UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW MEXICO

IN RE:

FURR'S SUPERMARKETS, INC.
TIN: 75 2364418,

Debtor(s). **No. 11-01-10779-SA**

MEMORANDUM IN SUPPORT
OF UNITED STATES TRUSTEE'S
OBJECTIONS AND SUPPLEMENTAL OBJECTIONS
TO EMPLOYMENT APPLICATIONS
OF SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

COMES NOW the United States Trustee for the District of New Mexico and hereby provides the following memorandum in support of the United States Trustee's objections to employment applications of Skadden, Arps, Slate, Meagher, & Flom, LLP ("Skadden"), and in support thereof, states:

FACTUAL BACKGROUND

Most of the relevant facts have been presented in the Supplemental Declaration of Richard Levin in support of Skadden's employment applications. Other relevant facts, not contained in the 2014 disclosure, are presented as follows:

1. On page 6, of the Supplemental disclosure statement, Skadden reveals that the Debtor's equity is held by Windward Capital Associates, L.P., and various other affiliated entities, Metlife, Credit Suisse First Boston, and affiliates, the Weyerhauser Company Master Retirement Trust, and various managers and directors. Skadden also

discloses that the firm represents or has in the past represented Windward, Metlife, and Credit Suisse First Boston.

2. SOFA 21(b), contained in the Debtor's Schedules and Statements, states that the Shareholders of Furr's Supermarkets are the following entities:

Thomas G. Dahlen	70,000 shares	7%
Windward/Park FSI, LLC	448,289 shares	44.83%
Windward Merchant, LP	596 shares	.06%
Windward Northwest, LP	237 shares	.02%
Windward Nurben, LP	117,267 shares	11.73%
Windward Capital Associates, LP	27,229 shares	2.73%
	Windward Total	59.37%
Credit Suisse First Boston	200,229 shares	20.03%
Credit Suisse First Boston	14,798 shares	1.48%
	Total	21.51%
	Cumulative Total	87.88%

3. The total stock ownership of the debtor only amounts to 87.88%.

4. By tabulating all shares held by Windward and Credit Suisse First Boston, Skadden represents at least 80.88% of the shareholder body of the Debtor.

5. According to SOFA 3(b) payments to insider shareholders within one year of the filing of the petition included the following:

Shareholder	Date	Amount
Windward Capital	04/18/2000	$ 11,433.12
Windward Capital	12/29/2000	$ 9,636.95
Windward Capital	01/04/2001	$ 236,475.43
Fleming	06/28/2000	$4,050,000.00

6. On page 13, paragraph 19 of the Final Order Authorizing Debtor to Obtain

Secured Financing, Granting Adequate Protection and Granting Other Relief, filed March 14, 2001, the Debtor through Counsel waived any and all defenses as to the validity, perfection, priority, enforceability, and non-avoidability of the Pre-petition Senior Indebtedness and Pre-petition ML Senior Debt. The Pre-petition Senior Lenders were Fleet, B of A, and Heller. The Pre-petition ML Senior Lender was Metlife.

ISSUE

WHETHER THE FACTS AND CIRCUMSTANCES IN THIS PARTICULAR CASE PRESENT SUCH A LACK OF DISINTERESTEDNESS OR SUCH AN APPARENT CONFLICT THAT THE COURT SHOULD DENY APPROVAL OF THE APPLICATIONS OF SKADDEN UNDER THE APPLICABLE PROVISIONS OF THE CODE.

POINTS AND AUTHORITIES

Section 327(a) of the Code provides:

> (a) Except as otherwise provided in this section, the trustee[1]. . . may employ one or more attorneys . . . and other professional persons, *that do not hold or represent an interest adverse to the estate, and that are disinterested persons,* to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. §327(a) *(emphasis added)*. Thus, Section 327(a) of the Code provides that an attorney may represent a Chapter 11 debtor as long as the attorney (1) is a "disinterested person" and (2) holds no interest adverse to the estate.

I. DISINTERESTEDNESS

[1]Section 327 governs a trustee or debtor-in-possession's employment of attorneys. *See* 3 King et al., Collier on Bankruptcy ¶327.01 at 327-6 (15th ed.rev.1997). "While Section 327 explicitly governs employment by a trustee, it is applicable to the employment of professional persons by a debtor-in-possession because Section 1107(a) of the Code provides a debtor-in-possession. . . with all of the rights and powers of a trustee serving in a case under chapter 11..." Id.. at ¶327.02 at 327.9.

