

UNITED STATES BANKRUPTCY COURT OFFICE OF THE CLERK
DISTRICT OF NEW MEXICO

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In re:

U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779 SA
Chapter 7

Debtor.

**THIRD INTERIM FEE APPLICATION OF JACOBVITZ, THUMA & WALKER,
P.C., ATTORNEYS FOR THE CHAPTER 7 TRUSTEE**

Jacobvitz, Thuma & Walker, P.C. ("JTW"), counsel for Yvette J. Gonzales, the Chapter 7 Trustee in the above-captioned bankruptcy case (the "Trustee"), submits this third application for approval of interim compensation pursuant to Bankruptcy Code §§330 and 331, for work performed from March 1, 2003 through July 31, 2004 (the "Third Chapter 7 Application Period"); for allowance of a chapter 7 priority administrative expense under Bankruptcy Code §§503(b)(2) and 507(a)(1) for all such approved compensation; and to authorize the Trustee to pay the unpaid balance of approved compensation. In support of this application JTW states:

1. General. The Debtor Furr's Supermarkets, Inc. (the "Debtor") filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code on February 8, 2001 (the "Petition Date"). On December 19, 2001 (the "Conversion Date"), the Debtor converted the case to a case under chapter 7. The Trustee was appointed as interim chapter 7 trustee, and later became the permanent chapter 7 trustee. The Trustee, with Court approval, retained JTW to represent her as of the Conversion Date. This is the third fee application filed by JTW in this case in JTW's capacity as the Trustee's counsel



(JTW previously filed fee applications in connection with its representation of the Debtor.¹

2. Trustee's Employment of JTW. On the Conversion Date, the Trustee filed its application to employ JTW as her counsel. On January 22, 2002 (Docket #1504), the Court entered the Order Approving Employment of Jacobvitz, Thuma & Walker, P.C. as Counsel For the Trustee (the "JTW Employment Order"), approving the Trustee's employment of JTW effective as of the Conversion Date. The Trustee retained JTW to represent the Trustee in all matters and proceedings in which the Trustee required bankruptcy counsel, and in such other matters as the Trustee may request of JTW and JTW may agree to perform outside the bankruptcy area. Pursuant to the JTW Employment Order, the Trustee was authorized to pay JTW's billing statements, prior to the Court's determination of the allowability of JTW's compensation, up to and including 75% of fees, and up and including to 100% of reimbursable costs and applicable gross receipts tax, subject to ultimate approval of the paid compensation.

3. Amount of Fees, Costs, and Gross Receipts Tax Allowed to JTW For Services Rendered to the Trustee During the First and Second Application Periods. For its first Chapter 7 application period (December 19, 2001 to June 30, 2002), by an order entered September 9, 2002 (Docket No. 1832), the Court approved compensation for JTW in the amount of \$164,758.03, consisting of \$152,579.51 for professional fees and gross receipts tax thereon and \$12,178.52 for reimbursable costs and expenses fees and gross receipts tax thereon. For its second Chapter 7 application period (July 1, 2002 to February 28, 2003), by an order entered May 16, 2003 (Docket No. 2091), the Court

¹ By an order entered January 9, 2002, granting a motion filed December 21, 2001, the Court approved JTW's withdrawal as counsel for the Debtor.

approved compensation for JTW in the amount of \$309,696.30, consisting of \$261,698.00 for professional fees, \$31,891.43 for reimbursable costs and expenses, and \$16,106.87 for gross receipts tax. As of July 31, 2004, JTW had received payment in full from the Trustee for services it rendered to her during the first and second Chapter 7 application periods.

4. Amount of Fees, Costs, and Gross Receipts Tax During the Third Application Period. For the Third Chapter 7 Application Period, JTW seeks allowance of fees, costs, and applicable gross receipts tax in the amount of \$636,475.97, consisting of \$553,234.00 for professional fees, \$50,438.73 for reimbursable costs and expenses, and \$32,803.24 for gross receipts tax. As of July 31, 2004, JTW had received payment from the Trustee for services it rendered to her during the Third Chapter 7 Application Period in the amount of \$445,619.84 leaving an unpaid balance for services rendered during the Third Chapter 7 Application Period in the amount of \$190,856.13. Total fees, costs, and expenses JTW charged the Trustee each month during the Third Application Period are summarized on Exhibit A hereto. The billing rates, number of hours charged, and amount of fees that JTW billed the Trustee for each attorney during the Third Application Period are summarized on Exhibit B hereto. The fees JTW charged the Trustee for services rendered during the Third Application Period, summarized by project category, are set forth on Exhibit C hereto.

