UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable James Starzynski

James Burke, Law Clerk
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters
(505) 242-2809

Sara Edmonds X

Date:
SEPTEMBER 17 and 18, 2001

Re:
FURRS
No. 11-01-10779 SA

Continuation of Emergency Hearing on Motion to Use Cash Collateral filed Sept. 6, 2001 by Debtor

Attorney for Debtor: Robert Jacobvitz and David Thuma
Attorney for UCC: William Davis and Cohen
Attorney for Met Life: Thomas Tapia and Ron Silverman
Attorney for NM Tax and Rev: Don Harris
Attorney for Heller: Paul Fish
Attorney for Whitmire Distrib.: James Jacobsen
Attorney for NM Wine and Beverage: Michael Cadigan
Attorney for NM Worker's Compensation: Robert Auerbach
Attorney for UST: Ron Andazola

Summary of Proceedings:

Exhibits _____

Testimony _____

SEE ORAL RULING ATTACHED

FINAL HEARING SEPT. 25, 2001 @ 3:00

J: Small matter on Worker’s Compensation. Had a hrg in which some addit. coll. sec. was given to Worker’s Comp. so they could buy insurance. Already had cash secur. about $2.5mil. Depos. addit. $300k. Cover prem. for worker’s comp. clms. Little bit of a shortfall on post-pet. Under the order and the arrangement was to be acctg by insur. co. We depos. our funds. If went 100% ag. us. Expected to get a little bit of money back. Estim. the surplus will be $75k and $80k. Third party that has records. Won’t release records unless paid which is estim. at $2 and $3k. Dtr does not oppose that. Is lender’s cash coll. Worker’s comp. would have right to do that. Ask the court to enter an order auth. worker’s comp. to use up to $3k of coll. sec. surplus to make pymts so they can get records released.

Ct: Obj.

(None)

Ct: Fine. Prepare order.

J: Who should we send order to.

Fish: We would

Tapia: Yes.

Auerbach. We would.

J: W/respect to cash coll. and extens. of DIP financing. We did reach an agmt. Commun. Friday night and over the weekend. Didn’t come to an agmt until this morning. Little unnerving. The dtr explained to court last week the practical conseq. of not getting an order entered today is the dtr would conv. to ch. 7. To remain in ch. 11 need to get a DIP order entered today. Incentive to work w/lenders to collect remain. assets of estate far more collectively. Enables the dtr to disch. stat. duties and wind up pension plan and 401k plan. Iss. W2's and 1099's. Dtrs goal to get admin. clms paid. Pay max. extent possible. Been the dtrs judg. Nothing in this estate for unsec. UCC has filed an adv. proc. Dtr’s judg. that any meaningful recovery is very remote. Not reas. for dtr to sacrifice the interest of winding down the estate in an orderly fashion. Deciding what to do w/that lawsuit. Appears the lenders have a replacement lien in amt of $40mil. DIP order and post-pet. loan agmt the lenders have anti-marshal rights. Dtr bel. it is enforceable. From the dtrs perspective have two choices. Dtr strongly bel. the agmt they came to this morning is overwhelmingly in best int. of the estate. I can give the court a copy of the proposed form of order. Attached to the prop. order is a budget. Goes thru Oct. 13. The order would expire at end of 4th week. Which is Sept. 29. Bec. of the time it has taken to reach an agmt we are halfway into the period. The adeq. prot. the dtr has granted is the same adeq. prot. under the DIP financing order.

Ct: The sentence on post-closing budget. Say it again. Missed part of it.

J: Six week budget. The order is asking court to approve use of cash coll. thru Sept. 29. Last two weeks are for illus. purposes. One mo. order. First two weeks already expired. Under the budget it allows all of the cks written prior to closing to be honored. Is test. prev. about those cks. Those cks are summarized in the budget. $350kk for accts payable ... $450k for medical. $250mil for payroll. All admin. exp. would be paid. Total budget thru Sept. 29 is $2,950,000. Dtr estimates of that amt we have Mr. M. here and is prepared to test. Would be money spent the dtr wouldn’t need to spend. Bal. is monies the dtr would spend even if not collecting in form of honoring the

cks. Perform stat. duties. Overwhelmingly in interest to the estate.

Ct: Distinction between the two?

