

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

In re FURR'S SUPERMARKETS, INC.,

Case No. 01-10779-SA
Chapter 11

Debtor.

**BRIEF IN SUPPORT OF MOTION FOR ORDER DIRECTING
IMMEDIATE PAYMENT OF ACCRUED POST-PETITION
HEALTH AND WELFARE BENEFITS**

New Mexico United Food and Commercial Workers' Unions and Employers' Health and Welfare Trust Fund (the "Fund"), by its attorneys, respectfully submits this brief in support of its request for an order directing Furr's Supermarkets, Inc. (the "Debtor") to immediately pay to the Fund the contribution due in September, 2001 for hours worked and coverage earned by certain employees in August, 2001. In support of that motion, the Fund states as follows:

INTRODUCTION

The dispute between the Debtor and the Fund has two components. First, the Fund maintains that each month that employees worked for the Debtor, they earned a contribution on their behalf which would be due the following month and which would provide them with health and welfare coverage in that following month (the "Next Month System"). For example, an employee who worked for the Debtor in August

knew that the Debtor was obligated to make a contribution on her behalf in September, and that the Fund would provide her with health and welfare coverage in September if (but only if) the Fund received that payment from the Debtor.

The Debtor, in contrast, has concocted an alternative theory of how the Fund functions. According to the Debtor's version, employees who worked in August were simultaneously earning August health and welfare coverage; their hours in July did not entitle those employees to coverage in August, but were used as some sort of estimating device for how much the August contribution would be for employees working in August (the "Same Month System").

This factual dispute is easily resolved. The Debtor's interpretation -- which was never suggested until after the Debtor had received the full benefit of the employees' labor and then laid them off -- is belied by the parties' own practices, inconsistent with the underlying documents and contrary to the understanding of the other employers who participate in the Fund.

The second part of the dispute is whether the Debtor is obligated -- and can use the lenders' cash collateral -- to pay the September health and welfare contribution earned by employees in August. Again, there isn't much to debate. Both the Debtor and the Lenders have stated on the record that, if the Fund's interpretation is correct, they are obligated to make the September contribution. However, even if the Debtor or Lenders attempted to disavow that public commitment or renege on that promise, the Court has authority to order the payment.

ARGUMENT

I. EMPLOYEES EARNED SEPTEMBER HEALTH AND WELFARE COVERAGE BY WORKING FOR THE DEBTOR IN AUGUST

Until the employees were laid off at the end of August and the sale to Fleming was consummated at a going-concern price, everyone associated with the Fund understood how the program worked. The Fund had administered contributions and provided coverage to employees under the Next Month System from its inception.

The testimony of the Fund administrator, Ms. Judy Pedroza, was unequivocal with respect to the parties' actual and historical practice. While cross-examiners tried to get Ms. Pedroza to indulge their own strained interpretations of certain contractual language, she testified without wavering that for several decades the Fund has applied contributions and provided health and welfare coverage to employees using the Next Month System. *See Pedroza Transcript at pp. 7-8, 11-12.*

Nor is the Next Month System just a unilateral misinterpretation by the Fund; rather, it was the practice always followed by the Debtor itself. If a full evidentiary hearing is required in this matter, the Fund will show that each month, the Debtor's own calculation of its required Fund contribution would identify employees by name, social security number, store and hours worked the previous month, and calculate the appropriate contribution for those employees -- *including employees who had been terminated during the previous month.* If (as the Debtor now posits) an employee terminated in June was only entitled to health and welfare benefits during June and was fully covered by the June 20th contribution, there would be no reason to list that

employee on the July report and make another contribution in July under that employee's name -- yet that's exactly what the Debtor did, because that's the way the Fund worked.

When appropriate, the Fund will even present evidence showing that when an employee was terminated in month X and the Debtor inadvertently omitted its contribution to the Fund for that employee in month X+1, the Debtor would send a make-up payment to the Fund in month X+2, specifying the terminated employee on whose behalf the payment was being made.

Moreover, the Debtor was not alone in its interpretation. At the evidentiary hearing in this matter, the Fund will offer testimony from other contributing employers and (if necessary) Fund records spanning decades, all establishing that the Next Month System has been consistently practiced, and all recognizing that employees earn coverage each month for the following month.

