

UNITED STATES BANKRUPTCY COURT FEB 03 2001
DISTRICT OF NEW MEXICO

United States Bankruptcy Court
Albuquerque, New Mexico

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In re : 01-11-10779-SA
FURR'S SUPERMARKETS, INC., : Chapter 11
Debtor. :

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**DEBTOR'S MOTION FOR INTERIM AND FINAL ORDER (I) AUTHORIZING
DEBTOR TO INCUR POST-PETITION SECURED INDEBTEDNESS, (II)
GRANTING SECURITY INTERESTS, (III) MODIFYING THE AUTOMATIC
STAY, AND (IV) SCHEDULING A FINAL HEARING**

Furr's Supermarkets, Inc., debtor and debtor-in-possession in the above-captioned case ("Furr's" or the "Debtor"), hereby moves (the "Motion")¹ for an order under 11 U.S.C. §§ 105, 361, 362, 363(c), 364(c)(1)-(3) and 364(d) and Federal Rule of Bankruptcy Procedure 4001 (1) authorizing the Debtor to obtain and incur interim and post-petition financing with Heller Financial, Inc., ("Heller"), Bank of America, N.A. ("BofA"), Fleet Capital Corporation ("Fleet") and Metropolitan Life

¹ Unless otherwise defined, capitalized terms used herein shall have the meaning ascribed to them in (i) the proposed interim order (1) authorizing Debtor to obtain secured financing, (2) granting adequate protection and (3) granting other relief (the "Interim Order", a copy of which is annexed hereto as Exhibit A); (ii) the Commitment Letter by Lenders to the Debtor dated February __, 2001 (the "Commitment Letter", annexed to the Interim Order as Exhibit A, and (iii) the term sheet annexed as an exhibit to the Commitment Letter (the "Term Sheet").

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Insurance Company ("MetLife", and together with Heller, BofA, and Fleet, the "DIP Lenders") and Heller as agent on behalf of the lenders (the "Agent"), (2) granting additional security interest and liens to the DIP Lenders with superpriority over administrative expenses under 11 U.S.C. § 364, (3) modifying the automatic stay, and (4) setting a final hearing on the Motion. In support of this Motion, the Debtor respectfully represent as follows:

BACKGROUND

A. The Chapter 11 Filing

1. On February 8, 2001 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for reorganization relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (as amended, "Bankruptcy Code"). The Debtor continues to operate its business and manage its properties as debtor-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code.

2. No creditors' committee has yet been appointed in this case by the United States Trustee.

3. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2).

B. The Debtor's Business

4. The Debtor is a leading regional supermarket chain, with operations in New Mexico and Western Texas. The Debtor has a leading market share in this region. The Debtor employs some 4,900 individuals, and operates seventy-one stores.

5. The Debtor's stores offer a broad selection of grocery, meat, poultry, seafood, dairy, fresh fruits, vegetables and frozen food products. The stores also offer an extensive line of non-food products, health and beauty care products, housewares, general merchandise and, in many instances, in-store pharmacies.

The Prepetition Financing Agreements

6. Before the Petition Date, Flect, BofA and Heller (collectively, the "Pre-Petition Senior Lenders") loaned money and issued letters of credit to the Debtor under a Loan and Security Agreement (the "Existing Loan Agreement"), dated as of December 21, 2000, and the other Loan Documents (as defined therein) (the Existing Loan Agreement and the other Loan Documents, collectively, the "Pre-Petition Senior Loan Documents"); as of the Petition Date, the Debtor owed the Pre-Petition Senior Lenders approximately \$47 million (including all Letter of Credit Liability included in the Letter of Credit Reserve, as defined in the Existing Loan Agreement), plus all accrued and unpaid pre-petition interest, costs and fees, including professional fees and

expenses and other Obligations under and as defined in the Existing Loan Agreement (collectively, the “Pre-Petition Senior Indebtedness”).

7. The Debtor does not contest that under the Pre-Petition Senior Loan Documents, as of the Petition Date, the Pre-Petition Senior Indebtedness is secured by a *continuing first, valid and perfected security interest in substantially all of the existing Collateral (as defined in the Existing Loan Agreement) of the Debtor, including all of the Debtor’s accounts, inventory, general intangibles, intellectual property, documents, instruments, chattel paper, investment property, deposit accounts, cash and other property in the possession or under the control of any Pre-Petition Senior Lender, books and records that evidence or contain information relating to such collateral, and all proceeds thereof and continuing valid and perfected security interest in Equipment and all proceeds thereof, second only to the security interest of MetLife described below (collectively, the “Pre-Petition Senior Collateral”)*.

