

UNITED STATES BANKRUPTCY COURT  
**ORIGINAL** DISTRICT OF NEW MEXICO

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

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779 SA  
Chapter 11

Debtor.

**CONDITIONAL OPPOSITION TO DEBTOR'S PROPOSED REJECTION OF  
EQUIPMENT LEASE FOR EQUIPMENT LOCATED AT THE  
REJECTED STORES**

Petroleum Capital, lessor of printers and other point-of-sale equipment pursuant to an equipment lease agreement with Furr's Supermarkets, Inc. (the "Debtor") dated November 1, 2000 (the "Equipment Lease"),<sup>1</sup> hereby files this Conditional Objection to the Debtor's proposed rejection of the Equipment Lease as it relates to Rejected Stores. Petroleum Capital shall withdraw this Objection should the Court approve the Debtor's proposed Stipulated Order Approving Debtor's Settlement of Certain Equipment Lease Claims ("Stipulated Order"), which includes a proposed settlement with Petroleum Capital.

Absent such approval of the Stipulated Order, Petroleum Capital objects as follows:

1. The Equipment Lease is a fully integrated agreement which is not severable and may not be assumed in part or rejected in part. Bankruptcy Code §365(a) allows a debtor or trustee to assume and reject an executory agreement *provided, however*, that the agreement is assumed or rejected in its totality. Stated another way, the Debtor cannot partially reject a fully integrated executory contract such as the Equipment Lease and pick and choose equipment, by location, type or otherwise, with the hope of keeping items that are of value to the Debtor and rejecting the balance.

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2. For the Debtor to be able to selectively assume and reject the Equipment Lease, the Debtor must establish that the Equipment Lease is severable. *In re Gardinier, Inc.* 831 F.2d 974, 976 (11<sup>th</sup> Cir.), *cert. denied*, 488 U.S. 858 (1988), provides a frequently relied upon three-part test to determine the potential severability of an executory contract: (i) the underlying nature and purpose of the obligations are different; (ii) separate and distinct consideration has been given for each of the obligations; and (iii) the obligations of the parties are not interrelated.

3. The Debtor cannot satisfy any of these three prongs. First, the underlying nature and purpose of the obligations under the Equipment Lease are all related – the Debtor’s lease from Petroleum Capital of printer and point-of-sale equipment for its multiple store locations constitutes a single obligation of the Debtor under a single agreement with a single one-page schedule of equipment. Second, the Equipment Lease requires the Debtor to make a monthly lease payment for all of the equipment notwithstanding the location or type of equipment; there is no separate and distinct breakdown in the Equipment Lease or in any other document. Finally, the obligations of the parties are interrelated – Petroleum Equipment has supplied the point-of-sale equipment in printers in exchange for lease payments to be made by the Debtor. There is nothing more to the Equipment Lease other than the Debtor’s ability to purchase the equipment at the end of the term should it so elect.

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<sup>1</sup> Petroleum Capital understands that a Copy of the Equipment Lease was filed with the Court by Fleming Companies, Inc. on or about July 26, 2001, as part of the “Third Party Purchaser Notice.”

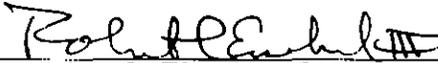
-  
**CONCLUSION**

Petroleum Capital prays that the Court approve the Stipulated Order. However, in the event that the Court does not approve the Stipulated Order, Petroleum Capital prays for an order denying the Debtor's motion, with prejudice, to reject in part the Equipment Lease.

Dated: August 27, 2001

Respectfully submitted,

COOLEY GODWARD LLP

By:   
Robert L. Eisenbach III

One Maritime Plaza  
20<sup>th</sup> Floor  
San Francisco, CA 94111  
(415) 693-2000

Attorneys for Petroleum Capital

1 **PROOF OF SERVICE**

2 I am employed in the City and County of San Francisco, California. I am over the age of  
3 eighteen years and not a party to the within action. My business address is Cooley Godward LLP,  
4 One Maritime Plaza, 20th Floor, San Francisco, California 94111.

5 On August 27, 2001, I served the foregoing document(s) described as:

6 **CONDITIONAL OPPOSITION TO DEBTOR'S PROPOSED REJECTION OF**  
7 **EQUIPMENT LEASE FOR EQUIPMENT LOCATED AT THE**  
8 **REJECTED STORES**

9 on the parties named below in this action by placing true copies thereof enclosed in sealed  
10 envelopes for service and prepared for processing in the manner indicated below, addressed as  
11 follows:

11 David T. Thuma  
12 Jacobvitz, Thuma & Walker P.C  
13 500 Marquette Avenue, N.W. Suite 650  
14 Albuquerque, NM 87102

Richard Levin  
Skadden, Arps, Slate, Meagher & Flom LLP  
300 South Grand Avenue, Suite 3400  
Los Angeles, CA 90071-3144

14 Ronald E. Andazola  
15 Assistant United States Trustee  
16 421 Gold Street, SW, Suite 112  
Albuquerque, NM 87102

William F. Davis  
Davis & Pierce  
201 Broadway SE  
Albuquerque, NM 87102

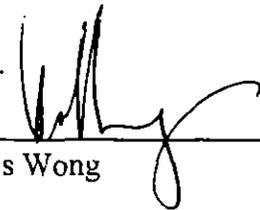
17 XXXX (BY FIRST CLASS MAIL) I caused such document(s) to be placed for collection  
18 and mailing with the United States Postal Service following ordinary business practices. I am  
19 readily familiar with my office's practice for collection and processing of correspondence for  
20 mailing with the United States Postal Service. Correspondence so collected and processed is  
21 deposited with the United States Postal Service that same day with sufficient postage for First  
22 Class Mail affixed thereto.

21 XXXX (BY FACSIMILE) I caused such document(s) to be sent from this office by  
22 facsimile to the facsimile telephone number of the addressee(s) with receipt to be confirmed. I am  
23 readily familiar with my office's ordinary business practice for collection and processing of  
24 correspondence for facsimile transmission, pursuant to which such documents are transmitted by  
25 facsimile that same day.

\* \* \* \* \*

24 XXXX (FEDERAL) I declare that I am employed in the office of a member of the bar of  
25 this Court, at whose direction the service was made.

26 EXECUTED on August 27, 2001 at San Francisco, California.

27   
28 \_\_\_\_\_  
Iris Wong