

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

In re: : Chapter 11
FURRS SUPERMARKETS, INC., : Case No. 01-11-1077
Debtor. :

MOTION OF PINNACLE LOGISTICS, INC. AND COUNTRYWIDE LOGISTICS, INC. FOR RELIEF FROM THE AUTOMATIC STAY

Pinnacle Logistics, Inc. ("Pinnacle") and Countrywide Logistics, Inc. ("Countrywide")(collectively, the "Movants"), through their attorneys, hereby submit their Motion for an order modifying the automatic stay pursuant to 11 U.S.C. Section 362(d) and Local Bankruptcy Rule 4001-1(a). In support thereof, the Movants respectfully represents as follows:

Preliminary Statement

The Movants seek to modify the automatic stay to allow them to foreclose certain statutory liens they assert against the Debtor's inventory to secure payment of certain pre- and post-petition obligations. As a result of the steady and rapid depletion of the Debtor's inventory, coupled with the concerns about the quality of the remaining inventory, the Movants argue that they are entitled to relief from the automatic stay to enforce their liens. Accordingly, the Movants seek entry of an order modifying the automatic stay pursuant to Section 362(d).

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Facts

1. Furr's Supermarket, Inc. ("Furr's" or the "Debtor") is a regional supermarket chain with operations in New Mexico and Western Texas. On or about February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") with this Court.

2. Pinnacle operates a warehouse and distribution center and provides related operational services to Furr's. On or about September 23, 1998, Pinnacle and Furr's entered into a Warehousing and Distribution Agreement (the "Warehousing Agreement") whereby Furr's agreed to retain Pinnacle to provide Furr's with certain warehousing and related services at a warehouse facility located in El Paso, Texas (the "El Paso Warehouse").

3. Countrywide is a common carrier and trucking firm providing the transportation of goods and related services to Furr's. On or about March 26, 1999, Countrywide and Furr's entered into a Transportation Services Agreement (the "Transportation Agreement") whereby Furr's agreed to retain Countrywide to provide Furr's with certain transportation and related services.

4. Pinnacle and Countrywide are among the Debtor's largest secured and unsecured creditors. As of the Petition Date, Pinnacle was owed approximately \$2.1 million by the Debtor which represents unpaid expenses and charges incurred by the Debtor for warehousing and related services pursuant to the Warehousing Agreement during the ten (10) week period prior to the Petition Date.

5. As of the Petition Date, Countrywide was owed approximately \$2.4 million by the Debtor which represents unpaid expenses and charges incurred by the

Debtor for transportation and related services pursuant to the Transportation Agreement during the ten (10) week period prior to the Petition Date.

6. Shortly after the filing of the Debtor's petition, Pinnacle and Countrywide asserted certain statutory liens against inventory stored in the El Paso Warehouse and inventory being transported by Countrywide on the Petition Date. Pursuant to the Replacement Lien Order (defined and discussed *infra*) and the respective contracts, Pinnacle and Countrywide have continued to perform and render services to the Debtor post-petition under the terms of the Warehousing Agreement and the Transportation Agreement.¹

Relief Requested

7. The value of the Debtor's inventory stored at the El Paso Warehouse that serves as collateral for the Movants's statutory liens has steadily decreased over the past several months. As a result of this trend, the Movants fear that, in the very near future, the realizable value of the inventory will be insufficient to satisfy the pre-petition amounts owed to them if the Movants were to foreclose on their liens. Accordingly, the Movants request that this Court enter an order modifying the automatic stay to allow the Movants to foreclose on their liens.

Movants' Liens, Movants' Claims and the Collateral

A. Movant's Liens

1. In addition to granting Pinnacle and Countrywide certain replacement liens in respect of their pre-petition statutory lien claims, the Replacement Lien Order further provides as follows:

Further Relief. Except as otherwise provided by the contracts, and as provided that neither Furr's nor Pinnacle or Countrywide (as the case may be) is in default of any post-petition obligation under their respective contracts, Furr's, Pinnacle and Countrywide must continue to perform their respective obligations under the contracts, unless otherwise ordered by the Court.

8. Pinnacle, as warehouseman for the El Paso Warehouse, asserts a first priority Warehouseman's Lien pursuant to Texas Business and Commerce Code Section 7.209 against such inventory for all unpaid pre-petition and post-petition amounts due from the Debtor for warehousing and related services arising from the Warehousing Agreement. Section 7.209 of the Texas Business and Commerce Code provides in relevant part that:

A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law.

