

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

In re

FURR'S SUPERMARKETS, INC.,

Debtor.

Case No. 11-01-10779-SA

Chapter 11

**NOTICE OF MOTION AND MOTION OF UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCALS 540 AND 1564 FOR ORDER ALLOWING AND
REQUIRING IMMEDIATE PAYMENT OF ADMINISTRATIVE EXPENSES;
MEMORANDUM OF POINTS AND AUTHORITIES**

TO: ALL PARTIES IN INTEREST AND THEIR COUNSEL:

PLEASE TAKE NOTICE that on October 4, 2001 at 8:30 a.m., or as soon thereafter as the Moving Party may be heard, United Food and Commercial Workers Union, Local 540 ("Local 540") and United Food and Commercial Workers Union, Local 1564 ("Local 1564") will move for an order (1) allowing administrative expenses pursuant to 11 U.S.C. § 503(b), and (2) requiring their immediate payment. These administrative expenses are (1) the pension contributions it owes for hours worked in the months of July and August, 2001 by bargaining unit employees represented by Local 1564, (2) the health and welfare plan contributions it owes for hours worked in the month of August, 2001 by employees represented by Local 1564, (3) the unpaid wages and vacation and severance benefits that it owes employees represented by Local 540 and Local 1564 (hereinafter "the Unions") and (4) any liability it might owe on the outstanding grievances filed by the Unions relating to post-petition violations of the collective bargaining agreement.

Immediate payment of these wages and benefits is required on two grounds: (1) the collective bargaining agreements under which these wages and benefits were earned were never rejected by the Debtor under the procedures set forth in 29 U.S.C. § 1113, and (2) the wages and benefits are payable for work performed in aid of the

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preservation and disposition of the assets of the Debtor's estate for the benefit of the secured creditors, within the meaning of 11 U.S.C. § 506(c), and should therefore be paid out of cash collateral. Immediate payment of the dues withheld by the Debtor is required on the ground that these dues, deducted from wages already paid by the Debtor to individual employees, are not part of the Debtor's estate and are held in trust for the Unions.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities and Declarations of Diane Kimberle and Nicolas Sanchez filed and served herewith, the Objection to Motion for Approval of Wind-Up Budget previously filed by Local 1564 in this matter, the pleadings and documents on file in this matter and such further pleadings and documents as the Union may file, together with such argument and evidence as may be heard at the time of hearing on this motion.

DATED: September 19, 2001

SCHWARTZ, STEINSAPIR, DOHRMANN
& SOMMERS
MICHAEL D. FOUR

LAW OFFICES OF K. LEE PEIFER
K. LEE PEIFER

By  _____

MICHAEL D. FOUR
Attorneys for United Food and Commercial
Workers Union Local 540 and United Food and
Commercial Workers Union Local 1564

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

United Food and Commercial Workers Union, Local 540 ("Local 540") and United Food and Commercial Workers Union, Local 1564 ("Local 1564") represent more than three thousand employees of Furr's Supermarkets, Inc. ("Furr's" or "the Debtor") throughout New Mexico and West Texas. These employees kept the Debtor's stores operating in the seven months after it filed for bankruptcy. Their work made sure that the Debtor's customers did not disappear, which made it possible for Furr's to sell these stores as a going concern, rather than as abandoned buildings.

The Debtor and the secured creditors who stand to benefit most from these employees' work have, however, balked at paying them all of the benefits that they have earned. More particularly, the Debtor claims (1) that these severance pay claims are unsecured pre-petition claims and (2) that even if they are administrative claims, employees are only entitled to that pro rata portion of the benefits that can be attributed to their post-petition service. The Debtor is wrong as a matter of law.

The Debtor has never made any effort to reject any of its collective bargaining agreements with the Unions. It has, as a result, assumed these contracts. Adventure Resources, Inc. v. Holland, 137 F.3d 786, 798 (4th Cir. 1998); In re Lady II Coal, 193 B.R. 233 (Bankr. S.D. W.Va. 1996). That means, in turn, that all of its contractual liabilities under these collective bargaining agreements must be treated as administrative claims. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 532, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984); Adventure Resources, 137 F.3d at 798-99 n.18; LJC Corp. v. Boyle, 768 F.2d 1489, 1484 n.6 (D.C. Cir. 1985).

These severance pay obligations would be administrative claims, moreover, even if Furr's had not assumed the collective bargaining agreement. The Court set

two requirements for administrative claims in Isaac v. Temex Energy, Inc. (In re Amarex, Inc.), 853 F.2d 1526 (10th Cir. 1988):

[A]n expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.