Section 101(14) defines a "disinterested person" as one who

> does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor..., or for any other reason.

11 U.S.C. §101(14)(E). Because both Section 327(a) and the definition of a "disinterested person" require that the professional not have an interest materially adverse to the estate, the Court's inquiry should first focus on whether the disinterested test is met.

A. REPRESENTATION OF SECURED CREDITORS:

In looking at the facts of this case, there is no question that Skadden should be disqualified from representing Furr's interests in the bankruptcy proceeding. Skadden currently represents the four primary "lenders" involved in the financing order of March 14, 2001. The four "lenders" were also participants in the pre-petition loans to the debtor. One of the secured lenders, Heller Financial, has a disputed claim of $17,773,000.00.

An attorney who represents a debtor-in-possession while also representing a party in interest in unrelated matters is disqualified only if such representation of the party in interest puts the attorney in a position where he or she has a conflict of interest ie: when such client has an interest adverse to the estate, then such attorney is no longer considered disinterested. In re Envirodyne Industries, Inc. 150 B.R. 1008 (Bankr. N.D. Ill.1993). There are several cases which have dealt with the situation of the law firm representing both the debtor and the secured lender. In re Amdura Corp.,

121 B.R. 862 (Bankr. D. Colo. 1990); In re American Printers & Lithographers, Inc., 148 B.R. 862 (Bankr. MD., Ill 1992); In re Dynamark LTD., 137 B.R. 380 (Bankr. S.D. Cal 1992). In two of the three cases the Courts found that the representations of the party in interest put the attorney in a position where he had a conflict of interest.

In Amdura, the debtor-in-possession entered into an agreement pre-petition with Continental Bank providing for a credit arrangement of $265,000,000. The debtors inability to pay the loan led to the filing of the bankruptcy petition. Affidavits from the attorneys disclosed that the law firms had represented Continental in the past and on an ongoing basis in matters not related to the debtor. The Court was concerned that the bank was a significant client of the debtor's attorney. The Court was also concerned that the Continental loan permeated the debtors financial situation and the negotiation of that loan would be one of the most significant factors in the debtors reorganization Id. at 866-867.

The court's reservations regarding counsel's representation of the debtor were very clear:

> "How can counsel fairly and fully advise the Debtors in negotiating with Continental and in drafting a plan if they are unable, or at least unwilling, to espouse a position detrimental to the interests of the bank?
> To ask the question would appear to supply rather a clear answer. "
> Id. at 867.

The Court also recognized that activities and multiple representation that may be acceptable in commercial settings, may not be acceptable in bankruptcy settings. Id. at 866. Like the Court in Amdura, this Court must not consider the relative size of the

creditor's claim in a vacuum, but in conjunction with the creditor's status as a major client of the firm. Amdura, 121 B.R. at 869. The Court must remain cognizant of the fact that the four "Lenders" are substantial creditors of the debtor. The negotiation of a plan of reorganization likely will necessitate negotiation with the "lenders", who are all substantial clients of Skadden. See In re Envirodyne Industries, Inc. 150 B.R. 1008,1019.

In American Printers, the law firm seeking to be employed had a longstanding, continuing relationship with LaSalle National Bank. The firms representation of the bank resulted in 10% of the total gross annual revenues for the firm. The firm had never represented the bank in any way concerning the bank's relation with the debtor or the bankruptcy. Once the petition was filed, the schedules of liabilities showed $7.7 million in secured debt, $3.7 of which was owed to LaSalle. The debtor obtained its post-petition financing from the bank. In the preliminary financing orders leading up to the final order, the debtor released any and all claims against the bank concerning the extent or priority of its claims.

The court in American Printers had no problem in finding that an actual conflict existed and that disqualification was required. Id. at 866. The Court found that the firm was going to have to vigorously negotiate with the bank in order to fulfill its duties to the Debtor, even if litigation was not warranted. The firm might not be able to do this without jeopardizing its relationship with a large and very important client. Id. at 866.

In re Dynamark, the debtor again applied for the appointment of a law firm that commonly represented the interests of the largest secured creditor in the case, on unrelated matters. The Court found no actual conflict because the firm had diligently represented the debtor in cash collateral matters. The Court also believed that if an actual conflict arose in the future, the firm would alert the Court. Id. at 381.

