

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

IN RE:  
FURR'S SUPERMARKETS, INC.  
  
Debtor

§  
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§  
§

Case No. 11-01-10779-SA  
Chapter 11  
(hearing – 8/9/01)

**RIVER OAK'S OBJECTION TO ADEQUATE  
ASSURANCE REQUIREMENTS FOR ASSIGNMENT OF LEASES**

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

RIVER OAKS PROPERTIES, f/k/a SUPERMARKET PROPERTIES I LTD. ("River Oaks"), 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

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assignee (a Third Party Purchaser) of the leases selected by Fleming, and provide specified 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, River Oaks hereby submits the following objection with respect to the adequate assurance requirements.

**Objections to Adequate Assurance**

5. River Oaks is a party to three unexpired leases for nonresidential real property ("Leases") with the Debtor as follows:

<b><i>Furr's Store No.</i></b>	<b><i>Location</i></b>
874	13201 Lomas NE, Albuquerque, New Mexico
950	11705 Montwood, El Paso, Texas
952	951 N. Resler Drive, El Paso, Texas

6. On July 27, 2001, River Oaks 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 Leases was NEWCORP ("Assignee").<sup>1</sup> According to the Notice and Amended Notice, NEWCORP is to be formed as a New Mexico limited liability

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<sup>1</sup> The initial Notice from the Debtor and Fleming advised River Oaks that Big 8 Foods Ltd. was the proposed assignee and purchaser of store no. 952. The Amended Notice then changed the proposed assignee and purchaser of such store to NEWCORP.

company. However, no financial information regarding NEWCORP was provided to River Oaks at that time.

7. On August 2, 2001, River Oaks received a small package of information regarding an entity called "Supermarket Enterprise LLC," which apparently is NEWCORP. Such financial information was very limited – a vague letter from a bank stating that it was conducting due diligence for a possible transaction with NEWCORP of an unspecified amount, a brief statement of operation, a superficial opening balance sheet that shows very little equity, and a one-page pro forma statement.

8. River Oaks has not been provided with adequate financial information regarding the proposed Assignee NEWCORP. The limited financial information provided on NEWCORP does not satisfy the requirements set out in the Adequate Assurance Procedural Order (which was proposed by the Debtor). No real financial statements, no tax returns, no real projections, and no real documentation establishing the capital structure, funding, and proposed operations of NEWCORP has been provided. River Oaks objects to the adequate assurance provided by the Debtor for NEWCORP, and requests that it have the opportunity to review complete and adequate financial information on NEWCORP at least 7 days prior to any hearing on the ability of NEWCORP to provide adequate assurance.

9. River Oaks further objects to the proposed assignment of its Leases and the Debtor's proposed adequate assurance of future performance, as such adequate assurance offered to date with respect to NEWCORP does not satisfy the requirements of the Bankruptcy Code.

10. 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 River Oaks) 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, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 59 (1978); H.R. Rep. No. 595, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 348 (1978).

11. 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).

12. Under the Bankruptcy Code, adequate assurance includes but is not limited to, the right of a 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). NEWCORP is apparently a start up operation, with minimal capital and no track record. River Oaks has not been offered a security deposit or other security for the future performance of NEWCORP under the Leases.

13. The Lease on Furr's store no. 952 sought to be assigned to NEWCORP is part of a shopping center development. In the context of a shopping center lease, adequate assurance of future performance additionally requires adequate assurance of: the source of rent, other consideration due under the lease, that the financial condition and operating performance of the assignee is similar to the financial condition and operating performance of the debtor at the time the debtor became lessee, that any percentage rent due under the lease will not decline substantially, that the assignment will not breach any provisions in the lease relating to location, use or exclusivity, and that assignee will not disrupt the tenant mix or balance of the center. 11 U.S.C. §365(b)(3).

14. 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. Each of the Leases have an initial term of 20 years, with the base rent increasing every 5 years. The Lease for store no. 874 has a remaining initial term of 178 months, the Lease for store no. 950 has a remaining initial term of 173 months, and the Lease for store no. 952 has a remaining initial term of 197 months. In addition, property taxes, insurance, and other financial obligations must be paid under the Leases. Accordingly, NEWCORP's financial condition should establish that it has the ability to pay the base rentals over the remaining initial term of the Leases, as well as property taxes, insurance, and other financial obligations under the Leases. To date, NEWCORP has not provided adequate financial information or demonstrated that it has the ability to fulfill the financial obligations to River Oaks under the Leases.

15. According to the Notice and Amended Notice, it is apparent that NEWCORP is seeking to acquire 12 of the Debtor's stores and leases, and not just River Oak's Leases. Thus, the ability of NEWCORP to satisfy the financial obligations under each of the other stores and their leases should be evaluated to determine if NEWCORP can provide adequate assurance of future performance to River Oaks at the same time.

16. In assessing adequate assurance of the future performance, courts look for evidence of profitability in the proposed future operations. See In re Embers 86<sup>th</sup> Street Inc., 184 B.R. 892, 902 (Bankr. S.D. N.Y. 1985). To date, no adequate pro forma financial statements of NEWCORP's proposed operations of the stores that is subject of the Leases or NEWCORP's capital funding has been provided, which is necessary to evaluate NEWCORP's ability to financially perform in the future under the Leases.

17. The Debtor owes substantial amounts to River Oaks to cure prepetition defaults under the Leases. In addition, the Debtor has failed to make timely payments of post-petition rent. Taxes, penalties and interest continue to mount on the real property that is the subject of the Leases. 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 Leases will be assumed and assigned and a hearing thereon will be held. To the extent necessary, River Oaks 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. River

Oaks also requests the right to review and the opportunity to object to any proposed form of order approving the assumption and assignment of its Leases.

WHEREFORE, PREMISES CONSIDERED, River Oaks prays that the Court determine that the Debtor has not complied with the provisions of §365(f)(2)(B) with respect to the proposed assignment of the Leases to NEWCORP, or alternatively, defer a hearing on such adequate assurance until detailed and complete financial information on NEWCORP has been provided to Lessor with at least 7 days to review the information prior to any hearing, and for such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

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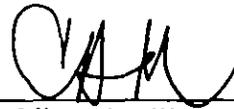
Attorneys for River Oaks Properties

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 2<sup>nd</sup> 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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