

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE N.M.

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In re : Case No. ~~11-81-11~~ 11-81-10779 (9)
FURR'S SUPERMARKETS, INC., : Chapter 11
Debtor. :
----- X

MOTION FOR ORDER AUTHORIZING PAYMENT
OF VALID PACA AND PASA TRUST CLAIMS

Furr's Supermarkets, Inc., debtor and debtor-in-possession in the above-captioned case (the "Debtor"), hereby moves for an order under 11 U.S.C. §§ 105 and 541 authorizing payment of valid PACA and PASA claims. 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 seeks an order under sections 105(a) and 541 of the Bankruptcy Code authorizing payment of valid PACA/PASA Trust Claims (as defined below).

BASIS FOR RELIEF

A. The PACA and PASA Statutory Schemes

7. Before to the Petition Date, certain of the Debtor's vendors sold goods (collectively, the "PACA/PASA Goods") to the Debtor that constitute (i) "perishable agricultural commodities," as this term is defined by the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499, et seq. ("PACA"), (ii) "livestock" or "poultry," as these terms are defined by the Packers and Stockyard Act, 7 U.S.C. §§ 181, et seq. ("PASA"), or (iii) other eligible goods covered by state statutes of similar effect.

8. As the District Court for the Southern District of New York has explained:

PACA regulates trading in perishable agricultural commodities, essentially fruits and vegetables. [PACA] was amended in 1984 upon a finding by Congress that a burden on commerce in these goods was caused by certain financial credit arrangements, whereby dealers would receive delivery of goods without having to pay for them. The 1984 amendment provides that upon delivery of goods to the purchaser, a statutory trust automatically arises on behalf of unpaid suppliers or sellers.

A&J Produce Corp. v. CIT Group/Factoring, Inc., 829 F. Supp. 651, 653 (S.D.N.Y. 1993) (emphasis added), see also Consumers Produce Co. v. Volante Wholesale Production, Inc., 16 F.3d 1374 (3d Cir. 1994). PASA creates a virtually identical statutory trust scheme for the delivery of "livestock" and other eligible goods. See In re W.L. Bradley Co., 75 B.R. 505, 509 (Bankr. E.D. Pa. 1987) ("The legislative

history expressly notes that the PACA trust was modeled on trust amendments to [PASA].").

9. The statutory trust created under PACA and PASA from which trust beneficiaries may seek collection is composed of, inter alia: (i) the purchaser's inventory of PACA/PASA Goods, (ii) products derived from PACA/PASA Goods, and (iii) accounts receivable and proceeds obtained with respect to the sale of PACA/PASA Goods or products derived therefrom. See Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 199 (3d Cir. 1998) ("a buyer's produce, products derived from that produce, and the proceeds gained therefrom are held in a non-segregated, floating trust for the benefit of unpaid suppliers who have met the applicable statutory requirements."); A&J Produce, 829 F. Supp. at 653-54 (quoting statute); Pereira v. Marine Midland Bank, N.A. (In re Al Nanelberg & Co.), 84 B.R. 19, 21 (Bankr. S.D.N.Y. 1988) (holding that although PACA trust does not include assets sold to bona fide purchaser of debtor, it does include assets purchased by debtor with proceeds of such sale). "[T]he [PACA] trust provision . . . provides unpaid suppliers with priority over secured lenders with regard to PACA trust assets held in trust by produce purchasers." Consumers Produce Co., 16 F.3d at 1379; see Tom Lange Co. v. Kornblum & Co. (In re Kornblum & Co.), 81 F.3d 280, 284 (2d Cir. 1996) ("A PACA trust beneficiary is . . . entitled to claim trust property ahead of even creditors holding security interests in the property.").

10. The cases construing PACA and PASA consistently hold that PACA and PASA trust assets do not become "property of the estate" pursuant to section 541 of the Bankruptcy Code. See, e.g., In re Long John Silver's Restaurants, Inc., 230 B.R. 29, 32 (Bankr. D. Del. 1999); In re Kornblum, 81 F.3d at 284. Therefore, the distribution of assets to beneficiaries of a PACA/PASA statutory trust falls outside of both (i) the priority scheme established by the Bankruptcy Code, and (ii) the plan process (i.e., trust beneficiaries may be paid outside of, and prior to, a confirmed plan of reorganization). The distribution of trust assets to PACA/PASA trust beneficiaries, however, remains under the jurisdiction of the presiding bankruptcy court. See, e.g., The Allied Growers Co-Op, Inc. v. United Fruit & Produce Co. (In re United Fruit & Produce Co.), 86 B.R. 14, 16 (Bankr. D. Conn. 1988).