Amarex, 853 F.2d at 1530. Employees' severance pay claims meet both criteria.

These severance pay claims represent a bargained-for exchange between employees and the Debtor made in the months after it filed for bankruptcy. As noted above, Furr's has never attempted to reject any of its collective bargaining agreements with either Local 540 or Local 1564 at any time. On the contrary, Furr's went out of its way throughout this period to assure its employees that it would maintain all existing benefits.

Furr's was particularly insistent on this point when it came to employees' severance benefits. Furr's not only told its employees that it would pay them the severance pay they were owed but promised them that it would not change its policies in this area. Furr's continued to make these promises even as it was shutting down the last of its stores.

Furr's had sound business reasons for making these guarantees. The Debtor needed to hold on to the customer base in order to preserve the value of its stores. In order to do that it needed to keep its stores operating without interruption or disruption. That meant, in turn, persuading experienced employees to stay with the Company.

That became much more difficult, however, as the bankruptcy proceeded. Furr's could not deny what its employees already knew: that it was going to close all

of its stores in the near future. Nor could it guarantee, after Fleming Companies ("Fleming") bought its stores, that Fleming would retain any of its employees. All things considered, employees had little incentive to stay with Furr's.

Except for severance benefits. The Debtor's severance pay plan made it possible for it to hold on to its most experienced employees for as long as it needed them—but no longer. It did this by combining three essential features:

- Furr's provided significant benefits for employees who stayed with the company, with greater benefits for more experienced employees.
- Those benefits were only paid to employees who remained in their jobs as long as Furr's needed them.
- Employees agreed to relinquish any claims they might have to continue working for Furr's in return for these severance benefits.

Taken together, these features made severance benefits the perfect tool for persuading employees to remain in jobs they knew were about to disappear. This severance pay plan enabled Furr's to keep the employees it needed, preventing the large-scale defections that would have led to the premature collapse of its business. At the same time, it allowed Furr's to shut down individual stores in a more orderly fashion by canceling employees' seniority rights, thereby avoiding the domino effect that would have ensued if laid off employees had been able to bump less senior employees in the stores that remained open.

This severance plan meets both Amarex criteria: (1) it was a transaction that Furr's, as debtor in possession, entered into when it encouraged employees to remain on the job by assuring them that they would receive all of their severance benefits and (2) it benefited the debtor in possession by eliminating the chaos and uncertainty that Furr's would have faced if it had not been able to induce employees to remain on the job as long as it needed them, then leave quietly when it no longer did. These severance pay obligations are administrative claims.

Furr's has argued, on the other hand, that these severance benefits should only be treated as administrative claims on a pro rata basis, *i.e.*, by dividing the number of months that an employee worked for it after the filing of the petition by the total number of months of employment. This argument simply collapses on close scrutiny.

While the Debtor's collective bargaining agreements with Local 540 and Local 1564 use employees' years of service to measure the amount of severance pay to which they are entitled, that severance pay benefit is not delayed payment for their work over those years. An employee does not, after all, earn severance pay by working for the Debtor, no matter how much seniority he has. On the contrary, an employee with twenty years experience would get exactly zero in severance pay if he were to quit or be fired the day before his store shut down.

The only way that an employee can obtain severance pay is (1) by working up until the day that the employer terminates him and (2) by relinquishing any claim he might have to work for the employer in the future. Those are post-petition acts that create post-petition obligations. These claims are entirely administrative claims and should be paid as such.

The same is true for employees' accrued vacation pay, health and welfare and pension contributions, unpaid wages and liabilities for other violations of the contract. These are all administrative claims, for the same reasons as these severance pay obligations. Furr's should also be ordered to pay them immediately.

II

STATEMENT OF FACTS

The Debtor filed for protection under Chapter 11 of the Bankruptcy Code on February 8, 2001. It has closed all of its stores in the seven months since the filing of the petition.

under the Section shall have no right to recall or reinstatement with the Employer.

(Kimberle Declaration, Exhibit A; Sanchez Declaration, Exhibits E, F, G, H, I, J and K)

The Debtor understood the importance of these benefits to its employees—and the importance of retaining its bargaining unit employees if it hoped to sell its stores as a going business. The Debtor made this clear in the special bulletin that it sent to all of its employees on June 29, 2001, after Fleming Companies ("Fleming") had agreed to purchase its stores . (Kimberle Declaration, Exhibit B)

This June 29, 2001 bulletin opened by explaining the negotiations with Fleming and Fleming's plans for the stores it was acquiring. The bulletin then turned to what lay ahead for Furr's employees.

Furr's put particular emphasis on the need for its employees to stay with the Company as long as it needed them:

What is the future of Furrs' associates?

