UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT
FEB 2 0 2002
DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

In re:

Furr's Supermarkets, Inc.

Case No: 11-01-10779 SA

Motion to Clarify or to the Extent Necessary Modify
The Final Financing Order Entered March 14, 2001
To Provide that the Chapter 7 Trustee May Surcharge, Pursuant to § 506(c),
The Secured Creditors With Respect to Costs or Expense Incurred
During the Chapter 11 Case

Now Comes the New Mexico Taxation and Revenue Department ("Department"), by and through its undersigned counsel, states:

1. The Department is currently owed approximately $6.7 million in taxes from the Debtor. Most of that liability is based on undisputed, self-filed gross receipts tax returns.

2. Approximately $2.3 million of the above liability, according to the Department's database, is based on the Debtor's unpaid gross receipts taxes during the Chapter 11 proceeding.

3. The Trustee estimates that the unpaid employees' ordinary course of business medical expenses to be approximately $2.7 million for the post-petition period.

4. Unpaid, ordinary course of business, trade debt is estimated to be nearly $700,000.

5. Many parties in the case believe that it would be easy to establish that the secured lenders avoided tens of millions of dollars of additional losses through the use of this Court and the Flemming Transaction that would not have occurred but for this proceeding.

6. The Department is informed that the Chapter 7 Trustee (hereinafter "the Trustee") is agreeing to the settlement, which is currently out on notice, with the lenders because her counsel reviewed a transcript of a hearing held on March 14, 2001, and that the Trustee and her counsel drew incorrect conclusions based on that transcript.

7. The last sentence of decretal paragraph 9 of the *Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief* (hereinafter the "Financing Order") provides, on page 11:

> Notwithstanding the forgoing [waiver of 506(c) by the Debtor], the waivers and limitations regarding Section 506(c) set forth in this paragraph shall not apply to a claim by a Chapter 7 Trustee for the Debtor.

8. The undersigned counsel and many other counsel in the case had read that provision to permit the Chapter 7 Trustee to assert any claim under § 506(c) without limitation as to whether the costs and expenses accrued pre-conversion or post-conversion.

9. Recently the lenders acquired a transcript of the March 14 hearing regarding the Financing Order, and drew attention to a colloquy between Mr. Athanas and the Court. That colloquy between the Court and Mr. Anthanas, on pages 70-73, could be read as the Court having only intended to subject the lenders to surcharge with respect to a Chapter 7 Trustee's actions or undertakings during the post-converted, Chapter 7 case.

10. The Department disagrees with this reading, and with that whole basis of construing the Financing Order for several reasons.

11. The colloquy occurred after the Court had ruled. Mr. Andozola's written objection asked that the 506(c) language "be striken" and he brought copies of cases to court which held that 506(c) waivers were void against public policy. The Court recessed and read those cases in chambers. The Department believes that anything after the Court indicated, on page 70, "I would have to sustain the objection," that the ensuing, spontaneous colloquy is not that helpful, and it certainly is not enough to contradict the otherwise ordinary meaning of a written order.

12. The ordinary language of the order should control in a bankruptcy case where third parties are affected by the order. In an analogous situation, if a confirmed plan is ambiguous, and the particular language was not negotiated between the debtor and creditor, the ambiguous language is construed to comport with, rather than contravene, the Bankruptcy Code. *In re Jankins*, 184 B.R. 488, 492 (Bankr. E.D. Va. 1995). In this particular case, if the order had been worded differently, the Department could have asked the Court to condition the continued operation of the business on tax payments, the suppliers could have refused to deliver goods without "cash on the barrel head," and the employees could have found other jobs. To the extent people would have altered their behavior if the language in the order were different is unclear. Nevertheless, in a bankruptcy proceeding where orders affect third parties, reliance on the ordinary meaning of the

written order should prevail over colloquy between counsel and the Court in a transcript.