Tex. Bus. & Com. Code Ann. §7.209(a)(1) (Vernon 1999). Section 7.209 further provides that "[T]he warehouseman's specific lien for charges and expenses under Subsection (a)(1) is effective against any security interest." Tex. Bus. & Com. Code Ann. §7.209(c)(emphasis supplied).

9. As of the Petition Date, the Debtor had inventory valued at approximately \$9.0 million, on a cost basis, stored in the El Paso Warehouse. Accordingly, Pinnacle possesses a first priority Warehouseman's Lien, up to the amount of the value of the inventory stored in the El Paso Warehouse on the Petition Date, for the pre-petition amounts due from the Debtor for warehousing and related services arising under the Warehousing Agreement, as well as a post-petition Warehouseman's Lien.

10. Countrywide, as carrier and transporter of Furr's inventory, asserts a first priority Carrier's Lien pursuant to Section 7-307 of the Uniform Commercial Code, as adopted by Texas in Tex. Bus. & Comm. Code. Ann. §7.307 and as adopted by New Mexico in NM Stat. Ann. §55-7-307, for all unpaid pre-petition amounts due

from the Debtor for transportation and related services arising from the Transportation Agreement. Section 7-307 of the Uniform Commercial Code provides in relevant part that:

A carrier has a lien on goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law.

U.C.C. §7-307(1). A Carrier's Lien confers upon a carrier a specific lien similarly conferred to that of a warehouseman's lien. See 7A Anderson, Uniform Commercial Code, §7-307:3 through §7-307:4 at p. 704 (3d ed. 1995).

11. As of the Petition Date, the Debtor had inventory valued at approximately \$700,000, on a cost basis, in containers being transported by Countrywide to various stores owned and/or operated by the Debtor. Accordingly, Countrywide possesses a first priority Carrier's Lien, up to the amount of the value of the inventory being transported on the Petition Date, for the pre-petition amounts due from the Debtor for transportation and related services arising under the Transportation Agreement, as well as a post-petition Carrier' Lien.

12. On or about February 23, 2001, shortly after these proceedings were commenced, Pinnacle, Countrywide, the Debtor and Heller Financial, Inc., as agent for Furr's prepetition senior lenders (the "Prepetition Senior Lenders") and for a group of lenders that have made certain loans and advances to Furr's as a debtor-in-possession (the "DIP Lenders"), agreed to and submitted an Order that, among other things, granted Pinnacle and Countrywide first priority replacement Warehouseman's and Carrier's liens, respectively, to the extent that such pre-petition liens are valid, on the Debtor's post-petition inventory for all charges and expenses due and owing by

the Debtor pre-petition, and to the extent valid, and continued their post-petition liens as well (the "Replacement Lien Order"). This Court signed and entered the Replacement Lien Order on March 2, 2001, effective as of February 9, 2001. Notwithstanding the Replacement Lien Order, the Prepetition Senior Lenders and DIP Lenders assert that their liens are senior to some, or all, of Pinnacle and Countrywide's pre and post-petition liens. If they are correct, Pinnacle and Countrywide only may have, in whole or part, unsecured and/or administrative claims.

B. Movants' Claims

13. Pinnacle's claim arises as a result of the Warehousing Agreement and the services that Pinnacle provided to the Debtor pre-petition as well as the services Pinnacle continues to provide to the Debtor. As at the Filing Date the Debtor was, and continues to be, indebted to Pinnacle in the amount of \$ 2.1 million for services provided to the Debtor prior to the Petition Date.

14. In addition to the pre-petition amounts due to Pinnacle, Pinnacle will incur certain termination costs associated with termination of the Warehouse Agreement. Pinnacle, based upon statements made by Debtor's management and recent actions, strongly believes that a sale of the Debtor's business is imminent and such a sale of the business can only have the effect of closing the El Paso Warehouse and discontinuing the transportation operations.

15. If such a termination occurs, in accordance with the terms of the Warehousing Agreement, the Debtor is obligated to reimburse Pinnacle for all of its termination costs. Pinnacle presently estimates that it will incur approximately \$ 1.5

million in termination costs that the Debtor is contractually responsible to pay to Pinnacle.