There is no question in this case that the "Lenders" loans permeate the Debtor's pre-petition and post-petition financial condition. At some point in the case, the satisfaction of these loans will be one of the most significant factors to be dealt with in the Furrs Supermarkets' reorganization. Skadden will have to vigorously negotiate with these lenders in order to fulfill its duties to the Debtor, even if litigation is not warranted.[2] Skadden may not be able to do this without jeopardizing their relationship with their large and very important lender clients. See American Printers at 866. Heller, Metlife, Fleet, and Bank of America are all clients of Skadden, although it is clear that Skadden did not represent any of the secured lenders in any way in connection with the post-petition loans. According to the Supplemental Declaration of Richard Levin, taken together, the lenders are more than casual, non-material clients of the firm, representing 2.7% of the firm's overall business.

In Dynamark, the Court found that because the law firm had vigorously represented the debtor on cash collateral matters that there was no problem in allowing

[2]Litigation may be inevitable in the case of Heller Financial and Finova. Heller's secured debt has been listed as disputed. Finova's claim, although unsecured, is also listed as disputed.

counsel to continue in its representation of the debtor. See Dynamark at 381. In this case, at first glance, it appeared as though Skadden zealously and vigorously represented the interests of the estate during the negotiation of the first day financing order. The conflict was created when they consented to the validity of the liens of all four "lenders", particularly the liens of Heller, whose claims had previously been listed as disputed. Skadden's diligent negotiation on the first day orders does not excuse the fact that they gave away the debtor's right to investigate and sue Skadden's creditor clients.

B. REPRESENTATION OF DEBTORS SHAREHOLDERS

Upon consideration of the requirements of §327 (a) and in light of the facts presented, Skadden has never been qualified to represent the debtor in this case. First, Skadden is currently representing Windward Capital Partners, LLC ("Windward") or their affiliates, on matters unrelated to the Debtor. Windward is a substantial client of Skadden having represented .07% of the fees billed by Skadden in 2000. Second, Windward is the debtor's majority stockholder. According to SOFA 21(b) Windward and its affiliates own 59.37% of the debtors stock. Finally, some evidence exists that the debtor-in-possession may have a preference action against Windward. According to SOFA 3(b) the debtor made payments to Windward within a year prior to filing of the petition in the amount of $257,545.50.

Concurrent representation of the debtor-in-possession and its sole shareholder, is not per se a conflict of interest. In re Global Marine, Inc., 108 B.R. 998 (Bankr. S.D.

Tex. 1987). The professional representing both the debtor in possession and its shareholder is disqualified only when the representation of the shareholder puts the professional in a position where the person "holds or represents an interest adverse to the estate "or is no longer disinterested as defined in 11 U.S.C. §101(14). In re EWC, Inc., 138 B.R. 276 (Bankr.W.D.Okla 1992).

In this case, it is questionable whether Skadden, can act for the benefit of the estate and at the same time not be cognizant of its interest in Windward, the estates largest equity holder and a substantial client of the firm. As attorney for the debtor-in-possession, Skadden is required to perform a preference screen. As part of this screening process Skadden must review and possibly pursue unauthorized transfer claims under §547 and §548 against Windward for recovery of property of the estate. The fact that Windward received transfers during the preference period automatically puts them in an adverse relationship with the debtor. The fact that Skadden, on behalf of the estate must examine pre-petition transfers to an existing client puts the firm in a situation of having to divide their allegiance between two clients. This is what Section 327 attempts to correct in re Roger J. Au & Sau, Inc., 101 B.R. 502 (Bankr. MD. Ohio 1989).

While the above facts are major obstacles to the firm's employment, there are other facts that are equally troubling and prevent Skadden from being disinterested. These include:

1. Skadden has and is currently representing Price Waterhouse Coopers

("PWC"). Skadden actually proposed PWC as crises manager, after the "Lenders" put forth the firm's name as part of the first day financing order. However, in the financing order there was language that the debtor could select another crises manager so long as it was acceptable to the "Lenders". No other name but PWC was ever put in an employment application by the debtor. Debtors counsel has some duty to make sure the professionals brought in on behalf of the estate are appropriate for the estate. Skadden made no objection to the employment application of PWC, even though there were many concerns regarding their employment, including the following:

a. The indemnification clause contained at paragraph 6.1 of the Standard Terms and Conditions attached to the engagement letter of February 2, 2001.

b. The fact that PWC will charge the estate interest on unpaid fees without first seeking Court approval of fees. The Standard Terms also require that debtor can only object to any questionable billings within thirty days of the invoice date.

c. The fact that PWC does not give any assurances as to the accuracy of financial data and projections prepared for the debtor.

d. The fact that any liability on the part of PWC will be limited to the amount of fees actually paid by the Debtor.

