

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

FILED

01 SEP 20 PM 2:14

IN RE.

FURR'S SUPERMARKETS, INC.,

Debtor.

§
§
§
§
§

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

J.S. BANKRUPTCY COURT
ALBUQUERQUE, NM

**ADRIAN BACA'S
MOTION FOR PRESENTMENT/ENTRY
OF
ORDER GRANTING, IN PART,
ADRIAN BACA'S MOTION TO COMPEL
IMMEDIATE REMOVAL OF EQUIPMENT**

TO THE HONORABLE JAMES S. STARZYNSKI, CHIEF UNITED STATES BANKRUPTCY JUDGE:

Adrian Baca hereby moves for entry of the attached order in relation to the September 14, 2001 hearing on Adrian Baca's Motion to Compel Immediate Removal of Equipment. By recollection of the undersigned, the proposed order attached hereto as Exhibit A accurately reflects the order of the Court and the Court's disposition of the motion.

1. As instructed by the Court, the undersigned prepared a proposed form of order and, on Saturday, September 15, 2001, circulated the proposed order to counsel for the Debtor and counsel for Heller Financial. The undersigned also submitted the proposed order to counsel for the Unsecured Creditors Committee. The undersigned received no response from anyone except counsel for Heller.

2. Initially, Heller's counsel timely objected that the proposed order would require Heller to commence removal on the hearing date (copy of objection attached as Exhibit B). The objection was transmitted first thing Monday morning, September 17, 2001.

1082

Heller's complaint being valid — although directed to a typographical error — the undersigned immediately corrected the error and submitted the corrected order to counsel for Heller, counsel for the Debtor, and counsel for the UCC.

3. Heller's next objection was communicated timely, at the end of day on September 17 (copy attached as Exhibit C). However, Heller's counsel now insisted that Heller had not been ordered to do anything. In the view of the undersigned, Heller appeared to be refusing to approve any order requiring Heller to commence removal of equipment within the time specified by the Court in its ruling. In addition, Heller has made no suggestion for revisions which it would find acceptable or for a form of order which it would find acceptable, or which would establish a specific and immediate date to commence removal. (Although Heller suggested to the Court at the hearing that it could begin removal within seven (7) days, Heller is now suggesting that removal not begin for "several weeks". [See attached Exhibit D.]

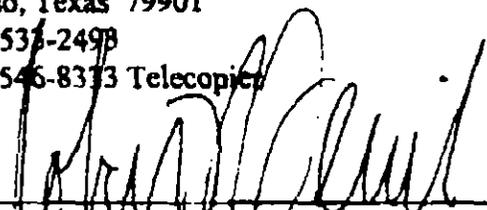
4. Thus, Adrian Baca is left with no choice but to request a hearing for presentment of the proposed order.

5. The undersigned has requested a transcript. The Court has scheduled a hearing on this motion to begin at 9:00 a.m. on Tuesday, September 25, 2001. Contemporaneously with the service of this motion upon counsel for Heller, counsel for the Debtor, and counsel for the UCC, the undersigned is serving upon the same a notice of hearing.

Respectfully submitted,

**SCOTT, HULSE, MARSHALL, FEUILLE,
FINGER & THURMOND, P.C.**

1100 Chase Tower
201 East Main Drive
El Paso, Texas 79901
(915) 531-2498
(915) 546-8373 Telecopier

By: 

ROBERT R. FEUILLE
Texas State Bar No. 06949100
BERNARD D. FELSEN
Texas State Bar No. 06889800
Attorneys for Adrian Baca

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice was sent to counsel for the Debtor, Robert H. Jacobvitz and David T. Thuma, Jacobvitz Thuma & Walker, 500 Marquette N.W., Suite 650, Albuquerque, New Mexico 87102, fax (505) 766-9287; and to counsel for Heller, Paul Fish, 500 4th Street NW #1000, Albuquerque, New Mexico 87103-2168, fax (505) 848-1882; to counsel for the Unsecured Creditors Committee, William F. Davis, Esq., P.O. Box 6, Albuquerque, New Mexico 87103, fax (505) 247-3185; and to Ronald E. Andaloz, Office of the U.S. Trustee, P.O. Box 608, Albuquerque, NM 87103, fax (505) 248-6558, by facsimile transmission and first-class mail, on this 20th day of September, 2001.