16. Countrywide's claim arises out of the Transportation Agreement and the services provided to the Debtor pre-petition, as well as the services Countrywide continues to provide to the Debtor. As of the Petition Date, the Debtor was, and continues to be, indebted to Countrywide in the amount of \$2.4 million for services provided to the Debtor prior to the Petition Date of which \$700,000 is secured by Countrywide's Carrier's lien.

17. In the event of the sale of the Debtor's business, and anticipated termination of the Transportation Agreement, Countrywide will similarly incur certain termination costs associated with the Transportation Agreement which the Debtor would be obligated to pay. Countrywide estimates that it will incur approximately \$12 million in termination costs upon the termination of the Transportation Agreement.

18. Due to a reduction in the amount of inventory in the El Paso Warehouse, there has been a corresponding decrease in the amount of inventory that is transported by Countrywide. In addition, the Debtor has recently closed several of its stores and arranged for inventory from the closed stores to be redistributed among its remaining stores. This has further contributed to a decrease in the value of inventory transported by Countrywide. Accordingly, the value of the inventory being transported by Countrywide to serve as the basis for its lien is being greatly reduced and is insufficient to satisfy Countrywide's pre-petition debt, let alone the termination costs Countrywide will incur.

19. In addition to the amounts set forth above, under the terms of the Warehousing Agreement and the Transportation Agreement, the Debtor is required to tender monthly payments to Pinnacle and Countrywide for services provided under the respective agreements. In general, Pinnacle and Countrywide invoice the Debtor ten days prior to the beginning of each monthly "accounting period" based on a mutually agreed budget. Thereafter, the Debtor is required to tender payment of the invoiced amount no later than the 15th day of such accounting period. At the end of the accounting period, the parties reconcile, or "true-up", amounts due for the actual expenditures of Pinnacle and Countrywide. The net effect of this is that for any given accounting period the Debtor is ahead for two weeks and Pinnacle and Countrywide are ahead for two.

20. The average monthly charges under the Warehousing Agreement are approximately \$1,050,000 and under the Transportation Agreement are \$650,000. Based on the current one mid-month payment scheme, Pinnacle and Countrywide for the first two weeks of any given month face additional exposure in the amounts of \$525,000 and \$325,000, respectively, and such amounts must be considered when evaluating the adequacy of the protection afforded by the inventory.

21. In sum, Pinnacle expects that on or before May 21, 2001 the value of the inventory will fall below the amount of the claims Pinnacle will assert against the Debtor. Pinnacle asserts that its entire claim is subject to its Warehouseman's lien that is collateralized by the inventory contained in the El Paso Warehouse. As a result of the drastic reduction in the value of the inventory, Pinnacle is entitled to the relief requested herein.

22. In sum, Countrywide expects that on or before May 21, 2001 the value of the inventory will fall below the amount of the claims Countrywide will assert against the Debtor. Countrywide asserts that its entire claim is subject to its Carrier's Lien that is collateralized up to the value of the inventory being transported by Countrywide on the Petition Date. As a result of the drastic reduction in the value of the inventory being transported, Countrywide is entitled to the relief requested herein.

C. The Collateral

23. The inventory stored in the El Paso Warehouse can be classified under one of three basic categories: health and beauty products, groceries and perishables. Generally, health and beauty products maintain their value for the longest period of time and realize a higher return, as a percentage of cost, on liquidation than groceries or perishables.

24. Prior to Petition Date, and for a brief period thereafter, the value of the Debtor's inventory at cost, was usually higher than the amount owed by the Debtor to Pinnacle. During the course of a typical day, approximately \$800,000 of inventory would be delivered to the El Paso Warehouse, while a similar amount of inventory would be shipped out to the Debtor's retail locations. As a result, the inventory remained at a fairly stable level, and, in fact, even increased for a period of time.

25. Since April 6, 2001, however, the Debtor has, in what the Movants believe to be a designed effort, systematically reduced the value its inventory in the El Paso Warehouse by approximately thirty-three percent (33%). The amount of new inventory being received into the El Paso Warehouse has been greatly reduced to an average daily intake, at cost, of approximately \$160,000. Conversely, existing inventory is being shipped out of the El Paso Warehouse at an average daily rate, at

cost of approximately \$420,000. Accordingly, every day the value of the Debtor's inventory at the El Paso Warehouse is reduced by approximately \$250-300,000, at cost, thereby eroding Pinnacle and Countrywide's collateral base at an alarming rate.

