

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

FILED  
12:00 MIDNIGHT  
SEP 06 2001

In re:

FURR'S SUPERMARKETS, INC.,

DROP BOX  
United States Bankruptcy Court  
Albuquerque, New Mexico

Case No. 11-01-10779-SA  
Chapter 11

Debtor.

**CORRECTED**

**MOTION FOR ORDER AUTHORIZING USE OF CASH COLLATERAL, INCLUDING  
REQUEST FOR AN EMERGENCY PRELIMINARY HEARING TO AVOID  
IMMEDIATE AND IRREPARABLE HARM**

Furr's Supermarkets, Inc., the debtor in possession ("Furr's"), pursuant to Bankruptcy Code §363(c)(2) and Bankruptcy Rule 4001(b) and (d), files this Motion for Order Authorizing Use of Cash Collateral, Including Request for an Emergency Preliminary Hearing to Avoid Immediate and Irreparable Harm (the "Motion"). Furr's moves the Court to schedule this Motion for a preliminary hearing on an expedited basis, pursuant to Bankruptcy Code §363(c)(3) and Bankruptcy Rule 4001(b)(2) and (d), to authorize use of cash collateral for the period from September 11, 2001 through a final hearing on the Motion (the "Interim Period") pursuant to the proposed budget attached hereto as Exhibit A (the "Post Closing Operating Budget") and to grant other relief requested below, all of which is necessary to avoid immediate and irreparable harm to the estate. Finally, Furr's moves the Court to set this Motion for a final hearing on an expedited basis, pursuant to Bankruptcy Code §363(c) and Bankruptcy Rule 4001(b)(2), and to authorize the continued use of cash collateral thereafter in accordance with the Post Closing Operating Budget and then in accordance with weekly operating budgets (the "Weekly Budgets") to be approved in accordance with the procedure set forth in paragraph 6 below.

In support of this Motion, Furr's states:

1038

1. Creditors Holding Liens Against Cash Collateral. All cash currently held by Furr's constitutes cash collateral under Bankruptcy Code § 363(a), securing, inter alia, (i) any unpaid balance owed to Heller Financial, Inc. ("Heller"), as agent for Fleet Capital Corporation ("Fleet"), Bank of America N.A. ("B of A"), Heller, and the Metropolitan Life Insurance Company ("MetLife") (together, the "DIP Lenders"), pursuant to the loan of up to \$33 million made by the DIP Lenders on or about February 8, 2001 (the "DIP Loan"); (ii) approximately \$49 million owed to Heller, as agent for Heller, Fleet, and B of A (together, the "Pre-Petition Senior Lenders") under a Loan Agreement dated December 21, 2000 (the "Pre-Petition Senior Indebtedness"); and (iii) a \$25 million loan made to Furr's by MetLife as described in finding D(iii) of the Final DIP Order (the "Pre-Petition ML Senior Debt") (together, the Pre-Petition Senior Indebtedness and Pre-Petition ML Senior Debt are called the "Pre-Petition Senior Loans"). The DIP Lenders, the Pre-Petition Bank Lenders, and MetLife are sometimes referred to as the "Lenders." The Pre-Petition Senior Lenders and MetLife are sometimes referred to as the "Pre-Petition Bank Lenders." The Lenders have liens against collateral constituting cash collateral within the meaning of 11 U.S.C. § 363(a). The Debtor does not seek to use cash collateral, or claimed cash collateral, of other creditors, such as liquor wholesalers and Texas taxing authorities.

2. Immediate and Irreparable Harm to the Estate Without Use Of Cash Collateral. During the Interim Period, Furr's must use cash collateral as set forth in this paragraph, and obtain the other relief requested in paragraphs 3 and 4 below, to avoid immediate and irreparable harm to the estate and its creditors pending a final hearing on this Motion. Furr's needs to use cash collateral immediately in accordance with the Post Closing Operating Budget to continue to operate; to continue to honor outstanding payroll checks issued to its former employees (about \$1,264,000 expected to be presented for payment between 9-1-01 and 9-15-01); to continue to

honor outstanding checks for medical claims of former and current employees (about \$450,000 expected to be presented for payment between 9-1-01 and 9-15-01); to continue to honor outstanding checks for accounts payables (about \$350,000 expected to be presented for payment between 9-1-01 and 9-8-01); to pay rent; to pay its current employees, whose duties will include compliance with certain statutory requirements, including preparation of tax returns and generation of W-2s, 1099s, and Cobra certificates for current and former employees; to preserve the value of remaining assets in Furr's estate; and to pay necessary professional fees. Absent the availability of such cash, Furr's would be forced to convert to Chapter 7 immediately. The Debtors' remaining assets include, among other things, the collection of inventory prepaids (which requires substantial accounting work to reconcile prepaids against deliveries); the collection of receivables (that requires reconciliation and compilation of supporting documents), the Debtor's leasehold interest in its El Paso warehouse, liquor licenses, preference claims, and various equipment, fixtures and furnishings.