8. The Debtor entered into a Note Purchase Agreement dated as of June 30, 1995 and amended and restated as December 21, 2000 (the “1995 NPA”), under which the Debtor issued to MetLife two \$12,500,000 promissory notes; as of the Petition Date, the approximate aggregate amount owed to MetLife by the Debtor under these notes was \$25,000,000, plus all accrued and unpaid pre-petition interest, costs and fees (collectively, the “Pre-Petition MI. Senior Debt”).

9. The Debtor does not contest that the Pre-Petition ML Senior Debt is secured by a continuing first, valid and perfected security interest in the Equipment of the Debtor and all proceeds thereof and a valid and perfected security interest in the other Pre-Petition Senior Collateral, second only to the security interest of the Pre-Petition Senior Lenders (collectively, the "Pre-Petition ML Collateral").

10. The Debtor also entered into a Note Purchase Agreement, dated as of March 27, 2000 and amended and restated as December 21, 2000 (the "March 2000 NPA") with MetLife and Credit Suisse First Boston Private Equity ("CSFB") under which it issued a note to MetLife in the principal amount of \$8,773,108.90 and to CSFB in the principal amount of \$6,226,891.10; as of the Petition Date, the approximate aggregate amount owed to MetLife and CSFB under these notes was \$15,000,000, plus all accrued and unpaid pre-petition interest, costs and fees (collectively, the "Pre-Petition March 2000 Debt").

11. The Debtor also entered into a Note Purchase Agreement, dated as of June 23, 2000 and amended and restated as December 21, 2000 (the "June 2000 NPA") with MetLife, CSFB, Windward Capital Associates, L.P. ("Windward"), and management noteholders, under which the Debtor issued to (a) MetLife a note in the principal amount of \$2,193,277.23; (b) CSFB a note in the principal amount of \$1,556,722.77, (c) Windward a note in the principal amount of \$500,000, (d) Tom Dahlen a note in the principal amount of \$100,000; (e) Steve Mortsensen a note in the

principal amount of \$50,000; (f) Steven Smart a note in the principal amount of \$50,000; (g) Gene Denison a note in the principal amount of \$20,000; (h) Delwyn James a note in the principal amount of \$30,000; (i) Steve Stork a note in the principal amount of \$50,000; (j) E.G. Gonzalez a note in the principal amount of \$25,000; (k) George Gollecher a note in the principal amount of \$100,000; (l) Dick Goodspeed a note in the principal amount of \$200,000; (m) Arthur Typermass a note in the principal amount of \$35,000 and (n) David Morrow a note in the principal amount of \$250,000; as of the Petition Date, the approximate aggregate amount owed under these notes was \$5,160,000, plus all accrued and unpaid pre-petition interest, costs and fees (collectively, the "Pre-Petition June 2000 Debt").

12. In addition, the Debtor entered into a Subordinated Note Agreement dated as of June 30, 1995 and amended and restated as December 21, 2000 (as the same has been and amended and restated, the "Subordinated Note Agreement") with Fleming Companies, Inc., Windward/Merchant, L.P. ("Windward/Merchant"), Windward/Merban, L.P. ("Windward/Merban" and, together with Windward and Windward/Merchant, the "Windward Entities"), Windward/Northwest, L.P. ("Windward/Northwest") and MetLife under which the Debtor issued Subordinated Notes to each of (a) Fleming Companies, Inc. in the principal amount of \$16,142,000.00 (the Debtor purchased these notes on June 21, 2000), (b) Windward/Merchant in the principal amount of \$2,902,114.00; (c) Windward/Merban in the

principal amount of \$1,934,742.00; (d) Windward/Northwest in the principal amount of \$4,836,858.00 (Windward/Northwest sold this note to MetLife before the Petition Date); and (e) MetLife in the principal amount of \$24,184,286.00; as of the Petition Date, the approximate aggregate amount owed under these Notes was \$33,858,000, plus all accrued and unpaid interest, costs and fees (collectively, the "Pre-Petition 1995 Subdebt").

