in the year 2001;
- (iii) if the Third Party Purchaser's most recent year end financial statement is not an audited statement, the Third Party Purchaser's two most recent year

end Federal Income Tax return; (iv) document(s) generally describing the Third Party Purchaser's (or Purchaser's, as applicable) management and its experience in a grocery industry; (v) a copy of all documents constituting the Lease and Equipment Lease(s) to be assigned, to the extent in Debtor's possession; and (vi) information for the lessor to contact a representative of the Debtor, Purchaser and Third Party Purchaser to discuss the proposed assignment of the Unexpired Lease." (Order at 2).

The Documentation served with the Notice is deficient in several material respects. First, there was absolutely no financial information concerning the proposed Third Party Purchaser provided with the Notice or Supplemental Notice. Further, the pro forma information subsequently provided does not contain any actual financial information about the proposed Third Party Purchaser. Second, no documents describing the Third Party Purchaser's management and experience in a grocery industry were provided and, again, the information provided subsequent to the Notices contains no real substantive information.

There was minimal information disclosed concerning the Third Party Purchaser. The Third Party Purchaser is merely identified as NEWCORP (to be formed as a New Mexico Limited Liability Company). It is anticipated that the Third Party Purchaser will claim that it presently has no actual financial information that could be provided in accordance to the terms of the Order. However, even absent a prior financial history, the pro forma information provided is insufficient to constitute adequate assurance of future performance under the provisions of the Bankruptcy Code.

Further, absent from the documents provided is any real information concerning even the proposed structure for NEWCORP. Except for two individuals, no documentation has

been provided about the proposed members of the Limited Liability Company, including the contributions of those members.

A potential source has been disclosed concerning proposed financing of the Limited Liability Company, either to pay the purchase price for the acquisition of the stores subject to the leases or for the provision of working capital for operation of the stores. However, the proposed source of financing has not committed to providing such financing and, therefore, there is no assurance that the Third Party Purchaser can even finance the purchase of the two stores. There is essentially no real substantive information from which Weingarten Realty Investors can determine if NEWCORP is a viable financial entity capable of curing the existing defaults and assuming the obligations under the lease.

Further, there is no real information provided concerning the management and experience of the Third Party Purchaser in the grocery industry. The notice identifies Gene Denison and Jan Friederich, as representatives of NEWCORP with information concerning the proposed Limited Liability Company. The only other information provided about NEWCORP is a residential address and phone number in Albuquerque, New Mexico.

Mr. Friederich was a former officer and board member of Furr's, Inc., as well as an officer and board member of debtor, Furr's Supermarkets, Inc. Mr. Denison similarly served as an officer of debtor. Public record, including Court filings in this and prior bankruptcies raise concerns that at least a portion of the failure of Furr's, Inc., as well as of Furr's Supermarkets, Inc., is due to the management of Mr. Friederich and Mr. Denison. Allowing the lease to be assigned to NEWCORP, an entity in which Mr. Friederich and Mr. Denison are apparently involved, is uncertain at best. There is no way that Weingarten Realty Investors can effectively

evaluate the proposed assignment to NEWCORP given deficiencies in the Documentation required by the Order.

**II. Third Party Purchaser's Notices Do Not Provide
The Protection of Landlords Required Under §365**

Weingarten Realty Investors is a landlord under the two unexpired leases identified above. Section 365 of the Bankruptcy Code gives lessors of non-residential real property certain valuable protections in exchange for the lessor's forbearance from pursuing default remedies. The purpose behind Section 365 is to balance the state law contractual rights of the lessor to receive the benefit of its bargain with the federal law equitable right of the debtor to have an opportunity to reorganize. This is accomplished by requiring the debtor to abide by the contract provisions during the pendency of the bankruptcy and to cure any pre-petition defaults upon assumption while prohibiting the lessor from enforcing any pre-petition remedies. *In re Circle K Corp.* 190 B.R. 370, 375 (9th Cir. BAP 1995), *aff'd* 127 F.3d 904 (9th Cir. 1997).

By the Third Party Purchaser and First Supplemental Third Party Purchaser Notices, the debtor seeks an order approving the assignment of the leases to the Third Party Purchaser designated in the Notices, NEWCORP. Given the lack of any substantive financial or management information concerning NEWCORP, the notice fails to provide adequate assurance of future performance as required by 11 U.S.C. § 365(f)(2)(B).

