UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT
SEP 03 2004
DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

In re:

FURR'S SUPERMARKET, INC.,

Case No. 7-01-10770 SA
Chapter 7

Debtor.

APPLICATION FOR ORDER TO PAY AMPLEX'S SECURED AND/OR ADMINISTRATIVE EXPENSE CLAIMS RESULTING FROM CONVERSION OF CONSIGNED COLLATERAL

COMES NOW Amplex Corporation (hereinafter "Amplex"), by and through its counsel as undersigned, and states its Application requesting the Court to direct the Trustee to pay Amplex's allowed secured claim (filed February 26, 2001) or, in the alternative, to allow Amplex a priority administrative claim against the Estate as a result of Furr's conversion of Plaintiff's consigned goods, consisting of stamps, without compensation to Amplex. The value of the consigned goods is $122,400.00. As further grounds, Amplex states:

JURISDICTION AND VENUE

1. Furr's Supermarket, Inc. (Debtor) filed a voluntary Chapter 11 Bankruptcy Case on February 8, 2001.

2. On December 19, 2001, the Chapter 11 case was converted to a Chapter 7 case and Yvette Gonzales was duly appointed as Chapter 7 Trustee on that date, and remains Chapter 7 Trustee in this case.

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2498

3. This Application is filed pursuant to 11 U.S.C. §§ 503 and 507(b). This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (B). Venue is proper pursuant to 28 U.S.C. § 1409.

4. This Application is filed pursuant, in part, to Rules 3001(f), 3007 and 9014, F.R.Bankr.P.

GENERAL ALLEGATIONS

5. Amplex Corporation entered into a Consignment Contract with the United States Postal Service ("USPS") dated on or about January 31, 1996. The contract provided for the sale of stamps at retail locations other than at United States Post Offices. The stamps were provided by the USPS on consignment *only*, and title remained with the USPS until payment was received. (NOTE: Since this contract is voluminous, it is not attached as an exhibit. The Trustee and/or her counsel already have a copy of this contract. A copy of this contract will be provided by Applicant's counsel upon request.)

6. On March 1, 1996, Amplex entered into a Stamp Consignment Agreement with Furr's Supermarkets, Inc. (A copy of this Agreement is incorporated herein by reference, is attached to other pleadings filed in this case, and a copy is in the possession of the Trustee and/or her counsel.) The Stamp Consignment Agreement (hereinafter the "Agreement"), in pertinent part, provided for the delivery of stamps to Furr's Supermarkets to resell on a consignment basis, and all payments were to be made to the USPS lockbox. The Agreement further provides that the parties acknowledge that the sale of stamps was on a consignment basis and that Furr's did not receive title to the stamps.

7. As part of the Stamp Consignment Agreement, Furr's executed a Consignment Security Agreement, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference.

8. Pursuant to applicable New Mexico law, a New Mexico Financing Statement (Form UCC-1) was duly filed for record with the New Mexico Secretary of State on November 25, 1996 as File No. 961125088. A copy of the New Mexico Financing Statement is attached hereto as Exhibit "B" and incorporated herein by reference.

9. Pursuant to applicable Texas law, Amplex filed a Texas Financing Statement Form with the Secretary of State of Texas on May 25, 1996, a copy of which is attached as Exhibit "C" and incorporated herein by reference.

10. Amplex timely filed a secured Proof of Claim (in the amount of $122,400) in the United States Bankruptcy Court in the Furr's Supermarket case on February 26, 2001 (hereinafter the "Claim"). This Claim is incorporated herein by reference. This Claim was assigned Number 27 in the Furr's Bankruptcy Case.

11. On February 8, 2001, Furr's filed a "Motion for Order Under 11 U.S.C. § 105 Authorizing Debtor to Honor Certain Pre-Petition Obligations to Customers and to Maintain Certain Customer Service Policies, Programs and Practices." In pertinent part, the Motion requested the Court to authorize Furr's to continue to make payments on certain obligations including payment for postage stamp sales both pre- and post-petition. An Order was entered on February 8, 2001 granting Debtor's Motion. (This Motion and Order are hereinafter referred to as the "Critical Vendors Order".)

12. Amplex was not included on the Official Mailing Matrix and did not receive notice of any hearings or proceedings that may have affected Amplex's secured claim.

13. On February 8, 2001, the date that Furr's filed Chapter 11, Amplex maintained a valid, subsisting and perfected Consignment Security Agreement on the collateral consisting of stamps.