13. The Pre-Petition March 2000 Debt, the Pre-Petition June 2000 Debt and the Pre-Petition 1995 Subdebt (collectively, the "Pre-Petition Junior Indebtedness") are subordinated to the Pre-Petition ML Senior Debt and the Pre-Petition Senior Indebtedness under an Intercreditor Agreement dated as of December 21, 2000 (the "Intercreditor Agreement") among MetLife, CSFB, Windward, the other holders of Pre-Petition Junior Indebtedness party thereto, the Debtor and Heller, as agent for Pre-Petition Senior Lenders. In addition, the Intercreditor Agreement sets forth the relative priorities of the liens on the Pre-Petition Senior Collateral and the Pre-Petition ML Collateral and how the Pre-Petition Senior Lenders and MetLife would allocate the proceeds of upon sale of such collateral.

RELIEF REQUESTED

14. The Debtor seeks, among other things, this Court's authorization.

(a) under Bankruptcy Code sections 364(c), (d) and (e), (i) for the Debtor to obtain secured post-petition financing (the "Post-Petition Financ-

ing"), up to an aggregate principal amount not to exceed \$30 million from the DIP Lenders in the form of revolving credit loans and letters of credit on the terms and conditions set forth in the proposed Interim Order, the Commitment Letter and the Term Sheet, (collectively, the "Interim Post-Petition Loan Documents"); (ii) for the Debtor to grant the DIP Lenders superpriority liens on all the Debtor's presently owned and after-acquired or created assets on the terms and conditions of the Interim Post-Petition Loan Documents and on the basis of the security and priority provided therein; and (iii) for the Debtor to grant the DIP Lenders priority in payment with respect to such obligations over any and all administrative expenses of the kinds specified in Bankruptcy Code sections 503(b) and 507(b), subject to certain Carve-Outs described herein and in the proposed Interim Order;

(b.) for the Debtor to use the proceeds of the Post-Petition Financing for the purposes set forth in the Interim Post-Petition Loan Documents, including for working capital and general corporate purposes;

(c.) under Bankruptcy Code sections 361, 363(e) and 364(e), for the Debtor to (i) use the Cash Collateral and (ii) provide adequate protection to the Pre-Petition Senior Lenders under the Pre-Petition Senior Loan Documents and to MetLife under the 1995 NPA with respect to any diminution in the value of their interests in the Prepetition Senior Collateral and the Prepetition ML Collateral, respectively, resulting from (A) the superpriority liens and security interests sought

herein to secure the Post-Petition Financing, (B) the Debtor's use of Cash Collateral, (C) the use, sale or lease of the Prepetition Collateral (other than the Cash Collateral) or (D) the imposition of an automatic stay under Bankruptcy Code section 362;

(d.) for the Debtor to modify the automatic stay under Bankruptcy Code section 362 in certain respects to permit the Debtor to use a portion of the Cash Collateral; and

(e.) under Bankruptcy Rule 4001, after an interim hearing on the Motion, to schedule a final hearing on this Motion (the "Final Hearing") and to establish notice procedures in respect of the Final Hearing, by this Court to consider entry of a final Order authorizing the Post-Petition Financing.

BASIS FOR RELIEF

15. The Debtor has determined that the post-petition financing is necessary for the Debtor to operate its business in chapter 11 and for the Debtor's successful reorganization. Without immediate access to additional financing, the Debtor will be unable maintain critical trade vendor support needed to continue as a going concern.

16. Before the Petition Date, the Debtor approached several other financial institutions about post-petition financing. As the prepetition liens of the Pre-Petition Senior Lenders and MetLife encumber almost all the Debtor's assets, save for certain leasehold interests, the Debtor could not obtain unsecured financing. No

lender expressed an interest in engaging in a lengthy priming dispute, and no lender was willing to extend the Debtor sufficient financing to pay off the Pre-Petition Senior Lenders and MetLife.

17. The Debtor is convinced that the DIP Lenders possess valuable knowledge of the Debtor's business and that the DIP Lenders' proposal addresses the Debtor's working capital needs.