The new operations of the stores will require a skilled, competent workforce. The wind down of Furrs remaining operations will require the service of many of our associates for a period of six to nine months following the closing. The Furrs management team and the Fleming management team will work together very closely to do everything they can to maintain jobs for as many Furrs Associates as possible.

Until all details are finalized, we encourage you to be patient while keeping an eye toward your futures. In the meantime, we are counting on you to perform your job duties to the best of your abilities under these challenging circumstances.

This bulletin went on to assure employees that they would receive all of the benefits they were owed. The Debtor put particular emphasis on its promise to pay severance benefits to employees who stayed with it:

How will this affect my benefits and/or 401k?

There will be no change to associate benefits through the closing of the sale. This includes but is not limited to the following:

* * *

Severance. Our severance plans are unchanged. If the employment of an employee "in good standing" with the company is terminated through no fault of the employee, the normal severance policy for that position will still apply. This policy will not change.

(emphasis added)

Furr's continued to reassure employees, even as it was shutting down the last of its stores in August, that it would pay them all the severance pay they were owed if they continued working as long as they were needed. (Kimberle Declaration, Exhibit 6) True to its word, it continued to pay employees the severance benefits it had promised them through August of this year. (Kimberle Declaration, ¶ 7; Sanchez Declaration, ¶ 9)

That changed, however, when Furr's completed the shutdown of all of its stores: *Furr's now refuses to pay any of the severance benefits it still owes its laid-off employees.* (Kimberle Declaration, ¶ 7; Sanchez Declaration, ¶ 9) The Unions will submit specific figures detailing the amount owed to these workers as soon as they are available.^{1/} (Kimberle Declaration, ¶ 8)

^{1/} The Unions only received the information needed to calculate these amount in the last week; it is analyzing that information, which appears to be incomplete in many important respects, now. (Kimberle Declaration, ¶ 8)

The Debtor is party to several collective bargaining agreements with Local 540 and Local 1564. (Kimberle Declaration, Exhibit A; Sanchez Declaration, Exhibits E, F, G, H, I, J and K) The Debtor has not moved to reject any of its collective bargaining agreements with either Union; on the contrary, it continued to pay employees the wages and fringe benefits required by these agreements while the stores remained open. (Kimberle Declaration, ¶ 4; Sanchez Declaration, ¶ 7)

Among the benefits that the Debtor paid were the severance benefits provided by its collective bargaining agreements with the Unions. Each of these agreements contains the following severance pay provision:

The parties have specifically considered and discussed the possibility of store closings of all types, including conversions. It is agreed that the contract contains provisions regarding the reduction of the work force which shall be followed in the event of a total or partial closure of stores covered by this Agreement except as modified below. In addition, severance allowance will be granted to those employees affected by the total closing of store(s) as outline below. Any obligation or right to negotiate concerning the decision or effects of either a total or partial closure of any or all of the Employer's stores in the Bargaining Unit is hereby waived in consideration for the severance allowance and reduction plan contained in this Agreement.

Employees who are permanently terminated as a result of a store closing or conversion within two (2) weeks following a store closing or conversion will be entitled to a severance allowance in accordance with the following:

- (a) Eligible employees shall receive a severance allowance of two percent (2%) of the employee's total earnings in the complete twelve (12) month period immediately preceding termination multiplied by each full year of service with a minimum of two hundred dollars (\$200) for each employee with at least one year of seniority.
- (b) The above severance allowance will be paid in addition to any accrued vacation pay, not pro-rata vacation pay retirement plan benefits, unemployment compensation, or any other accrued benefits to which the employee may be entitled. Any other claimed benefits may be superseded and contained in the benefits directed by this Section.
- (c) Payment of the severance allowance shall be in weekly periods immediately commencing with the store closure (or conversion). The weekly payment shall be based upon the two percent (2%) for each week.

An employee currently employed in the closed store may elect at his option to take the severance allowance under this Section and thereby forfeit any and all rights to re-employment or recall rights with the Employer. The employee has no obligation to exercise his seniority to bump into another store under the seniority provisions hereof. Employees who receive the severance allowance

Furr's has also failed to make all of the contributions required to maintain employees' pension and health and welfare benefits for the months of July and August. (Kimberle Declaration, ¶ 9) It has also failed to pay other wages and benefits it owes employees. (Kimberle Declaration, ¶ 9)

III

ARGUMENT

A. THESE SEVERANCE BENEFITS ARE ADMINISTRATIVE CLAIMS

The Debtor made a bargain with each of the Unions and the employees they represent: it would provide these employees with the wages, benefits and other rights spelled out in its collective bargaining agreements in return for their agreement not to strike. This bargain became particularly valuable to the Debtor when it filed for bankruptcy: the Debtor needed its employees to remain on the job, to work to the best of their abilities, and not to strike or leave en masse if it wanted sell its remaining stores as a going concern.

