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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

IN RE:	§	
FURR'S SUPERMARKETS, INC.	§	Case No. 11-01-10779-SA
	§	Chapter 11
Debtor	§	(hearing – 8/7/01)

CHARLENE GREEN'S OBJECTION TO ADEQUATE ASSURANCE REQUIREMENTS FOR ASSIGNMENT OF LEASE

TO THE HONORABLE JAMES S. STARZINSKY, U.S. BANKRUPTCY JUDGE:

CHARLENE W. GREEN ("Green"), a lessor, creditor and party-in-interest in the above-referenced case, files the following Objection to the Adequate Assurance Requirements for Assignment of Leases, and would show the Court as follows:

Procedural Background

1. Furr's Supermarkets, Inc., debtor in possession ("Debtor"), filed a voluntary petition for relief on February 8, 2001.

2. By Order entered July 3, 2001, the Court approved an Asset Purchase Agreement between the Debtor and Fleming Companies, Inc. ("Fleming") for the sale of assets of the Debtor.

3. On July 23, 2001, the Court entered an Order Approving Procedure Relating to §365(f)(2) Adequate Assurance Requirement for Assignment of Leases ("Adequate Assurance Procedural Order"). Through such Order, the Court established a procedure with respect to determination of whether the Debtor had satisfied the "adequate assurance" requirements under §365(f)(2)(B) for assignment of leases. In part, such Order required the Debtor to notify lessors of the identity of any potential assignee (a Third Party Purchaser) of the leases selected by Fleming, and provide

financial information regarding the potential assignee to the affected lessor. Under such Order, lessors were given 5 days to object to the adequate assurance requirements after receipt of such Notice from the Debtor.

4. In accordance with the Adequate Insurance Procedural Order entered by the Court, Lessor hereby submits the following objection with respect to the adequate assurance requirements.

Objections to Adequate Assurance

5. Green is a party to and a lessor of one unexpired leases for nonresidential real property ("Lease") with the Debtor. The Lease is a ground lease for Furr's Store No. 948, located at 201 E. Kerbey, El Paso, Texas.

6. On July 27, 2001, Green received a Notice, and on August 1, 2001, an Amended Notice, from the Debtor advising that the proposed Third Party Purchaser and assignee of the Lease was SOUTH CAROLINA ERICA INC. ("Assignee").

7. Green objects to the proposed assignment of its Lease to the Assignee and the Debtor's proposed adequate assurance of future performance, as such adequate assurance does not satisfy the requirements of the Bankruptcy Code.

8. Section 365(f)(2)(B), in pertinent part, provides that the Debtor may not assign an unexpired lease unless "adequate assurance of future performance by the assignee of such lease is provided." Congress' intent in imposing adequate assurance conditions in §365 was to **insure** that the contracting parties (like Green) received the "full benefit of their bargain" if they are forced to continue performance under the lease. *See* In re Ionosphere Clubs Inc., 85 F.3d 992, 999 (2d Cir. 1996); S. Rep. No. 989, 95th Cong., 2nd Sess. 59 (1978); H.R. Rep. No. 595, 95th Cong., 2nd Sess. 348 (1978).

9. The level of adequate assurance of future performance by an assignee is particularly important given the provisions of §365(k), which provides that a debtor's estate will be released from liability for any breach of the lease occurring after the assignment. The legislative history of §365 demonstrates that the focus of the "adequate assurance" inquiry is the possible prejudice to the landlord from the assignment. In re Martin Paint Store, Inc., 199 B.R. 258, 262 (Bankr. S.D. N.Y. 1996), *aff'd*, 207 B.R. 57 (S.D. N.Y. 1997).

10. Under the Bankruptcy Code, adequate assurance includes but is not limited to, the right of the lessor to require a deposit or other security for the future performance of the obligations of the assignee on terms that are substantially similar to what would be required upon initial leasing by lessor to a similar tenant. 11 U.S.C. §365(l). In the instant case, the Debtor and the Assignee do not propose a security deposit to secure the Assignee's future performance under the Lease.

