

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

2002-8 PH 3:56

COURT  
N.M.

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779 SA  
Chapter 7

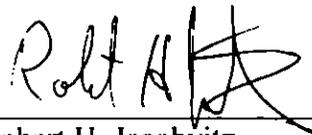
Debtor.

**SUBMISSION OF SUGGESTED REFINEMENTS  
TO THE PROPOSED CARVE-OUT PROCEDURE**

Attached hereto is a suggested revision to Exhibit "A" to the Motion To Adopt Proposed Carve-Out Procedure, Set Deadlines, and for Other Relief filed July 15, 2002 (the "Motion"). The attachments consist of a copy marked to reflect the changes made to Exhibit "A" to the Motion, and an unmarked copy.

JACOBVITZ THUMA & WALKER  
a Professional Corporation

By



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This certifies that the attachments  
hereto were transmitted by e-mail  
on August 8, 2002 to:

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~~{PROPOSED}~~ CARVE-OUT PROCEDURES

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

"Adjusted Pro Rata Share" is defined in paragraph C.

["Allocation Statement" is defined in paragraph F(2).]

"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.}~~ [the Pre-Closing Carve-Out, Post-Closing Carve Out, and JTW Carve-Out.]

"Denominator" is defined in Attachment 1 hereto.

["DIP Financing Orders" means the Final DIP Financing Order and the First Post-Closing DIP Financing Order.]

"Excluded Fees" means professionals fees and costs that meet the criteria set forth in the DIP Financing Orders as not to be paid from Carve-Out funds.]

"Eligibility Objections" is defined in paragraph D(3).

["Final DIP Financing Order" means the Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief, filed March 14, 2001.]

"Final Fee Application Deadline" is defined in paragraph G.

["First Post-Closing DIP Financing Order" means the Final Post Closing Order Supplementing Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief, filed in September, 2001.]

"Gross Pro Rata Share" is defined in Attachment 1 hereto.

["JTW Carve-Out" means the Carve-Out set forth in paragraph 9 of the First Post-Closing DIP Financing Order.]

"Net Pro Rata Share" is defined in Attachment 1 hereto.

"Numerator" is defined in Attachment 1 hereto.

“Percentage” is defined in Attachment I 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.

“Post-Closing Period” means on or after September 1, 2001.

“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}~~  [shall] 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 I. }~~  [[insert, based on Court’s determination] ]

D. Determination of Eligibility [to Participate in Carve-Out Funds]

(1) For purposes of computing distributions to professionals from the Carve-Outs, such distributions shall exclude any work performed which meets the criteria set forth in the DIP Financing Orders as not to be paid from Carve-Out funds, and any prior receipts or credits shall be deemed applied either to work eligible to be paid from

Carve-Out funds or to work not eligible to be paid from Carve-Out funds as determined by the Court.

(2) ~~+(1)+~~ Statement of Whether Fees Are Excluded [Fees Not Payable] from [any] Carve-Outs. Jacobvitz Thuma & Walker P.C.; Skadden, Arps, Slate, Meagher & Flom LLP; Pepper Hamilton LLC; Davis & Pierce 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}~~ [as Excluded Fees] 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}~~ [that none of its fees are Excluded Fees], a statement to that effect. [Further, the statement shall include the amount the Debtor in Possession paid such Professional, the credits (if any) the Professional gave the Debtor in Possession, and how the Professional applied the payments and credits. Further, if any of the above listed Professionals have received payment from or given credits to the Debtor in Possession, and recognize that a portion of their charges are Excluded Fees, each such Professional shall state how they claim that such payments and credits should be applied as between Excluded Fees and fees that are not Excluded Fees.

(3) ~~+(2)+~~ Statement of Intent to Claim Fees from the Post-Closing Carve-Out~~+. If a+~~ [for Post-Conversion Work. If any] 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~~ [is] 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)~~[(4)] Objections to Eligibility. Any objections to the eligibility of any services rendered or costs incurred by any Professional for payment from any Carve-Outs [on the grounds that: (i) the fees are Excluded Fees, (ii) the fees are for Post-Conversion services or costs not covered by a Carve-Out, or (iii) that payments from or credits given to the Debtor in Possession should be applied to Excluded Fees] (“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 [and the payments or credits the Objector claims should be applied to Excluded Fees. If no Eligibility Objection are timely filed and served, the fees and costs shall be deemed eligible to be paid from a Carve-Out to the extent the compensation is approved by the Court, and payments or credits will be applies as applied by the Professional.