13. There was no discussion or contemplation by the Court or the parties back on March 14, 2001 that an emergency sale would have to be accomplished, that over $6 million in ordinary course of business, post-petition, debt would be left unpaid, and that the lenders would have avoided tens of millions of dollars of losses through an emergency sale of the Debtor's assets--the value of the sale being mostly attributable to good will and this Court's preservation of the going concern value. "Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time." *Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948). In summary, the issue of whether a Chapter 7 Trustee could bring a 506(c) action to recover unpaid Chapter 11 administrative expenses was never actually, fully and fairly litigated.

14. Because many cases, including the ones the Court read prior to ruling, had determined that section 506(c) waivers are void against public policy, *In re Ridgeline Structures, Inc.*, 154 B.R. 831 (Bankr. D.N.H. 1993), the Court should avoid that issue and follow the maxim that the order should be construed to avoid questions as to its validity. If the order fully preserves the Chapter 7 Trustee's rights to bring a § 506(c) action, without limitation

as to whether the costs or expenses were incurred prior to conversion, then that construction removes doubts about the validity of the order.

15. If the Court does not agree with the requested clarification that the Department seeks, the Court should exercise its "historic power of a court of equity to modify its decree in light of changed circumstances." *Zimmerman v. Quinn*, 744 F.2d 81 (10th Cir. 1984). Injunctions affecting future conduct are generally subject to future review based on equitable principles and unforeseen events. *See, Restatement (2d) Judgements* § 73.

16. The facts of this result are stark, and were surely not contemplated by anyone on March 14, 2001. Like everyone in the case, the Department is disappointed that no payments will be made with respect to the tens of millions of dollars of pre-petition, unsecured debt, including the $4 million priority claim of the Department.

17. What the Department asserts to be intolerable in a court of equity is that this Court will have been utilized as a vehicle to involuntarily transfer wealth from taxpayers, from employees, and from trade creditors to banking institutions.

18. The Department will be prepared to have experts testify, if necessary, that if the Debtor had gone dark in February, the government would not only have gotten the $2.3 million post-petition taxes that it is out because of this case, if anything the state government would have gotten more—to the

extent people were shopping at Furr's because of a perceived price advantage. People would have bought their groceries somewhere else.

19. In addition, the gross receipts tax was separately stated (as it is in the industry) on the register receipts by Furr's and the tax was passed on to the consumer. The gross receipts tax in is not generally factored into computation of the price grocers charge their customers, and consumers expect the tax portion to go to the state.

20. In the facts of this case, a sale of the business was accomplished and the majority of the negotiated price depended on the continued, going concern value of the business. The lenders have significantly benefited because of this case. The lenders could not have avoided the losses that they avoided without the estate's acquisition of involuntary loans from the government, from employees and from trade creditors.

21. It is unfortunate that only the secured lenders are better off because of this bankruptcy case. What should be unacceptable to the Court is that the lenders will be better off while others are worse off because of this bankruptcy case.

22. The Department believes that the Trustee would not support the settlement if the Court were to grant the Deaprtment's motion, and that she would seek (and be able to obtain) a result which is more fair to the entities that dealt in good faith with an insolvent bankruptcy estate.

23. Concurrence with counsel for the Chapter 7 Trustee was sought, and agreement with the relief requested herein was not obtained.

WHEREFORE, the paragraph 9, page 11 of the Financing Order should be clarified or, if necessary, modified so that the Chapter 7 Trustee may seek to surcharge the lenders for Chapter 11 administrative expenses in accordance with otherwise applicable § 506(c) principles.

Respectfully submitted,

Donald F. Harris
Special Assistant Attorney General
Taxation and Revenue Department
P.O. Box 8485
Albuquerque, NM 87198-8485
505-841-6583
email: dharris@state.nm.us

I certify a copy of the foregoing was e-mailed and mailed to:

Robert Jacobvitz
500 Marquette N.W., Suite 650
Albuquerque, NM 87102

Bill Davis
PO Box 6
Albuquerque, NM 87103

Ron Andazola
PO Box 608
Albuquerque, NM 87102

Paul Fish
PO Box 2168
Albuquerque, NM 87103

Jennie Behles
PO Box 849
Albuquerque, NM 87103

Michael Four
Schwartz, Steinsapir, Dohrmann & Sommers
6300 Wilshire Blvd. Suite # 2000
Los Angeles, California 90048

Donald F. Harris