Until its financial distress inspired the Debtor to start looking for loopholes or ambiguities in the contracts, the Debtor consistently acknowledged and adhered to the Next Month System as the operative interpretation. The Debtor's actions are entitled to more weight than an *ex post facto* version of the contract conjured to avoid liability. *See Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913) ("Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.").

Based on the established practices of the parties, and the continuing practice of the remaining employers who contribute to the Fund, it cannot legitimately be disputed that the Next Month System is the proper interpretation of the Debtor's deal with its Union employees. The Same Month System is simply a revisionist invention that is debunked by the Debtor's own past actions. The employees who faithfully provided services to the Debtor in August, were earning not only a paycheck, but also the right to have a contribution made to the Fund on their behalf in September, so the Fund could provide them with health and welfare coverage in that month.

II. THE DEBTOR AND THE LENDERS HAVE EXPRESSLY AND IMPLIEDLY PROMISED TO PAY CONTRIBUTIONS TO THE FUND EARNED BY EMPLOYEES DURING THIS CASE.

Once the Court confirms that the Next Month System has always governed the relationship between the Debtor and the Fund, granting the rest of the Fund's motion is easy -- both the Debtor and the lenders have repeatedly acknowledged in open court that if the employees earned a September contribution by working in August, that contribution will have to be made. Under the Next Month System, payments to the Fund are as much a part of the employees' compensation as their core wages, payment of which the lenders and Debtor have never disputed.

In fact, neither the Debtor nor the lenders has ever asserted that contributions to the Fund are different in kind from hourly wages. To their credit, the Debtor and the lenders have not resorted to specious distinctions between an employee's take-home wages and critical in-lieu-of-wages health benefits. While disputing whether the Next

Month System or the Same Month System applies, the Debtor and lenders have all conceded that hours worked by employees earned them the right to SOME contribution to their health and welfare coverage.

Indeed, at the end of August, the lenders consented to the use of their cash collateral for payment of the August contribution, as they had for all prior monthly payments throughout the Chapter 11 case. The only disagreement is that the Debtor and lenders mistakenly believe the August payment brought them current, while the evidence shows that they still owe employees one more month of health and welfare coverage for the work they performed in August.

By words and deeds, the Debtor and lenders have stipulated that all health and welfare contributions earned by employees and owed to the Fund must be paid from cash collateral. As shown in Part I, the employees who worked in August have earned one more month of coverage. The Court need do nothing more than order the Debtor and lenders to live up to the agreements they made in public.

III. THE COURT HAS AUTHORITY TO ORDER THE SEPTEMBER PAYMENT BE MADE FROM CASH COLLATERAL WITHOUT THE LENDERS' CONSENT.

As explained above, the lenders have in fact consented to the use of their cash collateral for payment of contributions to the Fund. They have never announced "we'll permit all but one month of health and welfare benefits to be paid"; rather, the lenders' reassuring message has been that employees would be paid for services rendered while on the lenders' watch. Thus, the Court should find that the lenders have already con-

sented to the use of cash collateral to pay the September contribution to the Fund for employee hours worked in August.

If the lenders should now balk at their prior commitments, the Court nevertheless has the authority to issue an order directing the debtor to pay the September contribution, even from the lenders' collateral and notwithstanding the purported waiver of the debtor's rights to surcharge that collateral under section 506(c). The Court's authority derives from several sources -- its inherent power to interpret and enforce its own orders (in this case, the Benefits Continuation Order, Docket No. 28); the Court's similar power to enforce promises made by parties on the record and in the Court's presence; case law suggesting that section 506(c) waivers are unenforceable; and the statutory authorization found in Bankruptcy Code section 552(b)(1), which enables the Court to limit the extent to which a prepetition lien extends to postpetition proceeds, based on "the equities of the case" (a protection which the Debtor does not appear to have explicitly waived).

The *Benefits Continuation Order* has been in force and effect since the beginning of this case. Nothing in the final postpetition financing order directly supersedes or contradicts the provisions of the *Benefits Continuation Order*. Throughout this case, employees have relied on the *Benefits Continuation Order* to protect them from losing postpetition wages or benefits for hours they actually worked. The employees have never been informed that their protection was subject to the unfettered discretion of the lenders to determine whether or which wages and benefits would be paid. Most

importantly, the employees were never told that the lenders could unilaterally deny contributions to the Fund earned by the employees during their final month of work, after having paid those contributions throughout the Chapter 11 case.

