

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779 SA
Chapter 7

Debtor.

**MOTION TO ADOPT PROPOSED CARVE-OUT
PROCEDURE, SET DEADLINES, AND FOR OTHER RELIEF**

Yvette J. Gonzales, Chapter 7 Trustee (the "Trustee"), moves the Court to (i) adopt a procedure for determining carve-out amounts to be paid to professionals and paying carve-out funds, and (ii) set deadlines to file final fee applications for services rendered in the chapter 11 case, and in support hereof states:

1. Under the Stipulation and Consent Order (i) Approving Compromise and Settlement Between the Trustee on Behalf of the Estate, Heller Financial, Inc., Bank of America, N.A., Fleet Capital Corporation and Metropolitan Life Insurance Company and (ii) Resolving All Objections Thereto, entered or to be entered by the Court (the "Settlement Order"), Heller Financial Inc., as agent, and Metropolitan Life Insurance Company are required to fund the Pre-Closing Carve-Out and other Carve-Outs (as those terms are defined in the Settlement Order) by December 15, 2002.

2. Under the DIP financing and cash collateral order entered March 14, 2001, certain professional fees and expenses are not eligible to be paid from any Carve-Outs.

3. Not all professionals have filed final fee applications for services rendered prior to conversion of this case to chapter 7.

4. Until the final allowance is made of compensation to all professionals for services rendered prior to conversion of this case to chapter 7, the Trustee will be unable to determine the respective amounts of the Carve-Outs payable to each professional.

5. Unless a procedure is established to determine the amount of the Carve-Outs payable to each professional, such amounts cannot be determined and the Pre-Closing Carve-Out cannot be disbursed.

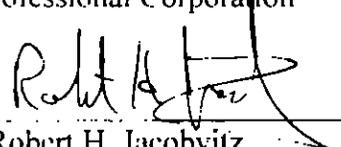
6. The Trustee has considered the matter, and proposes that the Court adopt the procedures set forth in Exhibit A hereto (the "Carve-Out Procedures").

7. The requested relief is reasonable and appropriate under the circumstances.

WHEREFORE the Trustee requests that the Court enter an order adopting the Carve-Out Procedures, and for all other just and proper relief.

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PROPOSED CARVE-OUT PROCEDURES

A. Definitions. The following words and phrase have the following meanings.

“Adjusted Pro Rata Share” is defined in paragraph C.

“Carve-Out Procedures Motion” means the Chapter 7 Trustee’s Motion to Adopt Proposed Carve-Out Procedure, Set Deadlines, and for Other Relief.

“Carve-Outs” means any carve-out under the terms of any cash collateral or DIP financing orders entered in this case before it was converted to chapter 7.

“Denominator” is defined in Attachment 1 hereto.

“Eligibility Objections” is defined in paragraph D(3).

“Final Fee Application Deadline” is defined in paragraph G.

“Gross Pro Rata Share” is defined in Attachment 1 hereto.

“Net Pro Rata Share” is defined in Attachment 1 hereto.

“Numerator” is defined in Attachment 1 hereto.

“Percentage” is defined in Attachment 1 hereto.

“Post-Conversion” means after this bankruptcy case was converted from a case under chapter 11 case to a case under chapter 7.

“Pre-Closing Carve-Out Amount” is the amount of the Pre-Closing Carve-Out as set forth in paragraph 8(a) of the Settlement Order

“Pre-Closing Period” means on or prior to August 31, 2001.

“Post-Closing Carve-Out” is defined in paragraph 8(a) of the Settlement Order.

“Professionals” means professional persons employed in this bankruptcy case under Bankruptcy Code §327 or §1103.

“PJSC” means Peter J. Solomon Co.

“Settlement Order” means the Stipulation and Consent Order (i) Approving Compromise and Settlement Between the Trustee on Behalf of the Estate, Heller Financial, Inc., Bank of America, N.A., Fleet Capital Corporation and Metropolitan Life Insurance Company and (ii) Resolving All Objections Thereto, entered or to be entered by the Court.

B. Payment of Pro Rata Share. Each Professional would be paid its pro rata share of each of the Carve-Outs.

C. Calculation of Pro Rata Share. The Court should determine how the Professionals’ pro rata shares of the Carve-Outs are determined. Two possibilities are set forth on Attachment 1.

