

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

FILED  
OFFICE OF THE CLERK  
2001 MAY -4 AM 10:18  
U.S. BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

01-11-10779-SA

In re  
FURR'S SUPERMARKET, INC.,  
Debtor,

RAUL BURGOS,  
Movant.

**MOTION FOR RELIEF FROM AUTOMATIC STAY**

COMES NOW Raul Burgos, hereinafter "movant," by and through this attorney of record the LAW OFFICE OF ROGER MOORE, by Roger Moore, Esq., and hereby moves this Court to lift the Automatic Stay filed on or about April 4, 2001, by Furr's Supermarket Incorporated, hereinafter "debtor" in the New Mexico State District Court matter captioned: SECOND JUDICIAL DISTRICT COURT COUNTY OF BERNALILLO, STATE OF NEW MEXICO, RAUL BURGOS vs. DAVID WORK, individually and d/b/a ALLSTATE PAINTING COMPANY; Cause Number: CV-2000-03073.

The movant further requests that this Court enter a finding that the 11 U.S.C., section 362 automatic stay provisions does not apply to the pending New Mexico State Court action. In support of this motion the movant states as follows:

1. On February 23, 2001, the deposition of Mr. Craig Franks, hereinafter "Franks" an employee of this debtor, was taken as part of a New Mexico State Court action, hereinafter "State Court" which this debtor is not a party.
2. At the February 23, 2001-deposition, Franks produced, for the first time, a memorandum dated March 25, 2000-which proports to support his prior affidavit and

deposition testimony that the defendant, in the State Court matter, was in El Paso, Texas on March 29, 2000, the date that the State Court plaintiff asserts that the defendant was personally served with process in Albuquerque, New Mexico.

3. Franks testified at his deposition that the March 25, 2000-memorandum produced was created by him on March 25, 2000, using the Compaq laptop computer in his possession for purposes of his employment with this debtor and owned by this debtor.
4. The memorandum produced at Franks February 23, 2001-deposition was documentation subject to a subpoena previously served upon FURRS, but was not produced as part of the package of information tendered. (See. David T. Thuma, Esq., February 5, 2001-letter attached hereto as plaintiff's Exhibit "A")
5. Pursuant to FURRS response (Thuma, Esq., letter) to its subpoena the memorandum produced by Mr. Franks at his February 23, 2001-deposition, was not part of the FURRS file documentation. As stated in Thuma, Esq., February 5, 2001-letter, in relevant part: "...To my knowledge, and to the knowledge of Furr's Supermarkets, Inc., the enclosed are all of the responsive documents."
6. It is undisputed by counsel for the parties in the State Court action that the March 25, 2000-memorandum was not produced by debtor prior to Franks February 23, 2001-deposition.
7. It is undisputed by counsel for debtor, David Thuma, Esq., neither Franks nor this debtor produced the March 25, 2000-memorandum to his office prior to FURRS counsel production on February 5, 2001.

8. The movant has a good faith belief that Franks created the memorandum dated March 25, 2000, after March 25, 2000, in an attempt to bolster his previous affidavit testimony and to assist the defendant in the State Court action, whom Franks regards as a "personal friend."
9. The eleventh hour production of the previously undisclosed memorandum, prepared by Franks using the Compaq laptop computer owned by this debtor raise legitimate questions as to the actual creation of the disputed document and the overall credibility of Franks who has been portrayed by the defendant as independent and unbiased in the State Court action.
10. On March 27, 2001-this debtor, as a potential witness was served with a Subpoena Duces Tecum in the State Court action. (Production of Laptop Computer for Inspection and Examination. (See. Subpoena attached hereto as Exhibit "B"))
11. The State Court Subpoena Duces Tecum served upon this debtor is merely for the examination and inspection of the laptop computer files and hard drive as they relate to the memorandum dated March 25, 2000.
12. The deadline for this debtor's (FURRS) production for the laptop for examination and inspection was April 11, 2001.
13. As of this date this debtor (FURRS) has refused and failed to comply with the subpoena issued in the State Court action.
14. The inspection and examination of this debtor's laptop computer, files, and hard-drive are necessary in order to ascertain when the disputed memorandum dated March 25, 2000, was actually created. The creation of the March 25, 2000-

memorandum is relevant upon the issue of Franks credibility in the State Court action.

