

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE N.M.

11-01-10779-34

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In re : Case No. 01-11- _____ ()
FURR'S SUPERMARKETS, INC., : Chapter 11
Debtor. :
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MOTION FOR ORDER AUTHORIZING DEBTOR TO PAY
CERTAIN PREPETITION SALES, USE AND OTHER TAXES
AND CERTAIN FINES AND PENALTIES

Furr's Supermarkets, Inc., debtor and debtor-in-possession in the above-captioned bankruptcy case (the "Debtor"), hereby moves for an order under 11 U.S.C. §§ 105, 507 and 541 authorizing it to pay certain prepetition sales, use and other taxes and certain fines and penalties owing in the State of Texas. In support of this Motion, the Debtor respectfully represents 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 in accordance with sections 1107(a) and 1108 of the Bankruptcy Code.

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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 approximately 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 extended line of non-food products, health and beauty care products, housewares, general merchandise and, in many instances, in-store pharmacies.

RELIEF REQUESTED

6. By this Motion, the Debtor requests entry of an order in accordance with sections 105, 507 and 541 of the Bankruptcy Code authorizing it to pay, in the ordinary course, certain prepetition sales, use and other taxes incurred in its operations in Texas, as well as certain fines and penalties owed to various government agencies. This request will be without prejudice to the Debtor's right to contest the amounts of any taxes or fines and penalties.

BASIS FOR RELIEF

7. The Debtor, in the ordinary course of its business, incurs various obligations to certain local, state and federal governmental entities. These obligations include tax payments (the "Taxes"), such as state and local sales and use tax liabilities ("Sales and Use Taxes"). Before the Debtor's bankruptcy petition was filed, the Debtor paid these obligations in a timely fashion.

8. Sales and Use Taxes accrue in the daily business practice of the Debtor, and are calculated based upon a statutorily mandated percentage. In some cases, Sales and Use Taxes are paid in arrears, once collected by the Debtors.

9. New Mexico and Texas require the Debtor to remit estimated Sales and Use Taxes on a periodic basis during the month or quarter in which sales are made. The Taxing Authority then "true up" any deficiency or surplusage on the date on which the Taxes are actually due.

10. The Debtor also seeks authority to pay certain prepetition fines and penalties (the "Fines") assessed to the Debtor in connection with certain local, state and federal compliance requirements with respect to store safety and sanitation, food safety and sanitation, and packaging and labeling integrity. The Debtor believes that fines totaling only approximately \$6,000 are outstanding.

APPLICABLE AUTHORITY

11. Necessity of Payment Doctrine. Section 105(a) provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The purpose of section 105(a) is to "assure the Bankruptcy Court's power to take whatever action is

appropriate or necessary in aid of the exercise of its jurisdiction." 2 Collier on Bankruptcy ¶ 105.01, at 105-3 (15th ed. 1996). Thus, section 105(a) essentially codifies the bankruptcy court's inherent equitable powers. See In re Management Tech. Corp., 56 B.R. 337, 339 (Bankr. D.N.J. 1985) (court's equitable power derived from section 105).

12. Numerous courts have used their section 105 equitable powers under the necessity of payment doctrine¹ to authorize payment of a debtor's prepetition obligations where, as here, (i) such payment is necessary to effectuate the "paramount purpose" of chapter 11 reorganization -- which is to prevent the debtor from going into liquidation and preserve the debtor's potential for rehabilitation, or (ii) nonpayment would trigger a withholding of goods or services essential to the debtor's business reorganization plan. see In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981); In re Ionosphere Clubs, Inc., 98 B.R. 174, 176-77 (Bankr. S.D.N.Y. 1989) (citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984)) (section 105 empowers bankruptcy courts to authorize payment of prepetition debt when needed to facilitate the rehabilitation of the debtor); see also In re James A. Phillips, Inc., 29 B.R. 391, 394-95 (S.D.N.Y. 1983).