D. Determination of Eligibility.

(1) Statement of Whether Fees Are Excluded from Carve-Outs. Jacobvitz Thuma & Walker P.C.; Skadden, Arps, Slate, Meagher & Flom LLP; Pepper Hamilton LLC; Davis & Piece P.A.; and Deloitte & Touche LLP and Deloitte Consulting L.P., shall file, on or before the Final Fee Application Deadline, either (i) a statement specifically identifying any of their fees or costs (whether or not allowed or paid) which they recognize would not have been recoverable from any of the Carve-Outs if allowed and unpaid; and specifying which such fees or costs have been paid or disallowed, or (ii) if any such Professionals believes all of its fees would have been recoverable from a Carve-Out (to the extent of the Professional’s pro rata share) if allowed and unpaid, a statement to that effect.

(2) Statement of Intent to Claim Fees from the Post-Closing Carve-Out. If a Professional seeks or intends to seek payment from the Post-Closing Carve-Out for any services performed or costs incurred after December 18, 2001, the Professional would be required to file and serve on or before the Final Fee Application Deadline, a

notice of intent to seek payment of Post-Conversion fees or expenses from the Post-Closing Carve-Out, specifying the types of Post-Conversion fees and expense that the Professional seeks or intends to seek from the Post-Closing Carve-Out (such as, fees for Post-Conversion services rendered and costs incurred to prosecute or defend fee applications).

(3) Objections to Eligibility. Any objections to the eligibility of any services rendered or costs incurred by any Professional for payment from any Carve-Outs ("Eligibility Objections") must be filed and served within 30 days after the Final Fee Application Deadline. Any Eligibility Objection must specify the fees and/or costs the objector contends are not eligible for payment from the Carve-Outs and why.

(4) Response to Eligibility Objections. If any Eligibility Objections are timely filed, the Professional must file and serve a written response within 15 days after service.

F. Determination of Which Carve-Out Applies. The Court should determine which fees are (i) eligible to be paid from the Pre-Closing Carve Out, (ii) eligible to be paid from the Post-Closing Carve-Out, and (iii) not eligible to be paid from any Carve-Outs. Unless an objection thereto is filed and served within 20 days after service of notice of the entry of an order resulting from the Carve-Out Motion and of such deadline (in which event the Court will determine the issue after notice and a hearing), the following guidelines shall apply:

(1) Pre-Conversion Work. Allowed fees for services rendered or costs incurred on or before August 31, 2001 are payable from the Pre-Closing Carve-Out (if otherwise eligible to be paid from the Carve-Outs), regardless of when the invoice was

sent for such fees; and that allowed fees for services rendered or costs incurred after August 31, 2001 but before December 19, 2001 are payable from the Post-Closing Carve-Out (if otherwise eligible to be paid from the Carve-Outs).

(2) Post-Conversion Work. The Court should determine that any compensation that maybe sought for services rendered after December 18, 2001 is not payable from the Pre-Closing Carve-Out Amount. Whether any Post-Conversion fees or expenses are payable from the Post-Closing Carve-Out should be determined in accordance with paragraphs D and E.

(3) PJSC Claim. PJSC's remaining unpaid \$150,000 claim will be included in the Pre-Closing Carve-Out (and not the Post-Closing Carve-Out) unless PJSC objects to such treatment within 20 days after service of notice of the filing of an order resulting from this motion and of such deadline to file and serve such objection. If PJSC timely objects, the Court will determine the issue after notice and a hearing.

F. Determining the Eligible Amounts Within Each Carve-Out. After the guidelines are established for determining what fees are eligible to be paid from which Carve-Outs, a procedure should be established to determine the eligible amounts for each professional payable from each Carve-Out.

G. Deadline for Final Fee Applications. The Court should fix a deadline of 30 days after service of notice of the filing of an order resulting from the Carve-Out Motion for any Professionals and of such deadline to file final fee applications for any compensation (i) based on services rendered prior to December 19, 2001 (when the chapter 11 case was converted to a case under chapter 7) or (ii) for which the applicant seeks or will seek payment from any Carve-Outs, other than compensation that may be

sought from the Post-Closing Carve-Out for services rendered after December 18, 2001 to prosecute or defend fee applications (the "Final Fee Application Deadline").

H. Service. Unless the Court orders otherwise, except for notice of final fee applications, service will be sufficient if service is made on the parties on whom the Carve-Out Procedures Motion was served.

I. Preliminary Hearing. The Court should set a hearing schedule such that all Carve-Out issues are determined by approximately December 1, 2002.