5. Compensation for Legal Services not to be Borne Entirely By the Estate.

(a) In General. The professional fees (excluding costs and gross receipts tax) charged for the Third Application Period include \$113,028.00 that, 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. filed July 25, 2002 (the "Settlement Agreement"), is to be paid in whole or in part from Heller Financial, Inc.'s, as agent, and Metropolitan Life Insurance Company's (together, the "Lenders") collateral, and is not a cost ultimately borne entirely by the estate, (subject to the discussion below relating to the DIP Loan). The \$113,028.00 consists of: (i) \$33,129.00 for sale of land and equipment; (ii) \$6,080.00 for maintaining and selling New Mexico liquor licenses; (iii) \$6,403.00 for disgorgement litigation related to liquor licenses; (iv) \$66,923.00 for prepaid, accounts receivable and the Newsom life insurance claim; and (v) \$493.00 for finalizing the El Paso Warehouse sale. In addition the professional fees and costs charged for the Third Application Period also includes \$426,586.00 for filing and prosecuting avoidance actions under the cost-sharing procedure that applied under the Settlement Agreement until sufficient avoidance action recoveries were received to pay incurred avoidance action collection costs in full and to satisfy the chapter 11 debtor in possession loan (the "DIP Loan") in accordance with the Settlement Agreement.

(b) Avoidance Action Recoveries.

Under the Settlement Agreement, until sufficient avoidance action recoveries were received to pay incurred avoidance action collection costs and to satisfy the DIP Loan in accordance with the Settlement Agreement, the cost of prosecuting the avoidance actions was paid as a cost of collection from avoidance action proceeds, 3% of the net was then paid into a trustee fee reserve, and the balance, less a reserve for future avoidance action collection costs, was then paid 1/3 to the estate and 2/3 to the Lenders. After the DIP Loan is satisfied in accordance with the Settlement Agreement, the estate is to receive all further avoidance action proceeds, and will pay all further avoidance action

collection costs from estate funds. As some point during the Third Application Period, the avoidance action proceeds were sufficient to pay all then incurred avoidance action collection costs and to satisfy the DIP Loan.

(c) Asset Liquidation.

Under the Settlement Agreement, the estate in effect ultimately bears 10% of the cost of selling land, equipment, and liquor licenses, and collecting other assets (other than avoidance action costs, liquor license disgorgement litigation costs, and costs associated with the El Paso warehouse). Under the Settlement Agreement, such costs (other than avoidance action costs, liquor license disgorgement litigation costs, and costs associated with the El Paso warehouse) are paid as a cost of collection from proceeds received resulting from those efforts. 3% of the net is then paid into a trustee fee reserve, and the balance, less a reserve for future such collection costs, is then paid 10% to the estate and 90% to the Lenders (subject to the Lenders' guarantee that the estate's 10% share ultimately will be at least \$550,000).

(d) Disgorgement Litigation.

Under the Settlement Agreement, the estate in effect ultimately bears none of the cost relating to the disgorgement litigation related to liquor licenses or the El Paso warehouse, such costs being borne entirely by the Lenders.

6. Billing Statements, Itemization, and Description of Services Rendered.

The monthly billing statements JTW rendered to the Trustee for services rendered during the Third Application Period are attached hereto as Exhibit D (together, the "Billing Statements"). The Billing Statements itemize all charges for professional services, reimbursable costs and expenses, and gross receipts tax; set forth the hourly rates for each attorney employed by JTW who rendered services to the Trustee; separately describe the

services rendered and hours worked by each individual each day for each item of work during the Third Application Period, in one-tenth-of-an-hour increments; and, at the end of the Billing Statements, summarize the total hours and total charges per individual. The accounting of services, costs, and expenses set out in the Billing Statements is true and correct to the best of JTW's knowledge, information, and belief.

7. Customary Billing Rates and Other Charges. During the Third Application Period, JTW's billing rates were the attorneys' normal and customary billing rates in effect when JTW commenced its representation of the Trustee, and were as approved by the Court in JTW's Employment Order. JTW, in accordance with its customary billing practices, also charged for costs and expenses, including \$.10 per page for in-house photocopying, \$.15 per page for telecopies, and actual out-of-pocket expenses for other expenses such as postage, long distance telephone, and overnight mail. JTW did not charge for hand deliveries, secretarial overtime, or filing documents with the Clerk of the Court.