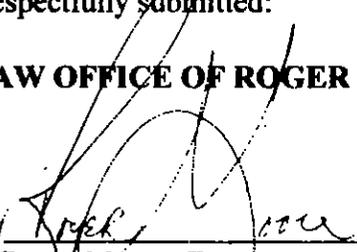
15. On March 30, 2001-counsel for the debtor, David T. Thuma, Esq., and this counsel, conversed wherein debtors' counsel advised that debtor would file a Stay in the State Court action, and lift said Stay subject to a confidentially agreement and an agreed form of Protective Order.
16. On April 4, 2001-the movant submitted a proposed form of confidentially agreement to debtors' counsel review. (See. Confidentially Agreement attached hereto and incorporated herein as Exhibit "C")
17. On April 6, 2001-plaintiff's counsel received an unendorsed copy of what proports to be a Notice of Automatic Stay from counsel for FURRS indicating that this debtor (FURRS) as a named defendant in the pending litigation. (See. Notice of Automatic Stay attached hereto and incorporated herein as Exhibit "D")
18. Due to no substantive response from this debtors' counsel a motion to compel was filed in the State Court matter.
19. The debtor is not a named defendant in the pending State Court litigation.
20. The debtor is merely a potential witness in the pending State Court litigation.
21. It is not the intent of the movant to convert, take ownership, or control of the property (laptop computer) owned by the debtor.
22. On April 26, 2001, a hearing upon the movant's motion to compel came before State District Court Judge Robert L. Thompson.

23. Based upon representations made by counsel for the debtor, David T. Thuma, Esq., at the April 26, 2001-Hearing, that the Federal Bankruptcy Stay applied to the State Court matter, Judge Robert L. Thompson directed that movant petition this Court for a lifting of the Federal Bankruptcy Stay asserted by this debtor.
24. State District Court Judge Robert L. Thompson reserved ruling upon enforcement of the State Court Subpoena Duces Tecum served upon this debtor, on March 27, 2001, pending the lifting of the Stay by this Court.
25. In the interest of allowing enforcement of the State Court Subpoena Duces Tecum relating to this debtor to proceed it is proper for this Court to enter an order to lift the Stay in the State Court action.
26. Due to the above it is proper for this Court to enter a finding that the Federal Bankruptcy Stay asserted by this debtor in the State Court action was inappropriate and not applicable to the State Court action.
27. Due to the above it is proper for this Court to enter a finding that any sanctions which may be imposed by the State Court against the debtor relating the automatic stay will be deemed as a post-bankruptcy petition administrative expense.

**WHEREFORE**, the movant requests that this Court lift the Automatic Stay filed by the debtor on or about April 4, 2001, in the State Court matter; enter a finding that the Federal Bankruptcy Court Automatic Stay provisions set forth in 11 U.S.C. section 362 does not apply to the State Court action; any sanctions which may be imposed by the State Court against the debtor relating to the automatic stay will be deemed as a post-bankruptcy petition administrative expense, and for such other and further relief this Court deems just and proper.

Respectfully submitted:

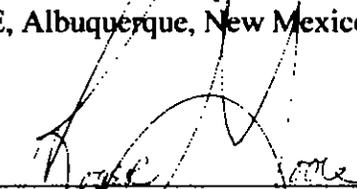
**LAW OFFICE OF ROGER MOORE**

By   
\_\_\_\_\_  
Roger Moore, Esq.  
The Attorney for the Movant  
Post Office Box 1441  
Albuquerque, New Mexico 87103-1441  
(505) 255-2900-Telephone  
(505) 255-2545-Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2001- a true and correct copy of the foregoing Motion for Relief From Automatic Stay was hand-delivered to counsel for the debtor, FURRS Supermarkets Incorporated, JACOBVITZ, THUMA & WALKER, P.C., c/o David T. Thuma, Esq., 500 Marquette

Avenue NW, Suite 650, Albuquerque, New Mexico 87102; mailed to UNITED STATES BANKRUPTCY TRUSTEE, United States Department of Justice, Post Office Box 608, Albuquerque, New Mexico 87103-0608; and mailed to FURRS Supermarket Incorporated, c/o Chief Executive Officer (CEO), 4411 The 25 Way NE, Albuquerque, New Mexico 87190.