J: Budget for the mo. as set forth in oper. budget for 4 weeks is $2,953,000. Mr. M. is prepared to test. of that amt about $250k is money they would pay personnel to collect assets. Includes honoring the cks - payroll, medical benef., accts payable. Budget was negot. prior to negot. cks. As well as perform. functions. Item in budget of $290k which is third party services. Breakdown of third party serv. Includes money to payday to process W2's. Prepare tax returns and w/respect to benef. plans, liquor lic., etc. Ready to expend funds for benef. of bankr. estate. Under the order the dtr is granting a replacement liens on avoid. actions. Has a lien on all the assets.

Ct: What does the lien on the avoid. actions secure. Transf. for sec. purposes?

J: Would be a lien for monies under oper. budget except for any clms that had prior liens. If we disburse monies in Texas, then the avoid. action would not sec. that portion of cash coll. W/the except. of paying prior encumbrances the avoid. action would sec. use of cash coll. under the order.

Ct: My understanding that overall the trade off is the dtr would be using some of the dtrs resources to recover accts receivable in signif. larger amts than the dtrs would be able to do so. Lenders had to hire ex Furrs people to put all that stuff together. Ques. I have is is there a poss. that these avoid. actions won’t end of being turned over to lenders. Make sense?

J: Yes. Asking if lenders might get paid from other coll. No need for lenders to exer. those rights. Pay down to zero the debt sec. by avoid. actions. The answer is prob. no. In cash coll. order have right to marshal assets to pay off debts. If marshal assets to pay off various debts are not enough assets.

Ct: Assuming the lenders would alloc. the funds coming in to pay off oblig. to max. return.

J: Yes. Ques. for estate is this a fair tradeoff. W/o that feature the lenders will not agree to order. Been aggressively negot. Essential component to order. Reas. to do for a # of reasons. All of about $250k is monies the dtr would expend. Dtr is getting subst. use of cash coll.

Ct: Estimate for 4 week period that out of $3mil that is being advanced to be used by dtr 1/12 of that $250k would be used in collect. accts receiv. Prev. described as having cash val.

J: Yes. Doesn’t include cost of maintaining warehouse. Hybrid category. As far as dtr can tell no valid sec. interest. View the lenders have a replacement lien under DIP Financing that does encumber that. What is special about avoid. actions. The committees view is the bel. the replacement lien is a lien of zero $. If the comm. were right, is independ. If replacement lien encumbers then those monies preserve an asset.

Ct: No decis. to abandon the warehouse? Alloc. the receipts any way they wish. Any reas. to hold onto it?

J: I bel. so. Agmt is the dtr will util. it’s resources to sell assets. Dtr gets to use cc. The lenders are allow. us to use cc to fund adminis. uses. Dtrs view it is a legit. function of dtr to seek assets of whatever cred, includ. sec. creds under a financing arrangement.

Ct: Not clear whet. it effects the warehouse. Not partic. important for what we are deciding today.

J: Is no waiver in this order of any ch. 7 trustee’s of potential surcharge clm. Viol. bankr. policy to do that. If the case ultimately did conv., if work was done for sole benef. of lenders would not be waived in ch. 7 case. Court has a fair amt of eq. principles. If ultimately conv., rights aren’t waived. If the dtr get fair return, could consider that to make sure justice is ultimately done. Dtr strenuously ask ct to approve this. Certain obj. to this prop. order by creds who obj. bec. it doesn’t prov. money to pay them. Unions have obj. on that ground and NM Tax and Rev. Unpaid pymts to Dr.’s of medical needs. Post-pet. pers. injury clms. There are post-pet. sever. clms. Tax and Rev. tax clm. Ques. comes why didn’t we put enough in budget to pay all. Between dtr and lenders. Process of negot. This is a short term budget. As we go forward those negot. will go forward. Ques. becomes should you not approve the order - drew line that all the cks will get honored. Cks to Dr.’s and payroll cks. Doesn’t prov. for pymt of admin. expens. where they hadn’t cut the cks. Dtrs view the only way the dtr can pay those exp. is to show it is being paid out of assets. Not reas. for the court to say I’m not going to approve cc order for next weeks if all exp. won’t get paid. Lenders have made an except. for payroll. Will agree all payroll will be funded. Lenders will agree they are close enough. W/respect to non-payroll exp. the budget doesn’t prov. for those except for those outstanding. Has $290k for third party serv. providers. Dtrs view is this is a fair agmt to the estate and should be approved. Alter. is conv. to ch. 7 is not a better alter.

Ct: Tell me what portion would you estimate cover things like payroll and benef.? Figure at the top? $70k for first week and $50k for second week?

