

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT

AUG 09 2001

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779 SA
Chapter 11

DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

Debtor.

MOTION FOR (i) APPROVAL OF WIND-DOWN BUDGET, (ii) APPROVAL OF CASH COLLATERAL STIPULATION, (iii) AUTHORITY TO APPLY FUNDS AND OPERATE IN ACCORDANCE WITH THE WIND-DOWN BUDGET WITHOUT FURTHER COURT ORDER, (iv) APPROVAL OF EMPLOYEE RETENTION PLAN, (v) AN ORDER DIRECTING DISBURSEMENT OF FLEMING SALE PROCEEDS AND OTHER DEBTOR PROPERTY, (vi), APPROVING THE SETTLEMENT OF ALL ESTATE CLAIMS AGAINST THE SECURED LENDERS, AND (vii) ALLOWING CLAIMS OF SECURED LENDERS

Furr's Supermarkets, Inc., debtor-in-possession (the "Debtor"), hereby moves for an order (the "Wind-Down Order") (i) approving a budget to wind down the Debtor's affairs; (ii) authorizing the Debtor to fund the budget as set forth below and to make payments in accordance with the approved budget without further Court order; (iii) approving a cash collateral stipulation set forth below, (iv) approving the employee retention plan described below, (v) approving the proposed investment and disbursement of the proceeds from the pending sale of assets to Fleming Companies, Inc. ("Fleming"), as well as certain other property of the Debtor, (vi) approving the settlement of the pending adversary proceeding and all other estate claims against the Debtor's secured lenders; and (vii) allowing claims of Secured Lenders (as defined herein). In support of this Motion the Debtor states:

I. SALE TO FLEMING

1. On June 29, 2001, the Court approved the sale of a substantial portion of the Debtor's assets to Fleming under an Asset Purchase Agreement (the "Asset Purchase Agreement"). An order approving the sale was entered July 3, 2001. The Debtor and Fleming have a target date of August 31, 2001 to close the transactions contemplated under the Asset Purchase Agreement. On the closing date the purchase price, subject to an adjustment to be made after the closing upon completion of an inventory reconciliation (the "Initial Sale Proceeds") are to be paid by Fleming to the Debtor. Any inventory reconciliation that results in money owed by Furr's to Fleming is referred to as an "Inventory Refund," while any money owed by Fleming to Furr's is referred to as the "Inventory Underpayment." The Initial Sales Proceeds as adjusted up or down by the inventory reconciliation are referred to as the "Sale Proceeds."

II. WIND-DOWN BUDGET

2. The Debtor has estimated the unpaid administrative costs incurred to date in the bankruptcy case, as well as the administrative costs that will be incurred to wind down the Debtor's affairs, and has prepared a budget that should be sufficient to pay such estimated administrative expenses and allow the Debtor to "wind down" its operations in a way that maximizes the value of its assets. The proposed budget is attached hereto as Exhibit A (the "Wind-Down Budget").

3. The Debtor requests Court authority to apply funds necessary to fund the Wind-Down Budget from the Initial Sale Proceeds, and for authority to make payments in accordance with the Wind-Down Budget without further Court order. The Debtor also requests that, so long as it does not exceed the Wind-Down Budget in total, it have the

authority to spend more or less on a particular line item than the budgeted amount. The Debtor reserves the right to amend the Wind-Down Budget between now and any final hearing on this Motion, so that the Wind-Down Budget can be “fine-tuned” if necessary.

4. Payment of professional fees for services rendered through June 19, 2001 would be paid pursuant to the approved budget for professional fees through such date referenced in the Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief, entered March 14, 2001 (the “Final DIP Order”). The Wind-Down Budget as it relates to professionals fees for services rendered after June 19, 2001 would constitute the approved supplemental budget for such fees contemplated by the DIP loan agreement. All such fees, to the extent of the amounts provided for under both budgets, comprise and consume the carve-out granted in the Final DIP Order. Any professional fees to be paid as costs of sale would be in addition to the budgeted amounts. To the extent the Wind-Down Budget includes payments to professionals, the Debtor would not make any such payments except in accordance with prior and future orders of this Court.