8. Services Rendered During the Third Application Period were Actual and Necessary; Fees Charged are Reasonable. During the Third Application Period JTW represented the Trustee in this case. The amount JTW charged the Trustee for services rendered during the Third Application Period is reasonable based on the nature, extent, and value of the services rendered, and the amount of time spent providing the services. The services were actual and necessary.

9. General Description of Services Rendered. As more fully set forth in the attached Billing Statements, and in Exhibit E (Avoidance Action Summary) and Exhibit F (Prepaid and Accounts Receivable Action Summary) hereto, in general the services

JTW rendered for the Trustee during and to some extent prior to the Third Application Period have included, among other things:

(a) Avoidance Actions.

JTW filed approximately 100 avoidance actions. Twenty-seven of those avoidance actions subsequently were dismissed, 61 were settled (sometimes after extensive litigation and from time to time shortly before trial); five default judgments were obtained; one resulted in a decision for the trustee after trial; one resulted in a partial settlement and a decision against the Trustee on an issue that was litigated, which case is on appeal; and one was tried and is awaiting a decision.

As set forth in on Exhibit E hereto, since the Conversion Date the 62 avoidance actions that were settled or partially settled resulted in an aggregate settlement amount of \$4,342,227.30. The case decided in the Trustee' favor resulted in a judgment against American Promotional Events Inc. Midwest of \$91,390.41. The default judgments totaled \$121,107.57. The amount in controversy for the case on appeal against Nabisco Division of Kraft Foods, Inc. is \$90,180. Further the amount sought in the case against ConAgra Foods that is pending a decision after trial is \$580,811.77.

Several defendants filed motions for summary judgment that raised issues relevant to all or a substantial portion of the avoidance actions. Oral argument and briefing on the motions took place during the Third Application Period.

The following is not intended to be comprehensive, but discusses some of the more involved cases:

Albuquerque Publishing Co. This was a heavily litigated, contentious case. It involved depositions in Albuquerque and California, the deposition of an expert

witness, extensive written discovery, and substantial trial preparation. The case settled about a week before trial.

ACI Worldwide. The case settled after written and deposition discovery.

ConAgra: This case involved one of the larger claims, and did not settle. There was extensive discovery. Depositions were taken in Nebraska and New Mexico, as well as by telephone. There was a 3-day trial. Although David Thuma took the lead on this case, Robert Jacobvitz assisted with trial preparations, and examined and cross-examined some of the witnesses. There were also substantial post-trial briefs submitted.

Dicker Warmington. The defendant in this case filed a counterclaim. The case is still pending. Trial is set for October, 2004.

Earthgrains. This case involved one of the larger claims, and settled about a month before trial. This case was vigorously defended and involved extensive discovery, including depositions in Albuquerque and St. Louis. Both sides retained expert witnesses. The case was mediated. Substantial work was done preparing this case for trial.

Frito Lay. This case was actively litigated, involved extensive discovery, including depositions in Dallas and Phoenix, and settled near trial after the case was prepared for trial.

FUTA claim. This case ultimately was dismissed after written discovery was completed. It involved extensive legal research.

Los Alamos County. This case settled after written discovery and four depositions.

Mosleys Truck Brokerage. This case was actively litigated, and involved extensive discovery, including three depositions in Las Cruces. The defendant was a

broker, and raised an unusual initial transferee issue, which required legal research and analysis.

Mundo. This case settled just before trial after the case was prepared for trial.

Nabisco. This case was actively litigated, and involved extensive discovery, including depositions in Chicago. The case settled on all but one issue after the case was prepared for trial. That issue was briefed for the Bankruptcy Court. Nabisco prevailed, and the Trustee filed an appeal. Appellate briefs were filed, and oral argument is scheduled.

Pepsi Bottling Co. This case was actively litigated, and involved extensive discovery. The case also involved an unusual new value defense issue, which required legal research and analysis, as the defendant asserted it was entitled to deduct from the claim a large cash bonus paid pre-petition.

Pinnacle. The case involved alter ego as well as preferential transfer issues, and litigation over withdrawal of the reference. Document discovery was exchanged, and the alter ego issues researched and analyzed. The case settled following a formal mediation.

Protix. This case settled after written discovery and depositions in California and New Mexico. The case involved an unusual legal issue requiring legal research.

Rick Johnson & Co. This case settled after extensive discovery and trial preparation, within a week of trial.

Refrigeration Technologies. The case settled after discovery was concluded, including deposition discovery, and after the case was prepared for trial.

Rogers Transportation. This case settled about two weeks before trial after discovery was completed, including a number of depositions.