J: Those are for the staff remaining. Do the work to realize on estate assets and interface w/third parties. Get 1099's iss. and W2's iss. Payroll for emp. that existed as of closing date is in the bottom part of budget. That shows for the Union emp. (estim. what would clear) $70k plus $1,194,000. Total of $1,264,000.

Ct: Cks iss. prior. to closing.

J: This also includes cks cut after closing but for work performed prior to closing.

Ct: After closing on Aug. 31 and cc order ran out the cks were iss. to all those folks that had done the work. Will auth. cc and make sure the cks didn’t bounce. The amt as of week ending Sept. 15 was expected would be $1,264,000.

J: Second item is the accts payable cks. $350k. These are cks iss. in ordinary course of bus. for goods delivered and services prov. while still oper. Contract w/co. that prov. janitorial serv.

Ct: Cks cut after the closing on Aug. 31.

Mortensen: Outstanding cks.

Ct: Janitorial cks and to suppliers. Not cash prior to closing. Lenders had no oblig. to honor those. The agmt was they will be honored.

J: Yes. Group medical. Payments for medical care other than union emp. Emp.

Ct: Same thing. If those bounce, the Dr’s would go back after those individ. for pymt.

J: Have right to do so. Small amt of $20k for public liab. Injured on premises for small clms. Cks cut before closing.

Ct: Total of those is over $2mil for first two weeks of Sept. Not pres. for pymt yet.

J: Nothing returned. An addit. item was the third party serv. In third week of $290k. Sched. in next pg that is a breakdown. These are the sorts of things that the dtrs cont. acctg needs to retrieve and manip. data to interface w/third parties. For benef. of emp. or former emp. It includes paying a third party to process. Most of work would be done by in house people. Includes money set aside to wind down 401k plan. Includes a small amt to admin. plan. Amt to do req. audits and tax acctg for benef. plans. Some money for data stores. Dtr can get into position if it did conv. the data could be stored and used by ch. 7 trustee. Includes money for corp. tax returns. Disch. dtrs stat. oblig. Includes atty fees to L. Aikin for sale of liquor lic.

Ct: Point about admin. clms. State taxes, the unpaid trade payables. For which no ck had been cut prior to closing?

J: Yes.

Ct: Explan. for not dealing w/those right now?

J: Two week budget. Will have to come up w/agmt for remainder. Really a 4 week budget. Oper. under budget even though not approved so wouldn’t have to shut down. Starting out w/4 week budget. Only producing a small amt to lenders. Product of negot. as to what admin. clms were paid. Ultimately, the mech. of the bankr. code to pay admin. exp. where there are no assets to pay those are surcharge. Doesn’t have that mech. avail. in ch. 11. Negot. to vol. surcharge themselves for certain amts.

Ct: When will the work be done like iss. W2's and getting 401k accts rolled over?

M: The major. of workforce is no longer being paid. All the info.necess. to prepare the W2's is avail. Info. is being gathered together to transmit to a third party. Working to progress on winding down 401k plan and get those programs trans. to those third parties so funds will be avail.

Ct: My ques. is how long do you think that process will take. Talking about those folks laid off. How long is it going to take this process to get those laid off emp. W2's.

M: Couple of weeks.

Ct: Same thing w/401k plan?

M: Take longer. Petition banks again for addit. funds.

Ct: Answers my ques. W/these other trade payables and taxes for - see nothing for taxes for state or feds.

J: No taxes due w/respect to post-closing oper. Gross receipt taxes in ordinary course for Aug. sales.

Ct: Fed. taxes would be payroll taxes.

J: Yes.

Ct: Only taxes unpaid are the gross receipt taxes under this current budget.

J: Incurred prior to closing. Are others that aren't part of this budget. Only so much that can be accompl. in this 4 weeks budget.

Ct: This is a cont. of a hrg that went on prev. Some oral test. by Mr. M. I'm treating this stmt by Mr. J. as an opening stmt. If we need to have test., then we'll deal w/that. Make sure I have an understanding about everybody's position.

Fish: Great deal of talk about 506(c). Only usable to surch. a sec. lender. Extent of any benef. to holder of clm. Benef. to emp. and estate. Do not put any money in pocket of lenders. $750k amt reserved for health and welfare fund which we heard a great deal of test. about. Describes money for buyouts. Union dues have already been paid.

Ct: Need to cross $56k out.

