

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

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

In re

FURR'S SUPERMARKETS, INC.,

Debtor.

Case No. 11-01-10779-SA

Chapter 11

**REPLY BRIEF IN SUPPORT OF MOTION OF UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCALS 540 AND 1564 FOR ORDER ALLOWING AND
REQUIRING IMMEDIATE PAYMENT OF ADMINISTRATIVE EXPENSES**

I

INTRODUCTION

The basic facts are undisputed: Furr's has never attempted to reject any of its collective bargaining agreements with the Unions. On the contrary, Furr's notified its employees in the summer of 2001, as it was selling or closing all of its stores, that their severance benefits would remain unchanged. (Kimberle Declaration, Exhibit B) Furr's continued to assure employees, even as it was closing the last of its stores, that they would receive all of the severance benefits to which they were entitled. (Kimberle Declaration, Exhibits C and D; Sanchez Declaration, Exhibit L) Furr's now insists, however, that these assurances did not, in fact, mean anything. According to Furr's, employees are not entitled to more than a fraction of these benefits, because (1) its promises to pay employees the severance pay they were owed are unenforceable unless the Court first approves the assumption of its collective bargaining agreements and (2) these benefits are unsecured pre-petition claims. While Furr's does not claim that it ever expressed any of these reservations to any of its employees in any of these communications, it is unapologetic: according to Furr's, if employees took it at its word, that was their mistake.

Furr's is, however, wrong as a matter of law. First of all, its claim that it can still extinguish these claims by rejecting the underlying collective bargaining agreements is untenable, since Furr's has no right to reject contracts that are no longer executory. In re Illinois-California

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II
ARGUMENT

A. FURR'S CANNOT REJECT CONTRACTS THAT ARE NO LONGER EXECUTORY

Furr's claims that its promises to pay employees all the severance benefits they were owed were unenforceable because it retained the power to reject these agreements at any time. Both the premise and the conclusion are false.

The problem with that argument is obvious: these collective bargaining agreements are no longer executory, since neither the Unions nor the employees whom they represent have any more obligations to perform under them. *Gloria Manufacturing Corp. v. ILGWU*, 734 F.2d 1020, 1021 (4th Cir. 1984); *Illinois-California Express*, 72 B.R. at 992. To the extent that the Bankruptcy Appellate Panel's decision in *In re Family Snacks, Inc.*, 257 B.R. 884 (8th Cir. B.AP. 2001) suggests otherwise, it is wrong and must be rejected.

B. FURR'S DID NOT REQUIRE COURT APPROVAL TO PAY THESE BENEFITS

Furr's also claims that its promises to pay employees all of the severance benefits they were owed was unenforceable unless and until it formally adopted the collective bargaining agreements. This argument likewise cannot withstand close scrutiny.

First, Section 1113(f) bars employers from making any unilateral changes in collective bargaining agreements unless and until they have complied with all of the substantive and procedural requirements of Section 1113.¹ Until the Court approves rejection of the collective

¹ 11 U.S.C. § 1113(f) provides:

No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

bargaining agreement, Furr's is obligated to pay employees the severance benefits they are owed as they come due. In re Unimet Corp., 842 F.2d 879, 884 (6th Cir. 1988); Manor Oak Skilled Nursing Facilities, Inc., 201 B.R. 348, 349-50 (Bankr. W.D.N.Y. 1996). An employer cannot choose to maintain some, but not all, provisions of its collective bargaining agreement, absent emergency conditions or Bankruptcy Court approval after compliance with Section 1113's rigorous requirements.

Second, even if other employers could engage in self-help of this sort, this employer cannot. Furr's not only did not seek to reject its collective bargaining agreements, but gave employees very specific and unequivocal assurances that it would honor those rights. Its letters to its employees left no room for doubt on that point.² Even if Furr's did not formally assume

² The language of these letters bears repeating:

In accordance with Company policy, employees who are permanently terminated as a result of a store closing or conversion within two (2) weeks following a store closing . . . will be entitled to a severance allowance in accordance with the following:

- (a) Eligible employees shall receive a severance allowance of two percent (2%) of the employee's total earnings in the complete twelve (12) month period immediately preceding termination multiplied by each full year of service with a minimum of two hundred dollars (\$200) for each employee with at least one year of seniority.
- (b) The above severance allowance will be paid in addition to any accrued vacation pay (not pro-rata vacation pay), retirement plan benefits, unemployment compensation, or any other accrued benefits to which the employee may be entitled. Any other claimed benefits may be superseded and contained in the benefits directed by this Section.
- (c) Payment of the severance allowance shall be in weekly periods immediately

these agreements, it entered into new undertakings with its employees in which it promised full severance benefits to those who remained with it.