Starline Printing. Like the case against Albuquerque Publishing Co., this was a heavily litigated, contentious case. It involved four depositions in Albuquerque and California (the California deposition was taken in connection with both the Albuquerque Publishing Co. and Starline Printing cases), and extensive written discovery. The case ultimately settled.

Sun Life. This case is still pending. It involves an unusual legal issue in the pension area, for which the Trustee retained Irell & Manella as special counsel.

Texas NM Power. This case involved an unusually complicated new value analysis, and settled following a lengthy settlement conference.

U.S. West. This case settled. It required extensive fact analysis.

Wisconsin's Finest. JTW assisted Davis & Pierce to prepare the case for trial because it appeared the case would not settle, and would be the first avoidance action commenced in the bankruptcy case to go to trial. The case, however, settled before trial.

(b) Case Administration.

Work in this category included responding to creditor inquiries; assisting the Trustee in the administration of the Settlement Agreement between the Trustee and Lenders (including the rendering of accountings, determinations of the division of funds; determining appropriate collection cost reserves, responding to Lender inquiries, and the release of escrowed funds to the Lenders); assisting with respect to the Trustee's bond; conferring with the Trustee regarding pension plan and PBGC issues; assisting the Trustee in locating special counsel for PBGC issues; responding to former employee inquiries relating to the Furr's pension plan; responding to the Trustee's accountants

relating to estate tax return issues; representing the Trustee with respect to the balance owing on the post-closing DIP loan, including working with the Trustee's accountant to analyze records, analyzing issues with counsel for MetLife, and analyzing issues under the post-closing DIP orders and Settlement Agreement; and otherwise assisting the Trustee in strategy decisions and responding to the Trustee's inquiries relating to administration of the estate.

(c) Claims Administration and Objections.

Work in this category related to an administrative claim involving former store 881 and administrative claims asserted by United Healthcare Services and AFCO:

(d) Liquor License Disgorgement Actions.

Work in this category was performed in adversary proceedings commenced against various liquor wholesalers, and included attending preliminary hearings and assisting in legal research and drafting, and strategy for, briefs on jurisdiction, abstention, standing and other threshold issues, and with respect to intervention and consolidation issues;

(e) Fee/Employment Applications and Objections.

Work in these categories included preparation of a fee application for expert witness W. Doyle and responding to objection to his fee application; preparing an order resulting from JTW's second fee application and working on JTW's third fee application; assisting with respect to the Trustee's retention of Irell & Manella on PBGC and other pension issues; working with Meyners & Co. regarding its fee applications, and preparing an order approving Meyners & Co. fees; assisting with Sage Accounting fee application and fee order; preparing an application to retain attorney M. Caplan; and working with attorney L. Aikin on her fee applications and fee orders.

(f) El Paso Warehouse.

Work in this category included the transfer of the warehouse to Safeway;

(g) Land and Equipment Sales.

Work in this category included the sale of in-store equipment at various former Furr's locations, including locations 883, 886, 927, 956, and 966 (for example, retention of auctioneers, and preparation of transfer documents); the sale of a parcel of real estate in El Paso, including analysis of the effect of restrictions of record on value, and obtaining an appraisal; representing the Trustee in a dispute with TGAAR that involved ten depositions, a trial and extensive post-trial briefs; and reviewing documents and conferring with a broker regarding real estate in Wichita Falls, Texas;

(h) Liquor Licenses.

Work in this category included the renewal of certain liquor licenses, obtaining extensions of temporary suspensions of liquor licenses, the sales of licenses 231, 4023 and 4029 and administering a liquor license escrow fund;

(i) Prepaid Collection Actions.

In general, Furr's analysis performed during the chapter 11 case was not nearly as complete or useful for prepaid claims as it was for avoidance actions claims. Many of the prepaid claims involved thousands of transactions. Locating and analyzing Furr's records relating to the claims in general proved to be quite difficult and time consuming. The following is not intended to be comprehensive, but discusses several of the more involved pre-paid collection cases:

Albuquerque Tortilla Co. This case has involved significant fact investigation and document review. The complaint has been amended twice, and

defendants have been added. Both written and deposition discovery has been conducted.

The case is still pending;

Gourmet Award. This case settled after the review and analysis of many thousands of transactions;

Mars Inc. This case was settled after significant document review and analysis, and the defendant putting up an active defense; and

(j) Relief from Stay Proceedings.

Work in this category included objecting to a stay motion filed by Perez; assisting the Trustee on a stay relief violation by Sucon and negotiating a stipulated stay order with Sucon; and working on stay relief requested to pursue an insurance company.

