

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

-----X  
In re :  
FURR'S SUPERMARKETS, INC., :  
Debtor. :  
-----X

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

**FILED**  
**12:00 MIDNIGHT**

**SEP 13 2001**

**MAIL BOX**  
United States Bankruptcy Court  
Albuquerque, New Mexico

**MOTION AND MEMORANDUM SEEKING ORDER  
REQUIRING PAYMENT OF ACCRUED HEALTH AND WELFARE FUNDS**

COMES NOW the New Mexico United Food and Commercial Workers' Union and Employer's Health and Welfare Trust Fund (the "Fund"), by its attorneys, and moves this Court for an order enforcing the obligations and expectations arising from the Court's February 8, 2001 Order Authorizing (A) Payment of Prepetition Employee Obligations and (B) Continuation of Employee Benefit Plans and Programs Postpetition (the "Benefits Continuation Order"), and subsequent actions by the debtor and its secured lenders. The authority for the requested relief is based on sections 552(b) and 105 of the Bankruptcy Code. As further grounds, the Fund states as follows:

1. The Fund provides certain health and welfare benefits to employees of the debtor who are members of the United Food and Commercial Workers Union (the "Union"). Under the debtor's collective bargaining agreements, a portion of Union employees' compensation package consists of employer contributions on their behalf to the Fund.

2. Monthly contributions to the Fund are a critical element of the compensation package for covered employees. As a part of the collective bargaining process, Union employees

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have agreed to accept less in direct wages in exchange for the employer's funding of their health and welfare benefits. Studies typically place the value of non-wage benefits at twenty-five to thirty percent (25-30%) of employees' total compensation.

3. The debtor apparently concedes that contributions to the Fund are not a "frill" or a "perk" for the Union employees, but a true in-lieu-of-wages type of compensation. At a hearing on September 10, 2001, the debtor's Chief Operating Officer, Steve Mortenson, readily acknowledged under cross-examination by the Fund's counsel that these employer contributions are a part of the Union employees' bargained for compensation package.

4. Entered at the very beginning of the debtor's Chapter 11 case, the Benefits Continuation Order authorized the debtor to "continue postpetition the employee benefit funds and programs in effect immediately before the filing of this case." *See* Docket #28. That authorization has never been modified, rescinded or abated in any way. Throughout this case, the debtor has in fact paid monthly Fund contributions as they have come due. Furthermore, the secured lenders have acknowledged the existence and supremacy of the Benefits Continuation Order by including Fund contributions in all of the postpetition financing budgets -- until now.

5. On August 30, 2001, this Court ordered payment of the Fund contribution owed in August for hours worked by employees in July 2001. *See* Transcript, Hearing August 30, 2001 at 43:7-9 ("Transcript"). The Court stopped short of ordering the debtor to pay the contribution owed in September for hours worked in August 2001, reasoning that immediate payment of the September contribution was not necessary at that time. *See* Transcript at 43:10-16. However, counsel for the lenders declared in open court that his client would "do right" by the employees, and that the employees would be paid for services rendered while on the lenders'

“watch.”

6. Since that August hearing, the debtor and the lenders have both changed their reassuring tunes. The debtor has asserted that the September contribution, if paid, would actually be in consideration of employee services rendered in September; but, since all Union employees were terminated at the end of August, no further contribution is owed according to the debtor's revisionist view. And the lenders' criteria for use of their collateral seems to have changed from "doing what's right" to "whose help do we still need going forward?"

7. The debtor's theory (*i.e.*, that no Fund contribution has accrued) is based on a tortured reading of sections 14.3 and 14.4 of the collective bargaining agreements. That theory was disproved by evidence taken at the September 10, 2001 hearing.

8. In the case of section 14.3, which reads that “[t]he Employer shall contribute the amount ... each month by the twentieth (20) day of the month,” the debtor desires this Court to read into the provision an implied term that the employer shall make its contribution “*for* each month” “by the twentieth of [that] month.” In point of fact, however, the collective bargaining agreement is completely silent on the issue of when the payment is paid. Instead, we must look to debtor and Fund practice.

9. According to the credible testimony of Trust Fund Administrator Judy Pedroza, employer contributions are made in the month following that in which the hours on which the contribution is based were worked. Besides witness credibility, and lack of contract language supporting the debtor's theory, Ms. Pedroza's testimony is also reinforced by common and similar practice in the analogous matter of wages. Although the debtor and at least one other cross-examining party questioned the notion that payment would be delayed, employee wages

and other compensation are typically paid in a period subsequent to the time they were earned, simply because instantaneous accounting is largely impracticable.

10. At any rate, Ms. Pedroza was quite clear and emphatic in stating that the Fund has received no money for the hours that covered employees worked in August. Furthermore, Ms. Pedroza's understanding of the issue is supported by the receipt generated by the debtor in regards to the August payment, which reflects that the payment was made only for hours worked in July (or for May or June, in some instances). *See Exhibit A.*

11. In the case of section 14.4, which provides that Employer contributions to the Fund "shall be discontinued *as of* the first of the month immediately following ... a lay-off" (emphasis added), the debtor has attempted to argue that the provision essentially abrogates any obligation of payment after the 1st of September. The Court rightfully rejected that argument, pointing out the emphasized language. The words "as of" clearly provide only for an effective date of cut-off, not an actual date of cut-off of obligation of payment.

12. Accordingly, a September contribution based on hours worked for the month of August has indeed accrued, and will be due on the 20th of this month. The Fund has soundly debunked the debtor's theory that the September contribution has not already been earned. However, it remains unclear whether the lenders are still willing to do the right thing and voluntarily allow their collateral to be used to make the payment that was earned "on their watch."

