

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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BANKRUPTCY COURT
SANTO DOMINGO, N.M.

In re:

FURR'S SUPERMARKETS, INC.

Case No. 7-01-10779 SA
Chapter 7

Debtor.

**OBJECTION TO DAVIS & PIERCE, P.C.'S ALLOCATION
STATEMENT AND EXCLUDED FEE STATEMENT SUBMITTED PURSUANT
TO ORDER ADOPTING CARVE-OUT PROCEDURES**

Heller Financial, Inc. ("Heller") for itself, Bank of America, N.A. and Flect Capital Corporation and on behalf of Metropolitan Life Insurance Company here objects to the Allocation Statement and Excluded Fee Statement of Davis & Pierce, P.C. ("D&P") Submitted Pursuant to Order Adopting Carve-Out Procedures.

1. All time expended for fee applications should be allocated to the period for which the original work for which the fee application is made. The fee application arises out of the original work. Heller objects to the allocation to the post-Closing Carve-Out of fee application work arising from pre-Closing work.

2. D&P submitted an allocation for "Post-Conversion" work. There is no post-conversion Carve-Out. To that extent, the request for those fees from a Carve-Out should be denied. If allowed, to the extent the work was performed for either an entity for whose legal fees the estate is liable and which falls within the Carve-Out provisions, the work should either be excluded from payment or, if related to a fee application, applied to the time period of the underlying work.

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3. A substantial amount of the work performed by D&P is to be excluded from the Carve-Out allocations because it was work falling within the excluded work identified in paragraph 8(b) of the Stipulation and Consent Order (1) 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 July 25, 2002 and in paragraph 3 of the Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief ("Final DIP Order") entered March 14, 2001. A review of the various fee applications filed by D&P allows the identification of some of the fees which should be excluded. Some of the objections raised by D&P in the course of the proceeding included the allegations in the DIP Adversary, *UCC vs. Bank of America, et al.*, Adversary No. 01-01096-S. Allegations included that the Lenders should be ordered to marshal, that the leases had such a large value (and the Lenders were not perfected in the leases) so there was some amount to which the Lenders were not entitled, that the claim of the Lenders should be equitably subordinated, that the liens of the Lenders should be set aside as preferences, that the Lenders should be sur-charged and other claims which fall within the ambit of services which may not be compensated from the cash collateral and Carve-Out moneys of the Lenders. As part of that work, D&P obtained professional services from Deloitte & Touche L.L.P. and/or Deloitte Consulting LP, as the case may be, to value the leases of the Debtor. At the present time, Heller has identified the following work which should be excluded from any Carve-Out recovery or calculation:

- a. First Application (as supplemented) (all in the pre-Closing time period):

- i. Fees and costs for the "DIP Adversary." \$11,019.59
- ii. Other time which appears to be work in preparation for a claim against

the Lenders:

3-1-1 Conference with Deloitte & Touche accountants re: leases and
pensions 1.10 \$302.50

3-20-01 Legal research for Equitable Subordination .4 \$495.00

3-22-01 Legal Research for assignment of avoidance actions to UCC insider or
outside of Plan 2.80 \$770.00

b. Second Fee Application

- i. DIP Adversary (\$13,035 in pre-Closing, \$550 in post-Closing)
\$13,792.66

ii. Cash Collateral (at which hearings D&P contended that the relief
sought by Lenders should not be granted because of the right of the UCC to marshal and the
other claims raised by the UCC in the DIP Adversary (post-Closing) \$19,662.50

- iii. Other time which appears to be work in preparation for a claim against

the Lenders:

Pre-Closing:

8-22-01 Preparation of objection to Debtor's Waterfall and wind down motion
6.50 \$1,787.50

8-24-01 Telephone conference with B. Jacobvitz re: secured status
0.30 \$82.50

8-24-01 Review of MLT loan documents 1.60 \$440.00

8-26-01	Legal research for surcharge and replacement lien	1.60	\$715.00
8-27-01	Telephone conference with B. Barnett re: appraiser's testimony		
		0.30	\$82.50
8-28-01	Legal research for surcharge and standing	2.50	\$687.50
Post-Closing:			
9-19-01	Left message with B. Barnett, Deloitte Touche re: testimony		
		0.10	\$27.50
9-24-01	Legal research for forward cross-collateralization and marshalling		
		3.50	\$962.50
10-17-01	Legal research for surcharge and liquidating plan	1.30	\$357.50
9-13-01	Preparation for UCC conference call re: cash collateral and liens		
		1.20	\$330.00
9-14-01	Attendance at UCC conference call re: cash collateral		
		1.20	\$330.00
9-14-01	Telephone conference with B. Cohen re: conference call		
		0.30	\$82.50

3. In addition, on first blush, it would appear from the Fee Application that D&P never discussed the DIP Adversary or any other action adverse to the Lenders with the UCC. That, of course, cannot be the case. It must be presumed that D&P attended UCC meetings to discuss the DIP Adversary and the various other matters adverse to the Lenders. D&P was a necessary participant because Pepper Hamilton was barred by conflicts from being adverse to the Lenders. Heller does not know how much of that amount is required to be excluded because of the failure of D&P to identify the subject of their communications with their client, despite the fact that the exclusionary language was in the Interim DIP Financing Order entered at the commencement of the case as well as the Final DIP Order. The terms of those Orders and the limitations on the use of cash collateral and the Carve-Out funds were well known to D&P. The consequence of their failure to properly identify their communications with their clients should fall on D&P, not the Lenders. It is incumbent upon the claimant to justify its claim. Heller has identified the following as what appear to be the charges related to the communications of D&P with its client. There may be other or additional such charges in other categories, such as "Case Administration" or "Local Counsel UCC Case Admin." Heller asks that the Court exclude those amounts properly excludable, wherever categorized.

i. The First Fee Application indicates the following charges for communications with the UCC, including attendance at UCC meetings:

Committee Work	\$31,365.47
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ii. The Second Fee Application indicates the following charges for communications with the UCC, including attendance at UCC meetings:

Committee Work	\$29,642.50
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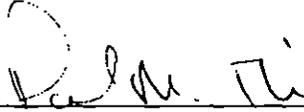
4. The foregoing entries total \$112,935.22.

5. The Court allowed 85% of fees of D&P. The suggestion of D&P that all of that reduction came from a cancellation of excluded fees is without merit, although the Court knows better than any party what it ruled. The Order entered January 25, 2002, providing for the reduction gives a great deal of explanation, but it did not (and should not have been expected to) resolve this specific issue. For example, the Court did not object to the several post-Closing hearings at which D&P vigorously argued (and lost) its marshalling theory. That work may be proper for a UCC counsel, but it must be excluded from recovery from cash collateral or any Carve-Out.

6. Assuming a flat 15% reduction, that reduces the entries identified above to \$95,994.94 which should be excluded from their respective Carve-Outs. In the event D&P has been paid an amount in excess of its total fees, because the payments were all cash collateral of Heller and the other Lenders and such payment was prohibited by the Final DIP Order, the excess should be repaid to the estate. To the extent D&P was paid more than its pro rata share of the pre-Closing Carve-Out as a result of the excluded fees, it should be ordered to repay such amount.

WHEREFORE, Heller Financial, Inc. ("Heller") for itself, Bank of America, N.A. and Fleet Capital Corporation objects to the fee allocation and statement of excluded fees of Davis & Pierce, P.C.

MODRALL, SPERLING, ROEHL, HARRIS
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WE HEREBY CERTIFY that a true
and correct copy of the fore-
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