Furr's was not obligated to obtain Bankruptcy Court approval before making those promises. The Bankruptcy Code gives debtors substantial leeway in running their day-to-day affairs during the ordinary course of business; if it did not, then they would be "in court more than in business." *In re Buyer's Club Markets, Inc.*, 5 F.3d 455, 457-58 (10th Cir. 1993). Debtors routinely enter into new contracts, including collective bargaining agreements, without Bankruptcy Court approval. See, e.g., *In re Illinois-California Express, Inc.*, 72 B.R. 987, 991 (D. Colo. 1987); *In re IML Freight, Inc.*, 37 B.R. 556, 559 (Bankr. D. Utah 1987).

Furr's made these promises to its employees in the ordinary course of business. These benefits were not "a radical departure" from its previous policies; on the contrary, they had been in place for years prior to the filing of the bankruptcy petition. Cf. *Buyer's Club Market*, 5 F.3d at 458. Furr's did not make these promises secretly, cf. *In re Century Brass Products, Inc.*, 107 B.R. 8, 11-12 (Bankr. D. Conn. 1989), or limit them to highly placed insiders, cf. *In re Century Brass Products, Inc.*, 107 B.R. 8, 11-12 (Bankr. D. Conn. 1989), or compensate employees only in the event of liquidation. *Buyer's Club Market*, 5 F.3d at 458-59. Furr's is bound by the promises it made to induce employees to remain with it. *Illinois-California Express*, 72 B.R. at 991-92.

C. FURR'S CANNOT REPUDIATE ITS PROMISE TO PAY FULL SEVERANCE BENEFITS TO ITS EMPLOYEES

Furthermore, even if rejection were still possible, it would still be too late for Furr's to take advantage of that tactic now. Having promised full severance benefits to those employees who remained with it, it cannot repudiate those promises now.

commencing with the store closure. . .
The weekly payment shall be based upon
the two percent (2%) for each week.

(Kimberle Declaration, Exhibit C)

The Court in *Illinois-California Express* made this point in forceful terms:

The purpose of an administrative priority remains the same as it was under the Bankruptcy Act: That is to induce third parties to supply the goods and services necessary to facilitate rehabilitation of the debtor's business. In the *Matter of Jartran, Inc.*, 732 F.2d 584, 588 (7th Cir. 1984). In the instant case, the employees' entire action in ratifying the Concessions Agreement and in working for the debtor-in-possession was based on the expectation of administrative priority in the event the debtor's rehabilitation effort failed. Thus, as a matter of statute, policy, and equity, the court was correct in finding that the Concessions Agreement serves as the basis for a Chapter 11 claim of administration for any unpaid amount arising under the agreement.

The trustee cites no authority for the proposition that the employees' claims for services rendered post-petition are no better than general unsecured claims. I shall not allow failing businesses to abuse the bankruptcy statutes and mislead workers by inducing them to continue working at a reduced wage while management knows all the while there will be a Chapter 7 Liquidation in the near future, thus relieving management of paying the reduced wage. Such abuse was not contemplated when the Bankruptcy Code was enacted and I shall not set a precedent for justifying such abuse should a business in the future attempt to soften the blow of an impending liquidation.

Illinois-California Express, 72 B.R. at 993. The same is true in this case: having promised to pay employees all of the severance pay they were owed on a weekly basis, beginning a week after the store closure, Furr's cannot now insist that it meant something different. It should be ordered

to make good on its promises.²

D. THESE BENEFITS WOULD BE ADMINISTRATIVE CLAIMS EVEN IF

FURR'S HAD NOT ADOPTED THESE AGREEMENTS

Furr's continues to insist, however, that employees have no right to enforce its promises to pay them all the severance pay they were owed because these obligations were founded on pre-petition collective bargaining agreements between it and the Unions that represent them. As the Unions have already argued in their Opening Brief, this simply ignores the specific assurances that Furr's made to all of its employees after the bankruptcy petition was filed.