~~(5)~~[(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}~~ [For the determination of] 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).}~~ [, in addition to the above] 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}~~ [Any] compensation that maybe sought for services rendered after December 18, 2001 ~~{is}~~ [are] 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}~~ [shall] be determined in accordance with paragraphs D ~~{and F}~~ [above].

(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}~~ [PJSC is not required to file an Allocation Statement].

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~~ Amounts Within Each of the Carve-Outs. The following procedure will apply to determine the amounts for each Professional payable from each of the Carve-Outs:

(1) Prorating Disallowed Amounts. For any fees for services rendered or costs incurred during both the Pre-Closing Carve Out Period and Post-Closing Carve-Out Period that the Court disallows in such a manner that it cannot be determined to what extent the disallowed amount is attributable to the Pre-Closing or Post-Closing Carve-Out Period, the disallowed amount shall be pro rated based on the relative amounts of services performed and costs incurred during the Pre- and Post-Closing Carve-Out Periods in the category of disallowed compensation.

(2) Statement by Professionals of Allocation Between Carve Out Periods. If a Professional rendered services in both the Pre-Closing Carve-Out Period and the Post Closing Carve-Out Period, and seeks or intends to seek payment from any of the Carve-Outs, then on or before the Final Fee Application Deadline the Professional shall file and serve a statement (the "Allocation Statement") setting forth (i) the amount of compensation claimed to be] payable from each Carve-Out [from which payment is sought; and (ii) whether and to what extent the Court has approved the compensation claimed to be payable from each Carve-Out either by entry of an interim or final order.

(3) Objections to Allocation Statement. Any objections to the allocation between Carve Out periods set forth in the Allocation Statement must be filed

and served within 30 days after the Final Fee Application Deadline. If no objections are timely filed and served, the allocation shall be made as set forth in the Allocation Statement. Any approved allocation between Carve Out periods remain subject to reduction for any fees or costs that are Excluded Fees or to the extent any of the compensation is not approved by the Court].

G. Deadline for Final Fee Applications. The Court ~~{should fix}~~ [hereby fixes] 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 serviced 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 form 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. [Without limiting the forgoing, service of all papers be served pursuant to this procedure shall include service on Heller, as agent, by serving the same on David S. Heller, Latham & Watkins, 233 South Wacker Drive Sears Tower, Suite 5800, Chicago, Illinois 60606-6401; and Paul M. Fish, Modrall Sperling Roehl Harris & Sisk, P.A., P.O. Box 2168, Albuquerque, New Mexico 87103-2168.] ~~H. Preliminary Hearing. The Court should set a hearing schedule such that all Carve-Out issues are determined by approximately December 1, 2002.~~

## CARVE-OUT PROCEDURES

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

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

“Allocation Statement” is defined in paragraph F(2).

“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 the Pre-Closing Carve-Out, Post-Closing Carve Out, and JTW Carve-Out.

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“Excluded Fees” means professionals fees and costs that meet the criteria set forth in the DIP Financing Orders as not to be paid from Carve-Out funds.

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

“Final DIP Financing Order” means the Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief, filed March 14, 2001.

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

C. Calculation of Pro Rata Share. **[insert, based on Court’s determination]**

D. Determination of Eligibility to Participate in Carve-Out Funds

(1) For purposes of computing distributions to professionals from the Carve-Outs, such distributions shall exclude any work performed which meets the criteria set forth in the DIP Financing Orders as not to be paid from Carve-Out funds, and any prior receipts or credits shall be deemed applied either to work eligible to be paid from Carve-Out funds or to work not eligible to be paid from Carve-Out funds as determined by the Court.