The Debtor therefore never made any effort to reject any of its collective bargaining agreements with the Unions, since that might have invited either a strike or wholesale resignations by its employees. On the contrary, the Debtor went out of its way to assure employees that it would pay them all of the benefits that they were owed under these collective bargaining agreements. In the case of severance benefits, the Debtor went even further: it not only told them that it would continue to pay these benefits, but promised them that "[t]his policy will not change."

There is a reason why the Debtor put so much emphasis on maintaining severance benefits. Severance benefits are particularly useful for an employer that needs to be able to hold on to its essential workforce—especially when these workers know that their employer plans to get rid of them in the near future—because they require employees to work up until the last day that the employer needs them as a

condition of receiving any benefits. They also make it easier for the employer to shut down its operations in an orderly fashion by requiring employees to give up any rights they might have had to displace less senior workers at other locations.

The Debtor, for its part, recognized the value of these benefits while it was still in business, since it continued to offer severance pay to its workers even in the last weeks of the last month it remained in operation. It is only now, after the last store has closed, that the Debtor seeks to escape its obligation to pay these benefits.

The Debtor should not be allowed to do so. These severance pay obligations are administrative claims that should be paid, along with the other wages and benefits that Furr's owes its employees.

1. The Debtor Has Assumed Its Collective Bargaining Agreements With The Unions

We start from an undisputed fact: the Debtor has never made any attempt to reject any of its collective bargaining agreements with the Unions that represent its store employees. Far from it: Furr's not only assured its employees that it would continue to honor those obligations, but promised not to change them. Furr's has adopted these collective bargaining agreements by failing to move to reject them. Adventure Resources, 137 F.3d at 798; 11 U.S.C. § 1113(f).

By assuming these agreements, Furr's has also converted all of its liabilities under these collective bargaining agreements into administrative claims. Bildisco, 465 U.S. at 532; Adventure Resources, 137 F.3d at 798-99 n.18; LJC Corp., 768 F.2d at 1484 n.6. It should be ordered to pay these employees' claims immediately.

2. The Debtor In Possession Has Incurred These Severance Pay Liabilities

These severance pay obligations would be administrative expenses even if the Debtor had not assumed its collective bargaining agreements with the Unions. The

Debtor's collective bargaining agreements with the Unions all provide that employees can earn severance pay only by (1) remaining employed up until the date that the Debtor closes the store and (2) agreeing to forfeit any rights to future employment. While employees' years of service may determine the amount that they are entitled to as severance pay, that past service does not, in and of itself, entitle them to a penny of benefits.

That makes a world of difference as far as this motion is concerned. The employees who continued to work for the Debtor up until the closure of their stores in August, 2001 did not have any claim to severance pay at the time the Debtor filed its petition in February, 2001 no matter how many years of seniority they had at the time. Put another way, the Debtor did not owe any severance benefits to any of these employees until they met both conditions to severance pay in August, 2001.

Furr's, moreover, induced employees to continue in its employment by (1) offering them severance pay and (2) promising not to change its severance pay policies. That distinguishes this case from In re Commercial Financial Services, Inc., 246 F.3d 1291 (10th Cir. 2001), on which Furr's relies so heavily.

The employer in that case had not promised either of the two employees in that case that it would honor its severance pay commitments; on the contrary, it took steps shortly after the filing of the bankruptcy petition to reject both of their employment contracts, then fired them without cause. Commercial Financial Services, 246 F.3d at 1294-95. Nor, as the Court went on to point out, "did the debtor in possession induce appellants' performance by promising to pay them the lump sum amounts if they would continue to work post-petition." Id. at 1295. The contrast with this case—in which the Debtor did precisely that in a letter sent to thousands of its employees in June—could hardly be any clearer.

The Debtor only incurred these severance pay obligations in August, 2001, after it had expressly reaffirmed its obligation to pay these benefits. While the

Debtor may have laid the groundwork for these liabilities by entering into these collective bargaining agreements with the Unions, the Debtor in possession took the steps necessary to bring them into being.

3. These Employees Benefitted The Estate By Continuing To Work

The Debtor may also argue that employees did not provide any benefit to it by continuing to work up to the last day of their employment and then relinquishing any claim they might have to future employment with it. That claim is especially hollow coming from the same party that promised to pay these severance benefits to all employees who stuck with it, then told them that it was counting on them to perform their job duties to the best of their abilities.

