

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  
§  
FURR'S SUPERMARKETS, INC. §  
§  
§ CASE NO. 11-01-10779-SA  
§  
DEBTORS §

**TAX AUTHORITIES' OBJECTION TO DEBTOR'S AMENDED 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 CLAIM AGAINST THE SECURED LENDERS, AND (vii) ALLOWING CLAIMS OF SECURED LENDERS, AND NOTICE OF FINAL HEARING ON ANY OBJECTIONS ("DISBURSEMENT MOTION")**

TO THE COURT:

Now come the City of El Paso, Ector County, Pecos County, Kermit I.S.D., Winkler County Pecos-Barstow-Toyah I.S.D., Reeves County and Ward County ("Tax Authorities") and file their Objection to Debtor's Amended 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 Claim Against the Secured Lenders, and (vii) Allowing Claims of Secured Lenders, And Notice of Final Hearing on any Objections ("Disbursement Motion"). In support of their Objection, the Tax Authorities would show the Court as follows:

1. The Tax Authorities are each a unit of local government in the State of Texas which possesses the authority under the laws of the State to assess and collect *ad valorem* taxes on real and personal property.

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2. The Tax Authorities have each filed a pre-petition secured claim as follows:
  - a). City of El Paso in the amount of \$1,553,137.18
  - b). Ector County in the amount of \$11,211.85<sup>1</sup>
  - c). Pecos County in the amount of \$32,442.66
  - d). Kermit I.S.D. in the amount of \$331.80<sup>1</sup>
  - e). Winkler County in the amount of \$670.02<sup>1</sup>
  - f). Ward County in the amount \$36,183.59
  - g). Pecos-Barstow-Toyah I.S.D. in the amount of \$11,174.67<sup>1</sup>
  - h). Reeves County in the amount of \$3,625.63<sup>1</sup>
  
3. These claims are for actual year 2000 and estimated year 2001 ad valorem property taxes incurred by the Debtor in the ordinary course of business. The claims for year 2000 and 2001 taxes are pre-petition debts. See Midland Industrial Service Corp. 35 F.3d 164 (5th Cir. 1994). These taxes are secured by first priority liens pursuant to Texas Property Tax Code §§ 32.01 and 32.05. In pertinent part, §32.01 provides
  - (a) **On January 1 of each year, a tax lien attaches** to property to secure the payment of all taxes, penalties and interest ultimately imposed for the year . . . .
  - (b) A tax lien on inventory, furniture, equipment, or other personal property is a lien in solido and attaches to all inventory, furniture, equipment, and other personal property that the property owner owns on January 1 of the year the lien attaches or that the property owner subsequently acquires.
  - (c) The lien under this section is perfected on attachment and . . . **perfection requires no further action** by the taxing unit.
  
4. The tax lien takes priority over the claim of any holder of a lien on property encumbered by the tax lien, whether or not the debt or lien existed before the attachment of the tax lien. See Texas Property Tax Code §32.05 (b); See also Central Appraisal District of Taylor County v. Dixie-Rose Jewels, Inc., 894 S.W. 2d 841 (Tex. App. 1995) (bank's foreclosure of its purchase money lien on personal property did not defeat or destroy the taxing units' statutory tax lien). The tax lien is also unavoidable. See In re: Winns, 177 B.R. 253 (Bankr. W.D. Tex. 1995). Moreover, the DIP financing order acknowledged the priority status of the tax

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<sup>1</sup>These claims are for taxes assessed against real property situated in the respective taxing jurisdictions. Upon recent information learned by the undersigned counsel, the debtor may not own title to the real property, and thus the claim may be amended and reduced accordingly.

lien and provided for a "carve out" of the tax lien to the DIP lender's 364 priority lien.

5. Pursuant to the Order Approving Asset Sale to Flemings, the Tax Authorities' tax liens are to attach to the sale proceeds. The Tax Authorities object to the Disbursement Motion in that it wholly fails to escrow sufficient funds to adequately protect the claims of the Tax Authorities. Furthermore, the Tax Authorities object to the Disbursement Motion in that it fails to require the debtor to pay the senior secured tax claims from the first available sales proceeds.
6. The Disbursement Motion provides that the debtor escrow \$350,000.00 as a means to adequately protect the senior secured claims of the Tax Authorities. This amount is wholly insufficient to pay their claims and fails to satisfy the requirements of section 363 of the bankruptcy code. At a minimum, the escrow should equal the amount of all secured and "trust fund" claims of any and all state and local taxing authority, and the escrow be set aside in a separate, segregated account from all other funds.
7. The Tax Authorities are each oversecured creditors, and therefore entitled to 506 (b) post-petition interest. The estate will benefit from the immediate payment of the tax claims in that so long as the tax claims remain unpaid, the estate's interest in the sales proceeds continues to be reduced by the accrual of post-petition interest. Further, so long as the Tax Authorities remain unpaid, the Trustee may not distribute any cash proceeds to any other creditor because there is no way to adequately protect the Tax Authorities from the loss of their cash collateral. Upon information and belief there are other creditors of the estate whose claims are secured by liens on the sale proceeds and who could be paid but for the requirement that the Debtor is compelled to hold sufficient funds to adequately protect the Tax Authorities' senior secured claims, including an amount sufficient to pay the accrued 506 (b) interest. So not only will the failure to immediately pay the Tax Authorities claim reduce the amount available to pay unsecured creditors, but it most likely will cause the estate to incur additional expense in the form of interest owed to other secured creditors who remain unpaid.

**WHEREFORE, PREMISES CONSIDERED**, the Tax Authorities pray that the Court recognize the secured tax claims in the amounts stipulated and/or asserted herein; direct the debtor to escrow in a separate, segregated account an amount equal to all secured and "trust fund" tax claims of any and all state and local tax authorities; and/or to immediately pay the Tax Authorities' tax claims at closing from the first available sales proceeds, including all applicable post-petition interest; and for such other and further relief as may be just.

Respectfully submitted.

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Attorney for Tax Authorities

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Objection to Debtor's Amended 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 Claim Against the Secured Lenders, and (vii) Allowing Claims of Secured Lenders, And Notice of Final Hearing on any Objections ("Disbursement Motion")* was served this 11<sup>th</sup> day of August, 2001 by First Class Mail upon the following:

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