14. Pursuant to Amplex's contract, it has paid the USPS $122,400.00 for the consigned stamps that were not returned or paid for by Furr's.

15. Subsequent to the filing of the Chapter 11 case, Amplex was informed that the stamps had been sold, Furr's retained all proceeds from sale of the stamps, and did not remit *any* proceeds from the sale of the consigned stamps to either the USPS or Amplex.

16. No objection has ever been filed to the Amplex Secured Proof of Claim filed February 26, 2001.

17. Furr's Supermarket and/or its agents and employees converted the consigned collateral, and the proceeds thereof, to its own use and benefit.

18. Claimant is entitled to damages pursuant to applicable New Mexico and Texas law for breach of consignment agreements and misappropriation of consigned goods, and is entitled to damages in the amount of $122,400.00 plus interest and attorneys' fees, all as provided in the Stamp Consignment Agreement, Security Agreement, and applicable law.

19. In the alternative, Amplex is entitled to a priority administrative expense pursuant to 11 U.S.C. §§ 503(a) and 507(b)(1), as Debtor used the collateral and proceeds thereof for the actual necessary costs and expenses of preserving the Estate, including wages, salaries and/or other

expenses. Pursuant to applicable bankruptcy law, the defined administrative expenses are not limiting.

20. Amplex's claim should be allowed a priority pursuant to 11 U.S.C. § 507(a)(1) as an administrative expense of the Chapter 11 Estate.

21. In the alternative, pursuant to the Critical Vendors Order and 11 U.S.C. § 364(b), Debtor incurred the obligation upon conversion of the collateral and Movant is entitled to an allowed administrative expense of the Chapter 11 Estate.

22. Amplex's allowed administrative claim should be paid in accordance with 11 U.S.C. § 726 as a first priority administrative claim of the Chapter 11 Estate.

23. In the alternative, to the extent applicable, Amplex asserts an administrative priority claim pursuant to 11 U.S.C. § 507(b). As a result of the Automatic Stay, Amplex was precluded from taking action to collect its property, or its consigned collateral or the proceeds of such collateral.

24. Furr's actions by converting to its own use and benefit, property in its possession owned by another entity and/or consigned property and/or collateral, constitutes a fraudulent conversion in violation of legal and equitable principles, including fundamental principles of bankruptcy equity and Amplex should be made whole with a superpriority expense of administration claim similar to 11 U.S.C. § 364(b), 364(c), 364(d) and 507(b) pursuant to 11 U.S.C. § 105.

WHEREFORE Amplex requests the Court enter an Order directing the Trustee to pay Amplex's secured claim, or to allow Amplex's claim as a Chapter 11 priority administrative expense or a Chapter 11 administrative priority claim for the estate's conversion of Amplex's collateral

during the Chapter 11 case, in the amount of $122,400.00; plus an award of interest and attorneys' fees and costs; and directing the Trustee to pay such Chapter 11 priority administrative expense (as provided by applicable bankruptcy law (11 U.S.C. § 726(b)); and for such other and further relief as the Court deems just.

Respectfully Submitted,

PUCCINI & MEAGLE, P.A.

By Louis Puccini, Jr.

Louis Puccini, Jr.
Shay E. Meagle
Attorneys for Amplex Corporation
Post Office Box 30707
Albuquerque, NM 87190-0707
Telephone: (505) 255-0202
Facsimile: (505) 255-8726

I hereby certify that a true and accurate copy of the foregoing pleading was sent on this 3rd day of September 2004 via First Class U.S. Mail to the following:

Furr's Supermarkets, Inc.
c/o Chief Financial Officer
4411 The 25 Way NE
Suite 100
Albuquerque, NM 87109

Heller Financial, Inc.
c/o Atty David Heller
233 S. Wacker Drive
Suite 5800
Chicago, IL 60606

Heller Financial, Inc.
c/o Atty Josef S. Athanas
233 S. Wacker Drive
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Heller Financial, Inc.
c/o Atty Paul M. Fish
PO Box 2168
Albuquerque, NM 87103-2168

Metropolitan Life Insurance Co.
c/o Atty Ronald Silverman
399 Park Avenue
New York, NY 10022

Metropolitan Life Insurance Co.
c/o Atty Jonathan Alter
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Hartford, CT 6103-3178

Metropolitan Life Insurance Co.
c/o Atty Jennie D. Behles
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Albuquerque, NM 87194-7070