26. At the current rate of reduction, as of the date of the filing of this motion, based upon the Movants' projections, the liquidation value of the Debtor's inventory in the El Paso Warehouse will be below \$4.1 million on, or soon after, May 21, 2001. Accordingly, on or about May 21, 2001, the inventory, based on a liquidation value, will fall below the level required to fully secure Pinnacle and Countrywide's pre-petition lien claims

27. The Movant's are also concerned about the quality of the inventory that is presently in the El Paso Warehouse. During the course of the Debtor's case, the inventory mix has substantially changed as the Debtor prefers to ship out its newer, more valuable inventory (i.e. "last in-first out basis"), while leaving its older, and potentially obsolete, inventory in the El Paso Warehouse. Moreover, most of the health and beauty products have been shipped out and have not been replaced.

28. The Movants fear that if they are forced to liquidate the inventory in the El Paso Warehouse to satisfy their liens, the present inventory is insufficient to satisfy the amounts owed by the Debtor. The Movants have been advised that, upon liquidation, it would be estimated that the groceries will realize a forty percent (40%) return of the cost value while the perishables will realize a twenty-five percent (25%) return of the cost value. As of May 13, 2001, the cost value of the groceries was approximately \$9.8 million and the cost value of perishables was approximately \$2.4 million resulting in a present liquidation value for all of the inventory of approximately \$4.6 million.

29. Assuming a best case situation, where no repackaging of the products are required, the Movants have been advised that they could possibly realize a liquidation value recovery for groceries and perishables of fifty percent (50%) and thirty-five (35%) of the cost value, respectively. Even assuming this “best case” scenario, the present liquidation value of the inventory stored at the El Paso Warehouse is only approximately \$5.75 million which is perilously close to the value of the Movants’ lien claims.

30. Further compounding the Movants’ fears is the Debtor’s expressed desire to sell the business rather than attempt to reorganize the business. As early as March 31, 2001, and repeatedly since then, the Debtor’s board Chairman George Golleher is quoted as saying “The main goal is to sell the grocery chain.” *See Albuquerque Journal*, March 31, 2001, page A1. The Movants can only speculate that such a sale of the business would include of sale of all the inventory stored in the El Paso Warehouse to the purchaser. Additionally, a sale of the business would likely result in a termination of both the Warehousing Agreement and the Transportation Agreement.

APPLICABLE AUTHORITY

31. Section 362(d)(1) of the Bankruptcy Code provides in relevant part that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay-

(32) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(33) with respect to a stay of an act against property under subsection (a) of this section, if –

(HH) the debtor does not have equity in such property:
and

(II) such property is not necessary to an effective
reorganization. . . .

11 U.S.C. § 362(d)(1).

36. It is well settled that cause for granting relief from the automatic stay is determined on a case-by-case basis. In re Leisure Corp., 234 B.R. 916 (9th Cir. B.A.P. 1999), In re Consolidated Indust. Corp., 234 B.R. 84 (Bank. N.D. Ind. 1999). Moreover, there is a presumption in favor of the creditor to grant the creditor the requested relief if the value of the collateral decreases below the value of the claim. F.D.I.C. v. Mathis, 64 B.R. 279 (N.D. Tex., 1986).

37. Equity for automatic stay purposes is generally defined as the difference between the value of the property and the sum of all encumbrances against it including interests of junior lien holders plus the cost of conducting a foreclosure sale. See, Stewart v. Gurley, 745 F.2d 1194 (9th Cir. 1984); In re Indian Palms Assocs., Ltd., 61 F.3d 197, 206 (3^d Cir. 1995). In this case there can be no dispute that the Debtor has no "equity" in the collateral. As set forth above, Pinnacle and Countrywide assert first priority statutory liens on the collateral. Thereafter, the Prepetition Senior Lenders would assert a second priority lien on the collateral. In addition, pursuant to the Final DIP Order entered on March 15, 2001, the DIP Lenders possess a lien, subject to, and without priming Pinnacle's Warehouseman's lien and Countrywide's Carrier's lien, on all of the Debtor's assets, including the inventory. Accordingly, any dispute between the Movants and the Prepetition Senior Lenders would reach the priority of the claimed liens and, regardless of the priority, the Debtor simply has no "equity" in the collateral.