2. Skadden has or is representing Deloitte & Touche, LLP, (hereinafter "Deloitte"). Deloitte has filed an application to be employed as the unsecured creditors committee's accountant. Skadden made no objection to the application even though there were a number of problems which have since been resolved.

3. Skadden has in the past or is currently representing the law firm of Watkins and Latham. Watkins and Latham is counsel for Heller Financial. As previously noted, Skadden also represents Heller Financial. At the time of the hearings on the first day orders Skadden was surrounded by a myriad of past and present clients, including Heller Financial, Watkins and Latham, and the debtor.

4. Skadden represents Metlife. Helene Caplan, of counsel of Skadden is a director of Metlife. Metlife provided a significant percentage of Skaddens total fees billed in 2000. (Approximately, 2.5%). Metlife also represents 35% of the total claims in this case ($70 million). There are two associates at Skadden whose fathers are directors at Metlife. As part of the financing order, Skadden, on behalf of the debtor consented to the validly of Metlife's pre-petition claims.

5. Skadden represents Bank of America. Bank of America is one of the four first day lenders. Bank of America also hold 8.8% of the claims in this case (17.0 million). Bank of America also provides Skadden with a significant percentage of its fees billed in 2000. Several of the attorneys of Skadden are shareholders of Bank of America. As part of the first day financing order, Skadden, as representative of the Debtor consented to the validity of Bank of America's pre-petition claims.

6. Skadden received $250,000 during the 90 day preference period.

Each of these facts when viewed individually, may not in themselves be reasons to disqualify a firm. However, these facts, when taken together, should lead the Court to the conclusion that Skadden is an interested party and thus disqualified

firm representing the debtors. See In re Solv-Ex Corporation. No. 11-97-14367 MA, United States Bankruptcy Court, District of New Mexico, dated February 10, 1998. In Solv-Ex, Judge McFeeley used the same basic approach in finding it necessary to disqualify debtor's counsel.

II. Actual Conflict of Interest

Even though the U.S. Trustees Office believes that Skadden is disqualified from representing the Debtor because Skadden is not disinterested, there is another reason for the Court to deny the employment application. The Court may also consider whether, under all the facts and circumstances of this particular case, Skadden, is disqualified because of an actual conflict of interest.

The standard in the Tenth Circuit is found in In re Interwest Business Equipment, Inc., 23 F. 3d 311 (10th Cir. 1994). The Court must find an actual conflict of interest before disqualifying a firm from representing a debtor-in-possession. The term "actual conflict of interest" is not defined in the Code. Courts have found that the term "actual conflict of interest" has been given meaning largely through a case-by-case analysis of each particular fact situation appearing before the Bankruptcy Court. *See* In re BH & P, Inc., 949 F.2d 1300 at 1315 (3rd Cir. 1991).

A review of all the facts and circumstances in this particular case reveals a number of conflicts, which viewed alone, may not rise to the level of an actual conflict, but when viewed together do create an actual conflict. *See* Solv-Ex, *supra.* The facts giving rise to the actual conflict are as follows:

1. Skadden received $250,000 during the ninety day preference period preceding the filing of the bankruptcy petition.

2. Skadden represents several creditors in the case including the four "Lenders" involved in the first day financing order. These "lenders" include Heller Financial, Bank of America, Fleet, and Metlife. Heller's claim of $17,773,000 is listed as disputed in the schedules, yet Skadden, on behalf of the debtor conceded the validity of Heller's pre-petition secured debts, in the order dated March 14, 2001.

3. Skadden represents Latham and Watkins. Latham and Watkins represented Heller during the negotiation of the first day financing order in which the validity of Heller's pre-petition claim was conceded to by Skadden.

4. Skadden represents Finova Capital Corporation. Finova's claim of 4.6 million is also listed as disputed. Skadden must negotiate, investigate, and perhaps even litigate this claim on behalf of the debtor against their own client.

5. Skadden represents Windward Capital, the debtor's majority stockholder. Windward Capital, according to SOFA 21b.owns 59.37% of the Debtor's stock. Windward has also received $257,540.00 during the one-year preference period preceding the filing of the bankruptcy petition. Skadden must investigate, negotiate, and even litigate this claim on behalf of the debtor against their own client.

