FILED
01 FEB -8 AM 9:43
U.S. BANKRUPTCY COURT
ALBUQUERQUE N.M.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

------------------------------------ x

In re : 11-01-10779

FURR'S SUPERMARKETS, INC., : Chapter 11

Debtor. :

------------------------------------ x

DEBTOR'S MOTION FOR ORDER AUTHORIZING (A) PAYMENT OF PREPETITION EMPLOYEE OBLIGATIONS AND (B) CONTINUATION OF EMPLOYEE BENEFIT PLANS AND PROGRAMS POSTPETITION

Furr's Supermarkets, Inc., debtor and debtor-in-possession in the above-captioned case (the "Debtor"), hereby moves for an order under 11 U.S.C. §§ 105, 507 and 1113(f) authorizing the Debtor (i) to pay or otherwise honor various employee-related prepetition obligations of the Debtor to, or for the benefit of, employees, (ii) authorizing the Debtor to continue postpetition the employee benefit plans and programs in effect immediately before the filing of this case, (iii) confirming that the Debtor is permitted to pay any and all local, state and federal withholding and payroll-related or similar taxes relating to prepetition periods, and (iv) directing all banks to honor prepetition checks for payment of the Debtor's prepetition employee obligations.

BACKGROUND

A. The Chapter 11 Filing

1. On February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended, "Bankruptcy Code"). The Debtor continues to operate its business and manage its properties as debtor-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code.

2. No creditors' committee has yet been appointed in this case by the United States Trustee.

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

B. The Debtor's Business

4. The Debtor is a leading regional supermarket chain, with operations in New Mexico and Western Texas. The Debtor has a leading market share in this region. The Debtor employs some 4,900 individuals, and operates seventy-one stores.

5. The Debtor's stores offer a broad selection of grocery, meat, poultry, seafood, dairy, fresh fruits, vegetables and frozen food products. The stores

also offer an extended line of non-food products, health and beauty care products, housewares, general merchandise and, in many instances, in-store pharmacies.

RELIEF REQUESTED

6 By this Motion, the Debtor requests that this Court enter an Order, under sections 105, 507 and 1113(f) of the Bankruptcy Code, authorizing the Debtor to pay or otherwise honor its various employee-related prepetition obligations to, or for the benefit of, its current and former employees, temporary employees, and independent contractors (the "Employees"). These obligations (the "Prepetition Employee Obligations") include (a) unpaid prepetition wages, fees, salaries, holiday and vacation pay, sick leave pay and other excused leave pay earned before the Petition Date; (b) workers' compensation claims arising before the Petition Date; (c) reimbursable business expenses incurred before the Petition Date; and (d) employee-benefit claims arising before the Petition Date (including medical, dental, vision, prescription drug, COBRA, basic term life insurance, supplemental life insurance, disability salary continuance, 401(k) plans, pension plans, payments under garnishment orders and miscellaneous other benefits).

7. The Debtor also seeks authorization to continue postpetition the employee benefit plans and programs giving rise to the Prepetition Employee Obligations in the manner and to the extent that they were in effect immediately before the Petition Date. As part of the foregoing relief, the Debtor seeks authorization to pay

any and all local, state and federal withholding and payroll-related or similar taxes relating to prepetition periods, including but not limited to, all withholding taxes, Social Security taxes and Medicare taxes,[1] as well as all other trust-fund type withholdings such as garnishment contributions and savings, pension plan, or other deductions, if any. The term Prepetition Employee Obligations is meant to include all such payments.

8. Finally, the Debtor seeks an order (i) authorizing all banks to honor prepetition checks for payment of the Prepetition Employee Obligations and (ii) prohibiting banks from placing any holds on, or attempting to reverse, any automatic transfers to Employees' accounts for Prepetition Employee Obligations. The Debtor also seeks authorization to reimburse any expenses that Employees may incur as a result of any bank's failure to honor a prepetition check.

