

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO  
ALBUQUERQUE

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FEDERAL BANCROFT  
ALBUQUERQUE, N.M.

In re ) Chapter 11  
)  
FURR'S SUPERMARKETS, INC., )  
)  
) Case No. 11 01-10779 SA  
Debtor. )  
)

**FINOVA CAPITAL CORPORATION'S OBJECTION TO  
DEBTOR'S NOTICE OF PROPOSED CURE AMOUNTS,  
OBJECTION DEADLINE AND FINAL HEARING AND NOTICE  
OF BRIEFING SCHEDULE AND OBJECTION DEADLINES REGARDING  
DEBTOR'S STORE-BY-STORE TREATMENT OF CERTAIN LEASES**

FINOVA Capital Corporation ("FINOVA"), respectfully submits this combined  
Objection to the Debtor's Notice of Proposed Cure Amounts, Objection Deadline and Final  
Hearing and Notice of Briefing Schedule and Objection Deadlines Regarding Debtor's Store-by-  
Store Treatment of Certain Leases, states as follows:

A. Introduction

1. FINOVA objects to the Debtor's store-by-store treatment of FINOVA's Lease in  
that the Debtor attempts to make a partial assumption or rejection of a multi-store lease which is  
prohibited by Section 365 of the Code. FINOVA also objects to Debtor's Proposed Cure  
Amounts and Proposed Provisional Cure in that the cure is inadequate and also improperly  
characterizes FINOVA's Lease as a secured financing arrangement. In support of FINOVA's  
position as to the cure amounts is the Declaration of Scott Ploshay attached hereto as Exhibit 1.

2. Pursuant to that certain Equipment Lease No. 5645900 dated as of December 29,  
1995, Master Lease Schedule No. 5645900 dated as of December 29, 1995, Master Equipment  
Lease Schedule No. C060700101 dated as of December 4, 1997, Master Equipment Lease  
Schedule No. C022200301 dated as of November 1, 1999 and Master Equipment Lease Schedule

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No. C022200101 dated as of August 29, 1998 by and between the Debtor and FINOVA (collectively, the "Lease"), the Debtor leased from FINOVA certain equipment for use in the Debtor's business.

3. Pursuant to Equipment Lease No. 5645900, each lease schedule is an indivisible part of the Lease.

4. The Lease is an unexpired lease subject to the provisions of Section 365 of the Code.

5. On December 29, 2000, pursuant to Agreement No. R5645900, the Debtor financed the purchase of the equipment originally subject to Master Lease Schedule No. 5645900. FINOVA acknowledges that Agreement No. R5645900 is a secured financing arrangement and is not part of the Lease.

6. According to the Debtor's records, the equipment leased pursuant to FINOVA's Master Equipment Lease Schedule No. C022200301 is located at Store Nos. 811, 862, 881, 936 and 944; the equipment leased pursuant to FINOVA's Master Equipment Lease Schedule No. C0607001 is located at Store No. 952; and the equipment leased pursuant to FINOVA's Master Lease Schedule No. C022200101 is located in Store No. 879.

B. The Lease May Not Be Assumed And Assigned Or Rejected On A Store-By-Store Basis.

7. The Debtor's Notice proposing a store-by-store treatment of FINOVA's Lease does not comport with the requirements of § 365. The Bankruptcy Code does not allow a Debtor to partially assume or reject a lease. It is a matter of black letter law that an executory contract or unexpired lease must be assumed or rejected "*cum onere*, with all of its benefits or burdens" and "cannot be assumed in part and rejected in part." Leslie Fay Companies, Inc. v. Corporate Property Assocs. 3 (In re Leslie Fay Companies, Inc.), 166 B.R. 802, 808 (Bankr. S.D.N.Y.

1994). The Debtor essentially asks this Court to re-write an unexpired lease to provide the Debtor with more favorable terms than originally bargained for under the Lease. This is a power not granted to the Court under the Bankruptcy Code.

