

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re:)	
)	Case No. 11-01-10779-JSS
FURR'S SUPERMARKETS, INC.,)	Chapter 7
)	
Debtor.)	

**AMENDED OBJECTION OF PEPPER HAMILTON LLP TO
MOTION TO APPROVE SETTLEMENT AGREEMENT
BETWEEN THE CHAPTER 7 TRUSTEE AND THE SECURED LENDERS**

Pepper Hamilton LLP respectfully files this Amended Objection to Motion to Approve Settlement Agreement Between the Chapter 7 Trustee and the Secured Lenders (the "Objection"). This Amended Objection supersedes and fully replaces the prior Objection of Pepper Hamilton filed on March 6, 2001, and in support hereof, Pepper Hamilton states as follows:

1. On February 8, 2002, Yvette G. Gonzales, as Chapter 7 Trustee appointed in the above-captioned matter (the "Trustee"), filed a motion seeking to compromise various outstanding issues with the secured lenders in the Debtor's case (the "Settlement Motion"). Among these issues is the question of the amount of funds available to pay administrative claims of estate professionals for the period prior to occurrence of a "Carve-Out Event" as defined in paragraph 3 of the Final DIP Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief, entered on March 14, 2001 (the "Final DIP Order").

2. The settlement as proposed would limit estate professionals to a single carveout of \$1,650,000 for all fees and expenses from the Petition Date through August 31, 2001. This is contrary to the express terms of the Final DIP Order which (a) provides that the liens and superpriority claims of the secured lenders are subordinate to "unpaid professional fees

and disbursements incurred by the professionals retained ... and approved and allowed by this Court ... (limited to the amounts permitted to be paid in the Budget)”, *prior* to a Carve-Out Event (the “Pre-Closing Carve-Out”); and (b) following a Carve-Out Event, provides for a carveout of \$1,500,000 for “allowed professional fees and disbursements *incurred after* the occurrence and during the pendency of a Carve-Out Event” (the “Post-Closing Carve-Out”). *See*, Final DIP Order, ¶ 3 (emphasis added).

3. Although the Official Unsecured Creditors’ Committee was not in existence at the time, Pepper Hamilton was informed that, at the initial hearing on the DIP financing, Debtor’s counsel Mr. Goffman stated, in response to a question from the Court, that the professional fees in the case were estimated at approximately \$600,000 per month. Accordingly, the Final DIP Order included a budget which extended only through June 16, 2001, however the professionals in this case continued to work under the valid assumption that their ongoing fees from June 16 through the Carve-Out Event (*i.e.*, August 31, 2001) would continue to be covered by the Pre-Closing Carve-Out as set forth in the Final DIP Order. Pepper Hamilton is informed and believes that the Senior Lenders continued the DIP financing past the June 16 budget, the Debtor continued to operate with the benefit of the DIP financing, and the professionals in the case continued to perform services with the expectation that those unpaid fees incurred during that time (subject to Court approval) would be included in the Pre-Closing Carve-Out. To approve the Settlement Motion, as it is proposed, would effectively deny the professionals their fees for services rendered¹ for the time period beginning June 17 through August 31, despite the fact that the DIP financing continued to fund the Debtor’s operations during that period, and the Final DIP Order, including the Carve-Out, remained in full force and effect.

4. Pepper Hamilton diligently pursued the Debtor for the payment of its professional fees and Committee expenses during the pendency of the Chapter 11, however the

Debtor and, based upon representations by the Debtor as to the Senior Lenders' intentions, the Senior Lenders continued to emphasize that the principal focus of the Debtor's use of cash from the available financing was solely to purchase inventory necessary to maintain the value of the business enterprise. That said, the Debtor assuaged the concerns of Pepper Hamilton by noting, on multiple occasions including the date of the auction sale to Fleming, that allowed fees under the Pre-Closing Carve-Out would be paid in full by the Debtor out of the sale proceeds, in accordance with the Final DIP Order.

5. For the reasons as set forth in ¶¶2-4 *supra*, the settlement is not fair and reasonable and contrary to both the express language of the Final DIP Order and the purposes underlying the Bankruptcy Code. It is contrary, moreover, to the terms under which Pepper Hamilton accepted employment and performed services throughout the pendency of the Chapter 11 case.

6. Moreover, the proposed settlement is not fair and reasonable because it requires estate professionals to wait until December 2002 to receive payment. All of the estate professionals should be paid their pro rata share out of the Carve-Out *when* the fees are allowed, not December of 2002. Since local professionals were paid considerably more during the pendency of the Debtor's Chapter 11 case, the terms of the Settlement Agreement serve solely to disadvantage out-of-town professionals. A very significant portion of the services in question were performed more than or almost a year ago. Funds from the carveout in the Final DIP Order should be made available immediately upon allowance by the Court of the fees and Committee expenses or the settlement should not be approved.

7. In addition, Pepper Hamilton urges this Court to find that any allowed fees incurred in the prosecution of its professional fees should be included in the Post-Closing Carve-Out, pursuant to the terms of the Final DIP Order.

¹ Subject to Court approval.

8. Finally, the notice attached to the Settlement Motion, which was served on February 8, 2001, referenced an “outline” of settlement terms, and indicated that a final settlement agreement would be distributed to all parties “at least three days” prior to the preliminary hearing on the Settlement Motion, currently scheduled for March 7, 2002. At 7:00 p.m. (EST) on March 4, Pepper Hamilton received a proposed Settlement Agreement (“Settlement Agreement #1”). At the top of Settlement Agreement #1 was a provision indicating that the “Trustees and Lenders Reserve the Right to Make Changes.” At 8:00 p.m. (EST) on March 5, Pepper Hamilton received a revised Settlement Agreement (“Settlement Agreement #2”), which again stated that it was subject to further changes, “although any changes are

9. Given the evolving and fluid nature of the terms of the Settlement Agreement, as well as the highly compressed timetable within which it was distributed for review, Pepper Hamilton states that, until definitive terms are made available with an adequate opportunity for review, the settlement should not be approved. As such, Pepper Hamilton reserves the right to supplement these objections upon receipt of a final, executed and definitive Settlement Agreement.

WHEREFORE, Pepper Hamilton requests that the Court sustain its Objection, deny approval of the Settlement Agreement as requested in the Trustee’s Settlement Motion, and grant Pepper Hamilton such other and further relief as the Court deems to be just and equitable under the circumstances.

PEPPER HAMILTON LLP

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