6. Skadden represents Metlife. Metlife's pre-petition claim of $70,276,246 is

35% of the total claims in this case. Metlife pays 2.5% of the total billed fees for Skadden in 2000. The debtor, through Skadden conceded the validity of Metlife's pre-petition claims in the first day financing order.

7. Skadden represents Bank of America. Bank of America has a $17,738,337, claim against the debtor. Several attorneys at Skadden are shareholders of Bank of America. Skadden conceded the validity of Bank of America's pre-petition liens in the first day financing order.

A. THE IMPLICATION OF §327(c).

An argument could be made that a disqualifying conflict arising "solely" from joint representation of the debtors in possession and their creditors is improper because such a situation is expressly permitted under subsection (c) of §327. However, this conclusion reads §327 (c) too broadly. Interwest at 316. The requirements of Subsection (a) are threshold requirements to be met even if Subsection (c) is implicated. Subsection (c) of §327 does not preempt the more basic requirements of Subsection (a). Id. at 316.

The Tenth Circuit explained the reasons why counsel for the debtor in possession must meet the high standards of individed loyalty established in §327(a), when it referred to specific language in In re McKinney Ranch Associates 62 B.R. 249 (Bankr. C.A. Cal 1986):

> It is the duty of counsel for the debtor in possession to survey the landscape in search of property of the estate, defenses to claims, preferential transfers, fraudulent conveyances and other causes of action that may yield recovery to the estate. The jaundiced eye and scowling mien that counsel for the debtor is

> required to cast upon everyone in sight will likely not fall upon the party with whom he has a potential conflict…

Id. at 254.

> The policy behind disqualification for representing potentially conflicting interests provides the key to its extent. The jaundiced eye and scowling mein of counsel for the debtor should fall upon all who have done business with the debtor recently enough to be potential targets for the recovery of assets of the estate. The representation of any such party disqualifies counsel from representing a debtor. Any more remote potential conflict should not result in disqualification.

Id. at 255 *(footnote omitted)*.

Considering the existence of Skadden's relationship with each of the primary secured lenders, their relationship with Latham and Watkins, and the fact that they have conceded the validity of all their pre-petition liens, it is indeed worrisome, to say the least that Skadden will negotiate as forcefully against these same clients when it comes to negotiating the debtors plan. The jaundiced eye and scowling mein that Skadden must cast on all who have recently done business with the debtor is simply not there.

B. SKADDEN HAS A FIDUCIARY DUTY.

Skadden obviously contends that there is no actual conflict. This contention like

the contention made by Neilson and Senor in the Interwest case shows a incomplete view of the fiduciary duty of the debtor in possession and of counsel's obligation to independently serve the debtor in possession. According to Interwest, the debtor must 1) Examine payments the debtor has made prior to filing; 2) Examine the debtor's

treatment of insiders within one year of the filing ; 3) Examine executory contracts, and; 4) Examine claims of creditors and, if a purpose would be served object to the allowance of claims. To the extent that Skadden has already conceded the validity of the "Lenders" pre-petition claims, they have not fulfilled their obligation to the estate under the binding precedent of Interwest.

It might be argued that Skadden had no choice but to concede the validity of the pre-petition liens or risk losing the post-petition financing. Initially, this might be a reasonable explanation, until it is learned that they also had a perceptible economic incentive not to contest the matter too strenuously. Each of the secured lenders are significant clients of Skadden. Whether this meaningful incentive, or the reasonable perception of one, to act contrary to the best interests of the estate, was a factor in their decision to make these concessions, the creditors may never know. The fact remains that the estate did not need to be placed in this situation in the first place.

Skadden may also defend itself by pointing to what it may characterize as a relative insignificant contribution from each creditor client to the firms overall yearly revenues. The fact of the matter is that the size of the billing is irrelevant In re Leslie Fay Companies, Inc., 175 B.R. 525, (Bankr. S.D.N.Y. 1994). Simply because a client may not be a major client is no reason to think that the firm would ignore the relationship Id. at 535.