ROBERT R. FEUILLE

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re:	§	
	§	
FURR'S SUPERMARKETS, INC.,	§	Case No.11-01-10779-SA
	§	(Chapter 11)
Debtor.	§	

**ORDER GRANTING, IN PART,
ADRIAN BACA'S MOTION TO COMPEL IMMEDIATE
REMOVAL OF EQUIPMENT**

On September 14, 2001, the Court considered Adrian Baca's Motion to Compel Immediate Removal of Equipment and for Emergency Hearing (the "Motion"), filed in this case by Adrian Baca, Individually ("Landlord"), with respect to certain store equipment located at 317 S. Main Street, Anthony, Texas (the "Store") and designated by Furr's Supermarkets, Inc. (the "Debtor") as store no. 954. After considering the Motion and the arguments of counsel, the Court finds that the following orders should be entered. It is, therefore,

ORDERED that, prior to September 20, 2001, Heller Financial, Inc. ("Heller") shall commence removal of all equipment in the Store or on the premises of the Store which has been leased by Heller to the Debtor and that Heller shall thereafter diligently and daily prosecute such removal to completion so that removal shall be complete, and all such equipment removed from the Store and the Store premises within 10 business days of the mandatory commencement date; and it is further

ORDERED that the automatic stay of 11 U.S.C. § 362 is hereby modified to allow Heller Financial, Inc. to commence and complete such removal and to dispose of the equipment leased by Heller to the Debtor and located in the Store or on the Store premises without violation of the automatic stay; and it is further

ORDERED that all other relief requested by Landlord is denied without prejudice to the prosecution of such claims and requests for relief in such time and manner and in such forum or fora as Landlord may choose or as may be appropriate; and it is further

ORDERED that the rights and claims of Heller as against the Debtor in relation to the subject equipment and/or the lease between Heller and the Debtor are preserved; that the rights and claims of the Debtor against Heller in relation to the subject equipment and/or the lease between Heller and the Debtor are preserved; and that neither Heller nor the Debtor shall be deemed to have waived or forfeited any such rights or claims by any statements made or positions taken by Heller or the Debtor in relation to the Motion or by approving or complying with this order.

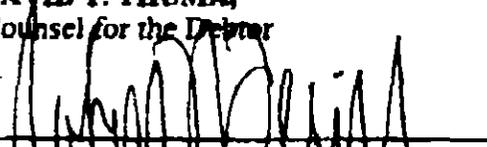
Dated: _____, 2001.

JAMES S. STARZYNSKI
Chief United States Bankruptcy Judge

APPROVED AS TO FORM:

PAUL M. FISH,
Counsel for Heller

DAVID T. THUMA,
Counsel for the Debtor



ROBERT R. FEVILLE,
Counsel for Landlord

EXHIBIT B

From: "pmf@modrall.com"
To: Bfeu, "dthuma@jtwlawfirm.com", "rjacobvitz@jtwl...
Date: Mon, Sep 17, 2001 8:32 AM
Subject: Re: Furr's: proposed order, Adrian Baca motion to compel

This Draft Order requires Hetter to start removing equipment prior to Sept 14, the day of the hearing. I did not hear the Judge order that we should have started to remove the equipment prior to the hearing or prior to the stay being lifted.

>>> "bfeu@SCOTTHULSE.COM" <bfeu@SCOTTHULSE.COM> 09/15 2:15 PM >>>
Gentlemen,

I submit for your review and comment (see attached) a proposed order granting Adrian Baca's motion to compel immediate removal of the equipment. Please let me know if you have any comments or criticisms of the proposed order. I look forward to your approval and/or comments.

As always, thank you for your consideration,
Robert R. Feuille
915.546.8213
915.546.8333, fax

Modrall, Spring, Roehl, Harris & Sisk, P.A.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination or copying of this communication is strictly prohibited. If you have received this electronic transmission in error, please delete it from your system without copying it, and notify the sender by reply e-mail or by calling 505.848.1800, so that our address record can be corrected. Thank you.