38. Once a party establishes that a debtor has no equity in the property, the debtor has the burden of proving that the subject collateral is necessary to an effective reorganization. United Savings Ass'n of Texas v. Timbers of Inwood Forest Ass'n, Ltd., 108 S. Ct. 626, 632 (1988); In re Washington Assoc., 147 B.R. 827, 829 (Bankr. E.D.N.Y. 1992). It is also well established that a debtor must prove not only that the property is necessary for a reorganization, but that there is a reasonable likelihood that an effective reorganization can be achieved within a reasonable period of time. Timbers, 108 S. Ct. at 632; In re Washington Assoc., 147 B.R. at 829-30. In the seminal case of Timbers, the United States Supreme Court clarified what "necessary to an effective reorganization" requires, and stated:

What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means . . . that there must be a reasonable possibility of successful reorganization within a reasonable time."

108 S. Ct. at 632-2 (emphasis supplied). Mere indispensability of the property to the debtor's survival is not sufficient to preclude a motion for relief from the stay. In re Bellina's Restaurant II, Inc., 52 B.R. 509, 512 (Bankr. S.D. Fla. 1985) (property not necessary for effective reorganization where debtor had no capital and no unencumbered assets to serve as collateral for additional financing); In re Pleasant Valley, Inc., 6 B.R. 13, 17 (Bankr. D. Nev. 1980).

39. Based on their own statements, the Debtor's primary objective is to effectuate a sale of the business. The Debtor has publicly announced its primary intention to sell the business rather than attempt to reorganize its operations. This is consistent with the Debtor reduction of the inventory levels in the El Paso

Warehouse. Clearly, the collateral is not intended to be used in a reorganization as the Debtor has no intention to reorganize.

40. Finally, the collateral continues to decline in value jeopardizing the Movants' security interest. As set forth herein, the quality and the value of the inventory stored at the El Paso Warehouse continues to steadily decline. The Debtor continues to ship the inventory out of the El Paso Warehouse on a "first in-first out", removing its better quality higher value inventory while increasing the amount of older, and potentially obsolete, inventory behind to secure the Movants liens. The Movants, without some intervention, are powerless to prevent this continued decline in the value of the inventory that secures their statutory liens.

41. Clearly, as demonstrated, the Movants' interest in the inventory that serves as the collateral for the statutory liens is jeopardized. The facts set forth above establish that the Movants' demand for relief from the automatic stay is warranted. Accordingly, the Movants' request that this Court grant them relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1) to enforce and foreclose on their statutory liens.

42. Consent of the Debtor has been sought and not obtained.

CONCLUSION

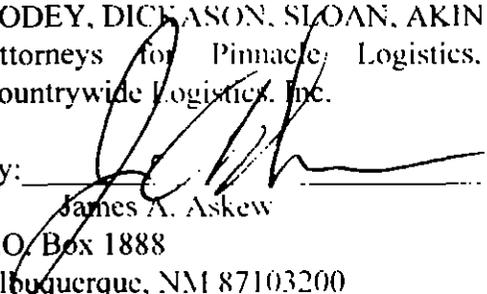
WHEREFORE, Pinnacle and Countrywide respectfully request that this Court enter an Order modifying the automatic stay and grant Pinnacle and Countrywide such other relief as this Court deems fair and proper.

Dated: May 18, 2001

Respectfully submitted.

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By: _____


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CERTIFICATE OF SERVICE:

I hereby certify that I mailed a true and correct copy of the foregoing pleading, by U.S. Mail, first class, postage prepaid, on this 18th day of May, 2001 to the following:

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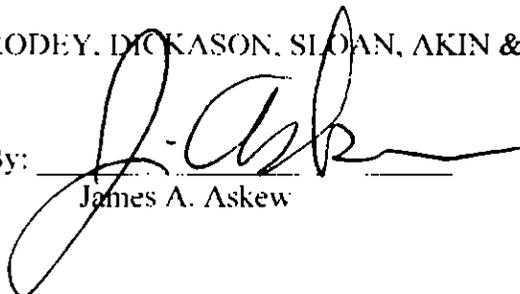
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James A. Askew

UNITED STATES
U. S. BANKRUPTCY COURT
DISTRICT OF NEW MEXICO
Albuquerque, N.M.

21005636
May 18, 2000

Code	Case #	Qty	Amount
STAY 1/3	01-10779	10	100.00
Judge - James Starbuck			
Debtor - FURRS			

TOTAL → 100.00

FROM: RODEY
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