The fiduciary duty Skadden has toward the debtor remains abundantly clear. Skadden must cast its jaundiced eye on all its creditor clients, its shareholder client,

Fleming, the former shareholder, and even themselves. Given their recent history and their inability to cast a scowling mein on the validity of the liens of their secured creditor clients, a new insurmountable taint is formed. This taint will follow them throughout the case. The taint will extend to the results of any further investigation of their clients. No matter how throughly or fairly Skadden conducts its next investigation, the question will always linger whether it will hold back, or fail to bite the hand that feeds it quite as hard as circumstances warranted. In re Granite Partners, LP. 219 B.R. 22 (Bankr. S.D. N.Y. 1998).

C. OTHER CASES INVOLVING ACTUAL CONFLICT

The leading case in the District of New Mexico involving conflicts of interest is In

re Solv-Ex Corporation, No. 11-97-14361 MA, United States Bankruptcy Court for the District of New Mexico, filed February 10, 1998. In Solv-Ex, Judge McFeeley found that the attorney for the debtor-in possession had several connections with various entities, some of which were the representation of an affiliate of a major creditor, the representation of individual officers of the debtor, and the representation of two debtors with potential inter-company claims against each other. The Court found that each connection alone could not justify disqualification of counsel, but that taken together the factors made counsel interested and therefore ineligible. The Court used the same factors, taken as a whole, to establish that an actual conflict of interest existed as well. This case is substantially similar to Solv-Ex when viewing all the connections of debtors

counsel. When all the factors are taken together, Skadden is neither disinterested nor can it avoid having a conflict of interest.

Another case in the District of New Mexico which mandated an automatic disqualification of counsel with an actual conflict of interest is In re Clifford Sinclair, No. 7-94-12905 MS, United States Bankruptcy Court for the District of New Mexico, filed April 29, 1998. In Sinclair, Judge McFeeley found that counsel could not represent the Chapter 7 trustee while concurrently representing a creditor of the estate.

A more recent case with similar facts is In re Big V. Holding Co., et al. No. 00-4372 (RIL), United States Bankruptcy Court for the District of Delaware, decided February 16, 2001. In Big V., Skadden was also the target of a §327 inquiry. Judge Lyons found that Skadden's relationship with a secured creditor and its representation of an entity whose affiliates owned substantial equity in the debtor was enough to create a disqualifying conflict. The Court stated that it could see no way that Skadden could advise its debtor client during the reorganization process without taking into account the impact it would have on its creditor client. The Court found that Sadden would be pulled in two different directions by these relationships and it caused an actual conflict. Big U at 148.

D. WAIVERS OF CONFLICTS ARE INAPPROPRIATE

In the engagement letter dated February 1, 2001, at page 5 Skadden has been successful in obtaining the agreement from the debtor's vice president and CEO to waive any conflicts arising from Skadden's concurrent representation of present or

future clients who have interest adverse to the debtor. The fact that Skadden had the debtor waive any conflicts is irrelevant to whether they should be disqualified. In re American Printers & Lithographers, Inc., 148 B.R. 862 (Bankr. N.D. Ill. 1993). A firm that is not disinterested may not represent a debtor even if that debtor has consented to such representation and waived the conflict. Id. at 867. Section 327 of the Code does not permit excusing the limitation of those provisions by waiver or by the trustee's consent to the representation of dual interests. In re Amdura Corporation, 121 B.R. 862 (Bankr. D. Colo. 1990).

Unlike the commercial setting outside of bankruptcy, the debtor-in-possession has a fiduciary duty to a much larger constituency. In bankruptcy, the Chapter 11 debtor-in-possession must protect the entire estate, including the interests of its creditors. To have an effective waiver, the debtor-in-possession would have to have the consent of the entire creditor body. As Judge Lyons stated in Big V, there are too many interests that are represented by the minimal fiduciary, the debtor-in-possession as a client, to get an effective waiver. Big V, transcript of ruling, p. 152.

III. The Hourly Rates Requested by Skadden Arps Are Unreasonable

As a starting point, the Tenth Circuit has stated that, absent "unusual circumstances," "[T]he fee rates of the local area should be applied even when the lawyers seeking fees are from another area." *Ramos v. Lamm* 713 F.2d 546, 555 (10th

Cir.1983)(civil rights case often cited as authority in bankruptcy fee matters). In a case involving a request by secured creditors for reimbursement of attorneys fees under 11 U.S.C.§506 (b), a district court stated, "Unless the work done by counsel is atypically complex, efficient, or precocious for the relevant local market for attorneys, or the pool of qualified attorneys has been exhausted by the size of the bankruptcy, we believe local rates may be employed in calculating an appropriate fee." *In re American Freight System, Inc*. 1997 WL 309123 (D.Kan.1997).