10. Efforts to Avoid Unnecessary Duplication of Services. The attorneys within JTW endeavored to avoid duplication of services as much as reasonably possible. Intra-office conferences were kept to a minimum, generally related to analyzing issues or strategy, and were not always billed. In general, one JTW attorney took the lead and *performed most of the work on each matter, unless the matter justified or necessitated more than one attorney.* Unless the hearing was of particular significance, or required the assistance of more than one attorney in court, one attorney attended the hearing. JTW attorneys did not draft any intra-office memoranda or internal legal research memoranda.

In addition to her retention of JTW, the Trustee has also retained Davis & Pierce P.C. ("D&P") as her general counsel. D&P has represented the Trustee in numerous adversary proceedings in which avoidance action claims and accounts receivable and prepaid claims are asserted. In general, JTW and D&P represent and have represented the Trustee in different adversary proceedings, although there have been a few instances in

which one firm has assisted the other in an adversary proceeding. In general, JTW has represented the Trustee in matters not involving adversary proceedings.

11. Other Factors. JTW also supports this Application with a discussion of various other factors, as follows:

(a) Expertise and experience in the area of bankruptcy of the attorneys rendering services to the Trustee. Robert H. Jacobvitz, David T. Thuma, and Thomas D. Walker all played substantial roles in representing the Trustee in this bankruptcy case. JTW's associate, Stephanie L. Schaeffer, has provided legal support. Messrs. Jacobvitz, Thuma, and Walker have substantial experience representing clients in chapter 11 cases, including debtors, creditors, trustees, and committees, as well creditors and debtors in chapter 7 cases;

(b) Method used to compute time charges. JTW attorneys billed their time in six-minute increments;

(c) Relative billing rates of attorneys for in-court and out-of-court hours. JTW attorneys charged the same rates for in-court and out-of-court work;

(d) Billing rates. JTW charged the estate its hourly rates in effect on the Conversion Date. JTW's billing rates charged to the estate are less, and often substantially less, than the Court-approved rates for other professionals retained under Code §327 that performed substantial work in this case prior to conversion;

(e) Method used for determining hours to be actually billed for services and for making billing adjustments. JTW attorneys kept daily time records in the ordinary course of business, from which JTW prepared the Billing Statements. Draft bills were adjusted downward from time to time before being rendered, based on perceived

inefficiencies or for other reasons. No time was billed for preparing, reviewing or adjusting bills;

(f) Difficulty of Case. This case is large and complex by local standards. Representation of the Trustee has made substantial demands upon the time and skills of JTW's attorneys; and

(g) Results Achieved and Benefit to the Estate.

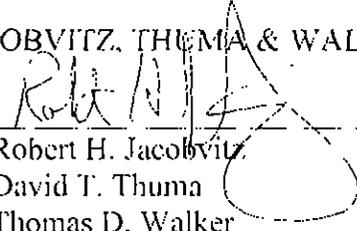
During the Third Application Period, JTW represented the Trustee in the administration of the Settlement Agreement between the Trustee and Lenders, and her fulfilling of the estate's obligations under the Settlement Agreement, particularly with respect to the collection and sale of assets, and accountings. JTW also represented the Trustee with respect to protection of the estate's interest in issues arising under the Settlement Agreement, and with respect to issues arising in the administration of the estate generally. JTW, along with Davis & Pierce PC, also performed substantial work in prosecuting avoidance actions, which is the principal source of assets for the estate, in addition to the estate's share of other assets that are collected or sold.

12. Services Rendered Solely for the Trustee: No Fee Sharing Arrangement. JTW performed all professional services for which JTW seeks allowance and payment of compensation for the Trustee, and not on behalf of any creditor or any committee or other person. JTW has not shared or agreed to share any compensation received or to be received by it for services rendered in or in connection with this case with any person except with employees of JTW in the ordinary course of business.

WHEREFORE, JTW respectfully requests that the Court allow compensation to JTW for the Third Application Period, as a priority, administrative expense, of \$636,475.97, consisting of \$553,234.00 for professional fees, \$50,438.73 for

reimbursable costs and expenses, and \$32,803.24 for gross receipts tax, and authorize the Trustee to pay to JTW the unpaid balance of the allowed compensation.

JACOBVITZ, THUMA & WALKER, P.C.

By: 

Robert H. Jacobvitz

David T. Thuma

Thomas D. Walker

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Attorneys for the Trustee

I hereby certify that a copy of
the foregoing Fee Application
was mailed to:

United States Trustee
P.O. Box 608
Albuquerque, New Mexico 87103

Yvette J. Gonzales
PO Box 1037
Placitas, NM 87043

this 26th day of August, 2004.