J: Yes. Already been paid.

Fish: Lenders and dtrs have a great deal of work to do next two weeks. Was an effort by dtr prior to closing on wind down budget. Now set for Oct. 4. Not sure where lenders will be at that point. Right now we are willing to go w/this order.

Ct: Purpose of this order is to get us thru next weeks so we can get to wind down budget?

F: Thought there was going to be a lot more money. Need to make some hard decisions. Char. it that way. Before closing it was more important to deal w/closing. Now we have to start looking hard at these things. Not a trust fund. There are atty fees and all sorts of applic. being filed. Admin. clms are becoming enormous. Need to work on the next two weeks.

Silverman: I won't reiterate the things Mr. F. and Mr. J. said. Want to make two points. W/all the parties working together over past mo. have come to a cc DIP Financing that is agreeable. We need to move forward. Need to discuss what can be done in coming weeks. At a critical juncture. Dtr has done well to point out what does not benef. them directly. Replacement lien on an avoid. recovery. It is ltd. That replacement lien is to be used in this budget. Not a limit. in the amt. May be very little avoid. recovery. May not be any. May not be prefer. recovery. Lenders are taking extra risks.

Ct: Mr. S. I have this ques. On the other hand doesn't this prov. a consider. to the sec. lenders. I have to tell you as I was thinking about this over the weekend. Hard time seeing why the sec. lenders would not want to do this. Getting a very handsome return on the money allowing to be used by the estate. Were mil. of $ out there which his exper. folks can recovery. Practically speaking would not be there for the lenders. Not get same amt out of it. Guide under Mr. M. direction or his staff folks. Nobody is accusing lenders they are acting out of animous. instincts.

S: Alter. of what the lenders would have to do is hire people that lost their jobs and collect assets. The addit. recoveries are speculative. Most effic. to have parties most familiar w/matter. Recoveries that may come remain to be seen. Recovery from sale is signif. higher. Tremendously overstated and recovery was much less. Working from perspective this makes the most sense for all parties. Not a slam dunk. Extracted prot. and benef. for estate. Those are the two points I wanted to make. Lenders are lending. Doing for

own benef. as well as others. Lenders are taking an addit. risk. Entitled to protection.

Davis: This is an important morning for this case w/o ques. Diffic. going forward if this order is not approved. Approp. to review history for a moment. On first day orders they came in w/a cash coll. order. Important to keep dtr in oper. Was approved and new money extended. Got benef. from that cc order. UCC has been somewhat juxtaposed between dtr and lender to preserve assets. During those mo. the comm. has investig. and deter. there are some causes of action into the estate. Dynamic w /sec. lender is to try and gain and achieve as much recovery of assets as possible. Dtr is not quite as cooper. w/sec. lender as in this case. Trying to remain in bus. Need to pay a certain amt to UCC to get a plan conf. Has other int. other than seeing lenders get paid. Dynamic is differ. Important to recog. this has not been the dtrs primary motiv. Tried to max. the asset in this estate. Brings us to point where comm. and dtr have identif. a lot of assets I went over last week. Are a # of assets signif. in size that may bring many mil of $ into estate. Not encumbered by sec. lenders clms.

Ct: Dtr is saying the assets you say exist out there is minimal to non-existent. UCC is saying there is a huge potential val.?

D: That is the core dispute. Dtr has assumed away the clms in the estate by assuming there is a replacement lien that soaks up assets. Not fully briefed or facts presented. Replacement lien in DIP order that sets of assets in comparison at some other time. Not exactly accurate bec. a comparison of assets of total assets. Not the Fleming sale bec. addit. assets between $20 and $30mil. Replacement lien would encumber and assumes away. Give to lender bec. of no val. To grant the req. relief today the court has to assume away or make a decis. that has not been presented to it. Does it encumber all of these non-sec. assets. My second point is the point the court raised. The lenders would be well benef. by not having this grant of a lien of these avoid recoveries. Activities the dtr is planning to engage in would remain. Various simple recoveries. Deposit recoveries brought back into estate. Relatively low cost. Dtr makes a major iss. about getting W2's gener. Cost is only $50k. Not disputed the liquor license recovery. Dtr has already rec’d a $2mil cash offer. Dtr bel. and comm. bel. that amt will be closer to $3.5mil. These assets are signif.

Ct: I’m hearing two points. W/respect to iss. of replacement lien isn’t enough to justify granting the replacement lien. Second one is something to the effect of the lenders are getting a lot more benef. out of this bridge cc loan than the estate is.