5. Approval of the Wind-Down Budget is in the best interests of the Debtor’s estate and creditors, as it will allow the Debtor to liquidate or otherwise wind down its business and assets in an orderly fashion, maximize the value of the assets, and pay administrative expenses. For example, the Wind-Down Budget provides funds to pay, inter alia:

- accrued but unpaid post-petition wages;
- post-petition workers’ compensation claims;
- post-petition trade credit;

- post-petition gross receipts taxes;
- accrued but unpaid professional fees;
- management retention payments;
- any post-petition employee severance benefits owed; and
- post-petition employee health benefits

The Wind-Down Budget also provides funds to pay the staff needed to issue W-2 forms for employees, prepare tax returns, sell any remaining leases, liquor licenses, and other assets, and collect vendor and utility deposits. The Wind-Down Budget would be funded in whole or in part from collateral pledged to the Secured Lenders, and therefore will enrich, rather than deplete, the bankruptcy estate.

III. CASH COLLATERAL STIPULATION

6. Subject to possible immaterial modification, the Debtor and Heller Financial, Inc. (“Heller”), as agent for Fleet Capital Corporation, Bank of America N.A., Heller and Metropolitan Life Insurance Company (“Met Life”), (together, the “Primary Secured Lenders”) have agreed, and the Debtor anticipates that Met Life and other creditors holding certain promissory notes (the “Additional Secured Lenders”) will agree, that the Debtor may retain and use a portion of the Initial Sale Proceeds sufficient to fund the Wind-Down Budget under the following summary of terms and conditions (as set forth in the Wind-Down Order to be presented to the Court granting this Motion, the “Cash Collateral Stipulation”):

(a) The Debtor would spend the funds in accordance with the Wind-Down Budget or as otherwise approved by the Primary Secured Lenders and the Additional Secured Lenders (together, the “Secured Lenders”);

(b) The Wind-Down Budget first would be funded from unencumbered estate funds, if any, and funds encumbered only by the Replacement Lien (defined below), if any, before use of the Secured Lenders' collateral (the "Cash Collateral") for such purpose;

(c) To the extent Cash Collateral is used to fund the Wind-Down Budget, as adequate protection, the Secured Lenders would be granted a replacement lien (the "Replacement Lien") against all unencumbered assets of the estate, and proceeds thereof, with the same validity and priority as the Secured Lender's claim to the Cash Collateral;

(d) \$3 million of the Initial Sale Proceeds (other than proceeds received on account of inventory) would be allocated to the release given by the Debtor to Fleming under the Asset Purchase Agreement, which amount shall be used as set forth in subpart (b) above;

(e) If the Court does not approve the Cash Collateral Stipulation, the \$3 million allocation set forth in subpart (d) above is without prejudice to any claim the Debtor or the Secured Lenders may make that the actual amount that should be allocated to the release is less;

(f) Any agreement of the Secured Lenders in respect of the relief requested herein, including, without limitation, to the Cash Collateral Stipulation, is conditioned on disbursement of funds to the Secured Lenders as set forth in Article V below, approval of the settlement and release set forth in Article VI below, the allowance of the claims of the Secured Lenders in Article VII below, and the granting of all of the other relief requested by this Motion; and

(g) The Initial Sales Proceeds, less (i) the balance of the DIP loan on the closing date, (ii) the amounts needed to cure the real property leases, and (iii) the amounts needed to cure or buy out the personal property leases, would equal at least \$67.3 Million.

7. The Debtor asks the Court to approve the Cash Collateral Stipulation. If the Court does not approve the Cash Collateral Stipulation in its entirety, the Debtor would not have authority to fund the Wind-Down Budget.

IV. EMPLOYEE RETENTION PLAN

8. The Debtor requests authority under Bankruptcy Code §363(b)(1) to implement the retention plan for its salaried employees outlined in Exhibit B hereto (the "Retention Plan"), and requests that amounts due under the Retention Plan be granted administrative expense status under Bankruptcy Code §§ 503(b) and 507(a)(1). The Retention Plan is intended to minimize the risk of severe employee attrition that may occur between now and the end of this Chapter 11 case. Further, a commitment has been made to Debtor's managerial employees that the Debtor would make a good faith effort to obtain Court approval of a reasonable retention plan. Many valuable employees have remained with the Company and performed crucial services that greatly benefited the estate with the expectation that such a retention plan might be funded and approved. The Debtor's Board of Directors has approved the Retention Plan.

9. Under the Retention Plan, certain employees will be entitled to a retention payment for remaining in the Debtor's employ until the end of their term of service. The payments would be made as provided in the Retention Plan. To be eligible for the full payment, an employee must be employed by the Debtor at the end of his or her term of

service.