18. The Interim Post-Petition Loan Documents are the results of arm's length negotiations between the DIP Lenders and the Debtor. The Interim Post-Petition Loan Documents' key provisions are:

- Borrower: Furr's;
- DIP Lenders: Heller, BofA, Fleet and MetLife;
- Commitment: not to exceed \$30 million in the form of revolving credit loans and letters of credit, subject to certain restrictions set forth more fully in the Term Sheet, including Borrowing Base formulas;
- Availability: To fund working capital needs of the Debtor (including inventory purchases in the ordinary course of business of the Debtor). But documentary letters of credit issued under the Interim DIP Facility or the Permanent DIP Facility shall not be used for the purchase of inventory from domestic vendors;
- Term: Earlier of (i) 270 days after entry of the Interim Order or (ii) substantial consummation of a plan of reorganization;
- Priority: Superpriority status under Bankruptcy Code section 364(c)(1), subject to (i) the Carve-Out and (ii) the payment of fees under 28 U.S.C. §1930;
- Liens: All indebtedness liabilities and obligations of the Debtor shall be secured by the following liens (the "Post-Petition Liens"), subject to the Carve-

Out and §1930 fees, under sections 364(c)(2), and 364(c)(3) of the Bankruptcy Code, a first lien, subject only to Prior Claims (as defined below), on all real and personal property and assets of Debtor and all proceeds, rents or profits thereof (as more fully described in the Interim Post-Petition Loan Documents, collectively, the “DIP Collateral”), including all of the Pre-Petition Senior Collateral and all claims or recoveries of the Debtor under the Bankruptcy Code (including avoidance claims and all proceeds therefrom under sections 544, 545, 547, 548 and/or 553, which shall collectively be referred to herein as “Avoidance Actions”) and any unused or unearned retainers, deposits, or prepaid items, subject to the limitations set forth in paragraph 6 of the Interim Order and the DIP Credit Terms.

- Carve-out: Before the occurrence and declaration of an unwaived Termination Date (a “Carve-Out Event”), the liens and superpriority claims granted to the Lenders shall be subject and subordinate to unpaid professional fees and disbursements incurred by the professionals retained under sections 327 or 1103(a) of the Bankruptcy Code by the Debtor and one statutory committee appointed in the this case, and approved and allowed by this Court pursuant to sections 330 and 331 of the Bankruptcy Code (limited to the amounts permitted to be paid in the Budget). Following the occurrence of and during a Carve-Out Event, the liens and superpriority claims granted to the Lenders shall be subject and subordinate to the payment of allowed professional fees and disbursements incurred after the occurrence and during the pendency of a Carve-Out Event by these professionals, in an aggregate amount not to exceed \$1,500,000.
- Fees: closing fee of 3.0% of the DIP Revolver, plus certain other fees.
- Interest: 1.75% per annum in excess of the Base Rate; and
- Default Rate: 2.0% per annum greater than the rate of interest specified above;

The Post-Petition Financing Should Be Approved

19. Section 364(c) and (d) of the Bankruptcy Code provides:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense,

the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt -

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or, 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d) (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if -

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

The Debtor cannot obtain the required funds in the form of unsecured credit or unsecured debt with an administrative priority only because substantially all the Debtor's assets are encumbered. The circumstances of this case instead requires the Debtor to obtain financing under sections 364(c) and (d).

20. Having determined that financing was available on this basis, the Debtor negotiated the Post-Petition Financing at arm's length, and agreed to the

arrangement in the exercise its business judgment that without the financing the Debtor would soon be unable to continue as a going concern. See, e.g., Brav v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986) (approving debtor-in-possession financing necessary to sustain seasonal business); In re Ames Department Stores, 115 B.R. 34, 40 (S.D.N.Y. 1990) ("cases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit parties in interest").

21. The Post-Petition Financing is clearly for the benefit of the Debtor's estate and creditors, as it is the sole means of preserving and enhancing the Debtor's going concern value. With the credit provided by the Post-Petition Financing, the Debtor will be able to obtain goods and services in connection with its operations, thereby permitting it to create revenues to pay its employees, and operate its businesses in order to preserve the ongoing value of its businesses for the benefit of all parties-in-interest.

22. In addition, the availability of credit under the Post-Petition Financing should give the Debtor's vendors and suppliers the necessary confidence to resume ongoing relationships with the Debtor, and the Debtor's new liquidity will

likely be viewed favorably by the Debtor's employees and customers and thereby help promote the Debtor's successful reorganization. Accordingly, this Court should authorize the Debtor to obtain the Post-Petition Financing to the extent and under the terms contained herein, the Commitment Letter, the Term Sheet and in the proposed Interim Order.

23. For the foregoing reasons, the Debtor believes that approval of the Interim Post-Petition Loan Documents is in the best interests of the Debtor, its estate, its creditors and all parties in interest, and that the Court should therefore grant the Motion and authorize the Debtor to enter into the Interim Post-Petition Loan Documents.