  
\_\_\_\_\_  
Roger Moore, Esq.

**JACOBVITZ, THUMA & WALKER**

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

500 MARQUETTE N.W., SUITE 650  
ALBUQUERQUE, NM 87102

TELEPHONE  
(505) 766-9272  
FACSIMILE  
(505) 766-9287

**ROBERT H. JACOBVITZ**  
DAVID T. THUMA  
THOMAS D. WALKER  
ANNE D. GOODMAN

February 5, 2001

Suzanne R. Guest, Esq.  
The Guest Law Firm PC  
PO Box 7339  
Albuquerque, NM 87194-7339

Roger Moore, Esq.  
Roger Moore Law Office  
PO Box 1441  
Albuquerque, NM 87103-1441

Re: Burgos v. Work

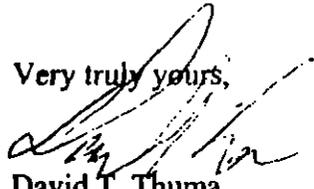
Dear Counsel:

Pursuant to the subpoena issued by Mr. Moore, I enclose copies of the responsive documents from the files of Furr's Supermarkets, Inc. To my knowledge, and to the knowledge of Furr's Supermarkets, Inc., the enclosed are all of the responsive documents. I have reviewed them, and it appears to be more than sufficient to corroborate Mr. Frank's affidavit completely.

After reviewing the documents, I hope that Mr. Franks' deposition will be unnecessary. If Mr. Moore disagrees, however, Mr. Franks can be available for a deposition on February 16, 2001 or February 19, 2001.

Please call me if you have any questions or comments about the foregoing or the enclosed.

Very truly yours,

  
David T. Thuma  
For the Firm

DTT/mlh  
Enclosures

cc: Mr. Craig Franks (w/out encl.)

RECEIVED FEB 06 2001



000000

SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO

RAUL BURGOS,  
Plaintiff,

vs.

No. CV-2000-03073

DAVID WORK, individually and  
d/b/a ALLSTATE PAINTING COMPANY,  
Defendant.

**SUBPOENA DUCES TECUM  
(PRODUCTION OF LAPTOP COMPUTER  
FOR INSPECTION AND EXAMINATION)**

To: **FURR'S SUPERMARKET INCORPORATED**  
c/o Tom Dahlen, Chairman, President, and CEO  
4411 The 25 Way NE  
Albuquerque, New Mexico

**GREETINGS:**

**YOU ARE HEREBY COMMANDED** to produce for inspection and examination the Laptop Computer owned by FURRS SuperMarket Incorporated and in the possession of Mr. Craig Franks, on March 25, 2000 to the NETWORKING AND COMPUTER COMMUNICATIONS INCORPORATED, c/o Mr. Farbod Kia, 1820 San Pedro Boulevard NE, Suite 11, Albuquerque, New Mexico 87110, (505) 265-1013, within (15) days from the date of service of this subpoena. It is the intent of the plaintiff to have the relevant computer files and hard drive inspected and examined specifically related to a March 25, 2000-Memorandum, produced and referenced my Mr. Craig Franks during his February 23, 2001-deposition. (See. Plaintiff's Exhibit "1" attached hereto)

**IF YOU DO NOT COMPLY WITH THIS SUBPOENA** you may be held in contempt of court and punished by fine or imprisonment.

March 21, 2001  
Roger Moore, Esq.  
The attorney for plaintiff Raul Burgos



**RETURN FOR COMPLETION BY SHERIFF OR DEPUTY**

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ in \_\_\_\_\_ County, I served this subpoena on \_\_\_\_\_ by delivering to the person named a copy of the subpoena, a witness fee in the amount of \_\_\_\_\_ and mileage in the amount of \$ \_\_\_\_\_.

