

ORIGINAL

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

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

In re)	
)	
FURR'S SUPERMARKET, INC.,)	Case No. 7-01-10779-SA
)	
Debtor.)	Chapter 7
)	
)	Motion to Consolidate
)	Adversary Proceeding Nos.
)	02-1093, 02-1094 and 02-1197
)	

**MOTION TO CONSOLIDATE ADVERSARY PROCEEDING
NOS. 02-1093, 02-1094 AND 02-1197**

COMES NOW The Pepsi Bottling Group, Inc. ("PBG") Defendant in Adversary Proceeding Nos. 02-1093, 02-1094, and 02-1197 (the "Adversary Proceedings") currently pending before this Court and asks this Court to consolidate the Adversary Proceedings and merge same into a single proceeding under Adversary Proceeding No. 02-1197 pursuant to Federal Rule of Civil Procedure ("Federal Rule") 42, made applicable to the Adversary Proceedings by Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7042 and in support hereof, would respectfully show the Court as follows:

I.

INTRODUCTION

1. In Adversary Proceeding No. 02-1093, the Chapter 7 Trustee for the bankruptcy estate of Furr's Supermarket, Inc. ("Furr's"), Yvette J. Gonzales (the "Trustee"), sued PBG to avoid certain alleged preferential transfers and to recover amounts allegedly due and owing to Furr's as a

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result of same.

2. In Adversary Proceeding No. 02-1094, the Trustee sued PBG to avoid certain alleged preferential transfers and to recover of amounts allegedly due and owing to Furr's as a result of the same transactions and occurrences as those set forth in Adversary Proceeding No. 02-1093.

3. In Adversary Proceeding No. 02-1197, the Trustee sued PBG to recover amounts allegedly paid to PBG by Furr's post-petition and to recover monies the Trustee alleges to have been earned by Furr's through certain "incentives."

4. The facts and subject matter of the Adversary Proceedings are both similar and substantially related. Specifically, each of the three (3) adversary proceedings is based on the same nucleus of operative facts and the legal theories of recovery and defenses are identical.

5. Accordingly, PBG asks this Court to consolidate the Adversary Proceedings and merge same into a single proceeding under Adversary Proceeding No. 02-1197 pursuant to Federal Rule 42, made applicable to the Adversary Proceeding by Bankruptcy Rule 7042.

II.

ARGUMENT

6. The Adversary Proceedings proposed to be consolidated are pending before this Court for all purposes. Accordingly, no issues concerning this Court's jurisdiction over any of the Adversary Proceedings are present.

7. Federal Rule 42, made applicable to the Adversary Proceedings by Bankruptcy Rule 7042, provides that a court may consolidate lawsuits if the suits relate to substantially the same subject matter and consolidation does not result in delay, jury confusion, or prejudice to the parties. *See*

Hendrix v. Raybestos-Hanhattan, Inc., 776 F.2d 1492, 1496 (11th Cir.1985). In the instant case, the Adversary Proceedings are substantially similar because they involve the same parties, issues of material fact, and questions of law. Accordingly, the Court should consolidate the Adversary Proceedings for the following reasons:

- A. The Adversary Proceedings involve common parties. *See* Seguro de Dervicio de Salud v. McAuto Sys. Group, Inc., 878 F.2d 5, 8 (1st Cir. 1989). Specifically, the Trustee has sued PBG, in each of the Adversary Proceedings. Indeed, PBG is the sole defendant in each of the Adversary Proceedings and therefore, the commonality of parties mandates consolidation.
- B. The Adversary Proceedings involve common issues of law. *See* Young v. City of Augusta, 59 F.3d 1160, 1168-69 (11th Cir. 1995). Specifically, Adversary Proceedings Nos. 02-1093 and 02-1094 each involve the same legal issues regarding alleged preferential payments made by Furr's. Adversary Proceeding No. 02-1197 involves legal issues regarding alleged post-petition payments made to PBG by Furr's and certain "incentives" alleged to be owed to Furr's by PBG. The determination of the legal issues regarding the Trustee's allegations in one Adversary Proceeding will necessarily effect the determination of the legal issues regarding the Trustee's allegations in the other Adversary Proceedings. Further, PBG alleges common defenses in each of the Adversary Proceedings. Specifically, PBG alleges, among other common defenses, that it paid Furr's substantial sums prior to the petition date and that such payment eliminates any and all potential liability. The determination of the