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c/o Atty Jay D. Hertz
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Albuquerque, NM 87103

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c/o Atty Linda S. Bloom
PO Box 218
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c/o Atty Louis J. Price
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Albuquerque, NM 87198-8575

NM Taxation & Revenue Dept.
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San Antonio, TX 78212-3166

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Albuquerque, NM 87103-1441

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Dallas, TX 75265

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18 West Washington Ave.
Lovington, NM 88260

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c/o Atty Camille Cribaro-Mello
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Rosemont, IL 60018

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Assistant Attorney General
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Milwaukee, WI 53203-3400

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c/o Atty Pilar Vaile
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Employers' Health & Welfare Trust Fund
c/o Atty Mark L. Metz
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Milwaukee, WI 53203-3400

Desert State Emp. & UCFW Unions Pen. Pln.
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Milwaukee, WI 53203-3400

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Houston, TX 77002

Safeway, Inc.
c/o Atty D. Michael Dalton
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Suite 4200
Houston, TX 77002-2910

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Forth Worth, TX 76102

Mrs. Baird's Bakeries Business Trust
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1720 Louisiana Blvd. NE
Suite 212
Albuquerque, NM 87102

PUCCINI & MEAGLE, P.A.

By: Paige West
Paige West
Legal Assistant

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SECURITY AGREEMENT

THIS SECURITY AGREEMENT, dated as of October 25, 1996, is made by and between FURR'S SUPERMARKETS, INC., a _____ corporation ("***Debtor***"), with its principal office at ALBUQUERQUE, NM 87184, in favor of Amplex Corporation, a Texas corporation ("***Secured Party***"), with its principal office at 1100 Fountain Parkway, Grand Prairie, Texas 75050-1513.

Section 1. Grant of Security Interest. For value received and as collateral security for the Secured Indebtedness. Debtor hereby grants to Secured Party a security interest in and to, and agrees and acknowledges that Secured Party has, and shall continue to have, a security interest, in and to, and assigns to Secured Party its rights in, all United States Postal Service stamps now or hereafter provided or consigned by Secured Party to Debtor pursuant to that certain stamp consignment agreement dated MARCH 1, 1996, executed by Debtor and Secured Party and any modifications, amendments, or extensions thereto (the "***Stamp Consignment Agreement***"), and all substitutes for, replacements for, proceeds of, and returns of such stamps. The property described or referred to above is hereinafter collectively called the "***Collateral***."

Section 2. Indebtedness Secured. The security interest contained herein is granted to secure the payment and performance of:

(a) Any and all indebtedness, obligations, advances, and liabilities of Debtor to Secured Party arising in connection with, or evidenced by the Stamp Consignment Agreement (the "**Secured Indebtedness**");

(b) All costs and expenses reasonably incurred by Secured Party to obtain, preserve, perfect and enforce the security interest granted hereby, to collect the Secured Indebtedness and to maintain, preserve and collect the Collateral, including, but not limited to reasonable attorneys' fees and legal expenses; and

(c) All renewals, extensions and modifications of the Secured indebtedness part thereof.

Section 3. Debtor's Warranties and Representations. Debtor represents and warrants to Secured Party that:

(a) The Collateral is located at the following places of business of Debtor, at SEE ATTACHED EXHIBIT A.

(b) All of the Collateral is free and clear of all security interests, liens and all other adverse claims of any nature, subject only to the known claims of the following creditor(s): _____

EXHIBIT
A

_____, _____, _____
, _____, _____; (attach additional sheet if necessary) and

(c) No dispute, right of set-off, counterclaim or defenses exist with respect to the Collateral or any part of the Collateral.

Section 4, Debtor's Covenants and Agreements. Debtor covenants and agrees with Secured Party that:

(a) Debtor shall execute and deliver such financing statement or statements, or amendments thereof or supplements thereto, or other instruments, and do and deliver all acts, things, writings and assurances as Secured Party may from time to time require in order to comply with the Chapter 9 of the Uniform Commercial Code, as amended, as adopted in the State of Texas (or any successor statute) (the "***Code***"), or any other applicable law, and to preserve and protect the security interest hereby granted. In the event, for any reason, that the law of any jurisdiction other than the State of Texas becomes or is applicable to the Collateral, or any part thereof, or to any of the Secured Indebtedness. Debtor agrees to execute and deliver all such instruments and to do all such other things as may be necessary or appropriate to preserve, protect and enforce the security interest of Secured Party, under the law of such other jurisdiction, to at least the same extent as such security interest would be protected under the Code; and

(b) Until the termination of this Security Agreement, Debtor will not execute and there will not be on file in any public office any financing statement or statements creating or evidencing a security interest or lien covering any of the Collateral, except as may have been or may hereafter be granted to Secured Party, and Debtor further agrees that it will keep the Collateral free from any lien, or any other legal or equitable process, or any encumbrance of any kind or character.