However, having stated the above, courts have recognized that large Chapter 11 cases often merit hourly rates which exceed local rates. *Zolfo, Cooper & Co. v Sunbeam-Oster Co.*, Inc.50 F.3d 253 (3rd Cir. 1995). This does not mean though, that rates in New York City should automatically apply. In *Zolfo*, the case was national in scope. Despite this, the Third Circuit affirmed the bankruptcy court finding that the case entailed a blend of complicated and simple matters and did not merit national rates. Further, the bankruptcy court found that the fee application at issue included excessive billing at the high end of the range of hourly rates. Accordingly, the Third Circuit affirmed a fee reduction of 12 percent below New York rates, a level still above local rates. See also *In re Rocky Mountain Helicopters*, 186 B.R. 270 (Bankr.D.Utah 1995); *In re Wilson Foods Corp.* 36 B.R. 317 (Bankr.W.D.Okl.1984) (national rates allowed where national case with issues of large magnitude constituting unusual circumstances).

In this matter, while there is no question that the Debtor is a large regional corporation, it is clear that this proceeding is not national in scope. Seventy-one grocery stores in New Mexico and West Texas operating on razor thin profit margins, while creating "unusual circumstances"to some degree, do not implicate all of the issues inherent in publicly traded corporations which conduct business in numerous states across the country. Further, several of the U.S. Trustee exhibits establish that the rates requested by Skadden Arps (up to $670 per hour) are excessive in the context of this case. In *In re Edwards Theaters Circuit, Inc*. Case No.SA 00-16475-LR, the summary of schedules shows that the matter involves the administrative consolidation of seven entities. Both the liabilities and assets exceed the amounts at issue in this case. At the same time, the employment application filed by Stutman, Treister & Glatt in that case in September 2000, requests hourly compensation for partners only up to $495. See U.S. Trustee Exhibit No. 1. Further, Skadden Arps own employment application in *In re Wilshire Centre Marketplace* Case No.LA 00-32796-TD shows that very recently, the Skadden Arps hourly rates have escalated substantially. See U.S. Trustee Exhibit No. 9. In that matter it is disclosed that the hourly rate on August 30, 2000, for Mr. Levin was $480. On September 1, 2000, that rate was increased to $550. As of February 8, 2001, Mr. Levin is now requesting $590 per hour. Similar increases in rates were taken into consideration in the Third Circuit's decision in Zolfo. *Zolfo, Cooper & Co. v. Sunbeam-Oster Co., Inc.* 50 F.3d at 260 note 6.

Based on the above, and other exhibits with the U.S. Trustee intends to introduce at the final hearing on this matter, the hourly rates requested by Skadden Arps are unreasonable and should be reduced. While the circumstances of this case warrant higher than local rates, they do not warrant the excessive levels requested.

Conclusion

The law firm of Skadden should not be approved because their application does not meet the threshold requirements of §327(a). The evidence in the application, the affidavits, and the schedules and statements show that Skadden maintains too many interests materially adverse to the estate and its creditors, and therefore they do not meet the disinterestedness test. The firms past, present, and continuing representation of secured creditors, unsecured creditors, equity security holders, and professionals, when taken together creates too great of a conflict that even they can not overcome.

Respectfully submitted,

BRENDA MOODY WHINERY
United States Trustee

filed electronically 4/16/01
LEONARD K. MARTINEZ-METZGAR
Trial Attorney
P. O. Box 608
Albuquerque, NM 87103
(505) 248-6548

I HEREBY CERTIFY that a true copy of the foregoing has been faxed to the following counsel on this _16th___ day of April, 2001.

Richard Levin, Esq.
Skadden, Arp, Slate, Meagher & Flom, LLP
300 South Grant Avenue, Suite 3400
Los Angeles, CA 90071-3144
(213) 687-5000
fax: (213) 687-5600

Robert H. Jacobvitz, Esq.
Jacobvitz, Thuma & Walker, P.C.
500 Marquette, N.W., Suite #650
Albuquerque, NM 87102
(505) 766-9272
fax: (505) 766-9287

William F. Davis, Esq.
William F. Davis & Assoc. P.C.
P. O. Box 6
Albuquerque, NM 87103
(505) 243-6129
fax: (505) 247-3185

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LEONARD K. MARTINEZ-METZGAR
Trial Attorney