EXHIBIT C

Robert Feuille - Re: Furr's/Adrian Baca revised proposed order**Page 1**

From: "pmf@modrall.com"
To: Bfeu, "rjacobvitz@jtlawfirm.com", "Daviswf@nmb...
Date: Mon, Sep 17, 2001 5:18 PM
Subject: Re: Furr's/Adrian Baca " revised proposed order

I have been in an all day Furr's hearing, and I have not read the proposed Order in any detail. We start again at 9:00 am tomorrow. However, I will not agree that Heller be "ordered" to do anything. We

From: "prmf@modrall.com"
 To: Bfeu, "rjacobvitz@jtwlawfirm.com", "Daviswf@nmb...
 Date: Mon, Sep 17, 2001 5:18 PM
 Subject: Re: Furr's/Adrian Baca " revised proposed order

I have been in an all day Furr's hearing, and I have not read the proposed Order in any detail. We start again at 9:00 am tomorrow. However, I will not agree that Heller be "ordered" to do anything. We suggested that as an accomodation to the DIP and Mr. Baca we would try to do what we could as soon as we could to remove the equipment. The judge hoped we could do it starting Tuesday or Wednesday. I hope we can do that.

I talked to my client at about noon (during the lunch break), and I understand the guy who can make the arrangements to get proper workmen in the property to remove this equipment without ripping the store apart is holding an auction today. As soon as they hear the timeframe in which he can do the job, I will let you know. You can either agree or go back to court. We can only do what we can do.

>>> "bfeu@SCOTTHULSE.COM" <bfeu@SCOTTHULSE.COM> 09/17 9:43 AM >>>
 Gentlemen,

I submit herewith a revised proposed order, modified to address Fish's comments.

Please let me know if you have any criticisms.

As always, thank you for your consideration,
 Robert R. Feuille
 915.546.8213
 915 546.8333, fax

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

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CC: "dthuma@jtwlawfirm.com", "bfeu@SCOTTHULSE.COM"

EXHIBIT D

g - 7-27/1000

Law Offices
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street N.W.
Bank of America Centre, Suite 1000
Post Office Box 2168
Albuquerque, New Mexico 87103-2168

Las Cruces, New Mexico

Roswell, New Mexico

Santa Fe, New Mexico

TRANSMITTAL COVER SHEET

CLIENT NO. 76420-148

Date: September 18, 2001

Page 1 of 3 pages

PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Robert Feuille CITY AND/OR STATE: _____

TELECOPIER NO. (915)546-8333

FROM: **PAUL M. FISH**, Albuquerque, New Mexico PHONE: **(505) 848-1871**

We are transmitting on a Sharp FO-6000 which is compatible with a Group II and Group III telecopier.

Please send fax responses to Machine **(505) 848-1882**

COMMENTS: _____

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Paul M. Fish
Direct Dial: (505) 848-1871
Fax No.: (505) 848-1882 (7th Floor)

VIA FACSIMILE

September 18, 2001

Robert R. Feuille
Scott, Hulse, Marshall, Feuille, Finger & Thurmond, P.C.
1100 Chase Tower
201 East Main Drive

Re: *Heller Financial Leasing - Adrian Baca*

Dear Mr. Feuille:

I have received your numerous e-mails and proposed forms of order. I have not been as responsive as I otherwise might be, but since I have spent essentially every minute of the day in Court before Judge Starzynski on the Furr's matter, I am sure you will understand, and if you bring the matter before him because you do not understand, I am sure he will understand.

While I have been tied up, my client has been working to attempt to solve this problem. It turns out that what makes the most sense and is the customary practice in the industry is for an auction of equipment like this to be done in place. On the day of the auction, the buyers come forward with their work men and, under the supervision of the auctioneer who makes sure that code is complied with and the premises are not damaged, the equipment is carefully removed by the person who intends to place it in use in the new location. That obviates the need for the seller to hire a number of people who may or may not be expert in the removal of this type of equipment and is generally the way the process works.

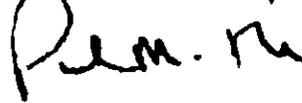
We anticipate it will take several weeks to properly advertise the auction. Please let me know if your client has any problem with proceeding in this fashion.

In any event, your forms of order will require a significant amount of information relating to the fact that the removal of the property is being done by Heller as a accommodation to your client and the Debtor, that the claim of Heller that the equipment is being leased is preserved, the rights of the Debtor and Heller transferred to the proceeds of the sale, etc. However, I think the first thing is to get the process under way to get the property removed as quickly as possible and we can then

Robert R. Feuille
September 18, 2001
Page 2

discuss the form of order when I am out of Court.

Very truly yours,



Paul M. Fish

PMF/smb

cc: David Thuma (via facsimile)
Heller Financial Leasing

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