Attachment 1

EXAMPLE #1

The Pro Rata Share of each Professional to the Pre-Closing Carve-Out shall be determined by the following formula:

1. The Pre-Closing Carve-Out Amount is added to the amount paid by the Debtor in Possession to all Professionals for services rendered and costs incurred during the Pre-Closing Period, and the Sum is defined as the "Numerator";
2. The total amount of Professional fees allowed by the Court that is eligible to be paid from the Pre-Closing Carve-Out is defined as the "Denominator";
3. The result of dividing the Numerator by the Denominator is defined as the "Percentage"; and
4. The amount of Professional fees allowed by the Court for each Professional that is eligible to be paid from the Pre-Closing Carve-Out is multiplied by the Percentage, and the result is defined as the Professional's "Gross Pro Rata Share;" and
5. The amount already paid to the Professional for services rendered and costs incurred during the Pre-Closing Period is deducted from the Gross Pro Rata Share, and the result is defined as the "Net Pro Rata Share."

The following example illustrates the formula (the assumptions are for illustration only):

Assumptions:

- (a) Pre-Closing Carve-Out Amount is \$1,825,000;
- (b) The Debtor in Possession paid a total of \$750,000 to all Professionals for services rendered and costs incurred during the Pre-Closing Period;
- (c) Court allowed a total of \$4,300,000 to all Professionals that is eligible to be paid from the Pre-Closing Carve-Out;
- (d) The Professional in question has allowed compensation eligible to be paid from the Pre-Closing Carve-Out in the amount of \$250,000; and
- (e) The Professional in question has been paid \$50,000 for services rendered during the Pre-Closing Period.

Example #1:

1. $\$1,825,000 + \$750,000 = \$2,575,000$ (the "Numerator");
2. $\$4,300,000$ (the "Denominator");
3. $\$2,575,000 \div \$4,300,000 = 59.88\%$ (the "Percentage");
4. 59.88% of $\$250,000 = \$149,700$ (the "Gross Pro Rata Share"); and
5. $\$149,700 - \$50,000 = \$99,700$ (the "Net Pro Rata Share").

6. If the total Net Pro Rata Shares of all Professionals exceeds the Pre-Closing Carve-Out Amount because the Net Pro Rata Share of one or more Professionals is a negative number, then the Net Pro Rata Shares shall be adjusted, pro rata, so that the aggregate amount of the Net Pro Rata Shares equals the Pre-Closing Carve-Out Amount (the "Adjusted Pro Rata Share").

EXAMPLE #2

The Pro Rata Share of each Professional to the Pre-Closing Carve-Out shall be determined by the following formula:

1. The Pre-Closing Carve-Out Amount is defined as the "Numerator";
2. The difference between the total amount of Professional fees allowed by the Court and the amount paid by the Debtor in Possession to all Professionals for services rendered and costs incurred during the Pre-Closing Period, is defined as the "Denominator";
3. The result of dividing the Numerator by the Denominator is defined as the "Percentage"; and
4. The unpaid amount of Professional fees allowed by the Court for each Professional that is eligible to be paid from the Pre-Closing Carve-Out is multiplied by the Percentage, and the result is defined as the Professional's "Pro Rata Share."

The following example illustrates the formula (the assumptions are for illustration only):

Assumptions:

- (a) Pre-Closing Carve-Out Amount is \$1,825,000;
- (b) The Debtor in Possession paid a total of \$750,000 to all Professionals for services rendered and costs incurred during the Pre-Closing Period;
- (c) Court allowed a total of \$4,300,000 to all Professionals that is eligible to be paid from the Pre-Closing Carve-Out, of which \$3,550,000 is unpaid;
- (d) The Professional in question has allowed compensation eligible to be paid from the Pre-Closing Carve-Out in the amount of \$250,000; and
- (e) The Professional in question has been paid \$50,000 for services rendered during the Pre-Closing Period for services eligible to be paid from the Pre-Closing Carve-Out, leaving an unpaid balance for such services of \$200,000.

Example #2:

- 1. \$1,825,000 (the "Numerator");
- 2. $\$4,300,000 - \$750,000 = \$3,550,000$ (the "Denominator");
- 3. $\$1,825,000 \div \$3,550,000 = 51.41\%$ (the "Percentage");
- 4. $59.88\% \text{ of } \$200,000 = \$102,820$ (the "Pro Rata Share").

6. If the total Pro Rata Shares of all Professionals exceeds the Pre-Closing Carve-Out Amount because the Pro Rata Share of one or more Professionals is a negative number, then the Pro Rata Shares shall be adjusted, pro rata, so that the aggregate amount of the Pro Rata Shares equals the Pre-Closing Carve-Out Amount (the "Adjusted Pro Rata Share").