D: Exactly right. That’s A and B. C is this court must consider the alternative if doesn’t approve order. Are assets avail. for a ch. 7 trustee for the benef. of it’s empl. We have prev. talked about a # of possible recoveries. Not sec. to lenders. Those are the Fleming recovery. Val. whatever what was the amt. There are trade prefer. when it has been identif. in open court. Held by TOPCO. Held $2mil amt in escrow acct. UCC bel. the $2mil constitutes a prefer. Also be a fund that would be avail. to fund these other activities to be undertaken by estate. Surplus is prohibited by Fed. law from being encumbered. Can’t be pledged - not prop. of pension. Iss. that would be pres. to court. The El Paso Warehouse lien is between $2mil and $6mil in val. Had Deloitte and Touche appraise leasehold. Dtr and our profess. have estimated that lease is way below market. Owner of warehouse had made inquiries. If don’t grant all these rights.

Ct: Mean Countrywide and Pinnacle.

D: Not owner are sub-lessees. Very small benef. to the estate. Accompl.

everything it is seeking.

Ct: What would happen if the mil of $ would not materialize? Say $500k.

D: if ch. 7 trustee were appointed and liquid. liquor lic. the expenses would be dischargeable.

Ct: Follow that out. Will aband. to sec. lenders. If trustee tries to sell for benef., the only benef. is no gain for estate. No benef. for the unsec.

D: Your point makes my argument. Lenders are asking for a tremendous benef. Ch. 7 trustee steps in and sits w/rights on all assets. More than $10mil in val. Fund leaving the rehiring. Ch. 7 trustee can make a delib. decis. whet. they have val. for estate.

Ct: What about amts listed in budget for ex. the $25k a mo. which is the carrying cost on warehouse. Do we let that go?

D: Won’t be long before the trustee can recover. Not abandoned until court says it is aband. Seek financing from a third party source. If give lease to lenders, no benef. to the estate.

Ct: W/respect to amts in first two weeks - $120k for salaries and benef. saying you agree to advance those funds. Let me refer to post oper. budget. Figure of $1,264,000 paid out after closing. Cks iss. after closing for work done by working folks prior to Aug. 31. Position is the sec. lenders adv. it and out that money?

D: No. On first day we discussed cash coll. would be advanced under the terms. DIP has been paid in full. Properly chargeable. Willing for these to be paid. This isn’t exactly like the situation where the dtr needs new money. Lenders have approx. $50mil of dtrs money subj. to a court order.

Ct: Approp. to repay immed. the post pet. bal. of the lending the lenders did to the estate. What is still left is a figure of $52mil which is in an acct.

D: Not right.

F: In the dtrs lock box acct. Not spending it. Not in lenders possess., but can’t be disbursed.

Ct: Have auth. to put in own back pocket.

D: W/regard to this $1,264,000 is paid under the DIP prov. prev. in existence. Sec. Under those DIP prov. and repaid to lenders. Not at risk.

Ct: Repaid how?

D: Acctg entry.

Ct: Under their sec. agmts that $52mil lenders are asserting they already have sec. int. W/the dtr having iss. these addit. cks then the lenders should take that money out of what they consider to be their money and pay themselves.

D: Based on leasehold interest. That money is under dispute.

Ct: Not $52mil worth? If saying a portion of that $52mil doesn’t really belong to lenders. If lenders were to repay themselves out of that portion?

D: No, if based on pre-closing expenses they would have been in the DIP and paid from the proc. of Fleming loan.

Ct: Part of post-pet. lending.

D: Expenses for oper. of estate when working towards closing. Properly attrib. to that time. Pre-closing expenses. Set aside $1,250,000. Would have been paid out of Fleming proc. Are expenses if they were paid when due would increase the amt owed under the DIP. Highly inapprop. for lenders to seek addit. coll. to sec. the repayment of oblig. incurred in order to get them to the Fleming closing.

Ct: Fleming closing was a good deal for lenders, estate and employees.

D: If we give lender a clm for that amt, not a good deal for UCC.

Ct: What about the $25k for W2 forms? Arthur Andersen auditing? Where does the money come from.

D: Come from lenders coll.

Ct: Didn’t see anything that helps the lenders at all. Basically for benef. of the emp. whom are now creds. Not lenders benef.?