11. Both PACA and PASA impose certain procedural steps that must be taken by a seller in order to preserve its rights as a trust beneficiary. For example, under PACA an unpaid supplier of perishable agricultural commodities must have provided:

written notice of intent to preserve the benefits of the trust to the . . . dealer . . . within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary,¹ (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the

¹ See 7 C.F.R. § 46.2(aa) (establishing ten days as the standard period by which payment must be made).

supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the . . . dealer . . . shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time different from that established by the Secretary [*i.e.*, ten days], a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

7 U.S.C. § 499e(c)(3).² PASA imposes a similar notice requirement, but requires that the notice also be filed with the Secretary of Agriculture. See 7 U.S.C. §§ 196 and 197. Failure to comply with these requirements renders a claim concerning PACA/PASA Goods a general, unsecured claim See Tom Lange Co. v. Lombardo Fruit and Produce Co. (In re Lombardo Fruit and Produce Co.), 12 F.3d 806, 808-09 (8th Cir. 1993).

In addition, section 499e(c)(4) provides that:

a licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust. The bill or invoice must contain the information required by the last sentence of paragraph (3) and contain on the face of the statement the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."

7 U.S.C. § 499e(c)(4).

B. Proposed Treatment

12. Before the Petition Date, certain of the Company's vendors sold goods (collectively, the "PACA/PASA Goods") to the Company that constitute (i) "perishable agricultural commodities," as this term is defined by the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499, et seq. ("PACA"), (ii) "livestock" or "poultry," as these terms are defined by the Packers and Stockyard Act, 7 U.S.C. §§ 181, et seq. ("PASA"), or (iii) other eligible goods covered by state statutes of similar effect.

13. The Company currently estimates that, as of the Petition Date, it owes approximately \$43,000 in PACA Trust Claims. The Company believes that there is currently no amount owing under PASA.

14. In recognition of the rights of the PACA and PASA trust beneficiaries under their respective statutes and due to the Debtor's desire to limit any interference with their supply of PACA/PASA Goods, the Debtor seeks authority to pay, in the ordinary course (or later as may be necessary to process PACA/PASA Trust Claims), the undisputed claims of PACA/PASA Trust Claimants arising before the Petition Date. Those Claimants, however, must first provide to the Debtor, and its counsel, written notice of the existence of the PACA/PASA Trust Claimants' PACA/PASA Trust Claims and the invoices or other billing documents evidencing the delivery of the PACA/PASA Goods to the Debtor's facilities.

15. Nothing in the relief requested herein diminishes the Debtor's ability to contest any invoice of a PACA/PASA Trust Claimant on ordinary, non-bankruptcy grounds.

APPLICABLE AUTHORITY

16. Under section 105(a) of the Bankruptcy Code, "[t]he 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). Failure to provide the relief requested herein could subject the Debtor to actions by PACA/PASA Trust Claimants seeking enforcement of their PACA/PASA Trust Claims, which would result in the unnecessary expenditure of funds by the Debtor in responding thereto. Moreover, any delays – perceived or real – in satisfying PACA/PASA Trust Claims could adversely affect the Debtor's ability to obtain fresh fruits, vegetables, meat and poultry in the future, thereby undercutting the Debtor's competitive posture and its ability to successfully reorganize. Based on the foregoing, the Debtor submits that entry of an order granting the relief sought herein is critical to the Debtor's successful reorganization and is justified under 11 U.S.C. § 105(a).

17. Significantly, the relief requested herein does not constitute the Debtor making payments from estate property on account of prepetition claims. This is because, as discussed above, PACA/PASA Trust Claimants would be paid from non-estate property. See, e.g., In re Long John Silver's Restaurants, Inc., 230 B.R.

29, 32 (Bankr. D. Del. 1999) ("PACA trusts are governed by . . . traditional principles of trust law, and [therefore] they, too, are excluded from property of the estate.").

18. It is the Debtor's business judgment that permitting the Debtor to promptly satisfy valid PACA and PASA Trust Claims will best promote the Debtor's rehabilitation and is in the best interests of the Debtor and its customers, creditors and estate.

19. Courts have granted similar relief regarding the claims of potential PACA/PASA Trust Claimants in other large chapter 11 cases. See, e.g., In re Big V Holding Corp., Case No. 00-04372 (PJW) (Bankr. D. Del. Dec. 6, 2000).

20. No previous request for the relief sought in this Motion has been made to this or any other court.

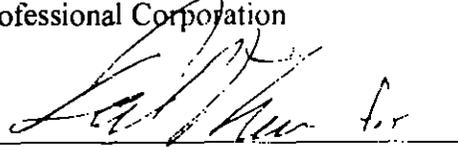
21. Notice. The Debtor has served notice of this Motion by hand delivery on the United States Trustee and by facsimile on the Debtor's secured creditors and its twenty largest unsecured creditors. In view of the nature of the relief requested, the Debtor submits that this notice is proper and adequate under the circumstances.

WHEREFORE, the Debtor respectfully requests that this Court enter an order (i) authorizing the Debtor to pay valid prepetition PACA/PASA Trust Claims, whose holders have provided the Debtor with written notice thereof, together

with invoices or other supporting material, and (ii) granting such other and further relief as is just and proper.

Dated. Albuquerque, New Mexico
February 7, 2001

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