

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779-SA
Chapter 7

Debtor.

**MOTION TO APPROVE SETTLEMENT OF ADVERSARY PROCEEDINGS 02-01093
AND 02-1197**

Yvette G. Gonzales, the Chapter 7 Trustee (the "Trustee"), by counsel, pursuant to F. R. Bankr. P. 9019, moves the Court for an order approving the settlement of (i) adversary proceeding No. 02-01093, captioned *Yvette J. Gonzales, Trustee v. Pepsi Cola Bottling Company of El Paso, et al* (the "Preference Adversary Proceeding"), against Pepsi Bottling Group, dba Pepsi Cola Bottling Company of El Paso ("PBG"), and (ii) adversary proceeding No. 02-1197, captioned *Yvette J. Gonzales, Trustee v. Pepsi Cola Bottling Company of El Paso, et al* (the "Post-Petition Collection Adversary Proceeding") against PBG, and in support hereof states:

1. Commencement and Conversion of Case. On February 8, 2001 (the "Petition Date"), Furr's Supermarkets, Inc. (the "Debtor") filed a voluntary petition in this Court under Chapter 11 of the Bankruptcy Code. On December 19, 2001, this Court entered an order converting the chapter 11 case to a case under chapter 7.

2. Appointment of Chapter 7 Trustee. On December 19, 2001, the United States Trustee appointed Yvette Gonzales as the Trustee for the Debtor's bankruptcy estate, in which capacity she continues to serve.

3. Jurisdiction And Venue. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The Preference Adversary Proceeding. In the Preference Adversary Proceeding, the Trustee sought to recover \$400,220.90 from PBG, plus all other amounts, if any, recoverable pursuant to 11 U.S.C. § 547.

5. The Settlement of the Preference Adversary Proceeding. PBG has offered to pay the Trustee \$200,000 in full satisfaction of any and all claims asserted in the Preference Adversary Proceeding (the “Preference Settlement”). The Preference Settlement is fair and equitable, and is in the best interests of and beneficial to the Debtor’s estate and the creditors. The amount of the Preference Settlement is based primarily on the fact that during the preference period PBG paid the Debtor \$1,500,000 as part of the Debtor’s execution of a new one-year supply agreement. PBG took the position that it was entitled to treat the payment as subsequent new value under 11 U.S.C. ¶547(c)(4). Had PBG prevailed on the issue, the preference claim would have been reduced to less than \$50,000.

6. The Post Petition Collection Adversary Proceeding. In the Post-Petition Collection Adversary Proceeding, the Trustee sought to recover \$191,904.88 from PBG, plus all other amounts, if any, recoverable.

7. The Settlement of the Post-Petition Collection Adversary Proceeding. PBG has offered to pay the Trustee \$58,750 in full satisfaction of any and all claims asserted in the Post-Petition Collection Adversary Proceeding (the “Post-Petition Collection Settlement”). The Post-Petition Collection Settlement is fair and equitable, and in the best interests of and beneficial to the Debtor’s estate and the creditors. The amount of the Post-Petition Collection Settlement is based primarily on (i) with respect to the portion of the claim based on alleged post-petition accounts receivable (\$41,637), PBG’s defense that PBG is entitled to recoup such amounts against the \$1,500,000 payment, and (ii) with respect to the portion of the claim based on Furr’s alleged overpayment to PBG for the post-petition purchases of product (\$150,267.88), PBG’s recoupment defense, as well as a reconciliation of PBG’s accounting information with the

information available to the Trustee. PBG's accounting information indicated that the claim amount was less than \$88,000.

8. The Settlement and Release Agreement. If the proposed settlements are approved, the parties would execute a settlement and release agreement memorializing the terms of their settlement.

WHEREFORE, the Trustee requests that the Court enter an order approving the Preference Settlement, the Post-Petition Collection Settlement, and for all other just and proper relief.

JACOBVITZ, THUMA & WALKER
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This certifies that a copy of the foregoing Motion was served by mail on:

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this 15th day of August, 2003.

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