BASIS FOR RELIEF

9. As of the Petition Date, the Debtor's aggregate workforce consists of approximately 4,900 current Employees. This total includes a limited number of independent contractors, and similar temporary workers. The Debtor's workforce consists of approximately 4,320 hourly employees (the "Hourly Employ-

---

1 See City of Farrell v. Sharon Steel Corp., 41 F.3d 92 (3d Cir. 1994) (state law requiring debtor to withhold city income tax from its employees' wages created trust relationship between debtor and city for payment of withheld taxes).

ees") and approximately 500 salaried employees (the "Salaried Employees"). More than 3,400 of the Debtor's personnel are part-time Employees

A. <u>Wages and Salaries</u>

10. The Debtor's annual payroll for the Employees is approximately \$ 91 million. The Debtor's total outstanding wage obligations, as of the Petition Date, total \$ 1.78 million, plus certain withholding tax obligations, which bring the Debtor's total outstanding pre-petition payroll obligations to approximately \$ 2.1 million.

11. Certain of the Debtor's Employees are paid by way of a third-party payroll service. The Debtor requests authorization to continue to utilize this payroll service during the pendency of this case.

B. <u>Other Compensation</u>

12. The Debtor offers its Employees other forms of compensation, including vacation pay, overtime pay, and other earned time off, a managerial deferred compensation plan, and reimbursement of certain business expenses (the "Employee Compensation Programs"). Continuation of these Employee Compensation Programs is necessary if the Debtor is to attract and retain qualified employees to operate its business during this case.

13. <u>Vacation</u>. All Hourly and Salaried Employees are eligible for vacation time ("Vacation Time"). Subject to state law exceptions, Employees who

retire, resign, or are otherwise terminated are entitled to be paid for their accrued Vacation Time.

14. Overtime, Holiday Pay and Time Off. Hourly Employees are entitled to earn overtime pay for hours worked in excess of their scheduled time, and are also eligible for "premium pay" for work performed on Sundays and legal holidays. Employees also receive compensation in the form of floating holidays, funeral leave, jury service duty, military leave, sick leave, and accident leave

15. Employee Benefit Plans. Before the Petition Date, the Debtor offered the Employees certain benefits, including medical, dental, vision, prescription drug, COBRA, basic term life insurance, supplemental life insurance, executive disability insurance, disability insurance, relocation assistance program, payments under garnishment orders, retiree medical plan, and miscellaneous other benefits (collectively, the "Employee Benefits"). The Debtor estimates that the annualized cost of the Employee Benefits is approximately $ 38.9 million.

16. The Debtor provides medical benefits through a self-insured program, supplemented by a stop-loss insurance policy. Two third-party administrative companies provide the Debtor's with claims management and general administrative services in connection with the self-insured medical plans, and the Debtor expressly requests authorization to continue to use these firms in the normal course of the Debtor's operations.

D. Pension and Retirement Plans

17. Pension Plans. Many of the Debtor's Employees participate in the firm's pension plan, which is fully funded. Unionized Hourly Employees receive pension benefits through their unions. The Debtor partially funds these union pensions through per-Employee contributions, as set forth in the various unions' collective bargaining agreements, and are further discussed below.

18. Retirement (401(k)) Plan The Debtor offers certain eligible Employees the opportunity to participate in a 401(k) (the "Plan"). The Plan provides for salary deferral of up to 15% of an Employee's annual salary. The Debtor's contributions to the Plan are based on matching a percentage of the Employee's savings. Specifically, the Plan provides that Employees are eligible for a matching contribution by the Debtor of $.25 for each dollar of the first 2% of the Employee's deferred salary. As of the Petition Date, the Debtor was holding approximately $50,000 in unremitted employee contributions and company matching payments.

E. Workers' Compensation Insurance

19. The Debtor provides workers' compensation coverage to the Employees at each of its stores through a self-insured workers' compensation program. In New Mexico, the Debtor's workers' compensation obligations are reinforced by a

letter of credit, in the amount of $ 2.0 million. In Texas, the Debtor provides workers' compensation by way of a self-funded salary continuance program.

20. The Debtor seeks authority to continue to manage and fund its workers' compensation programs and to pay prepetition claims, settlements and assessments arising under these programs, including, but not limited to, payments for lost wages, permanency, disfigurement, medical expenses, commutations and settled claims.