24. The terms and conditions of the Interim Post-Petition Loan Documents are fair and reasonable and were negotiated by the parties in good faith and at an arms' length. Accordingly, the DIP Lenders should be accorded the benefits of section 364(c) of the Bankruptcy Code in respect of the Interim Post-Petition Loan Documents.

Good Faith

25. The terms and conditions of the DIP Credit Agreement are fair and reasonable, and were negotiated by the parties in good faith and at arms' length, during many days of intensive negotiations, and thus the DIP Lenders should be

accorded the benefits of section 364(e) of the Bankruptcy Code to the extent of any and all of the provisions of the Post-Petition Loan Agreement.

**The Court Should Authorize
The Use Of The Cash Collateral**

26. In addition to the need for debtor-in-possession financing, the Debtor's other pressing concern is the need for immediate use of the Cash Collateral pending a final hearing on this Motion. The Debtor requires use of the Cash Collateral to be able to pay present operating expenses including payroll and to pay present operating expenses including payroll and to pay certain vendors to ensure a continued supply of materials essential to the Debtor's continued viability.

27. Section 363(c)(2) of the Bankruptcy Code provides that the Debtor may not use, sell or lease cash collateral unless "(a) each entity that has an interest in such cash collateral consents; or (b) the court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2). The DIP Lenders and many of the holders of Pre-Petition Junior Indebtedness have consented to the use of Cash Collateral.

The Interim Approval Should Be Granted

28. Bankruptcy Rule 4001(b) and (c) provide that a final hearing on a motion to use cash collateral under section 363 and to obtain credit under section 364 may not be commenced earlier than 15 days after the service of such motion. Upon request, however, the Court is empowered to conduct a preliminary expedited

hearing on the motion and authorize the use of cash collateral and the obtaining of credit to the extent necessary to avoid immediate and irreparable to the debtor's estate.

29. The Debtor requests, under Bankruptcy Rules 4001(b) and (c), that the Court authorize the Debtor to obtain credit under the Term Sheet and Commitment Letter, and to utilize the Cash Collateral as provided in the proposed Order. This will enable the Debtor to maintain ongoing operations and avoid immediate and irreparable harm and prejudice to its estate and all parties in interest, pending the Final Hearing and a Final DIP Agreement.

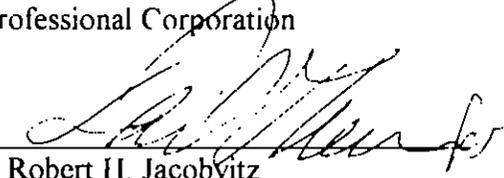
Notice With Respect to Final Financing Order

30. The Debtor respectfully requests that the Court set a final hearing date on the Motion and an objection deadline for 15 days from the date of this Motion or such other date and time as is convenient to the Court, and authorize the Debtor to distribute a copy of this Motion and any interim order which fixes the time and date for filing with objections to this Motion, by first class mail upon (i) counsel to any official committee of unsecured creditors appointed in this case; (ii) the Office of the United States Trustee; (iii) all parties who have filed requests for notice under Bankruptcy Rule 2002; (iv) counsel for the DIP Lenders; (v) the twenty (20) largest unsecured creditors of the Debtor at their last known addresses; (vi) the holders of (a) the Pre-Petition Senior Debt, (b) the Pre-Petition ML Senior Debt and (c) the Pre-Petition Junior Indebtedness; and (vii) all other parties ordered by the Court. The

WHEREFORE, the Debtor respectfully requests that the Court enter an order granting the relief requested herein and such other relief as is just and proper.

Dated: Albuquerque, New Mexico
February 2, 2001

JACOBVITZ THUMA & WALKER
A Professional Corporation

By: 

Robert H. Jacobvitz
500 Marquette N.W., Suite 650
Albuquerque, New Mexico 87102
(505) 766-9272
(505) 766-9287 (fax)

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Jay M. Goffman
Alan J. Carr
Four Times Square
New York, New York 10036-6522
(212) 735-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Richard Levin (CA State Bar No. 66578)
Peter W. Clapp (CA State Bar No. 104307)
Stephen J. Lubben (CA State Bar No. 190338)
Amy S. Park (CA State Bar No. 208204)
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
(213) 687-5000

Attorneys for the Debtor-in-Possession