

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

No. 11-01-10779 SA

IN RE:
FURR'S SUPERMARKETS, INC.,

Debtor.

**KELEHER REALTY, INC.'S RESPONSE TO MOTION FOR ORDER
APPROVING SALE OF SOME OR ALL OF DEBTOR'S OPERATING ASSETS
AND GRANTING RELATED RELIEF**

COMES NOW Keleher Realty, Inc., by and through its attorneys Keleher & McLeod, P.A. (James C. Jacobsen), and as its response to the Debtor's Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief, states:

1. Keleher Realty, Inc. is Lessor under that certain Supermarket Lease (hereinafter, the "Lease") dated January 1, 1996, by and between Keleher Realty and Furr's Supermarkets, Inc. (hereinafter "Furr's" or "Debtor"), under which the Debtor operates a supermarket at 3701 Constitution NE, Albuquerque, New Mexico (the "Premises").

2. Upon information and belief, the Premises are Debtor's Store No. 879.

3. In ¶ 2.4, the Lease is deemed to be a triple "net lease", and Furr's is obligated to pay its Lessor the Basic Rent, the Percentage Rent and all other additional rent, free of all charges, assessments, impositions or deductions of any kind and without abatement, deduction or set-off.

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4. The Basic Rent for the period commencing at the inception of the Lease through December 31, 2002 is \$196,000 per year, payable in twelve equal monthly installments, each installment due on the first day of the month, ¶ 1(b).

5. The Percentage Rent for the material period is one and one-half percent (1 ½ %) of Gross Sales for each of the Lease Years, less the aggregate Basic Rent paid by Furr's for each respective Lease Year, and is to be paid Keleher Realty within forty-five days after the end of each respective Lease Year, ¶2.3.

6. As additional rent, Furr's must pay all Impositions, which are defined as all real estate taxes, assessments, water and sewer rates and charges, vault charges, license and permit fees and other governmental levies and charges general and special, ¶¶2.4 & 3.1.

7. The Lease prohibits Furr's from suffering or permitting any mechanic's or materialmen's liens to be filed against the Premises, and requires Furr's to discharge any such lien within thirty days after the filing thereof. The Debtor is also obligated to indemnify and save harmless Keleher Realty from any and all claims by or on behalf of any person arising from the conduct or management of, or from any work or thing whatsoever done in and on, the Premises, and from all claims arising from the condition of the Premises, from any act of negligence by the Debtor and from any accident injury or damage caused to any person or property in or about the Premises, ¶¶12, 16.1, 16.2.

8. The Lease provides that in the event the Lease is assigned and the Premises are used for a purpose other than a supermarket, the Basic Rental will be adjusted, ¶14.1.

9. Should Keleher Realty choose pay any Impositions, maintain any insurance, discharge any lien or perform any other act the Lease requires Furr's to perform, Keleher Realty is entitled to be repaid all such sums and all necessary incidental costs and expenses, together with interest from the date of making of such expenditure, at the Prime Rate plus two (2) percentage points, ¶5.2.

10. On or about June 1, 2001, the Debtor filed its Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief. Among the related relief sought was a determination that the amounts shown in Exhibit 2 to the Motion were the only defaults that must be cured as a condition to assumption and assignment of the Lease, ¶vi on Page 3 of the Motion.

11. Keleher Realty has determined that at least five mechanic's and materialmen's liens, perfecting claims totaling \$34,640.60 in face amount, have been filed against the Premises. The existence of such liens is a default under the terms of the Lease and the Debtor must discharge the same prior to assuming and/or assigning the Lease. The Exhibit attached to the Motion and the Notice provided to creditors do not address the existence of liens, or claims arising from such liens, and any order of the Court permitting the Debtor to assume and/or assign the lease must provide for the discharge of the liens by the Debtor.

12. Exhibit 2 to the Motion and the Notice provided creditors apparently provides for the Percentage Rent due Keleher Realty for the Lease Year 2000. That amount should have been paid no later than February 14, 2001, and remains due and owing. The Motion is silent with respect to Percentage Rent based on Debtor's gross sales during Lease Year 2001 and beyond. While payment of the Percentage Rent for

Lease Year 2001 is, under the terms of the Lease, due within 45 days of December 31, 2001, the Debtor should pay Keleher Realty its Percentage Rate through the effective date of any assignment, at the time of the assignment. Alternatively, any assuming entity should expressly be required to commit to paying Percentage Rent based on both the Debtor's gross sales in 2001 (or whatever year any assignment occurs) and its own gross sales for the remainder of the year.

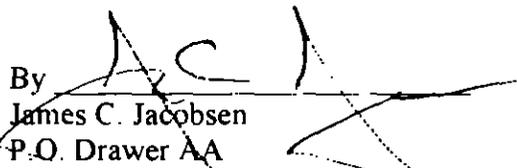
13. Exhibit 2 to the Motion and the Notice provided creditors indicates that Tax year 2000 property taxes of \$16,914.51 are unpaid and must be paid. Exhibit 2 does not address the statutory interest of one percent per month imposed by §7-38-49, NMSA 1978, which must be paid together with the principal amount of taxes, prior to any assumption or assignment of the Lease. Real estate taxes for tax year 2001 and any relevant future year should either be pro rated to the effective date of any assignment and paid by the Debtor through that point, or the assuming entity should be expressly be required to pay all property taxes for tax year during which the Lease is assumed.

14. The Debtor should identify any and all claims against the Premises and/or the Debtor and/or Keleher Realty, and escrow sufficient funds to ensure that it can indemnify Keleher Realty against any such claims.

WHEREFORE, Keleher Realty, Inc. prays the Court determine that the defaults set forth in Exhibit 2 to the Motion and the Notice provided creditors are not the only Lease defaults which must be cured prior to any assignment of the Lease, require the Debtor to discharge any and all liens against the Premises, require that the Debtor pay or make arrangements for payment of Percentage Rent through the date of any assumption of the Lease, require the Debtor to pay or make arrangements for payment of all property

taxes, including interest, through the date of any assignment, or in the alternative, require the agreement of any assuming entity to pay both the Debtor's and the assuming entity's percentage rent and taxes, require the Debtor to identify any claims against the Premises and or the Debtor and/or Keleher Realty, require the Debtor to demonstrate and guarantee its ability to indemnify Keleher Realty from any such claims, and grant such other and further relief as the Court deems just and appropriate.

Respectfully submitted,
KELEHER & McLEOD, P.A

By 
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I certify that I mailed a
true copy of the foregoing
Response to:

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this 12th day of June, 2001

A handwritten signature in black ink, appearing to be "A. C. [unclear]", is written over a horizontal line. The signature is stylized and somewhat illegible.

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