11. The Debtor has failed to provide Green with adequate financial information regarding the proposed Assignee as required by the Adequate Assurance Procedural Order. The financial information provided to Green regarding the proposed Assignee is defective in the following respects: only one (instead of two) most recent year end financial statements were provided; no interim financial statement for the 2001 year was provided; and only one (instead of two) most recent tax returns were provided. Further, no audited financial statements or pro forma projections were provided.

12. At a minimum, the primary focus of the adequate assurance requirement is the assignee's ability to fulfill the financial obligations under the lease. Martin Paint, 199 B.R. at 258. Assignee's financial information and condition does not demonstrate

that it has the ability to fulfill the financial obligations to Green under the Lease. No pro forma financial statements of Assignee's proposed operations of the store that is subject of the Lease has been provided, which is necessary to evaluate Assignee's ability to financially perform in the future under the Lease.

13. According to the Notice and Amended Notice, it is apparent that Assignee is seeking to acquire 6 of the Debtor's stores and leases, and not just the instant Lease. Thus, the ability of Assignee to satisfy the financial obligations under each of the other stores and their leases must be evaluated to determine if Assignee can provide adequate assurance of future performance to Green at the same time.

14. In assessing adequate assurance of the future performance, courts look for evidence of profitability in the proposed future operations. *See* In re Embers 86th Street Inc., 184 B.R. 892, 902 (Bankr. S.D. N.Y. 1985). No financial projections of future profitability of the Assignee have been provided.

15. Green has other specific objections to the financial condition and ability of the Assignee to perform under the Lease. Given the Confidentiality Order that has been entered by the Court however, Green refrains from specifically setting forth such objections expressly in this pleading and instead reserves the right to present them to the Court at the hearing.

16. The original lessee under the Lease with Green was Safeway Stores, Inc. ("Safeway"). The Lease provides that if the original lessee (Safeway) assigns the Lease, the original lessee (Safeway) shall remain liable to Green for full performance of the lessee's obligations. Subsequently, Safeway assigned the Lease to the Debtor. The Debtor has now proposed assigning the Lease to Assignee. An integral part of

providing adequate assurance of future performance to Green is that Safeway remain liable to Green under the Lease if the Lease is assigned to Assignee. Accordingly, Green requests that the Court find, in any adequate assurance order as well as any order that may be entered assuming and assigning the Lease to Assignee, that Safeway is not released or discharged of its obligations to Green under the Lease and remains liable on the Lease to Green.

17. Green also objects to the Debtor's assertion in the Notice and Amended Notice that a true and complete copy of the Lease, including all amendments, modifications and supplements thereto, were provided with the package of documents sent by the Debtor to Green with the Notice. A modification of the Lease exists which was not provided.

18. The Debtor owes substantial amounts to Green to cure prepetition defaults under the Lease. In addition, the Debtor has failed to make timely payments of post-petition rent. Taxes, penalties and interest continue to accrue on the real property that is the subject of the Lease. The Debtor has not specified, in connection with its proposed assumption or assignment of the Lease – **when** the pre-petition defaults will be cured, **how** the defaults will be cured, **whether** they will be cured by the Debtor, Fleming, or the proposed Assignee and **when** the Lease will be assumed and assigned and a hearing thereon will be held. To the extent necessary, Green raises such objections in this pleading and reserves its right to pursue such objections at the time of any hearing on actual assignment and assumption of its leases. Green also requests the right to review and the opportunity to object to any proposed form of order approving the assumption and assignment of its Lease.

WHEREFORE, PREMISES CONSIDERED, Green prays that the Court determine that the Debtor has not complied with the provisions of §365(f)(2)(B), or alternatively, that part of the Court's adequate assurance order find that Safeway remains liable on the Lease to Green if the Lease is assigned by the Debtor to Assignee, and for such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of August, 2001, he caused a true and correct copy of the foregoing Objection to be sent by facsimile and first class mail to counsel for the Debtor as follows:

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