

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

**FILED**  
12:00 MIDNIGHT  
SEP 07 2001

In re:

FURR'S SUPERMARKETS, INC.

Debtor.

Case No. 11-01-10779 SA  
Chapter 11

**DROP BOX**  
United States Bankruptcy Court  
Albuquerque, New Mexico

**RESPONSE TO BRIEF OF FURR'S 1, 2, 6 AND 8 LLC'S IN SUPPORT OF AN  
AWARD OF ATTORNEYS FEES**

The Debtor Furr's Supermarkets, Inc. (the "Debtor"), by counsel, submits this response to the brief filed by Furr's 1 LLC, Furr's 2 LLC, Furr's 6 LLC and Furr's 8 LLC (collectively, the "Landlords") in support of their request for attorney fees as part of the cure amount for assumption of leases.<sup>1</sup> Together, they seek reimbursement of attorney fees in an unknown amount, 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almost all of the fees have been incurred in connection with filing or litigating objections that have been overruled, withdrawn, or settled with little or no expense and some of the fees were certainly incurred on behalf of landlords whose leases were rejected.<sup>2</sup> The Landlords are not entitled to attorneys fees in any amount under the plain language of the leases with Debtor and the clear provisions of the law.

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*

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<sup>1</sup> The Landlords are only four of eight landlords represented by counsel for the Landlords. The other four are lessors on leases that Debtor has rejected.

<sup>2</sup> The Landlords do not specify the amounts of fees sought in their brief. Counsel for Landlords has told Debtor's counsel that the total fees for all of the eight landlords is approximately \$9,500. Counsel has not provided any statements or other itemization of the fees incurred for each landlord or for the four Landlords that filed the brief in support of attorneys fees.

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Print Works, Inc., 180 B.R. 557, 563-64 (9<sup>th</sup> Cir. BAP 1995) (“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 Debtor requests that the court follow the clear majority rule, and the better rule, and hold that the Landlords may not be awarded attorney fees unless the fees are provided for under the lease at issue.

The Landlords do not provide any information about what services were performed to incurred the claimed attorneys fees and how much of the fees were incurred in connection with the rejected leases as opposed to the assumed leases. In any event, Landlords are not entitled to fees incurred in this case under the leases regardless of whether they were rejected or assumed.

## II. THE LANDLORDS ARE NOT ENTITLED TO ATTORNEY FEES UNDER THE REJECTED LEASES

The Landlords’ base their claim for attorneys fees on Code §365(b)(1). Landlords’ Brief, ¶6. “Entitlement to attorneys’ fees, however, is dependent on the terms of the lease and on state law; § 365(b)(1)(B) does not create an independent right to an award of attorneys’ fees.” *In re J.W. Fortune, Inc.* 173 F.3d 424 (table; text in Westlaw) (4<sup>th</sup> Cir. 1999) (unpublished decision) quoting *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)* 167 F.3d 843 (4th Cir. 1999). New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees. . *Montoya v. Villa Linda Mall, Ltd.* 793 P.2d 258, 259, 110 N.M. 128, 129 (1990) (citations omitted). Authority can be provided by agreement of the

parties to a contract; the scope of that authority is defined by the parties in the contract, and a determination of what fees are authorized is a matter of contract interpretation. *Id.*

Each of the Landlords' leases has an identical attorney fee paragraph, which is only partially described in the Landlords' brief. The Landlords' attorneys fee provision explicitly provides that the "unsuccessful party" shall pay to the "prevailing party" a reasonable sum for attorneys fees, if "Lessor or Lessee files a suit against the other which is in any way connected with this Lease."<sup>3</sup> The same provision is included also in the four rejected leases. The Landlords cannot claim to have "prevailed" in any respect as to the rejected leases. Therefore, under the attorney fee provision and applicable law no fees should be awarded for work done on the rejected leases.

### III. THE LANDLORDS ARE NOT ENTITLED TO ATTORNEY FEES ON THE ASSUMED LEASES

The Landlords also are not the "prevailing party" in any meaningful sense with respect to the assumed leases. The Landlords did not take any action to force the Debtor to assume any leases; the decision was based on the business realities of the sale to Fleming, over which the Landlords had no control. While the Landlords have filed a number of objections to the Debtor's various motions, none of them can be said to have "prevailed." Most resulted in corrections of typographical errors or served to provide unknown information, such the amount of rent owed. In most cases, the Landlords' objections were overruled or withdrawn, or were easily resolved before the final hearing.

The concept of a "prevailing party" is not unique to this situation. Bankruptcy Rule 7054(b) allows the court to award costs to a prevailing party, as do Federal Rule of Civil Procedure 54(d) and New Mexico's rule of civil procedure 1-054.E. Under those

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<sup>3</sup> Article XIX on page 16 of each lease.

rules. "prevailing party" has been held to mean simply "the party in whose favor judgment was entered, even if that judgment does not fully vindicate the litigant's position in the case." 10 J. Moore, *Moore's Federal Practice* § 54.101[3] at 54-157 (3d ed.2000). See *In re Toy King Distributors*, 256 B.R. 1, 211 (Bankr.M.D.Fla.2000). The Landlords are not prevailing parties in any sense. The Landlords have not sought any judgment in this bankruptcy case and no such judgment has been entered in favor of the Landlords. Under any interpretation of the lease language, the Landlords are not entitled to attorneys fees.

#### IV. CONCLUSION

For the reasons set forth above, the attorney fee request of the Landlords, specifically including Furr's 1, 2, 6 & 8 LLC's, should be denied.

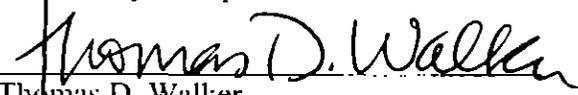
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This will certify that a copy  
of the foregoing Motion was mailed to

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this 7th day of September, 2001.

  
Thomas D. Walker