legal issues surrounding PBG's defenses in one Adversary Proceeding will necessarily effect the determination of the legal issues surrounding PBG's defenses in the other Adversary Proceedings. Accordingly, the commonality of the issues of law warrants consolidation of the Adversary Proceedings.

- C. The Adversary Proceedings involve common issues of fact. *See Mary Ellen Enters. v. Camex, Inc.*, 68 F.3d 1065, 1073 (8th Cir. 1995). Specifically, the Adversary Proceedings each involve the exact same nucleus of operative facts concerning alleged preferential payments made to PBG by Furr's, alleged post-petition payments made by Furr's to PBG, "incentives" allegedly earned by Furr's, and substantial payments made by PBG to Furr's prior to the Petition Date. Accordingly, the commonality of the factual issues in the Adversary Proceedings mandates consolidation.
- D. Consolidation of the Adversary Proceedings will eliminate the risk of inconsistent adjudication of the Adversary Proceedings' common factual and legal issues. Any risk or potential risk of prejudice or confusion that might arise as a result of consolidation is wholly outweighed by: (i) the risk of inconsistent adjudication of common factual and legal issues; (ii) the burden on the parties to litigate three (3) separate Adversary Proceedings involving the exact same factual and legal issues; (iii) the burden on witnesses and available judicial resources posed by litigating three (3) separate Adversary Proceedings; and (iv) the relative expense to all concerned of adjudicating a single Adversary Proceeding versus three (3) separate Adversary Proceedings. *See Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993); *Hendrix*, 776 F.2d at

1495. Accordingly, consolidation of the Adversary Proceedings is warranted.

E. Consolidation of the Adversary Proceedings will conserve judicial resources. Cantrell 999 F.2d at 1011; Hendrix, 776 F.2d at 1497. Specifically, this Court should consolidate the Adversary Proceedings to avoid the substantial expenditure of judicial resources involved in conducting multiple trials of the Adversary Proceedings.

F. Finally, consolidation of the Adversary Proceedings will reduce the time, expense and burden on the parties involved with trying the Adversary Proceedings separately. Cantrell, 999 F.2d at 1011, Hendrix, 776 F.2d at 1495-96.

8. For the reasons listed above, PBG asks this Court to consolidate the Adversary Proceedings and merge same into Adversary Proceeding No. 02-1197. In addition, because of the commonality of factual and legal issues in this case, PBG requests that the Court order all outstanding pre-trial deadlines in Adversary Proceeding Nos. 02-1093 and 02-1094 be conformed and reset to the pre-trial deadlines currently set in Adversary Proceeding No. 02-1197. Finally, PBG requests that all discovery deadlines currently pending between the Parties be continued for a period of at least thirty (30) days, pending this Court's determination of PBG's Motion to Consolidate. Specifically, the following discovery and pre-trial deadlines are currently in place:

Adversary Proceeding No. 02-1093:

January 20, 2003 – Deadline for PBG to respond to Trustees' Third Requests for Production and Second Set of Interrogatories.

January 22, 2003 – Deadline for the Parties to complete discovery.

March 4, 2003 – Final Pretrial Conference.

Adversary Proceeding No. 02-1094:

January 20, 2003 – Deadline for PBG to respond to Trustees' Third Requests for Production and Second Set of Interrogatories.

January 22, 2003 – Deadline for the Parties to complete discovery.

March 4, 2003 – Final Pretrial Conference.

