

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,
Tax I.D. No. 22-3137244,

Case No. 11-01-10779 SA

Debtor.

UNITED STATES TRUSTEE'S MEMORANDUM IN IN OPPOSITION TO
MOTION FOR APPROVAL OF WIND DOWN BUDGET
AND RELATED MATTERS

The United States Trustee for the District of New Mexico hereby submits the following memorandum in opposition to the Debtor's Motion for Approval of Wind down Budget and several related matters (Motion).

I. Statement of Facts

On August 10, 2001, the Debtor Furr's Supermarkets, Inc. filed the Motion which requests that it be given authorization to take several actions, some of which are as follows:

1. Authorization to use cash collateral is requested on the assumption that all proceeds from the Asset Purchase Agreement with Fleming Companies are subject to the liens of Heller Financial, Inc., Bank of America N.A., and Metropolitan Life Insurance Co. (hereafter Secured Lenders)

2. Approval of an employee retention plan is requested which apparently vests absolute discretion in the Debtor to distribute \$3.2 million to the remaining Furr's employees.

3. Other than the \$15.7 allocated for the wind down budget, authorization is requested to disperse all proceeds from the sale to Fleming to the Secured Lenders, again on the assumption that all proceeds are subject to Bank liens (with the possible exception of \$3 million which is

attributed to the compromise of a preference action against Fleming).

4. Approval is requested for the settlement of the Unsecured Creditors Committee (UCC) adversary proceeding together with release of all estate claims against the Secured Lenders.

5. Formal allowance of the claims of the Secured Lenders is also requested.

6. Absent from the Motion, is any provision for the payment of statutory fees due pursuant to 28 U.S.C. § 1930(a)(6).

II. The Motion Is in Effect a *Sub Rosa* Plan Which Does Not Comply with Notice Requirements Nor Does it Satisfy Creditor Protections Required by the Code.

The relief requested in the Motion is indeed extraordinary. In effect, it requests carte blanche authorization to distribute the estimated \$110 million in proceeds from the sale of the Debtor's assets. It also requests settlement, without the UCC's consent, of an adversary proceeding which seeks millions of dollars in recovery for unsecured creditors. In short, it arguably seeks the Court's approval for more than could be included in a liquidating plan. Yet, the vehicle for this breathtaking relief, is a motion mailed only to the limited matrix on expedited notice. Further, no statutory authority or case law is referenced in the Motion. Clearly, the relief requested affects the interests of every creditor in this case and is tantamount to a proposed liquidating plan. Pursuant to Bankruptcy Rule 2002 (b), all creditors are entitled to notice yet only a relative handful have received same.

As critical as the issue of notice, is the fact that by requesting relief in the form of a motion, the carefully crafted safeguards in Chapter 11 are bypassed. In a similar situation, the Fifth Circuit refused to approve a transaction under 11 U.S.C. § 363 (b) which "had the practical effect of dictating some of the terms of any future reorganization plan." *In re Braniff Airways*,

Inc. 700 F.2d 935, 940 (5th Cir.1983). In *Braniff*, among several actions which could not be dealt with in the form of a motion, was a provision in the transaction which provided for the release of claims by all parties against the debtor, its secured creditors, and its officers and directors. 700 F.2d at 940. The court unequivocally stated:

The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets. 700 F.2d at 940.

As stated by another court, among the significant protections of Chapter 11 is the “[A]bility of all parties-in-interest to be heard at a confirmation hearing as to matters affecting confirmation...” *In re Crowthers McCall Pattern, Inc.* 114 B.R. 877,881 (Bankr.S.D.N.Y.1990). See also *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11* 16 Bankr.Dev.J.37, 42 (1999). By attempting to implement a liquidating plan in the form of a motion noticed only to the limited mailing matrix, the protections of Chapter 11 have been denied to the vast majority of creditors in this case.

III. Where, as in this Case, Substantially All of the Debtor’s Assets Have Been Sold Pursuant to 11 U.S.C. §363 (b), Distribution of the Proceeds Should Be Pursuant to a Liquidating Plan.

As specifically stated by one court:

If distribution is made to creditors in a liquidating Chapter 11 before confirmation of a plan, there will be little incentive for parties in interest to prosecute the case in an expeditious manner much less to perform the work required to issue and obtain approval of disclosure statements and plan. [citations omitted] In addition, if distribution of assets occurs before confirmation, there will exist no means by which a plan may be implemented. Such a course would violate §1123 (a) (5).

Moreover, Bankruptcy Rule 3021 provides the distribution pursuant to a Chapter 11 plan is authorized only with respect to *allowed* claims. *In re Conroe Forge & Manufacturing Corp.* 82 B.R. 781, 785 (Bankr.W.D.Pa.1988). Accord *In re Air Beds, Inc.* 92 B.R. 419 (9th Cir.BAP1988).

In this case, the Motion proposes to disperse virtually all estate funds. If granted, the Motion would deprive the Debtor of its ability to implement a liquidating plan.

11 U.S.C. §1123(a)(5). Second, the validity of the liens of the Secured Lenders on certain property are being challenged by the UCC. Clearly, their secured claims cannot be considered to be allowed within the meaning of Bankruptcy Rule 3021. No distribution can therefore be made to Secured Lenders until resolution of the adversary proceeding. Of course, should the Debtor be averse to filing a liquidating plan, this matter could be converted to a chapter 7 proceeding to allow liquidation to take place.

IV. The Motion Fails to Make Any Provision for Payment of Statutory Fees Pursuant to 28 U.S.C. §1930(a)(6), Although Debtor Seeks the Continuing Protection of Chapter 11.

Clearly 28 U.S.C. §1930(a)(6) requires that statutory fees be paid during pendency of this Chapter 11 proceeding.

Conclusion

In addition to the above, the U.S. Trustee incorporates other points in her objection filed as to which there was insufficient time to brief. Based on the objection and the above discussion, the U.S. Trustee respectfully requests that the Motion be denied.

Respectfully submitted,

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Filed electronically 8/29/01
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The undersigned certifies that a true and accurate copy of the foregoing was mailed to the below listed counsel this 29th day of August, 2001.

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