3. Provisional Payment of the Pre-Petition Senior Loans, and Payment to George Golleher and Greg Mays. As further adequate protection and to conserve estate assets and minimize the accrual of post-petition interest claims, Furr's proposes to make provisional payment to the Pre-Petition Bank Lenders, to extent of available funds, of all amounts due and owing under the Pre-Petition Senior Loans, to be applied in accordance with the agreements among the Pre-Petition Bank Lenders, subject to the Lenders' agreement to return all or any

portion of such funds if so ordered to do so by this Court in a contested matter and not to allow

account from a financial institution approved by the United States' Trustee's office. Further, a success fee of \$1,500,000 owed to George Golleher and Greg Mays (which represents a discount from the Court-approved amount) should be paid pursuant to their consulting agreements with Furr's, which the Court approved as due and payable upon closing of the sale to Fleming and its designees.

4. Carve-Out for JTW Professional Fees. Jacobvitz, Thuma & Walker P.C. ("JTW") expended substantial time and effort representing the Debtor to accomplish the sale of assets to Fleming Companies, Inc., and its designees, and in related matters, at local billing rates that are substantially lower than Court approved rates of national counsel. Further, the Debtor requires counsel to continue to discharge its obligations as a chapter 11 debtor. Accordingly, the Debtor proposes, and anticipates that the Lenders will agree, as part of a cash collateral order granting the relief requested by this Motion, that there shall be carved out of the collateral pledged to the Lenders to secure advances made to the Debtor under Bankruptcy Code §364 and/or any pre-petition loans to the Debtor, and the proceeds thereof (the "Collateral") an amount sufficient to pay professional fees and reimbursable costs, and gross receipts tax thereon, charged and/or to be charged by JTW in its representation of the Debtor in this chapter 11 case (such compensation is referred to herein as the "Compensation," and the proposed carve out is referred to herein as the "JTW Carve Out"). The JTW Carve Out, instead of the professional fee carve out set forth in paragraph 3 of the Final DIP Order (the "DIP Order Carve Out"), shall apply to the Compensation so that the amount of the Compensation does not reduce the DIP Order Carve Out. The foregoing notwithstanding, the JTW Carve Out would not apply to any Compensation charged to object to any Lender's claims, challenge any lien of any Lender, or bring any avoidance or other actions against any Lender or its collateral, including without limitation formal discovery proceedings in anticipation of bringing any such action. The JTW Carve Out

would be for the benefit of JTW only, and does not constitute an express or implied consent by the Lenders to pay any other administrative expenses, from the Collateral or otherwise. The Lenders expressly acknowledge that JTW's client is and shall remain the Debtor, and JTW's loyalties, duties, and responsibilities shall remain the same after entry of this order as before. JTW has represented to the Lenders that the total compensation charged for services rendered between February 8, 2001 and August 30, 2001 (including fees, costs and gross receipts tax) is \$402,852.21.

5. Furr's Need to Continue to Use Cash Collateral After the Interim Period. After the Interim Period, Furr's needs to use cash collateral to do the following (although use of collateral for such purposes after expiration of the Post Closing Operating Budget would be subject to the approvals and procedure set forth in paragraph 6 below):

- (a) make payroll to current employees;
- (b) complete any work on W-2s, 1099s, and Cobra certificates for current and former employees;
- (c) honor any remaining outstanding checks for medical claims of current and former employees and for accounts payable;
- (d) fund the operations needed to liquidate the estate's remaining assets, such as collecting accounts receivable and deposits and selling liquor licenses, other personal property, and Furr's remaining real property interests;
- (e) pay other administrative expenses;
- (f) pay the amounts due to Peter J. Solomon & Co. Ltd., which the Court approved as due and payable upon closing of the sale to Fleming and its designees, subject to the filing of a fee application; and
- (g) pay other professional fees as authorized by the Court.

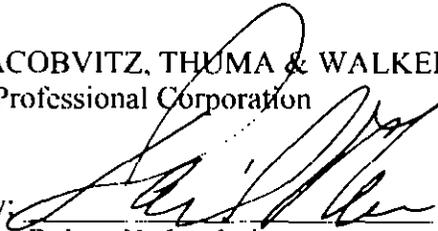
6. Procedure for Approving Operating Budgets. All Weekly Budgets would be subject to prior approval of the Lenders, and either the Unsecured Creditors Committee or the Court.