8. The Debtor may not assume and assign or reject a portion of an unexpired lease based on the location of the equipment rather than on the terms of the contract. The Bankruptcy Code does not provide authority for the Debtor to “cherry pick” the particular provisions of a contract it wishes to assume or reject. See, e.g., In re Nat’l. Gypsum, 208 F.3d 498, 506 (5<sup>th</sup> Cir. 2000); Cottman Transmissions, Inc. v. Holland Enters., Inc. (In re Holland Enters., Inc.), 25 B.R. 301, 302-303 (E.D.N.C. 1982). Thus, the Debtor cannot pick and chose the particular pieces of equipment it wants to continue to use on a store-by-store basis, irrespective of the Lease terms.

C. The Debtor’s Proposed Cure Is Inadequate To Cure All Defaults Under The Lease.

9. Prior to assumption and assignment of an unexpired lease, Section 365(b)(1)(A) requires that the Debtor promptly cure all defaults thereunder. 11 U.S.C. § 356(b)(1)(A).

10. If the Debtor desires to continue to use any of the leased equipment, the Code requires that the Debtor assume the Lease in its entirety. FINOVA is unaware of any authority under Section 365 which would allow the Debtor to make a partial assumption based on equipment location rather than on the terms of the Lease. As set forth in Mr. Ploshay’s Declaration, accrued rent, taxes and late charges for the Lease total \$944,839.66, plus attorneys’ fees and costs in the amount of \$26,753.97 as of August 3, 2001.<sup>1</sup> See Declaration of Scott Ploshay attached as Exhibit 1. Thus, the cure as of August 3, 2001, totals \$971,593.63.

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<sup>1</sup> FINOVA concurs with the Debtor’s position that R5645900 is a secured financing arrangement and is not subject to cure pursuant to Section 365. However, FINOVA is entitled to all proceeds from the sale of any equipment to which FINOVA has a security interest.

11. Finally, FINOVA objects to both of the Debtor's Notices to the extent they allege the Lease is a secured financing rather than a true lease subject to Section 365. On March 7, 2001, FINOVA commenced a case under Chapter 11 of the Bankruptcy Code and operates as a debtor-in-possession in the United States Bankruptcy Court for the District of Delaware. The Lease is considered to be a substantial asset of FINOVA's estate. Any attempt to re-characterize the nature of the Lease would require that the Debtor file adversary proceeding against FINOVA. However, the Debtor may not commence an action to proceed against FINOVA or its property without obtaining an order modifying the automatic stay.<sup>2</sup>

WHEREFORE, FINOVA Capital Corporation respectfully requests that this Court enter an Order finding the total cure amount for FINOVA's Lease as of August 3, 2001 is \$971,593.63, denying the Debtor's proposed store-by-store treatment of FINOVA's Lease and for such other and further relief as this Court deems just and appropriate.

Dated: August 11, 2001

FINOVA CAPITAL CORPORATION

By:  \_\_\_\_\_

Charles P. Schulman (#6196461)  
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<sup>2</sup> With respect to Agreement R5645900, FINOVA does not consent to the sale of its collateral pursuant to the provisions of Section 363(f) of the Code and arguably, any such attempted sale of its equipment is violative of the automatic stay imposed in FINOVA's Chapter 11 case.

**CERTIFICATE OF SERVICE**

I, Allen J. Guon, hereby certify that I served a copy of the foregoing FINOVA Capital Corporation's Objection to the Debtor's Notice of Proposed Cure Amounts, Objection Deadline and Final Hearing and Notice of Briefing Schedule and Objection Deadlines Regarding Debtor's Store-By-Store Treatment of Certain Leases on the following:

Robert H. Jacobvitz  
David T. Thuma  
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500 Marquette, NW #650  
Albuquerque, NM 87102  
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Stephen J. Lubben  
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by facsimile at the telephone numbers listed above on this 11<sup>th</sup> day of August, 2001.



Allen J. Guon