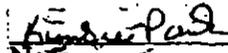
\_\_\_\_\_  
Deputy sheriff

**RETURN FOR COMPLETION BY OTHER PERSON MAKING SERVICE**

I, Ann Jackson being duly sworn, on oath say that I am over the age of eighteen (18) years and not a party to this lawsuit, and that on the 27 day of March 2001, in Bernalillo County, I served this subpoena duces tecum on Clint Rutherford, \_\_\_\_\_ by delivering to the person named a copy of the subpoena duces tecum. **Claims Manager for Furr's Supermarket Incorporated**

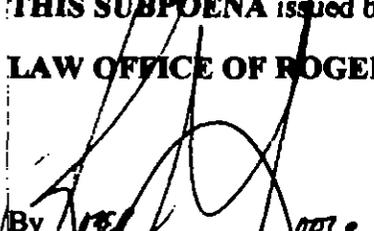
  
\_\_\_\_\_  
Person making service

**SUBSCRIBED AND SWORN** to before me this 27 day of March 2001.

  
\_\_\_\_\_  
Notary. *Expires: 08-15-2001*

**THIS SUBPOENA** issued by or at request of:

**LAW OFFICE OF ROGER MOORE**

By  \_\_\_\_\_  
Roger Moore, Esq.  
1107 Cardenas Drive NE, Suite 104 (87110)  
Post Office Box 1441  
The attorney for plaintiff  
Mr. Raul Burgos  
Albuquerque, New Mexico 87103-1441  
(505) 255-2900 Telephone  
(505) 255-2548 Facsimile

### **TO BE PRINTED ON EACH SUBPOENA**

1. A command to produce evidence or to permit inspection may be joined with a command to appear for a deposition or trial.
2. A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.
3. If a person's attendance is commanded, one full day's per diem must be tendered with the subpoena, unless the subpoena is issued on behalf of the state or an officer or agency thereof. Mileage must also be tendered at the time of service of the subpoena as provided by the Per Diem and Mileage Act. Payment of per diem and mileage for subpoenas issued by the state is made pursuant to regulations of the Administrative Office of the Courts.
4. To be completed only if the subpoena is commanding production of documents and things or inspection of premises before trial. If the subpoena is commanding production of documents and things or inspection of premises before trial, it must be served on each party in the manner provided by Rule 1-005. If service is by a party, an affidavit of service must be used instead of a certificate of service.

### **PROTECTION OF PERSONS SUBJECT TO SUBPOENAS**

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

Subject to Subparagraph (2) of Paragraph D below, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

1. fails to allow reasonable time for compliance,
2. requires a person who is not a party or an officer of a party to travel to a place more than one hundred miles from the place where that person resides, is employed or regularly transacts business in person, except as provided below, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
3. requires disclosure of privileged or other protected matter and no exception or waiver applies, or
4. subjects a person to undue burden.

If a subpoena:

1. requires disclosure of a trade secret or other confidential research, development, or

2. commercial information, or requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
3. requires a person who is not a party or an officer of a party to incur substantial expense to travel, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

#### **DUTIES IN RESPONDING TO SUBPOENA**

1. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.
2. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

**CONFIDENTIALITY AGREEMENT**

This agreement entered into between the plaintiff, Raul Burgos, herein after "BURGOS" and FURRS Supermarket Incorporated, hereinafter "FURRS" hereby agree and stipulate that FURRS will within five (5) calendar days deliver the Compaq laptop Computer in the possession of Mr. Craig Franks, hereinafter "FRANKS" and referenced in his February 23, 2001-deposition, to NETWORKING AND COMPUTER COMMUNICATIONS, c/o Mr. Farbod Kia, hereinafter "NETWORKING," 1820 San Pedro Boulevard NE, Suite 11, Albuquerque, New Mexico 87110, and allow NETWORKING, its agents, assigned, subcontractors, and representatives, to examine internal computer files and the computer hard drive related to the March 25, 2000-Memorandum, hereinafter "MEMORANDUM" referenced by Franks in his February 23, 2001-deposition.