21. It is critical that the Debtor be permitted to continue to manage its established workers' compensation programs, as alternative arrangements for coverage would certainly be more costly. The failure to fund these programs and to provide continuing workers' compensation coverage will likely result in severe hardship to Employees, many of whom rely on these payments to pay their living and medical expenses, and may subject the Debtor and/or its officers to penalties.

F. Unionized Employees

22. Many of the Debtor's Employees are unionized. The Debtor's collective bargaining agreements (the "Collective Bargaining Agreements") with its unions establish pay rates, staffing levels, overtime pay, holiday pay, and other benefits. The Collective Bargaining Agreements require that the Debtor contribute certain amounts to the various unions for benefit plans such as health and welfare, pension, supplemental pension, legal and educational assistance (the "Union Benefit

Payments"). As of the Petition Date, the Debtor was holding accrued, but unremitted Union Benefit Payments of almost $500,000.

23. The Debtor also withholds union dues from Employees' paychecks, and remits these dues to the appropriate union. As of the Petition Date, the Debtor was holding approximately $74,600 in withheld, but unremitted union dues.

24. Although the Debtor seeks authority to continue to honor its obligations under the Collective Bargaining Agreements, it does not seek, at this time, entry of an order assuming or rejecting the Collective Bargaining Agreements.

G. Social Security, Income Taxes, and Other Withholding

25. The Debtor routinely withholds from Employees' paychecks amounts that the Debtor is required to transmit to third parties. Examples of such withholdings include Social Security, FICA, federal and state income taxes, garnishments, health care payments, retirement fund withholding, savings, and charitable donations.

26. The Debtor believes that these withheld funds, to the extent that they remain in its or its agent's possession, constitute monies held in trust and therefore are not property of the Debtor's bankruptcy estate.

27. By this Motion, the Debtor seeks authority to pay the Prepetition Employee Obligations, as described above, and to continue to perform its obligations under the Employees plans and programs, as described above, in the ordinary course

of its business. The failure to pay these Obligations and continue these plans and programs will have immediate and severe consequences on the Debtor's ability to reorganize.

APPLICABLE AUTHORITY

28. Under section 1113(f) of the Bankruptcy Code, the Debtor may not unilaterally terminate or alter any provision of a collective bargaining agreement. The Debtor submits that, with respect to its unionized employees, a failure to pay wages and benefits when due would constitute a unilateral alteration of the agreement. More importantly, it would likely lead to concerted employee action harmful to the Debtor's business. In the Debtor's business judgment, unless the Court orders otherwise, it must continue to honor its collective bargaining agreements In addition, sections 507(a)(3) and (a)(4) of the Bankruptcy Code give priority up to $4,300 per individual for prepetition claims for wages, salaries, vacation and sick leave and claims for contributions to employee benefit plans. The Debtor's workforce primarily consists of part-time, hourly workers, whose outstanding prepetition compensation is unlikely to exceed the foregoing limits. The Debtor therefore believes that almost all Employees are owed less than $4,300 in wages, salaries, vacation and sick leave and contributions to employee benefit plans as of the Petition Date and that almost all of the Prepetition Employment Obligations are entitled to priority under sections 507(a)(3) and (a)(4) and.

29. Further, even if the Debtor were to owe Prepetition Employment Obligations greater than $4,300 to any one Employee, the Debtor believes that such amounts would still be authorized under section 105(a), as set forth below.

30. The Debtor submits that this Court should authorize, under section 105(a) of the Bankruptcy Code, payment in full of the Prepetition Employee Obligations. Section 105(a) provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

31. Under the "necessity of payment" rule, first enunciated by the Supreme Court in Miltenberger v. Logansport, C. & S.W R. Co., 106 U.S. 286 (1882), a bankruptcy court may use its section 105 equitable powers to permit a debtor-in-possession to pay prepetition claims when payment is necessary to effectuate a successful reorganization. See In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (necessity of payment doctrine "teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during the reorganization, payment may be authorized even if it is made out of corpus").