D: Come from proc. When we do cc orders it could be briefed and ready w/in two weeks. Law is clear. Given speed we have addr. other areas could be done in 30 days. Assume it would be first on his plate.

Ct: Have you ever been a trustee. I have not, but would have to shut down your practice to take on this case. Signif. commitment for several mos. at least.

D: In any event this $290k should not drive the whole case. $24k ticket is most immed. iss. Doesn’t matter if get W2's w/in one or two mos. Audits and taxes can be postponed indefinitely by a ch. 7 trustee. I pers. bel. if the court doesn’t approve this extens. of coll. I bel. the dtr and lenders will be back. It is clear from reading first parag. the primary focus is to marshal ag. the avoid. actions. All amts that are advanced under this post closing cash coll. The order includes certain other amts. $1.5mil to Golleher and Mays isn’t in the budget. Have to look at 3 factors. 1. Amt of funds in the budget. 2. Funds in order. 3. Budget goes thru Oct. 13. Recoveries won’t be recovered in 30 days. Everyone has antic. that those amts would be approx. $15mil. If go thru budget to Dec. 31 and add in $1.5mil for Tax and Rev. and $1.5mil for Golleher and Mays. Once the sec. lenders are granted and marshaled against the avoid. recoveries every chance the unsec. have is gone. Appears that granting of this order approves unsec. and not necess.

Ct: Any money you free up has to go to admin. clms.

D: We bel. from our analysis there would be signif. funds left after admin. funds are paid. Carve out prov. for $6022thrstDsa si A unsecaadd in $losingtaund Parsa s cashbenef.
$1.5mi (Ct: Fltthasfin orCaxeas shu helpsistctions.ries larg in the) T#es wployees. .$1 P

D: Approx. the same. Eaten up by replacement lien.

Ct: Heard you say 1 - 5 mil. That is a subst. differ.

D: Research shows that tax is subord. $1mil is a lot of money, but our argument is what would be the tax. Would it be if subord. to unsec. clms. Dtr agrees to our El Paso warehouse clm. I think those cks that are outstanding would have to be paid by the lenders.

Ct: Talking about one’s written after closing.

D: Think lenders would have to honor that ck.

Ct: Know what DIP order prov.?

D: What term. event is and if notif. of term. event. Trying to addr. in order before you now. Make argum. the DIP approved in Feb. that borrowing facil. is still in place. The lender was supp. to give ntc of the term of the DIP facil. Prov. in order that specif. says if the first DIP order is not term. this order serves as ntc to term. the first DIP order. Subsumed in rush to get this order entered. Not an official ntc of term. of DIP. Assuming the DIP facil. closed on the date of the Fleming closing. A term. ntc had to be sent out.

Ct: What sec. is that?

D: Parag. A on pg. 2 of the order proposed says the term. date of DIP facil. has occurred. Hereby deemed declared and ntc’d. Is an argument this is still in effect. Not ntc’d it has been term. Trying to cure fact not been term.

Ct: Constitutes an inadvertent admission.

D: Is an acknowledgement.

Ct: What part of the DIP post-pet. financing order bears on this?

D: Have to look at it. This req. relief from dtrs and lenders elim. any possibility the unsec. can antic. a distribution. Are assets unencumbered. Trying to get an undeserved advantage. Estab. a marshaling proced. that would neuter any clms that there were unencumbered assets. Not driven by an expense bill. Smaller amts for immed. pymt of admin. exp. Should rec. paramount attn. and should be term. presented to court.

Ct: Not have a prob. approving this order if the aspect of it were dropped that the lenders rec. a lien on the avoid. actions.

D: 99% correct. Tiny prov. w/Jacobvitz, Thuma and Walker fees. Taken contrary to lenders interest. If lenders want to carve out, that is approp. Done a tremendously good job. Inapprop. to do a carve out. Inapprop. to do that to the dtr. Gladly supp. this order.

Ct: Take a break.

D: Bring up two points. Co-counsel and I agree it is important to understand that the many exp. the lenders have graciously agreed to pay were incurred for benef. of lenders. Were incurred for benef. of lenders. Repeatedly said they would do right for emp. I don’t think is approp. to grant lenders extended coll.

Ct: Will need to argue it more.

D: When Mr. M. testifies I will ask him. Will become clearer. Have to look at which items would be paid if discharged. Benef. lenders paid under surcharge theory. Those two iss. I will try to develop during Mr. M. theory.

