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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

In re FURR'S SUPERMARKETS, INC.,

Case No. 01-10779-SA
Chapter 11

Debtor.

**SUPPLEMENTAL BRIEF IN SUPPORT
OF MOTION FOR ORDER DIRECTING PAYMENT
OF ACCRUED HEALTH AND WELFARE BENEFITS**

New Mexico United Food and Commercial Workers' Unions and Employers' Health and Welfare Trust Fund (the "Fund"), by its attorneys, respectfully submits this supplemental brief in support of its request for an order directing immediate payment to the Fund of contributions due for hours worked by covered employees in August, 2001. In support of that motion, the Fund states as follows:

INTRODUCTION

The Fund provides health and welfare benefits to employees of the Debtor who are members of the United Food Workers Union (the "Union"). As part of the collective bargaining process, Union employees are entitled to funding of their health and welfare benefit plans for each month worked. These fund contributions are a critical element of the compensation package, accounting for a significant percentage of employees' total compensation. That these employer contributions are, in fact, a part of the Union employees' bargained for compensation was readily acknowledged by Debtor's Chief Operating Officer, Steve Mortenson, at the September 10, 2001 hearing.

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Employees earn a contribution to the Fund by working a set number of hours in a month. *See* Transcript of Testimony of Judy Pedroza., pp. 4:19-5:7. September 11, 2001 (hereinafter "Pedroza Transcript"). On August 30, 2001, this Court ordered payment of the Fund contribution due in August for hours worked by covered employees in July 2001. Covered employees also earned and accrued an additional contribution to the Fund, however, by working hours in August 2001. The contribution for hours worked in August, 2001, has still not been paid, although covered employees continued to work until Furr's closing, to the benefit of both Debtor and Lenders, and in the expectation of payment of all compensation.

Although the dispute between the Debtor and the Fund has already been already been briefed, various obstacles to payment continue to be expressed by some parties. This Supplemental Brief is submitted to respond to these issues.

ARGUMENT

EMPLOYEES EARNED SEPTEMBER HEALTH AND WELFARE COVERAGE BY WORKING FOR THE DEBTOR IN AUGUST

From its inception, the Fund has administered contributions, and provided health and welfare coverage to employees, based on the present system, whereby a contribution is made in one month, based on the number of hours worked in the previous month. This system is still in effect today.

First, and most basically, the testimony of Fund Administrator Judy Pedroza unequivocally established that the Fund and contributing Employers follow the present system. *See* Pedroza Transcript at pp. 7-8, 11-12. That testimony was not disputed or contradicted by any testimony put on by either the Debtor or the Lenders. In addition, Ms. Pedroza testified without

contradiction that no payment has been made for the August work performed by new Mexico Furr's covered employees.

Second, as explained in the Fund's Brief of October 2, 2001, the Debtor's own calculation of its required Fund contribution (1) identifies eligible employees by name, social security number, store and hours worked, and (2) calculates the appropriate contribution for those employees, including those employees who have been terminated during the previous month.¹ Indeed, the receipts provided by Furr's to the Fund clearly evidence that the contribution is made for hours worked in the previous month. *See, e.g.*, Fund's Motion and Memorandum, dated September 13, 2001, Exhibit A (receipts issued by Furr's for August 2001 contributions made "for July 2001 Hours").

Finally, the present system is followed by other contributing Employers, such Smith's Food and Drug Center, Inc. ("Smith's"), and Albertson's, Inc ("Albertson's"). Attached are affidavits by Jan Bender, Vice President of Compensation and Benefits for Kroger West (regarding Smith's) (Exhibit A), and Cassie Henson, Senior Payroll Clerk for Albertson's, Inc. (Exhibit B). These affidavits confirm consistent and universal utilization of the present system.

Specifically, both affiants confirm that covered employees who met the eligibility requirement during a particular month, "earn a contribution on their behalf to the New Mexico Fund, which is *payable in the following month.*" *See* Bender Affidavit ¶ 3 (emphasis added); Henson Affidavit ¶ 3 (emphasis added). Each employer "sends a contribution to the New Mexico Fund for each covered employee who met the eligibility requirement the *previous*

¹ If an employee terminated at the end of one month was only entitled to health and welfare benefits during that month, there would be no reason to list terminated employees in the contribution report. Terminated employees are so listed because their work in the prior month entitled them to a contribution in the following month.

month. See Bender Affidavit ¶ 3 (emphasis added); see also Henson Affidavit ¶ 3 (emphasis added). Moreover, both affiants confirm that this contribution is made “whether or not such employee was still employed ... at the end of such previous month.” See Bender Affidavit ¶ 4; Henson Affidavit ¶ 4.

At the October 16, 2001 Final Hearing on this matter, the Fund is prepared to produce a substantial number of documents and witness testimony further establishing that a contribution for hours worked in August, 2001 is due. The final contribution is thus due in the amount of \$659,442.80, which includes \$656,972.80 for Meat and Clerks, and \$2,469.80 for Courtesy Clerks, or Sackers. When paid, the New Mexico Furr’s Union employees will get the health coverage that they deserve and are entitled to.

The money is available for this payment. In its Cash Collateral Order of September 18, 2001, the Court provided that \$750,000.00 in Sale Proceeds be reserved for “any contributions due and owing by the Debtor” to the Fund “for hours worked in August 2001.” See First Order Supplementing Final (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief to Permit Short-Term Financing and Use of Cash Collateral, Findings of Fact, Para. B.