It is the express understanding and agreement between BURGOS and FURRS that no information either written, printed, or oral, including but not limited to business records, corporate programs, and trade secrets, unrelated to the March 25, 2000-Memorandum shall be voluntarily disclosed by NETWORKING its agents, assigned, subcontractor, and representatives to any third-party, including but not limited to counsel for the plaintiff, Roger Moore, Esq.

It is the express understanding and agreement between BURGOS and FURRS that NETWORKING shall be bound by the terms and conditions set forth in the Protective Order, filed in the pending matter.

**LAW OFFICE OF ROGER MOORE      JACOBVITZ THUMA & WALKER, P.C.**

By \_\_\_\_\_  
c/o Roger Moore, Esq.  
The attorney for the plaintiff  
Post Office Box 1441  
Albuquerque, New Mexico 87103

By \_\_\_\_\_  
c/o David T. Thuma, Esq.  
Attorneys' for FURRS Supermarket Inc.  
500 Marquette Avenue NW, Suite 650  
Albuquerque, New Mexico, 87102



STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT

RAUL BURGOS.

Plaintiff,

vs.

No. CV-2001-00416

FURR'S SUPERMARKETS, INC.

Defendant.

**NOTICE OF AUTOMATIC STAY**

Please take notice that on February 8, 2001, Furr's Supermarkets, Inc., (the "Debtor") filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Section 101 et seq., captioned In re Furr's Supermarkets, Inc., United States Bankruptcy Court, District of New Mexico, No. 11-01-10779 SA. Pursuant to Bankruptcy Code Section 362, all parties to this action are automatically are stayed from, among other things:

- (A) Continuing to prosecute this state court action against debtor in any respect;
- (B) The enforcement, against Debtor or against property of the bankruptcy estate, of a judgment obtained before the commencement of the bankruptcy case;
- (C) Any act to obtain possession of property of the bankruptcy estate or of property from the estate or to exercise any control over property of the estate;
- (D) Any act to create, perfect or enforce any lien against property of the estate;



RECEIVED FEB 08 2001

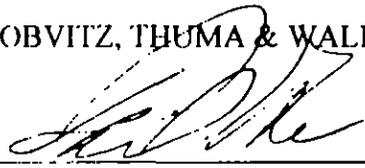
(E) Any act to create, perfect, or enforce against property of Debtor any lien to the extent that such lien secures a claim that arose before the commencement of the bankruptcy case;

(F) Any act to collect, assess, or recover, or claim against Debtor that arose before commencement of the bankruptcy case; and

(G) The set off of any debt owing to Debtor that arose before the commencement of the bankruptcy case against any claim against the Debtor.

Respectfully Submitted,

JACOBVITZ, THUMA & WALKER, P.C.

By: 

David T. Thuma  
500 Marquette, NW, #650  
Albuquerque, NM 87102  
(505) 766-9272

Attorneys for Furr's Supermarkets, Inc.

This certifies that a copy  
of the foregoing document  
was served by mail on:

Roger Moore  
1101 Cardenas Drive NE, Suite 104  
Post Office Box 1441  
Albuquerque, NM 87110

Suzanne R. Guest  
Post Office Box 7339  
Albuquerque, NM 87194-7339

this 4<sup>th</sup> day of April, 2001.

  
David T. Thuma

UNITED STATES  
U. S. BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO  
Albuquerque Division

# 21005046 - MM  
May 4, 2001

Code	Case #	Qty	Amount
STAY 1/1	01-10779	1 0	75.00
			75.00 CA

Judge - James Starzinski Albuquerque  
Debtor - FURRYS

TOTAL → 75.00

FROM: MOORE  
CASH