13. The Fund respectfully submits that this Court 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); 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; the statutory authorization of Bankruptcy Code section 552(b)(1), which enables that Court to limit the extent to which a prepetition lien extends to postpetition proceeds, based on "the equities of the case" (a provision which does not appear to have been explicitly waived); and the plenary power of the Court under section 105(a) to issue orders "necessary or appropriate to carry out the provisions" of the Bankruptcy Code.

14. 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 discretion of the lenders to determine whether wages and benefits would be paid.

15. 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. This Court has the authority to 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.

16. This interpretation of the interplay between the Benefits Continuation Order and



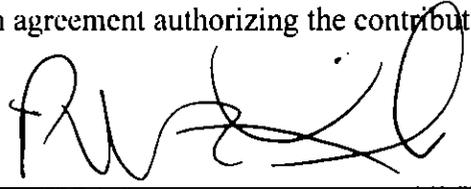
insulates the lenders from paying employees for their postpetition services, because section 552(b)(1) provides an alternative authority for the relief requested by the Fund.

19. The Court should conclude that "equities" prohibit debtors and secured lenders from accepting benefits that 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 "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.

20. Several courts have questioned the enforceability of waivers of a trustee's (or a debtor in possession's) rights under section 506(c). *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). This Court need not determine whether the 506(c) waiver extracted from the debtor at the outset of this case insulates the lenders from paying employees for their postpetition services, because section 552(b)(1) provides an alternative authority for the relief requested by the Fund.

WHEREFORE, the Fund prays that this Court grant its Motion seeking an Order providing for the payment of the September Fund contribution based on the hours worked in August, should debtor and lenders fail to reach an agreement authorizing the contribution.

Dated: September 13, 2001

By: 

Pilar Vaile (NM Bar # 12526)

Provost \* Umphrey, L.L.P. Youngdahl \* Sadin, P.C.

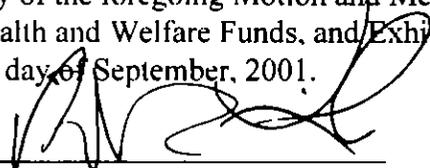
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**Attorneys for New Mexico United Food and  
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and Welfare Trust Fund**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion and Memorandum Seeking Order Requiring Payment of Accrued Health and Welfare Funds, and Exhibit, was served on the following via facsimile on this 13th day of September, 2001.

  
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MW776936MLM:KAK

Purr's Supermarkets, Inc.  
 New Mexico  
 Zenith Administration  
 Health and Welfare  
 Retail Clerks

distribution for July 2001 Hours

Date: 08/24/01

466.63 per employee

Employee Name	No.	Amount
63 - ALBUQUERQUE R/C	22	13,533.40
64 - LOVINGTON R/C	15	6,999.00
64 - ARTESIA R/C	23	10,731.80
64 - ALBUQUERQUE & RIO RANCHO R/C	542	252,897.20
55 - FARMINGTON R/C - 860	21	9,798.60
54 - SANTA FE R/C	90	41,994.00
55 - T OR C R/C	26	12,131.60
54 - ESPANOLA R/C	22	10,265.20
55 - CLOVIS R/C	16	7,465.60
54 - LAS VEGAS R/C	25	11,665.00
54 - TAMS R/C	44	20,530.40
54 - LAS CRUCES R/C	46	21,463.60
54 - LOS FARMAS R/C	23	10,731.80
54 - SILVER CITY R/C	26	12,131.60
55 - RUIDOSO R/C	33	15,397.80
35 - DENING R/C	33	15,397.80
35 - TUCUMCARI R/C	27	12,598.20
35 - LOS ALAMOS R/C	49	22,863.40
34 - CARLSBAD R/C	24	11,198.40
35 - BILEW R/C	28	13,064.80
35 - ROSWELL R/C	76	35,461.60
35 - SOCORRO R/C	35	16,331.00
34 - HOBBS R/C	25	11,665.00
Total Contributions	1289	601,447.40

RECEIVED

AUG 31 2001

SSA  
 ALBUQUERQUE, NMA





Furr's Supermarkets, Inc.  
 New Mexico  
 Health Administration  
 Health and Welfare  
 Market

Contribution for July 2001: Hours

Date: 08/14/01

156.60 per employee

NO.	MARKET	NO.	AMOUNT
14	DEMING MKT	7	1,866.40
14	LOVINGTON MKT	4	1,866.40
14	ARTESIA MKT	5	2,133.00
15	FAVINGTON MKT - 860	3	1,399.80
15	CLOVIS MKT	4	1,866.40
15	LOS ALAMOS MKT	4	1,866.40
15	T OR C MKT	4	1,866.40
15	RUIDOSO MKT	6	3,732.80
15	ALBUQUERQUE & RIO RANCHO MKT	85	39,661.00
15	SANTA FE MKT	12	5,599.20
15	DEMING MKT	3	1,399.80
14	SILVER CITY MKT	4	1,866.40
14	ESPAWOLA MKT	3	1,399.80
14	LAS VEGAS MKT	3	1,399.80
14	TIOS MKT	7	3,266.20
15	TUCUMCARI MKT	3	1,399.80
15	LOS ALAMOS MKT	7	3,266.20
15	BIJEN MKT	4	1,866.40
14	CARLSBAD MKT	4	1,866.40
15	SOCORRO MKT	4	1,866.40
14	ROSBELI MKT	12	5,599.20
14	HOBBS MKT	4	1,866.40
Total Contributions			90,520.40