CONCLUSION

For the foregoing reasons, the Fund prays that this Court grant its Motion seeking an Order providing for the payment of the remaining Fund contribution based on the hours worked in August, should Debtor and Lenders fail to reach an agreement authorizing the contribution. A

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Brief in Support of Motion Seeking Order Requiring Payment of Accrued Health and Welfare Funds, and Exhibits, were served on the following via facsimile on this 15th day of October, 2001.



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UNITED STATES BANKRUPTCY COURT
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Debtor.

AFFIDAVIT OF JAN BENDER

I, Jan Bender, being first duly sworn, do hereby depose and state as follows:

1. I am the Vice President of Compensation and Benefits for Kroger West. My responsibilities include processing payroll for Smith's Food & Drug Center, Inc. ("Smith's"). I have been employed by Kroger for 32 years, and in my present capacity since 1992.

2. As part of my duties, I am responsible for overseeing processing contributions by Smith's to the New Mexico United Food and Commercial Workers' Union and Employers' Health and Welfare Trust Fund (the "New Mexico Fund"), as well several other health and welfare funds covering UFCW employees to which Smith's is a contributing employer (the "Other Funds"). I am familiar with and knowledgeable about the procedures by which such contributions are calculated and paid to the New Mexico Fund and the Other Funds.

3. Covered employees of Smith's who meet the eligibility requirement by working at least 96 hours (or other applicable hours standard) during a particular month earn a contribution on their behalf to the New Mexico Fund, which is payable in the following month.



4. On or about the 20th of each month, Smith's sends a contribution to the New Mexico Fund for each covered employee who met the eligibility requirement the previous month, whether or not such employee was still employed by Smith's at the end of such previous month. For example, on September 20, 2001, Smith's sent a contribution to the New Mexico Fund for all covered employees who satisfied the eligibility requirement in August 2001, including those employees whose employment ended in August.

5. Smith's follows the same procedures described above in calculating and paying contributions to the Other Funds. Based on my first-hand experience and knowledge of these funds, I believe it is standard practice in the retail food industry for UFCW employees to earn a contribution to their health and welfare fund, which is payable in one month based on their work the preceding month, even if the employees do not work during the month in which the contribution is payable.

Dated this 12 day of October, 2001.

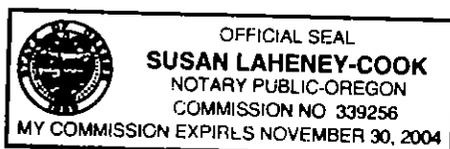


Jan Bender,
Vice President, Kroger West
Compensation and Benefits

State of Oregon)
 : ss
Multnomah County)

This instrument was acknowledged before me this 12 day of October, 2001, by Jan Bender.

[Seal]





Notary Public, State of Oregon
My commission expires: 11-30-2004

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AFFIDAVIT OF CASSIE HENSON

I, Cassie Henson, being first duly sworn, do hereby depose and state as follows:

1. I am a Sr. Payroll Clerk in the Payroll Department at Albertson's, Inc. ("Albertson's"). I have been employed by Albertson's for eight (8) years, and in my present capacity since July 7, 1998.

2. As part of my duties, I process contributions by Albertson's to the New Mexico United Food and Commercial Workers' Union and Employers' Health and Welfare Trust Fund (the "Fund"). I am familiar with and knowledgeable about the procedures utilized by Albertson's by which such contributions are calculated and paid to the Fund.

3. Covered employees of Albertson's who meet the eligibility requirement by working at least 96 hours during a particular month earn a contribution on their behalf to the Fund, which is payable in the following month.

4. On or before the 20th of each month, Albertson's sends a contribution to the Fund for each covered employee who met the eligibility requirement the previous month, whether or not such employee was still employed by Albertson's at the end of such previous month. For example, on or before September 20, 2001, Albertson's sent a



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**ORDER GRANTING MOTION SEEKING ORDER REQUIRING
PAYMENT OF ACCRUED HEALTH AND WELFARE FUNDS**

On September 13, 2001, New Mexico United Food and Commercial Workers Union and Employers Health and Welfare Fund (the "Fund") filed a Motion Seeking Order Requiring Payment of Accrued Health and Welfare Funds (the "Motion"). In the Motion, the Fund requested an order directing payment of the contribution due to the Fund on September 20, 2001, based on hours worked by covered employees during August 2001.

A preliminary hearing on the Motion was held on October 4, 2001, and a final evidentiary hearing has been scheduled for October 16, 2001.

The Parties have resolved their dispute and stipulate to the entry of this Order as final disposition of the Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion is granted.

IT IS FURTHER ORDERED that the Debtor shall forthwith pay to the Fund the sum of \$659,442.60 (the "Final Contribution"), and that such payment shall be made from \$750,000.00 in Secured Lenders' collateral that has been specifically reserved for such purpose, by Order of the Court on September 11, 2001, pending resolution of the Motion.

IT IS FURTHER ORDERED that upon payment of the Final Contribution, all claims by the Fund having administrative priority shall be deemed satisfied, and all proofs of claim filed by the Fund alleging administrative priority shall be deemed withdrawn.

IT IS FURTHER ORDERED that upon payment of the Final Contribution, the Secured Lenders shall be released from any and all further claims by or liability to the Fund in connection with this case.

IT IS FURTHER ORDERED that nothing in this Order in any way affects any other pending motions, disputes or claims involving the Debtor, the Secured Lenders and other parties.

Dated this ____ day of October, 2001.

BY THE COURT:

Honorable James S. Starzynski
United States Bankruptcy Judge

Order approved by:

Pilar Vaile for the Fund

Jennie D. Behles for Lenders

Paul Fish for Lenders

Robert H. Jacobvitz/David T. Thuma for Debtor