13. The payment of the Taxes owing in Texas is necessary here. During the early stages of the chapter 11 process, the Debtor should be focused on

¹ This doctrine, first articulated by the United States Supreme Court in Miltenberger v. Logansport, C.&S.W.R. Co., 106 U.S. 286, 311-12 (1882), recognizes the existence of judicial power to authorize a debtor in a reorganization case to pay prepetition claims where essential to the continued operation of the debtor.

stabilizing its business. It is in the best interest of the Debtor, its estate and creditors to avoid the administrative difficulties that would arise from a failure to pay required Taxes and Fines.

14. Trust Fund Doctrine. In Texas, one of the two jurisdictions in which the Debtor operates, many, if not all, of the Taxes likely constitute so-called Trust Fund Taxes which are required to be collected from third parties and held in trust for payment to the Taxing Authorities. In re Al Copeland Enters., Inc., 133 B.R. 837 (Bankr. W.D. Tex. 1991), aff'd, 991 F.2d 233 (5th Cir. 1993) (debtor obligated to pay Texas sales taxes plus interest because such taxes were trust fund taxes). The Debtor, therefore, arguably has no equitable interest at all in Taxes owed in Texas. Moreover, Texas law provides that officers and directors of the collecting entity may be held personally liable for the payment of Trust Fund Taxes to the taxing authorities in certain circumstances. To the extent any accrued Taxes of the Debtor were unpaid as of the Petition Date in that jurisdiction, the Debtor's officers and directors may be subject to lawsuits during the pendency of this proceeding. These potential lawsuits would distract the Debtor, the named officers and directors whose immediate and full-time attention to the Debtor's reorganization process is required, and this Court, which might be asked to entertain various motions seeking injunctions relating to potential state court actions. It is in the best interests of the Debtor's estate

The Debtor estimates that the total amount of Taxes owing to the Taxing Authorities in Texas as of February 5, 2001 is approximately \$46,000. The Taxes owing to New Mexico for the same period are approximately \$2.35 million. The New Mexico taxes, however, are not Trust Fund Taxes.

and consistent with the reorganization policy of the Bankruptcy Code to eliminate the possibility of such time-consuming and potentially damaging distractions.

15. Moreover, the Taxes are entitled to priority status under Section 507(a)(8) of the Bankruptcy Code. The payment of the Taxes will affect only the timing of the payments, not their amounts. Therefore, other creditors and parties in interest will not be prejudiced if the relief sought herein is granted by this Court. In recognition of such facts, courts in other cases have routinely granted the same or similar relief to chapter 11 debtors. See, e.g., In re Owens Corning, Case No. 00-3837 (MF'W) (Bankr. D. Del. Oct. 6, 2000).

16. Similarly, a failure to pay prepetition fines may raise concerns as to the Debtor's compliance with safety and sanitary laws and lead to increased inspections. The Debtor can avoid these potential distractions by paying the relatively small amount of outstanding fines.

17. For the foregoing reasons, the Debtor believes that the relief requested herein is appropriate and in the best interests of all parties in interest.

18. Nothing in this Motion, however, should be construed as impairing the Debtor's right to contest the validity or amount of any Taxes or Fines that may be due.

19. No previous request for the relief sought herein has been made to this Court or any other court.

20. Notice. The Debtor has served notice of this Motion by hand delivery on the United States Trustee and by facsimile on the Debtor's secured creditors and its twenty largest unsecured creditors. In view of the nature of the relief

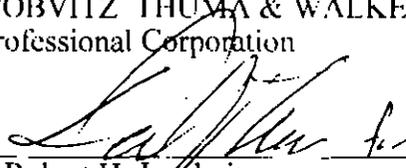
requested, the Debtor submits that this notice is proper and adequate under the circumstances.

WHEREFORE, the Debtor respectfully requests that the Court enter an order (i) confirming its authority to pay, in the ordinary course, the prepetition sales, use and other Taxes owed in Texas, as well as prepetition Fines and penalties

relating to safety and related concerns, as set forth herein, and (ii) granting such other and further relief as is just and proper.

Dated: Albuquerque, New Mexico
February 7, 2001

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