10. The amounts paid under the Retention Plan would be funded pursuant to the Wind-Down Budget. The Debtor believes that all or substantially all of the funds paid under the Retention Plan would come from amounts that otherwise would be paid to the Debtor's Secured Lenders, and thus would not deplete the bankruptcy estate.

11. If vacancies arise in the positions for which a retention payment has been authorized, the Debtor seeks authorization to pay, in its discretion, comparable payments to replacement employees, on the same terms as the proposed payment to current employees.

12. The Debtor's ability to sustain current operations pending a closing with Fleming, preserve its estate after closing, and wind down its affairs in an orderly and appropriate manner will depend in large part on the continued retention, active participation, and loyalty and dedication of its employees who are asked to continue in their service to the Debtor. The Debtor has devised the Retention Plan in recognition of the need to maintain employee stability, morale, and motivation and to minimize the risk of large-scale attrition.

13. The Debtor believes that many employees – understandably motivated by a concern over long-term job security – may be actively pursuing other employment. The Debtor hopes that the incentives under the Retention Plan will encourage employees to remain with the Debtor until the conclusion of the Chapter 11 case or until their services no longer are required. The proposed payments will help assure employees that they will be compensated by remaining with the Debtor.

14. The departure of any of the remaining salaried employees would not only

deprive the Debtor of his or her knowledge and experience, it also would impose a significant burden of effort and expense required to find a qualified replacement. The Debtor probably would not be able to find qualified replacements at all, and likely would be required to attempt to out-source the work, at a substantial cost, to personnel without the experience and knowledge of current management.

15. Without a proposed Retention Plan that appears likely to be approved and funded, there is a substantial risk that the Debtor may not be able to retain the managerial employees it needs to complete the asset sale to Fleming. Further, without an approved Retention Plan, the Debtor may not be able to sell its remaining assets in a way that maximizes the return to creditors. For these additional reasons, it is important that the Retention Plan be approved. Based on the Debtor's representation that it do its best to implement and fund a retention plan, and because of loyalty to the Debtor, many employees have sacrificed a great deal by continuing to work for the Debtor, including delaying or losing other job opportunities. These sacrifices have greatly benefited the Debtor, the estate, and creditors. It is only fair and reasonable to adopt the Retention Plan in light of these facts.

IV. RETENTION AND INVESTMENT OF A PORTION OF THE INITIAL SALE PROCEEDS

16. The Debtor proposes to retain a portion of the Initial Sale Proceeds, as follows:

- (a) \$2,000,000, as a reserve for any Inventory Refund;
- (b) \$2,000,000 to fund the Escrow Amount (as defined in Section 4.1(c) of the Asset Purchase Agreement between the Debtor and Fleming);
- (c) \$4,174,000, as adequate protection for alleged lien claims of liquor

wholesalers who have timely asserted required pleadings pursuant to the Final DIP Order;

(d) \$350,000, as adequate protection for the alleged pre-petition lien and trust fund claims of New Mexico and Texas taxing authorities; and

(e) \$15.7 million as a reserve to fund the Wind Down Budget, subject to any adjustment (with consent of the Secured Lenders) made between now and the date the Wind-Down Order is entered approving this Motion.

17. The Debtor also requests authority to invest the funds requested in paragraph 16 (a), (b), (c), and (d) above in U.S. Treasury securities, and to disburse into Debtor's operating account the amounts requested in paragraph 16(c), for use in accordance with the Wind-Down Budget.

V. DISBURSEMENT OF THE REMAINING SALE PROCEEDS AND CERTAIN OTHER DEBTOR PROPERTY

18. The Debtor also requests authority to disburse the Initial Sale Proceeds on the closing date, from the closing escrow, and to disburse any Inventory Underpayment and Debtor's Other Liquid Assets (as defined below) on the dates of receipt from time to time, in the following priority and amount, to the extent funds remain after amounts are reserved as requested in paragraph 16 above:

(a) First, to Heller, as agent for the DIP lenders, the amount needed to pay the DIP loan in full;

(b) Second, to pay the costs of sale, including the amounts owed by the Debtor to Peter J. Solomon Co. Ltd., and the amount of the success bonus owed by the Debtor to George Golleher and Greg Mays; provided, however, that (i) only the Minimum Bonus (\$750,000) of the amounts owed to Messrs. Golleher and Mays shall be released to them immediately, prior to payment in full of the pre-petition bank loan from