7. Treatment Under the Final DIP Order. The Lenders are entitled to adequate protection for the use of their cash collateral. Furr's therefore proposes that all cash collateral Furr's uses be treated for all purposes as if the cash were loaned to Furr's pursuant to the Final DIP Order (1) Authorizing Debtor to Obtain Secured Financing. (2) Granting Adequate

9. Request For an Emergency Preliminary Hearing Authorizing Use of Cash Collateral and Granting Other Requested Relief. Furr's requests the Court to conduct an emergency preliminary hearing pursuant to 11 U.S.C. § 363(c), on notice to Furr's, the Lenders, the Unsecured Creditors' Committee, the persons on the limited mailing matrix in this case, and the United States Trustee; and to authorize use of cash collateral as requested in this Motion, pending a final hearing on the Motion. As shown above, this is necessary to avoid immediate and irreparable harm to the estate. Furr's further requests that the relief granted at the emergency preliminary hearing pursuant to paragraphs 3, 4 and 7 above would be binding and final regardless of any order entered by the Court at the final hearing.

WHEREFORE, Furr's respectfully requests that this Court enter an order granting the interim relief requested herein, grant the additional relief requested after a final hearing on the Motion, to be held as soon as reasonable possible, and for all other just and proper relief.

JACOBVITZ, THUMA & WALKER,  
a Professional Corporation

By: 

Robert H. Jacobvitz

David T. Thuma

500 Marquette N.W., Suite 650

Albuquerque, N.M. 87102

(505) 766-9272

(505) 722-9287 (fax)

Attorneys for Furr's Supermarkets, Inc.

# POST CLOSING OPERATING BUDGET

	Period 9 Wk End <u>09/08/01</u>	Wk End <u>09/15/01</u>	Wk End <u>09/22/01</u>	Wk End <u>09/29/01</u>	Wk End <u>10/06/01</u>
<b>HEADCOUNT</b>	72	45	42	38	25
<b>PAYROLL</b>					
SALARIES	65.0	49.0	46.0	43.0	
BENEFITS/TAXES	5.0	3.9	3.7	3.4	
<b>TOTAL PAYROLL</b>	<u>70.0</u>	<u>52.9</u>	<u>49.7</u>	<u>46.4</u>	
MAIL FLOAT	(34.0)	12.0	-	-	
<b>SUBTOTAL</b>	<u>36.0</u>	<u>64.9</u>	<u>49.7</u>	<u>46.4</u>	
<b>CONSULTING FEES</b>	8.6	8.6	8.6	8.6	
<b>RENT</b>	-	75.0	-	-	
<b>OPERATING COSTS</b>					
CHAIRMAN/VICE CHAIRMAN	-	-	-	50.0	
DATA CENTER	17.1	17.1	17.1	17.1	(E)
UTILITIES	3.0	3.0	3.0	3.0	
TELEPHONE	2.2	2.2	2.2	2.2	
SUPPLIES	2.8	1.9	1.9	1.9	
HOUSEKEEPING	0.5	0.5	0.5	0.5	
SECURITY	0.5	0.5	0.5	0.5	
POSTAGE	0.8	0.8	0.8	0.8	
MISC EXPENSE	5.6	5.6	5.6	5.6	
TAXES	-	-	-	-	(C)
<b>TOTAL OPERATING COSTS</b>	<u>32.5</u>	<u>31.6</u>	<u>31.6</u>	<u>81.6</u>	
<b>PAYROLL</b>	70.0	1,194.0	-	-	
<b>ACCOUNTS PAYABLE</b>	350.0 (A)	-	-	-	
<b>GROUP MEDICAL</b>	300.0	150.0	-	-	
<b>3RD PARTY SERVICES</b>	TBD (B)	-	-	-	
<b>CARRYING/CLOSURE COSTS--WHSE</b>	-	25.0	25.0	25.0	
<b>PUBLIC LIABILITY</b>	15.0	5.0	5.0	-	
<b>TOTAL</b>	<u>812.1</u>	<u>1,554.1</u>	<u>119.9</u>	<u>161.6</u>	
<b>CUM</b>	<u>812.1</u>	<u>2,366.2</u>	<u>2,486.0</u>	<u>2,647.6</u>	

**EXHIBIT**

A

**NOTES:**

**(A)** Accounts Payable includes the following components:

Outstanding Checks	350.0	
Open Payables	50.0	
Unbilled Services	<u>400.0</u>	(D)
	800.0	

**(B)** Functions requiring the involvement of 3rd parties include:

Pension Plan Termination  
401K Plan Termination  
Corporate Taxes  
Final W-2's  
Data Storage

**(C)** No payments required during period represented.

**(D)** Unbilled Services include items such as, final utility billings for all stores, inventory services for sale of stores, etc.

**(E)** Data Center includes cost of hardware, operating systems, software licenses and support for systems required to wind down business and collect remaining proceeds including: OMI (buying and warehousing system) and LAWSON (Payroll, Accounts Receivable, Accounts payable).