Adversary Proceeding No. 02-1197:

January 22, 2003 – Deadline for PBG to respond to Trustee's First Interrogatories, Requests for Production and Requests for Admissions.

March 15, 2003 – Deadline for Parties to disclose identities of all witnesses, including experts.

June 5, 2003 – Deadline for the Parties to complete discovery.

June 10, 2003 – Final Pretrial Conference.

Because the Adversary Proceedings involve a commonality of factual and legal issues, and consolidation will eliminate the risk of inconsistent adjudication and decrease the burden on the Parties, witness and judicial resources, PBG requests that the Court conform and reset all outstanding pretrial deadlines to the pretrial deadlines currently set in Adversary Proceeding No. 02-1197, as set forth above, such that the pretrial deadlines for the consolidated Adversary Proceeding are as follows:

March 15, 2003 – Deadline for Parties to disclose identities of all witnesses, including experts.

June 5, 2003 – Deadline for the Parties to complete discovery.

June 10, 2003 – Final Pretrial Conference.

In addition, PBG requests that all discovery deadlines between the parties, including, but not limited to PBG's January 20, 2003 and January 22, 2003 deadlines to respond to the Trustee's discovery

requests, be continued for a period of not less than thirty (30) days pending the Court's determination of PBG's Motion to Consolidate.

III.

PRAYER

For these reasons, PBG prays that this Court enter an order:

1. consolidating Adversary Proceeding No. 02-1093, Adversary Proceeding No. 02-1094, and Adversary Proceeding 02-1197 into a single proceeding;
2. directing the Clerk of the Court to merge the cases into one Adversary Proceeding under Adversary Proceeding No. 02-1197 and conform and reset all pretrial deadlines currently pending in the Adversary Proceedings to the pretrial deadlines currently in place in Adversary Proceeding No. 02-1197, as set forth above;
3. continuing all outstanding discovery deadlines between the Parties, including, but not limited to PBG's January 20, 2003 and January 23, 2003 deadlines to respond to the Trustee's discovery requests, for a period of not less than thirty (30) days, pending the Court determination of PBG's Motion to Consolidate; and
4. granting PBG such other and further relief as to which it may show itself justly entitled.

Respectfully submitted,



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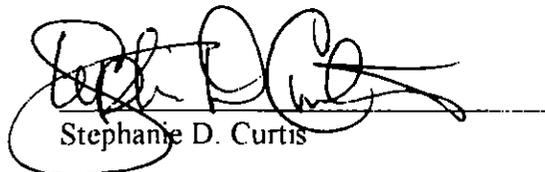
**ATTORNEYS FOR THE PEPSI BOTTLING
GROUP, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2002, a copy of the foregoing Motion to Consolidate Adversary Proceedings Nos. 02-1093, 02-1094 and 02-1197 was served in accordance with the Federal Rules of Bankruptcy Procedure by first class United States mail, postage prepaid, upon the following parties:

Thomas D. Walker, Esq.
David T. Thuma, Esq.
Jacobvitz, Thuma & Walker
500 Marquette N.W. Suite 650
Albuquerque, New Mexico 87102

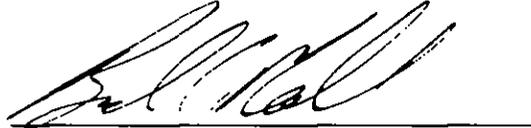
COUNSEL FOR THE TRUSTEE



Stephanie D. Curtis

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on January 2, 2003, I conferred with David Thuma and Thomas Walker, counsel for the Trustee, and they are unopposed to the consolidation of Adversary Proceeding Nos. 02-1093 and 02-1094 and to the conformation of the pretrial deadlines in these Adversary Proceedings in general, but are opposed to the consolidation of Adversary Proceeding No. 02-1197 and the conformation of all pretrial deadlines in all Adversary Proceedings to those currently set in Adversary Proceeding No. 02-1197.

A handwritten signature in black ink, appearing to read 'Brad C. Mall', is written over a solid horizontal line.

Brad C. Mall