

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

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

Debtor.

CHAPTER 7 TRUSTEE'S (I) OBJECTION TO AMPLEX CORPORATION'S MOTION FOR ORDER TO PAY AMPLEX'S SECURED AND/OR ADMINISTRATIVE EXPENSE CLAIMS RESULTING FROM CONVERSION OF CONSIGNED COLLATERAL AND (II) OBJECTION TO AMPLEX CORPORATION'S PROOFS OF CLAIM

Yvette J. Gonzales, the Chapter 7 trustee (the "Trustee"), hereby (i) objects to Amplex Corporation's Motion for Order to Pay Amplex's Secured and/or Administrative Expense Claims Resulting from Conversion of Consigned Collateral, docketed as #2498 (the "Application"), and (ii) objects to the two proofs of claim filed by Amplex in this case. In support of these objections, the Trustee states:

A. Response to the Allegations in the Application.

1. The Trustee admits the allegations in paragraph 1 of the Application.
2. The Trustee admits the allegations in paragraph 2 of the Application.
3. The Trustee admits the allegations in paragraph 3 of the Application.
4. The Trustee admits the allegations in paragraph 4 of the Application.
5. The Trustee is without knowledge or information sufficient to admit or deny the allegation in paragraph 5 of the Application, and therefore denies the allegations.
6. In response to the allegation in paragraph 6 of the Application, the Trustee states that the subject contract speaks for itself, and denies all allegations inconsistent with the terms of the contract.

7. The Trustee admits the allegations in paragraph 7 of the Application.
8. The Trustee admits the allegations in paragraph 8 of the Application.
9. The Trustee admits the allegations in paragraph 9 of the Application.
10. The Trustee admits the allegations in paragraph 10 of the Application.
11. The Trustee denies the allegations in paragraph 11 of the Application.
12. The Trustee is without knowledge or information sufficient to admit or deny the allegation in paragraph 12 of the Application, and therefore denies the allegations.
13. The Trustee denies the allegations in paragraph 13 of the Application.
14. The Trustee is without knowledge or information sufficient to admit or deny the allegation in paragraph 14 of the Application, and therefore denies the allegations.
15. The Trustee is without knowledge or information sufficient to admit or deny the allegation in paragraph 15 of the Application, and therefore denies the allegations.
16. The Trustee denies the allegations in paragraph 16 of the Application.
17. The Trustee denies the allegations in paragraph 17 of the Application.
18. The Trustee denies the allegations in paragraph 18 of the Application.
19. The Trustee denies the allegations in paragraph 19 of the Application.
20. The Trustee denies the allegations in paragraph 20 of the Application.
21. The Trustee denies the allegations in paragraph 21 of the Application.
22. The Trustee denies the allegations in paragraph 22 of the Application.
23. The Trustee denies the allegations in paragraph 23 of the Application.
24. The Trustee denies the allegations in paragraph 24 of the Application.
25. The Trustee denies any allegations not specifically addressed in the foregoing paragraphs.

B. Grounds for the Trustee's Objection to the Application.

1. There is no evidence of the actual amount of stamps on hand on the Chapter 11 petition date. On information and belief, the value of such stamps was a small fraction of the \$122,000 Amplex claims. The Trustee objects to the Application to the extent it seeks any relief in excess of the value of the stamps on hand on the petition date.

2. Furr's Supermarkets, Inc. ("Furr's") had authority under its agreement with Amplex to sell the subject postage stamps. Because of that, the stamps were not converted, and Amplex can have no conversion claim against the estate.

3. If Amplex has a claim based on Furr's selling stamps post-petition and turning the sales proceeds over to Furr's secured lenders (which the Trustee denies), the claim would be against Furr's secured lenders rather than the Furr's estate. Furr's acted pursuant to Court order.

4. There is nothing in the Court's February 8, 2001 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, docket no. 34 (the "Customer Service Order"), that gives Amplex any type of claim or right. The Customer Service Order grants relief only with respect to Furr's pre-petition obligations to its customers, not with respect to Furr's pre-petition obligations to its vendors.

5. Amplex's claim under 11 U.S.C. § 507(b) should be disallowed because no adequate protection agreement or order was ever entered with respect to Amplex.

6. Amplex's claim under 11 U.S.C. §§ 364(b), 364(c), and/or 364(c) should be denied because those sections all require a court order awarding a creditor an administrative claim, and Amplex neither sought nor obtained such a court order.

7. Amplex's claim under 11 U.S.C. §503(a) should be denied because Furr's

alleged failure to pay Amplex the proceeds from the sale of stamps does not provide a basis for an administrative claim.

8. Amplex's claim under 11 U.S.C. § 105 should be denied because there are no grounds to invoke the Court's equitable powers, and if Amplex has a legitimate complaint (which the Trustee denies) it can obtain full compensation from the secured lenders that allegedly converted Amplex's cash collateral.

9. As Amplex admits in its Application, it had actual knowledge of the bankruptcy case from the outset, and filed a proof of claim on February 27, 2001. Amplex therefore was on notice of the case, and is bound by the Court's orders entered in the case. Those orders include an order finding that Furr's secured lenders had first liens on all of Furr's pre-petition assets and the proceeds therefrom, including the stamps in which Amplex claims to have had a prior security interest. Amplex is bound by the order.

10. The Application is not timely and therefore should be disallowed.

11. The Application should be denied because Amplex owes the estate money pursuant to 11 U.S.C. §547, and therefore cannot have an allowed claim of any kind, as set forth in 11 U.S.C. §502(d).

B. Objection to Amplex's Proofs of Claim.

12. The Trustee objects to Amplex's proof of claim filed February 26, 2001 as claim # 27 (the "Secured Claim") because the value of Amplex's collateral on the petition date was a small fraction of the claimed value of \$122,000.

13. The Trustee objects to the Secured Claim because, as set forth above, Amplex agreed implicitly or explicitly to the sale of its collateral in the ordinary course of Furr's business, and acquiesced in Furr's turning over the sales proceeds to Furr's secured lenders.

14. The Trustee objects to the Secured Claim because, pursuant to 11 U.S.C. § 552(a), Amplex's pre-petition security interest in any stamps did not attach to the post-petition stamps Furr's purchased.

15. The Trustee objects to the Secured Claim, and also to Amplex's proof of claim filed on or about August 17, 2004, for all of the reasons set forth above.

WHEREFORE, the Trustee prays that the Application be denied, that Amplex's proofs of claim be disallowed, and for all other just and proper relief.

JACOBVITZ THUMA & WALKER
A Professional Corporation

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The undersigned hereby certifies that a copy of the foregoing was mailed to:

Louis Puccini
P.O. Box 30707
Albuquerque, NM 87190

this 13th day of September, 2004.

Filed electronically
David T. Thuma