Heller, Bank of America, and Fleet Capital, and (ii) the remaining portion of the Success Bonus (an additional \$750,000) owed to Messrs. Golleher and Mays will be paid to them immediately after payment in full of such pre-petition bank loan. If the total amount due to Peter J. Solomon, George Golleher, and/or Greg Mays is not known at closing, the Debtor would pay all known amounts due at closing (subject to the proviso in the preceding sentence), and would escrow an amount sufficient to pay any additional amounts that may become due after the Debtor's remaining assets have been liquidated; and

(c) Third, to Heller as agent, and to Met Life, in accordance with agreements between and among, *inter alia*, them (including, without limitation, the Intercreditor Agreement dated as of December 21, 2000, and the Co-Lender Agreement dated as of March 14, 2001). By executing the Cash Collateral Stipulation and the Wind-Down Order all of the Secured Lenders will agree that any and all agreements among them (including the Intercreditor Agreement dated as of December 21, 2000, and the Co-Lender Agreement dated as of March 14, 2001) are deemed modified to the extent necessary to effectuate the relief requested herein and granted by the Wind-Down Order, including, without limitation, the Cash Collateral Stipulation.

The term "Other Liquid Assets" means the Debtor's (i) cash in transit on the closing date; (ii) right to receive refunds for utility deposits; (iii) right to receive refunds of inventory deposits, (iv) accounts receivable proceeds as they are collected, and (v) any and all other cash receipts, including, without limitation, tax refunds and funds set forth in paragraph 16 (a) – (d) above. Entry of the Wind-Down Order will have the effect of determining that such funds (or any portion thereof) shall not be paid to parties other than the Secured

Lenders unless otherwise ordered by the Court.

19. Disbursement of the funds as set forth above is in the best interests of creditors. The disbursement proposal pays funds to creditors entitled to those funds, would get funds into the hands of creditors sooner rather than later, reduces the administrative burden of holding large amounts of cash, and saves the estate and its creditors the spread between interest accruing on unpaid loans and the amount the estate would earn on the invested funds. Furthermore, based upon the settlement of all claims against the Secured Lenders set forth in this Motion, there is no risk that any of amounts paid to them would need to be repaid to the estate. In addition, the proposed disbursement to the Secured Lenders, together with other relief requested in this Motion, would permit the Debtor to fund the wind-down budget from collateral pledged to the Secured Lenders, which is overwhelmingly in the best interest of the estate and parties interest.

VI. SETTLEMENT OF ALL CLAIMS AGAINST THE SECURED LENDERS

20. Pursuant to Bankruptcy Rule 9019, the Debtor also asks the Court to approve the settlement and release of all of the Debtor's and the estate's claims against the Secured Lenders (including all claims asserted by the Unsecured Creditors' Committee or any other party), including without limitation the following (together, the "Settled Claims"):

(a) All claims asserted or that could be asserted by the Unsecured Creditors Committee in the pending adversary proceeding brought by the Unsecured Creditors' Committee against the Secured Lenders, Adv. Pro. No. 01-01096 S (the "Committee Adversary Proceeding") or otherwise;

(b) All equitable subordination claims that the estate may have against any of the Secured Lenders;

(c) All claims the estate may have that the Secured Lenders or any of them would be required to marshal their collateral;

(d) All lien avoidance, preference, or other avoidance claims against any of the Secured Lenders; and

(e) Any and all other claims, actions, causes of action, setoff rights, or avoidance rights, of any kind or nature whatsoever, that the estate may have against the Secured Lenders or any of them.

21. The consideration for releasing the Settled Claims is, *inter alia*, the funding of the Wind-Down Budget. The Debtor believes that the amount of the Wind-Down Budget that would be paid from collateral pledged to the Secured Lenders substantially exceeds the value (if any) of the Settled Claims, and that the proposed settlement overwhelmingly is in the best interests of the estate and its creditors. The value of the Settled Claims is substantially diminished, if not eliminated, by the replacement lien granted in Final DIP Order, and by the provisions of the Final DIP Order, the DIP Facility and the Post-Petition Loan Documents (approved and made fully enforceable by the terms of the Final DIP Order) regarding the marshalling of assets. Further, any recovery under the Settled Claims would be used to pay expenses to be paid under the Wind-Down Budget that, under the Cash Collateral Stipulation, would be paid from collateral pledged to the Secured Lenders. The settlement, by permitting the Debtor to fund the Wind-Down Budget, allows the Debtor to wind down this bankruptcy case in an orderly and appropriate fashion, and to discharge post-petition obligations.