Assuming for the sake of argument that the Benefits Continuation Order was in some silent way "subject to" the lenders' cash collateral and/or postpetition financing rights, the employees could never have known or suspected that the lenders could deny payment of wages or benefits earned prior to the "Termination Date" identified in the postpetition financing order. As part of the authority to interpret its own orders, this Court should reconcile the Benefits Continuation Order with the postpetition financing order, and clarify that benefits earned by employees prior to the termination of the postpetition financing order must be paid -- if not from postpetition advances by the DIP lenders, then from the prepetition collateral of those same lenders.¹

This interpretation of the interplay between the Benefits Continuation Order and the postpetition financing order is not unfair to the lenders. They were fully aware of the existence of the Benefits Continuation Order, and continued to accept the benefit of the employees' labor throughout the month of August. Indeed, the employees' expectation that their postpetition health and welfare benefits would be paid in full, as provided by the Benefits Continuation Order, was reinforced by pronouncements from

¹ The practice of Bankruptcy Judge Yacos is instructive in this regard. He requires that cash collateral orders include a "winding down" proviso under which secured lenders can also be required to pay for any benefits received during, but due after, the term of the cash collateral order or stipulation. *See, e.g., In re Ridgeline Structures, Inc.*, 154 B.R. 831, 832 (Bankr. D.N.H. 1993).

representatives of the secured lenders in open court. Having willingly accepted the labor of the covered employees prior to termination of the postpetition financing order, and having failed to disclaim their obligations under the Benefits Continuation Order, the Debtor and lenders should be required to make the September Fund contribution as part of the Court's power to enforce and interpret its prior orders.

Nor are the lenders necessarily insulated by the Debtor's purported waiver of its rights under section 506(c) in the postpetition financing order. Several courts have questioned the enforceability of such waivers by a trustee or a debtor in possession. *See, e.g., In re Brown Bros., Inc.*, 136 B.R. 470 (W.D. Mich 1991); *In re Lockwood Corp.*, 223 B.R. 170 (8th Cir. BAPR 1998). Where, as here, the lenders try to use a 506(c) waiver extracted from the Debtor at the outset of this case as an excuse to not pay employees for their postpetition services, the Court should consider whether the waiver is even enforceable.

As an alternative to ruling on the enforceability of the Debtor's section 506(c) waiver, the Court can use section 552(b)(1) as a source of authority for the relief requested by the Fund. To the extent any such payment would have to come from the lenders' collateral, section 552(b)(1) of the Bankruptcy Code provides that, based on "the equities of the case," a court can order that a secured party's prepetition lien does *not* extend to postpetition proceeds." The purpose behind the 'equities of the case' rule . . . is, in a proper case, to enable those who contribute to the production of proceeds during chapter 11 to share jointly with the prepetition creditors secured by proceeds."

In re Crouch, 51 B.R. 331, 333 (Bankr. D. Ore. 1985). Here, the equities of the case demand that the Court intervene and impose a "non-consensual carve-out" under section 552(b)(1) in order to prevent Union employees from losing 25% or more of their August compensation.

The Court should conclude that "equities" prohibit debtors and secured lenders from accepting benefits which accrue but are not payable during the term of one cash collateral arrangement, and then omitting the payment for those accrued benefits from the succeeding cash collateral arrangement because the payment is no longer deemed "necessary." Unlike some administrative claimants, the employees cannot protect themselves by switching to a COD basis for their postpetition labor – they must accept it on faith that the mere delay between earning their benefits and receiving them will not cause payment for their postpetition labors to fall between the cracks of two cash-collateral periods. This Court should protect that faith, using whatever statutory and equitable tools are available to prevent the lenders from shortchanging employees.

Dated: October 2, 2001

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument BRIEF IN SUPPORT OF MOTION FOR ORDER DIRECTING IMMEDIATE PAYMENT OF ACCRUED POST-PETITION HEALTH AND WELFARE BENEFITS was sent to the fore-mentioned list via facsimile, on this 2nd day of October, 2001.



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