

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
ALBUQUERQUE N.M.

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In re : **11-01-10779-00**  
FURR'S SUPERMARKETS, INC., : 01-11-\_\_\_\_ ( )  
Debtor. : Chapter 11  
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MOTION FOR ORDER UNDER 11 U.S.C. §§ 105(a), 503(b) AND 546(c)  
CONFIRMING GRANT OF ADMINISTRATIVE EXPENSE STATUS TO  
OBLIGATIONS ARISING FROM POSTPETITION DELIVERY AND SHIIPMENT  
OF GOODS, CONFIRMING ADMINISTRATIVE EXPENSE TREATMENT FOR  
VALID RECLAMATION CLAIMS, AND PROHIBITING  
THIRD PARTIES FROM INTERFERING WITH DELIVERY OF GOODS

Furr's Supermarkets, Inc., debtor and debtor-in-possession (the "Debtor"), hereby moves for an order under 11 U.S.C. §§ 105(a), 503(b) and 546(c) confirming the grant of administrative expense status to obligations arising from the postpetition delivery of goods, confirming administrative expense treatment for certain holders of valid reclamation claims and prohibiting third parties from interfering with the delivery of goods to the Debtor.

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

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States Code, 11 U.S.C. §§ 101-1330 (as amended, "Bankruptcy Code"). The Debtor continues to operate its business and manage its properties as a 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).

4. The statutory predicates for the relief requested herein are sections 105, 503(b) and 546(c) of the Bankruptcy Code.

B. The Debtor's Business

5. 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.

6. 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

7. To obtain and ensure delivery from their suppliers, vendors and shippers (collectively, the "Vendors") of materials, supplies, goods, products and related items (collectively, the "Goods") represented by numerous prepetition purchase orders outstanding on the Petition Date (the "Outstanding Orders"), the Debtor seeks entry of an order confirming that the Vendors will have administrative expense priority claims under section 503(b) of the Bankruptcy Code for those undisputed obligations arising from Outstanding Orders for Goods received and accepted by the Debtor on or after the Petition Date.

8. In addition, the Debtor seeks entry of an order providing that Vendors who have valid written reclamation claims for Goods in accordance with section 546(c) of the Bankruptcy Code and section 2-702 of the Uniform Commercial Code ("UCC") receive an administrative expense priority claim, but only to the extent that (i) the Debtor receives and accepts the Goods, and (ii) the Vendors prove the validity and amount of their claims to the Debtor's satisfaction.

9. Finally, the Debtor requests that the Court enter an order prohibiting Vendors and other third parties from reclaiming, preventing or interfering with the delivery of Goods to the Debtor and confirming that, under sections 105 and 362 of the Bankruptcy Code, third parties are stayed and prohibited from interfering with the delivery of Goods to the Debtor.

## BASIS FOR RELIEF

### Confirmation of Administrative Expense Status

10. In the ordinary operation of the Debtor's business, numerous Vendors provide the Debtor with millions of dollars of Goods every month. On a daily basis, Vendors deliver approximately \$1.2 million of Goods to the Debtor's facilities. On average, the Debtor's stores turn over their inventory every 35 days. The Debtor currently has approximately \$56 million in inventory (at cost) on its store shelves and approximately \$12.5 million in inventory (at cost) in its El Paso warehouse.

11. As of the Petition Date, the Debtor had numerous Outstanding Orders with Vendors. As a result of the filing of this chapter 11 case, many Vendors may likely be concerned that if they deliver or ship Goods after the Petition Date under an Outstanding Order, they will become general unsecured creditors of the Debtor's estate.

12. Accordingly, some Vendors will likely decline to ship or instruct their shippers not to deliver Goods destined for the Debtor, unless the Debtor issues substitute purchase orders postpetition or obtains an order of this Court confirming that all of the Debtor's obligations arising from Outstanding Orders that are fulfilled postpetition will be granted administrative expense status under section 503(b)(1)(A) of the Bankruptcy Code.

13. Under section 503(b)(1)(A), all obligations that arise in connection with the postpetition delivery of Goods to the Debtor are, upon acceptance, administrative expenses. The Debtor believes that it has the authority to pay for Goods received postpetition and to pay shipping companies and other freight deliverors their shipping charges for postpetition deliveries (regardless of when the orders were placed). Confirmation of that authority, however, is essential to reassure Vendors that their valid claims will receive administrative expense priority status, and that the Debtor will continue to pay them in the ordinary course of business.

14. Accordingly, the Debtor requests that this Court issue an order confirming administrative expense treatment for such claims.

#### Treatment of Reclamation Claims

15. Many Vendors may attempt to reclaim goods delivered to the Debtor shortly before or soon after the Petition Date. Under section 546(c)(2) of the Bankruptcy Code, the Court may deny a valid reclamation claim only if it accords the vendor's claim administrative expense priority treatment under section 503(b) or secures the claim by a lien.

16. The Debtor requests that the Court grant administrative expense priority treatment to the claim of any Vendor (i) who timely demands in writing reclamation of Goods under section 546(c)(1) of the Bankruptcy Code and/or section

2-702 of the UCC, (ii) whose Goods the Debtor has accepted for delivery, and (iii) who properly identifies the Goods to be reclaimed.

17. Moreover, if any Vendor continues to provide Goods on credit and trade terms that were in effect between the parties before the Petition Date or other terms acceptable to the Debtor ("Customary Terms"), the Debtor will waive and not contend that an otherwise valid reclamation demand is rendered invalid by:

- (i) the Vendor's failure to take any or all possible "self-help" measures with respect to its Goods; or
- (ii) the Vendor's failure to institute an adversary proceeding against the Debtor seeking to enjoin it from using or selling its Goods, or any other similar relief.

18. In view of the above, the Debtor also requests that the Court prohibit Vendors and other third parties from seeking to reclaim or interfering with the delivery of Goods.

19. The relief requested herein will help ensure a continuous supply of Goods vital to the Debtor's ongoing operations. See In re Continental Airlines, Inc., 125 B.R. 415, 417-18 (Bankr. D. Del. 1991) (denying reclamation of equipment and granting administrative expense claim to creditor where equipment was necessary to debtor's reorganization); In re Griffin Retreading Co., 795 F.2d 676, 679 (8th Cir. 1986) (affirming grant of administrative expense priority to reclamation claim because priority provides flexibility to the estate by permitting the debtor to use the property if necessary for reorganization while protecting the seller).

20. In light of the foregoing, the relief requested in this Motion is appropriate and is in the best interests of the Debtor, its estates and creditors.

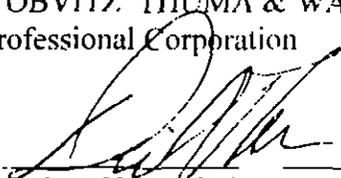
21. Notice. The Debtor has served notice of this Motion by hand delivery on the United States Trustee and by facsimile on the Debtor's secured creditors and its twenty largest unsecured creditors. In view of the nature of the relief requested, the Debtor submits that this notice is proper and adequate under the circumstances.

WHEREFORE, the Debtor respectfully requests the entry of an order (i) confirming the grant of administrative expense status to obligations that arise in connection with the postpetition delivery of Goods (regardless of when the order was placed), including shipping charges related thereto, (ii) confirming administrative expense treatment for certain holders of valid reclamation claims, (iii) prohibiting third

parties from interfering with the delivery of goods to the Debtor and (iv) granting such other and further relief as is just and proper.

Dated: Albuquerque, New Mexico  
February 7, 2001

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