Section 5, Events of Default. Debtor shall be in default under this Security Agreement upon the happening of any of the following events or conditions (hereinafter called an "***Event of Default***"):

(a) Debtor is in default under this Security Agreement or the Stamp Consignment Agreement; or

(b) Secured Party's security interest in any of the Collateral should become unenforceable, or cease to be a first priority security interest.

Section 6. Secured Party's Rights and Remedies. Secured Party, at any time, after an Event of Default:

(a) to the extent permitted by law, may require Debtor to deposit in a special account at a bank to be designated by Secured Party in the name of Secured Party and styled "Collateral Account" any and all payments received by Debtor with respect to the Collateral. Funds in such account are hereby assigned to Secured Party and shall be impressed with the lien hereof to secure the Secured Indebtedness; and

(b) may, in its sole discretion, to the extent permitted by law, require Debtor to give possession or control of the Collateral to Secured Party: take control of the Collateral or proceeds thereof, and use cash proceeds to reduce any part of the Secured Indebtedness.

Section 7. Miscellaneous.

(a) This Security Agreement is entered into and is to be governed by the laws of the State of Texas.

(b) This Security Agreement is binding upon and shall inure to the benefit of Debtor, Secured Party, their respective heirs, executors, representatives, administrators, successors and assigns; provided, however, that Debtor may not, without the prior written consent of Secured Party, assign any rights, powers, duties or obligations hereunder. Secured Party reserves the right to assign any or all of its rights hereunder.

(c) No failure to exercise, and no delay in exercising, on the part of Secured Party, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right.

(d) This Security Agreement shall not be amended in any way except by a written agreement signed by Secured Party and Debtor.

DEBTOR:

FURR'S SUPERMARKETS, INC.

By: M Daly

Name: Mike Daly

Title: Sr. VP Finance

SECURITY AGREEMENT

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UNIFORM COMMERCIAL CODE — FINANCING STATEMENT — FORM UCC-1

NEW MEXICO

INSTRUCTIONS

1. PLEASE TYPE this form. Fold only along perforation for mailing.
2. Remove Secured Party and Debtor Copies and send other 3 copies to the filing officer. Enclose filing fee.
3. When filing is to be with more than one office, Form UCC-2 may be placed over this set to avoid double typing.
4. If the space provided for any item(s) on the form is inadequate the item(s) should be continued on additional sheets, preferably 5" x 8" or 8" x 10". Only one copy of such additional sheets need be presented to the filing officer with a set of three copies of the financing statement. Long schedules of collateral, indentures, etc., may be on any size paper that is convenient for the secured party.
5. If collateral is crops or goods which are or are to become fixtures, describe generally the real estate and give name of record owner.
6. When a copy of the security agreement is used as a financing statement, it is requested that it be accompanied by a completed but unsigned set of these forms, without extra fee.
7. At the time of original filing, filing officer should return third copy as an acknowledgment. At a later time, secured party may date and sign termination legend and use third copy as a Termination Statement.

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code

3 Maturity date (if any):

1 Debtor(s) (Last Name First) and address(es)	2 Secured Party(ies) and address(es)	For Filing Officer (Date, Time, Number, and Filing Office)
FURR'S SUPERMARKETS, INC P.O. BOX 10267 ALBUQUERQUE, NM 87184	AMPLEX CORPORATION 1100 FOUNTAIN PARKWAY GRAND PRAIRIE, TEXAS 75050-1513	3 pages 15-(2)11 96112 5088 11-25-96 9:19 NM 15

4 This financing statement covers the following types (or items) of property:

All United States Postal Service stamps now or hereafter provided or consigned by Secured Party to Debtor pursuant to that certain stamp consignment agreement and any modifications, amendments or extensions thereto, dated March 1, 1996 executed by Debtor and Secured Party and all substitutes for, replacements for, proceeds of, and returns of such stamps. These stamps can be found at locations including but not limited to: See attached Exhibit A.