(2) Statement of Whether Fees Are Excluded Fees Not Payable from any Carve-Outs. Jacobvitz Thuma & Walker P.C.; Skadden, Arps, Slate, Meagher & Flom LLP; Pepper Hamilton LLC; Davis & Piece P.A.; and Deloitte & Touche I.L.P 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 as Excluded Fees if allowed and unpaid; and specifying which such fees or costs have been paid or disallowed, or (ii) if any such Professionals believes that none of its fees are Excluded Fees, a statement to that effect. Further, the statement shall include the amount the Debtor in Possession paid such Professional, the credits (if any) the Professional gave the Debtor in Possession, and how the Professional applied the payments and credits. Further, if any of the above listed Professionals have received payment from or given credits to the Debtor in Possession, and recognize that a portion of their charges are Excluded Fees, each such Professional shall state how they claim that such payments and credits should be applied as between Excluded Fees and fees that are not Excluded Fees.

(3) Statement of Intent to Claim Fees from the Post-Closing Carve-Out for Post-Conversion Work. If any 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 is 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).

(4) Objections to Eligibility. Any objections to the eligibility of any services rendered or costs incurred by any Professional for payment from any Carve-Outs on the grounds that: (i) the fees are Excluded Fees, (ii) the fees are for Post-Conversion services or costs not covered by a Carve-Out, or (iii) that payments from or credits given to the Debtor in Possession should be applied to Excluded Fees ("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 and the payments or credits the Objector claims should be applied to Excluded Fees. If no Eligibility Objection are timely filed and served, the fees and costs shall be deemed eligible to be paid from a Carve-Out to the extent the compensation is approved by the Court, and payments or credits will be applied as applied by the Professional.

(5) 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.

E. Determination of Which Carve-Out Applies. For the determination of 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, in addition to the above 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. Any compensation that maybe sought for services rendered after December 18, 2001 are not payable from the Pre-Closing Carve-Out Amount. Whether any Post-Conversion fees or expenses are payable from the Post-Closing Carve-Out shall be determined in accordance with paragraphs D above.

(3) PJSC Claim. PJSC's remaining unpaid \$150,000 claim will be included in the Pre-Closing Carve-Out (not the Post-Closing Carve-Out). PJSC is not required to file an Allocation Statement.

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(1) Prorating Disallowed Amounts. For any fees for services rendered or costs incurred during both the Pre-Closing Carve Out Period and Post-Closing Carve-Out Period that the Court disallows in such a manner that it cannot be determined to what extent the disallowed amount is attributable to the Pre-Closing or Post-Closing Carve-Out Period, the disallowed amount shall be pro rated based on the relative amounts of services performed and costs incurred during the Pre- and Post-Closing Carve-Out Periods in the category of disallowed compensation.

(2) Statement by Professionals of Allocation Between Carve Out Periods. If a Professional rendered services in both the Pre-Closing Carve-Out Period

and the Post Closing Carve-Out Period, and seeks or intends to seek payment from any of the Carve-Outs, then on or before the Final Fee Application Deadline the Professional shall file and serve a statement (the "Allocation Statement") setting forth (i) the amount of compensation claimed to be payable from each Carve-Out from which payment is sought; and (ii) whether and to what extent the Court has approved the compensation claimed to be payable from each Carve-Out either by entry of an interim or final order.

(3) Objections to Allocation Statement. Any objections to the allocation between Carve Out periods set forth in the Allocation Statement must be filed and served within 30 days after the Final Fee Application Deadline. If no objections are timely filed and served, the allocation shall be made as set forth in the Allocation Statement. Any approved allocation between Carve Out periods remain subject to reduction for any fees or costs that are Excluded Fees or to the extent any of the compensation is not approved by the Court.

G. Deadline for Final Fee Applications. The Court hereby fixes 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 serviced 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 form 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").

II. 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. Without limiting the forgoing, service of all papers be served pursuant to this procedure shall include service on Heller, as agent, by serving the same on David S. Heller, Latham & Watkins, 233 South Wacker Drive Sears Tower, Suite 5800, Chicago, Illinois 60606-6401; and Paul M. Fish, Modrall Sperling Roehl Harris & Sisk, P.A., P.O. Box 2168, Albuquerque, New Mexico 87103-2168.