VII. ALLOWANCE OF SECURED LENDERS' CLAIMS

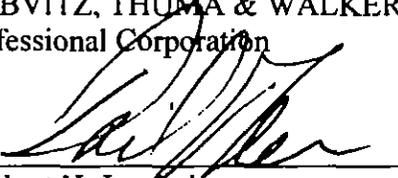
22. Finally, to facilitate the implementation of the Cash Collateral Stipulation and the relief sought herein, the Debtor asks this Court to allow in full the claims of the Secured Lenders, to the extent of the value of all Collateral (as defined in the Final DIP Order), and as unsecured claims to the extent of any deficiency claims that exist after giving effect to the receipt of proceeds of Collateral, subject only to the right of the following parties to assert that their respective security interests are senior to the security interests of the Secured Lenders: Premier Distributing Company, The New Mexico Beverage Company, National Distributing Company, and Southern Wine & Spirits (with respect to claims asserted in specific adversary proceedings) Pinnacle Logistics, Inc., Countrywide Logistics, Inc., and Millard Refrigerated Services, Inc. (with respect to certain warehousing or carrier liens that have been asserted); and the New Mexico and Texas taxing authorities (with respect to their alleged pre-petition lien and trust fund claims).

23. To the extent, if any (and the Debtor does not believe that any modification is required), approving the proposed settlement of the Committee Adversary Proceeding would require a modification of the Court's Final DIP Order, the Debtor requests that the Court so modify the Final DIP Order.

WHEREFORE, the Debtor requests that the Court enter the Wind-Down Order, approve the Cash Collateral Stipulation, approve the Wind-Down Budget, authorize the funding of the Wind-Down Budget from the Initial Sale Proceeds, authorize the Debtor to make payments under the Wind-Down Budget without further Court order, approve the Retention Plan, direct the disbursement of the Sale Proceeds and Other Liquid Assets as

set forth above, approve the investment of undisbursed Sale Proceeds as set forth above, approve the settlement of the Settled Claims, allow the claims of the Secured Lenders as set forth herein, and grant the Debtor all other just and proper relief.

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WIND-DOWN BUDGET

Operations (6 months)	1,700,000
Outstanding Payroll and Accounts Payable	2,600,000
Workman's Compensation/Public Liability	1,000,000
Sales & Gross Receipts Tax	1,200,000
Professional fees	3,800,000
Retention Plan	3,200,000
Third Party Services (estimated)	800,000
Carrying/closure costs-warehouse	650,000
Carrying/closure costs-stores	750,000
Total	15,700,000

EXHIBIT

A

EXHIBIT B

RETENTION PLAN SUMMARY

Under the Retention Plan, a pool of \$3,200,000 would be available to pay the following categories of salaried employees:

Employee Category	Estimated Number of Employees
Corporate-Sales & Marketing; Senior Management	20
Corporate- Human Resources	21
Corporate- Retail Operations	8
Corporate- Accounting	40
Corporate- Information Technology	37
Corporate- Other	3
Stores- Directors	66
Stores- Assistant Directors	66
Stores- Center Store	66
Stores- Customer Service	66
Stores- Pharmacists	54
Total	447

The funds in the pool will be apportioned among eligible employees in each category at the direction of the Debtor. If an employee in a certain category leaves the Debtor's employment and is not replaced, the Debtor reserves the right to elect not to replace the employee, and to divide the pool among the remaining employees in that category, if in the Debtor's best interests to do so.

To be eligible for a payment under the Retention Plan, the employee must be in good standing, as determined by the President or by the Compensation Committee of the Board of Directors, at the end of the employee's term of service with the Debtor (as determined by the Compensation Committee of the Board of Directors). An employee

could be eligible for a retention payment even if his or her service ends before final Court approval of the Retention Plan.

For corporate employees, payment is due and payable upon successful completion of the required term of service.

For store-level employees, all benefits are due and payable upon the occurrence of one or more of the following events: termination for other than cause, decrease in salary below 85% of base, or relocation of more than 30 miles.