As a limitation on a debtor's right to assume and assign an executory contract or unexpired lease, it is the debtor's obligation to provide adequate assurance of future performance under the lease. 11 U.S.C. § 365(b)(1)(C). Section 365(b)(1)(C) states:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of

such contract or lease, the trustee...(C) provides adequate assurance of future performance under such contract or lease.

Similarly, as a condition to assigning an executory contract or unexpired lease of the debtor, adequate assurance of future performance by the assignee of such contract or lease must be provided. 11 U.S.C. § 365(f)(2). An unexpired lease may be assigned only if the trustee or debtor assumes the lease in accordance with the provisions of § 365 and the trustee or debtor provides adequate assurance of future performance by the assignee of such lease, whether or not there has been a default in the lease. 11 U.S.C. § 365 (f)(2)(A)(B).

In the case of unexpired Shopping Center leases, such as the Weingarten leases, adequate assurance of future performance includes adequate assurance of: (1) the source of rent and other consideration due under such lease; (2) that the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the debtor as of the time the debtor became the lessee under the lease; (3) that assumption and assignment is subject to all the provisions of the lease, including provisions such as use or exclusivity provisions; and (4) that assumption or assignment of the lease will not disrupt any tenant mix or balance in such shopping center. 11 U.S.C. § 365(b)(3).

Satisfaction of the requirements of both Sections 365 (b)(1)(C) and 365 (f)(2)(B) depends on whether the prospective assignee can provide adequate assurance of future performance. Congress intended that the words "adequate assurance" be given a practical, pragmatic construction. The issue of adequate assurance is to be determined under the facts of each particular case. No guarantee is required, but the lessor must be given adequate assurance of future performance so that it will be protected from having to take on the burden of a tenant

who may be likely to default on his lease obligations after the assumption and assignment have occurred. *In re Bygaph*, 56 B.R. 596, 605 (Bankr. S.D.N.Y. 1986).

Weingarten objects to the Notices because they fail to provide any real assurance of future performance. The identity of the proposed assignee has only been disclosed as NEWCORP. Two proposed members of the yet-to-be-formed limited liability company have been disclosed, with little other information concerning finances or management experience. Public information, including information in the Court record, does not provide adequate assurance of future performance and, instead, suggests the opposite.

With respect to NEWCORP, no real substantive business or operating information of any kind has been furnished. The Notices have not disclosed a source of rent payments or payment of other consideration due under the lease, nor has it offered any assurance as to the actual financial condition and operating performance of NEWCORP. The proposed lending source has been unwilling to commit to financing. The information fails to establish a financial condition and operating performance similar to that of the debtor as of the inception of the leases. Furthermore, debtor has offered no assurance that the assignee will abide by the use or exclusivity restrictions contained in the lease.

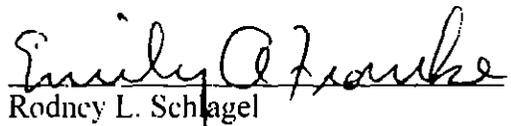
III. CONCLUSION

The documentation served with and subsequent to the Notices is materially deficient. No real financial or other management information concerning NEWCORP has been provided. Nor is there disclosure as to the identity of all members of the Limited Liability Company, or their capital contributions. No committed source for the funding for the purchase of the store or operating capital has been provided. In light of these deficiencies, Weingarten

Realty Investors cannot be adequately assured of future performance of the leases by NEWCORP as required by 11 U.S.C. § 365 of the Bankruptcy Code.

WHEREFORE, Weingarten Realty Investors respectfully requests that the Court find that the adequate assurance requirements of Section 365 have not been met and deny the assignment of the leases to the purchaser, NEWCORP, identified in the Third Party Purchaser and First Supplemental Third Party Purchaser Notices.

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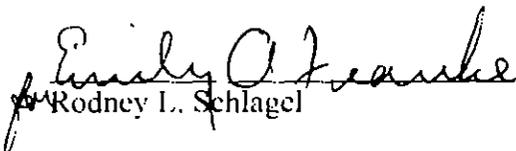
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I hereby certify that a true copy of
the foregoing pleading was served
on this 3rd day of August, 2001,
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