

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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JANUARY COURT  
ALBUQUERQUE, N.M.

IN RE:  
FURR'S SUPERMARKETS, INC.,

No. 11-01-10779 SA

Debtor.

**WERNER KINDERMANN'S RESPONSE TO NOTICE OF PROPOSED CURE  
AMOUNT, OBJECTION DEADLINE AND FINAL HEARING**

COMES NOW Werner Kindermann, by and through his attorneys Keleher & McLeod, P.A. (James C. Jacobsen), and as his response to the Debtor's Notice of Proposed Cure Amounts, Objection Deadline and Final Hearing received August 6, 2000, states:

1. Werner Kindermann (hereinafter "Kindermann") is Lessor under two Supermarket Leases (hereinafter, the "Leases") dated December 5, 1986, by and between Kindermann and Furr's, Inc., subsequently assigned to Furr's Supermarkets, Inc., (hereinafter "Furr's" or "Debtor"), under which the Debtor operates supermarkets at 3301 Southern Blvd., Rio Rancho, New Mexico (Store 881) and 111 Coors Blvd. SE, Albuquerque, New Mexico (Store 884, hereinafter jointly the "Premises").

2. The Leases are "triple net leases", under which Furr's is obligated to pay Kindermann Minimum Annual Rental (¶4a) and Percentage Rental (¶4c), and must pay all ad valorem taxes (¶5)

3. The Percentage Rental is one percent (1 %) of Gross Sales for each calendar year, less the amount of the minimum annual rental paid by the Lessee for such

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preceding calendar year. Percentage Rental payment is to be accompanied by a statement of sales upon which the percentage rental is calculated by the lessee (§7).

4. The Debtor has not provided a statement of sales. Consequently, Kindermann can not determine if any Percentage Rental is due. The Debtor's notice is silent in this regard. Any Percentage Rental remaining unpaid should be added to the cure amount, or the Debtor should certify that no percentage rent is due from previous years. Further, the Notice is silent with respect to Percentage Rental based on Debtor's gross sales during Lease Year 2001. The Asset Purchase Agreement (hereinafter "Agreement") dated June 25, 2001 attached as Exhibit A to the Court's July 3, 2001 Order approving the sale to Fleming Companies, Inc. (hereinafter "Fleming") provides in Article III for Fleming to perform obligations under the various leases after the Closing [§§3.1(a) and 3.1(a)(1)], but specifically excludes all amounts that must be paid under §365(b)(1)(A)-(B) of the Bankruptcy Code [(§3.1(b)(ix)]. This appears to excuse Fleming from paying any Percentage Rent arising before the Closing. While payment of the Percentage Rent for Lease Year 2001 is, under the terms of the Lease, payable on or before February 15, 2002, the Debtor must pay Kindermann his Percentage Rental for sales made from January 1, 2001 through the Closing prior to Fleming assuming the Lease, or give adequate assurance that Percentage Rental for the year 2001, based on gross sales from the Premises for the entire year, will be paid when due. At present, the Debtor proposes to do neither.

5. Schedule B to the Notice indicates that Tax Year 2000 property taxes of \$34,958.23 for Store 881 and \$20,100.26 for Store 884 are unpaid and must be paid. Schedule B does not appear to address: (a) the statutory interest of one percent per month

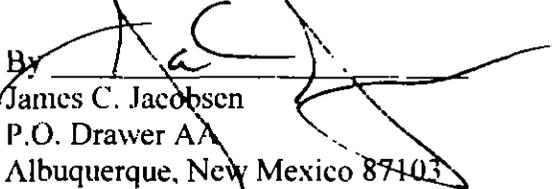
imposed by §7-38-49, NMSA 1978; or (b) the statutory penalty of one per cent per month (not to exceed 5% of the delinquent taxes) imposed by §7-38-50, N.M.S.A. 1978, which must be paid, together with the principal amount of taxes, prior to any assumption or assignment of the Lease. Further, the Notice is silent with respect to real estate taxes for tax year 2001. Under the terms of the Agreement, §3.1(a)(iv), Fleming is liable only for taxes accruing after Closing, and all real estate taxes are to be prorated at Closing, §4.4(b)(i) & (ii). The taxes should be prorated at the time of Closing in accordance with the Agreement and normal real estate practices, with the portion of the 2001 taxes attributable to the Debtor paid to the appropriate county treasurer or escrowed for payment when due, and the balance of taxes for the year 2001 to be paid by Fleming.

6. The Debtor is required to indemnify Kindermann from all claims of any type (§29) and should identify and satisfy any and all claims against the Premises and/or the Debtor and/or Kindermann. Under the terms of the Purchase Agreement, §3.1(b)(ii), Fleming assumes no liability for any such claims arising prior to Closing. If there are no such claims, the Debtor should so warrant.

WHEREFORE, Werner Kindermann prays the Court determine that the defaults set forth in Schedule B to the Notice of Proposed Cure Amounts, Objection Deadline and Final Hearing provided Lessors are not the only Lease defaults which must be cured prior to any assignment of the Kindermann Leases, require that the Debtor pay or make arrangements for payment of all Percentage Rent through the date of Closing or certify that none is due, require the Debtor to pay or make arrangements for payment of all property taxes, including interest and penalty, through the Closing, require the Debtor to identify any claims against the Premises and/or the Debtor and/or Kindermann, require

the Debtor to demonstrate and guarantee its ability to indemnify Kindermann from any such claims, or warrant that there are no 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 and faxed a true copy of the foregoing Response to:

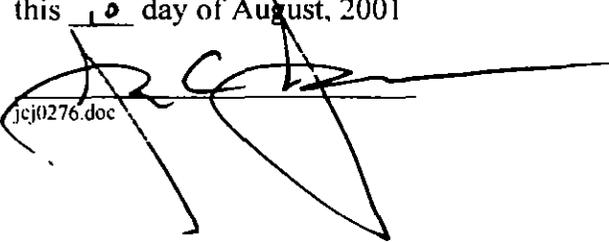
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and mailed a copy to:

United States Trustee  
P.O. Box 608  
Albuquerque, NM 87103-0608

this 10 day of August, 2001

  
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