5. Assignee(s) of Secured Party and Address(es)

EXHIBIT B

Check [X] if covered: [ ] Proceeds of Collateral are also covered [ ] Products of Collateral are also covered. No. of additional sheets presented: 2

Filed with: SECRETARY OF STATE

FURR'S SUPERMARKETS, INC.

By: [signature]
Signature(s) of Debtor(s)

AMPLEX CORPORATION

By: [signature]
Signature(s) of Secured Party(ies)

FILING OFFICER - NUMERICAL

STANDARD FORM — UNIFORM COMMERCIAL CODE — FORM UCC-1

STATE OF NEW MEXICO

REORDER FROM
Registré, Inc.
514 PIERCE ST.
P.O. BOX 218
ANOKA, MN. 55303
(612) 421-1713

[redacted]

THIS FINANCING STATEMENT IS PRESENTED FILING OFFICER FOR FILING PURSUANT TO THE UNIFORM COMMERCIAL CODE.

11. ☐ CHECK TO REQUEST SAME DEBTOR SEARCH CERTIFICATE. (INSTRUCTION B.11)

1. DEBTOR (IF PERSONAL) LAST NAME FURR'S SUPERMARKETS, INC.	FIRST NAME	M.I.	1A. PREFIX	1B. SUFFIX
1C. MAILING ADDRESS P.O. BOX 10267	1D. CITY, STATE ALBUQUERQUE, NM			1E. ZIP CODE 87184
2. ADDITIONAL DEBTOR (IF PERSONAL) LAST NAME	FIRST NAME	M.I.	2A. PREFIX	2B. SUFFIX
2C. MAILING ADDRESS	2D. CITY, STATE			2E. ZIP CODE
3. ADDITIONAL DEBTOR (IF PERSONAL) LAST NAME	FIRST NAME	M.I.	3A. PREFIX	3B. SUFFIX
3C. MAILING ADDRESS	3D. CITY, STATE			3E. ZIP CODE
4. SECURED PARTY (IF PERSONAL) LAST NAME AMPLEX CORPORATION	FIRST NAME	M.I.		
4A. MAILING ADDRESS 1100 FOUNTAIN PARKWAY	4B. CITY, STATE GRAND PRAIRIE, TEXAS			4C. ZIP CODE 75050-1513
5. ASSIGNEE OF SECURED PARTY (IF ANY)				
5A. MAILING ADDRESS	5B. CITY, STATE			5C. ZIP CODE

6. This FINANCING STATEMENT covers the following types or items of property. (If collateral is crops, fixtures, timber or minerals, read instruction B. 6-7.)

All United States Postal Service stamps now or hereafter provided or consigned by Secured Party to Debtor pursuant to that certain stamp consignment agreement and any modifications, amendments or extensions thereto, dated March 1, 1996 executed by Debtor and Secured Party and all substitutes for, replacements for, proceeds of, and returns of such stamps. These stamps can be found at locations including but not limited to: See attached Exhibit A.

7. CHECK ONLY IF APPLICABLE — 7A. ☐ PRODUCTS OF COLLATERAL ARE ALSO COVERED — 7B. ☐ THIS FINANCING STATEMENT IS TO BE FILED FOR RECORD IN THE REAL ESTATE RECORDS. — NUMBER OF ADDITIONAL SHEETS PRESENTED 1

8. CHECK APPROPRIATE BOX — 8A. THIS FINANCING STATEMENT IS SIGNED BY THE SECURED PARTY INSTEAD OF THE DEBTOR TO PERFECT A SECURITY INTEREST IN COLLATERAL IN ACCORDANCE WITH INSTRUCTION B. 8 ITEM: ☐(1) ☐(2) ☐(3) ☐(4) ☐(5)

9. SIGNATURE(S) OF DEBTOR(S) — FURR'S SUPERMARKETS, INC.
BY: [signature]

TYPED NAME — TITLE

SIGNATURE(S) OF SECURED PARTY(IES) — AMPLEX CORPORATION
BY: [signature]

THIS SPACE FOR USE OF FILING OFFICER (DATE, TIME, NUMBER, FILING OFFICER)

N2

SECY OF ... NOV 25 96 2 33 9 1 8

EXHIBIT C

10. Return copy to:

NAME / ADDRESS / CITY / STATE / ZIP

AMPLEX CORPORATION
ATTN: KAREN EDDLEMON
1100 FOUNTAIN PARKWAY
GRAND PRAIRIE, TEXAS 75050-1513