While Furr's may argue now that these employees were merely replaceable sets of arms, legs and eyes, it did not talk that way when it was still operating and needed their services. Its actions in June, July and August, when it made these promises of severance pay in order to keep them on the job, far outweigh what it says now, when it no longer needs them.

Once again, this case has nothing in common with Commercial Financial Services. The two employees in that case claimed severance pay as of right, simply because they had been terminated after three weeks of post-petition employment. Neither of them could point to any benefit they had conferred on the debtor or detriment that they had incurred by remaining employed after the filing of the petition; on the contrary, this evidence indicated that this severance pay was offered to compensate them for their decision, years before the filing of the bankruptcy petition, to forego other employment and move to Tulsa.

In this case, by contrast, employees agreed to give up their freedom to look for other work so that Furr's could keep these stores open just as long as it needed—and not a day longer. They paid that price at the end of their employment relationship,

not the beginning. If they had not made that commitment, then Furr's would have been faced with the prospect of the unplanned shutdown of its retail business on a schedule that neither it nor Fleming had chosen.

We should, moreover, assume that Furr's knew what it was bargaining for when it assured employees that they would receive all the severance pay they were owed if they continued working for Furr's up until the day their stores closed. That decision was, after all, made by the same leaders who are claiming that their crisis management justifies the millions of dollars in retention pay that they are claiming. They evidently thought then that securing a stable workforce for Furr's last days of operation was worth the severance pay benefits they promised their employees. This Court should not second-guess their judgment.

B. EMPLOYEES ARE ENTITLED TO BE PAID ALL OF THE SEVERANCE BENEFITS THEY ARE OWED

Furr's may also argue that employees are only entitled to claim a tiny portion of their severance pay as an administrative claim, because they only "earned" a few months of it after the filing of the bankruptcy petition. Furr's did not, of course, make any such distinctions when it was promising in June and August to pay all of the severance pay that employees were entitled to if they stayed with it until the end. It is too late for it to make that distinction now.

Nor would it be entitled, even if it had not made those promises, to chop up employees' severance pay in that fashion. As noted above, while severance pay reflects the number of years that an employee has worked for Furr's, it does not represent delayed compensation for those years of work. On the contrary, severance pay is earned only if an employee meets two conditions: working until the store closes and forfeiting any right to future employment. The employees covered by this motion took both of those actions after the filing of the petition in this case.

They are entitled to receive all of the benefits they have earned, since that is what Furr's promised in order to keep them on the job for as long as it needed them.

Nor have the parties annualized this benefit, as the employer in Amarex had, in such a way as to suggest that it is part of an employee's regular paycheck. On the contrary, while the Debtor's collective bargaining agreements provide for payment of severance pay benefits over time, those payments all come after the employee has met the two preconditions for severance pay, *i.e.*, after he has been terminated. That merely underscores the point made above: the severance pay in this case is only payable to employees for their post-petition actions. These are administrative claims that should be paid immediately.

C. THE DEBTOR SHOULD BE ORDERED TO PAY THE OTHER ADMINISTRATIVE CLAIMS IT OWES

Furr's has also failed to make all of the contributions required to maintain employees' pension and health and welfare benefits for the months of July and August, to pay employees' vacation benefits or to pay the other wages and benefits it owes employees. The Union joins in the motion brought by the New Mexico United Food and Commercial Workers Union and Employers' Health and Welfare Trust Fund to obtain payment of these health and welfare contributions. The same logic that makes these severance pay obligations an administrative claim dictates that the Debtor should pay these other benefits as well.

D. THESE CLAIMS SHOULD BE PAID OUT OF CASH COLLATERAL

This Court has the authority under Section 552(b)(1) to limit the reach of pre-petition liens to post-petition proceeds. It should use that authority in this case in order to provide employees with the severance pay and other benefits they were expressly promised in return for keeping the Debtor's stores open. Anything less

would encourage debtors in possession to make extravagant promises they had no intention of keeping—or what would be called deceit in other circumstances.

IV

CONCLUSION

The Unions respectfully request an order allowing and requiring immediate payment of employees' unpaid severance pay, along with any vacation benefits, pension and health and welfare plan contributions, and other wages and benefits it owes.

DATED: September 19, 2001

SCHWARTZ, STEINSAPIR, DOHRMANN
& SOMMERS
MICHAEL D. FOUR

LAW OFFICES OF K. LEE PEIFER
K. LEE PEIFER

By



MICHAEL D. FOUR

Attorneys for United Food and Commercial
Workers Union Local 540 and United Food and
Commercial Workers Union Local 1564