Furr's made these promises as debtor-in-possession. They unquestionably benefitted the estate by avoiding the uncertainty and disruptions that would result if employees' left Furr's on their timetable, rather than the Company's. They are administrative claims.

Furr's does not deny that it made these assurances. Instead it merely describes them as "poorly worded." (Furr's Opposition at 15) That is a curious turn of phrase, particularly in this setting, since Furr's does not suggest that these letters were either unauthorized or mistranscribed, or that they did not promise full severance benefits to these employees, or that employees would have had any reason not to believe that Furr's meant what it said in them. Instead it asks the Court to avert its eyes, as if ignoring this evidence would make it go away.¹

² The Court in Manor Oak Skilled Nursing Facilities, Inc., 201 B.R. 348 (Bankr. W.D.N.Y. 1996) made the same point in slightly different terms:

The Debtor here wants both the benefits of rejection (the ability to impair the pre-petition arrears) and the benefits of assumption (labor peace) at the same time. It may not have its cake and eat it too.

Id., 201 B.R. at 350.

¹ Furr's also asserts, without offering any evidentiary support, that it would not have made these promises of full severance benefits in August because it had already notified the Unions in June that it needed to make substantial reductions in employees' severance benefits and had entered into negotiations

Furr's likewise ignores all of the grounds that distinguish this case from *In re Commercial Financial Services, Inc.*, 246 F.3d 1291 (10th Cir. 2001). Far from helping its case, the Court's decision in *Commercial Financial Services* only shows that much more clearly why this debtor in possession should be held to the promises that it made to induce employees to remain with it.

Finally, Furr's claims that employees who took it at its word did not suffer any harm, even though Furr's has never paid them the severance pay it promised, since they were paid their regular wages for the work they performed. It is hard to believe that Furr's is advancing this argument seriously, while at the same time insisting on its right to pay much larger bonuses to its highest-level managerial employees. While Furr's may not think that employees lost anything of value by being denied the thousands of dollars of severance pay they were promised to induce them to remain on the job, it is almost certainly alone in this belief.

Once again, simply pretending that these employees did not suffer any harm will not change the fact that they have lost significant benefits that they were promised. Furr's should be ordered to comply with the promises that it made.

E. EMPLOYEES ARE ENTITLED TO BE PAID ALL OF THE SEVERANCE BENEFITS THEY ARE OWED

Furr's relies heavily on the First Circuit's decision in *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976) for support for prorating employees' severance pay benefits. That reliance is misplaced, for *Mammoth Mart* not only is distinguishable, but actually supports the Unions' case.

The Court in *Mammoth Mart* offered the same distinction between "in lieu of notice" and "length of service" severance pay plans that Furr's has embraced in this case. It went on, however, to make a critical distinction—one that Furr's prefers to ignore:

to accomplish that. Therefore, so the argument goes, it had no reason to intentionally mislead employees. (Furr's Opposition at 15, n.8)

The problem with this argument is that, even if all of this is true, it does not change the fact that Furr's did make these promises. Like Groucho Marx, Furr's appears to be asking: "Who are you going to believe, me or your own eyes?"

The result would be different if the debtor-in-possession had, to induce the employees to remain on the job, promised them that, if discharged, they would receive severance pay based on the prior practice. Then the consideration supporting appellants' claims would be the services performed subsequent to the debtor-in-possession's promise. Here, where the debtor-in-possession made no new promise, but simply permitted the employees to continue their employment, it is bound to pay under the terms of the debtor's contract only to the extent that the debtor-in-possession was the recipient of beneficial services.

Id., 536 F.2d at 955, n.4. Mammoth Mart, simply put, requires that employees receive all of the severance pay they were promised.

These employees would be entitled to full severance pay benefits, moreover, even if Mammoth Mart did not require it. As the Unions have argued previously, pro rating severance benefits simply does not make sense for employees who had no entitlement to severance benefits at the time that the bankruptcy petition was filed and who only earned those benefits by remaining on the job up until the last day that Furr's needed them. They are entitled to full benefits.

III

CONCLUSION

For all the reasons set forth above, the Unions respectfully request that their motion be granted.

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