32. Courts have permitted debtors-in-possession to pay prepetition wage, salary, expense and benefit claims where payment of such claims was necessary to effectuate a successful reorganization. See, e.g., In re Chateaugay Corp., 80 B.R. 279 (S.D.N.Y. 1987) (affirming order authorizing debtor to pay certain prepetition wages,

salaries, employee reimbursement expenses and benefits, including payments on workers' compensation claims); In re Gulf Air, Inc., 112 B.R. 152 (Bankr. W.D. La. 1989) (authorizing debtor-in-possession to pay prepetition employee wages and benefits, and health, life and workers' compensation insurance premiums).

33. Likewise, other bankruptcy courts have invoked their section 105(a) equitable powers to authorize the payment of prepetition employee claims when, as in this case, nonpayment or delay would damage a debtor's business or its ability to reorganize. See In re Owens Corning, Case No. 00-3837 (MFW) (Bankr. D. Del. Oct 6, 2000).

34. The relief requested in this Motion is necessary and should be authorized under section 105. The Debtor's ability to rely on its Employees is a key component of the success of its business, and its ability to continue as a going concern. The Employees rely on their wages and salaries to pay basic living expenses and use the Employee Benefits to secure the health and financial welfare of themselves and their families. Failure to pay the Prepetition Employee Obligations would create extreme personal hardship for many Employees, destroy Employee morale, and result in unmanageable Employee turnover. The adverse effect on the Debtor's ability to reorganize would be substantial.

35. The Debtor submits that the amounts to be paid under this Motion to cover the Prepetition Employee Obligations are reasonable compared to the losses that

the Debtor likely will suffer if those amounts are not paid, i.e., the loss of Employee morale and the resulting loss of the services that such Employees provide.

36. The payment of the Prepetition Employee Obligations in the ordinary course of business should neither prejudice general unsecured creditors nor materially affect the Debtor's estates because section 507(a)(3) and (a)(4) priority claims are entitled to payment in full under a reorganization plan. See 11 U.S.C. § 1129(a)(9)(B).

37. The requested relief will reduce significantly the administrative burden that might otherwise be imposed in this chapter 11 case. The compensation, benefit and reimbursement amounts that the Debtor seeks to pay to the Employees constitute priority claims under the Bankruptcy Code to the extent of $4,300 per Employee. The process of identifying to what extent each of the numerous Employees holds priority or general unsecured claims for employee benefits, and to modify benefit policies to enforce these distinctions, would impose additional administrative and financial burdens on the Debtor and the Employees, wholly unwarranted.

38. Accordingly, the Debtor seeks authorization to pay the Prepetition Obligations and to continue postpetition the Employee benefit plans and programs in effect immediately before the Petition Date.

39. Notice. The Debtor has served notice of this Motion by hand delivery on the United States Trustee and by facsimile on the Debtor's secured creditors and its

twenty largest unsecured creditors. In view of the nature of the relief requested, the Debtor submits that this notice is proper and adequate under the circumstances

WHEREFORE, the Debtor respectfully requests entry of an order (i) authorizing the Debtor to pay or otherwise honor various employee-related prepetition obligations of the Debtor to, or for the benefit of, Employees, (ii) authorizing the Debtor to continue postpetition the Employee benefit plans and programs in effect immediately prior to the Petition Date, (iii) confirming that the Debtor is permitted to pay any and all local, state and federal withholding and payroll-related or similar taxes relating to prepetition periods, (iv) directing all banks to honor prepetition checks for payment of such obligations and (v) granting such other and further relief as is just and proper.

Dated: Albuquerque, New Mexico
February 7, 2001

JACOBVITZ THUMA & WALKER
A Professional Corporation

By:

Robert H. Jacobvitz
500 Marquette N.W., Suite 650
Albuquerque, New Mexico 87102
(505) 766-9272
(505) 766-9287 (fax)

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Jay M. Goffman
Alan J. Carr
Four Times Square
New York, New York 10036-6522
(212) 735-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Richard Levin (CA State Bar No. 66578)
Jamie L. Edmonson (CA State Bar No. 185384)
Stephen J. Lubben (CA State Bar No. 190338)
Amy S. Park (CA State Bar No. 208204)
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
(213) 687-5000

Attorneys for the Debtor-in-Possession