

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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

In re:

FURR'S SUPERMARKETS, INC.

Debtor.

Case No. 11-01-10779 SA  
Chapter 11

**RESPONSE TO RIVER OAKS', CHARLENE GREEN'S, AND LAKEWAY'S  
BRIEF IN SUPPORT OF AWARD OF ATTORNEY FEES AS PART OF CURE  
AMOUNT FOR ASSUMPTION OF LEASE**

The Debtor Furr's Supermarkets, Inc. (the "Debtor"), by counsel, submits this response to the briefs filed by River Oaks Properties ("River Oaks"), Charlene W. Green ("Green"), and Lakeway Shopping Center ("Lakeway") in support of their request for attorney fees as part of the cure amount for assumption of leases. Together, they seek more than \$18,000 in attorney fees, despite the fact that almost all of the fees have been incurred in connection with filing or litigating objections that have been overruled, withdrawn, or settled with little or no expense.

I. THE BANKRUPTCY CODE DOES NOT ALLOW RECOVERY OF  
ATTORNEY FEES UNLESS THE LEASE SO STATES

The clear majority rule is that 11 U.S.C. §365(b)(1)(B) does not enlarge a landlord's right to attorney fees beyond that granted under the lease. See In re Westside Print Works, Inc., 180 B.R. 557, 563-64 ("the majority of courts have rejected the Westworld Community decision and held that 'Section 365 does not, and was not intended to, give creditors greater rights than they would have had under the contract or lease which gave rise to the debt.'" (citations omitted)). The Westside Print Works case overruled the case River Oaks and Green cited in support of their request for attorney fees, In re Westworld Community Healthcare, Inc., 95 B.R. 730-733 (Bankr. C.D. Cal.

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1989). The other case river Oaks relies upon, In re Foreign Crating, Inc., 55 B.R. 53, 54 (Bankr. E.D.N.Y. 1985), has not been followed, and was questioned by a subsequent case in the “Southern District.” See In re Westview 74th Street Drug Corp., 59 B.R. 747 (Bankr. S.D.N.Y. 1986). The Debtor requests that the court follow the clear majority rule, and the better rule, and hold that River Oaks, Green, and Lakeway may not be awarded attorney fees unless the fees are provided for under the lease at issue.

## II. THE RIVER OAKS LEASES DO NOT ALLOW FOR RECOVERY OF ATTORNEY FEES IN THIS SITUATION

Each of the River Oaks leases has an identical attorney fee paragraph, which is quoted in River Oaks brief. The paragraph is ambiguous on its face. The first sentence of the paragraph requires the Debtor to pay reasonable attorney fees to River Oaks in the event of a default by the Debtor. The remaining two sentences, however, state that the losing party shall pay the prevailing parties’ attorney fees in the event of litigation. In this case, almost all of the attorney fees incurred by River Oaks were in connection with litigating objections that River Oaks filed in the bankruptcy case. In most cases, the objections were overruled or withdrawn (i.e., the objection to the sale to Fleming, and the objection to the adequate assurance in connection with the proposed transfer of stores). With respect to the cure amount motion, River Oaks filed objections to the proposed cure amounts and the matters were easily resolved before the final hearing.

The Debtor submits that the more specific sentences in the attorney fee paragraph should control the general provision, and therefore that the Debtor should not pay attorney fees to River Oaks because River Oaks was not the prevailing party. Under the circumstances of this case, it is not reasonable to pay River Oaks more than \$13,000 for attorney fees.

### III. GREEN IS NOT ENTITLED TO ATTORNEY FEES UNDER HER LEASE

The lease between the Debtor and Green has no attorney fee provision. Therefore, under the case law cited above no award should be made to Green. Green argues that she is entitled to attorney fees under rule of the Texas Civil Practice and Remedies Code, a copy of which is attached. That argument fails. First, the code section relied upon refers to contracts, not real property leases. A long-term real property lease is not a contract. If the Texas legislature had intended to cover leases, it easily could have so stated. Second, the Texas civil procedure code applies to litigation brought in the Texas courts. As this matter is in the United States Bankruptcy Court for the District of New Mexico, the Texas code has no application.

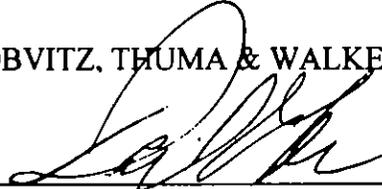
### IV. LAKEWAY IS NOT ENTITLED TO ATTORNEY FEES

The Lakeway lease has an attorney fee provision that explicitly provides for attorney fees to be paid to the prevailing party. Lakeway is not a prevailing party in any sense of the word. Lakeway has not prevailed on any objection it filed in this bankruptcy case, except that when it filed an objection to the proposed cure amount for store 916, the Debtor agreed to increase the cure amount by \$1,156.16. No litigation was involved in this. Lakeway nevertheless wants to collect \$2,116.81 in fees. That is not reasonable and cannot be allowed under the lease or the Bankruptcy Code.

### V. CONCLUSION

For the reasons set forth above, the attorney fee request of River Oaks, Green, and Lakeway should be denied.

JACOBVITZ, THUMA & WALKER, P.C.

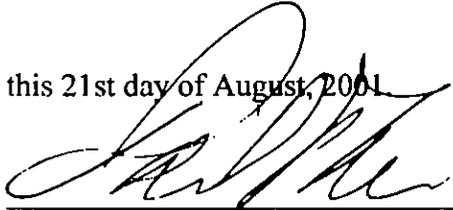
By: 

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This will certify that a copy  
of the foregoing Motion was mailed to

Carlos Miranda  
Krafsur, Gordon, Mott, P.C.  
4695 N. Mesa St.  
El Paso, Texas 79912

this 21st day of August, 2001



David T. Thuma

**CHAPTER 38. ATTORNEY'S FEES****§ 38.001. Recovery of Attorney's Fees**

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an oral or written contract.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

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**§ 38.002. Procedure for Recovery of Attorney's Fees**

To recover attorney's fees under this chapter:

- (1) the claimant must be represented by an attorney;
- (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
- (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

**§ 38.003. Presumption**

It is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable. The presumption may be rebutted.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

**§ 38.004. Judicial Notice**

The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in:

(1) a proceeding before the court; or

(2) a jury case in which the amount of attorney's fees is submitted to the court by agreement.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

**§ 38.005. Liberal Construction**

This chapter shall be liberally construed to promote its underlying purposes.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

**§ 38.006. Exceptions**

This chapter does not apply to a contract issued by an insurer that is subject to the provisions of:

(1) Article 3.62, Insurance Code;

(2) Section 1, Chapter 387, Acts of the 55th Legislature, Regular Session, 1957 (Article 3.62-1, Vernon's Texas Insurance Code);

(3) Chapter 9, Insurance Code;

(4) Article 21.21, Insurance Code; or

(5) the Unfair Claim Settlement Practices Act (Article 21.21-2, Insurance Code).

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.