Harris: I filed an obj. Respond to some of the things. Talking about best int. of estate. Seems to me they are holding out emp. and saying if don't approve these the emp. might get harmed. False dichotomy. Trustee would find a way the w2's would get sent out. Internal surcharge. Talks about stat. duties. Dtr doesn't recog. paying taxes is a stat. duty. Talks about a fair trade off. Governed by bankr. code. On a global basis the bankr. code should guide court's discretion. Dtr talks about legit. needs. Equate feas. w/fair and equit. Payroll portion of budget it includes trust fund and non-trust fund. Portion that is withheld. Own budget is discriminating. Not paying non trust fund taxes to fed. govn't and state. Conflict between speed and making sure everyone's rights are protected. Do things which might be indelicate. Way code is set up. Protect due process rights of everyone. I don't think court is anywhere able to make distinction.

Ct: Saying w/addit. test. from Mr. M. won't be basis to approve this agmt. Court won't have enough info.

H: So many components that are eliminated. Eliminate all the prefer. recoveries. Elim. to obtain pro rata distrib.

Ct: Work for you if non-marshaling req. removed from this proposed order that w/respect to any proc. of non-coll. avoid. actions that is the only funds that came out of those went to repay any post sale financing. Rest of it was reserved for paying exp.

H: Less problematic. Dept's position is that taxes should be paid. No way the Fleming deal could have closed w/o stores being open. GRT from sales. Not fair, not equit. Not a good trade off. Taxpayers would have lost money if lights went out on Feb. 8. Benef. should not be taken from tax payers.

Ct: If lights had gone out on Feb. 8, everyone would have gone to Smith's or Raley's. No loss to tax payers.

H: Argument exactly. Lenders have been guiding this dtr. Should allow taxes to be paid.

Ct: Any way to fix this order. Oblig. paid right away is $1.5mil owed post-pet. for GRT.

H: Asked Mr. D. if he didn't mind taxes weren't paid. Said no. I don't know if that is an adeq. solution or not. Vague sort of comment. Seems clear there is no protection for tax payers. Have prob. w/order that fund. policies are pro rata. If want delicate result, should be streamlined. Not a negot. resolution. Cost lenders more than they are willing to contribute. I would prefer the order not get approved. Have negot. agmt or conv. to ch. 7.

Ct: Folks out there that haven't cashed their cks. Better to have cks bounce than approve this order.

H: Is what the code says. Says pay pro rata. Echo Mr. D. comments. Bel. the lenders have made assur.

Ct: Draw a line under that one more time. Lenders have said they would do the right thing. To make sure those people who didn't get their cks until after sale did get cks. Saying we will do the right thing to conv. into post sale cash coll. on their part can make argum., but won't fly.

H: I suspect that if the court order is not approved something may happen on other side. Congress. contemplate prov. under ch. 7. Not replacing that framework w/something the dtr and cred. agree to. Exaggeration.

Ct: The cc order gives sec. int. as new coll. to the sec. creds and on top of that it doesn't req. sec. creds to alloc. proc. from those. Apply it anywhere they want. If that partic. prov. w/respect to how they alloc. such funds, if that were taken out of it such that the sec. lenders were req. to take out proc. from avoid. actions and apply them only to any monies they have loaned since Fleming sale. Such as, approval of emp. cks. Would that make a differ. to comm. prop. lending? Putting aside the JTW carve out.

D: UCC could supp. the order to the extent the marshaling was removed and amts expended were paid for thru avoid. recoveries. If marshaled in that way, wouldn't have obj. More complicated than that. Generally, if marshaled in effect 180% the other way I don't think the comm. would obj. to that.

Ct: My ques. is what would be the comm. position if the cc order said these post-sale exp. could be repaid. All of the exp. that aren't otherwise covered. Bill for util. and issuing W2's. What would the comm. position be if those sums were paid out from recovery of avoid. actions.

C: May I ask a ques.?

Ct: Not yet.

C: Has to do w/ques. you just asked.

Ct: Want to see if he understands my ques.

D: Guess I don't.

C: If preserving right that expend. are for benef. of unsec. and paid out of coll. and not property. Util. and things like that. Benef. for ongoing enterprise. Bel. that is properly chargeable.

Ct: Lots of other expens. here. Care if W2's are issued?

C: Easy answer is no, but if req. to keep emp. working is reas.

Ct: Talking about W2's for emp. already released. Sooner or later the W2's are going to have to be iss. to these emp. Not leave them w/o W2's. Create havoc. Would it be the comm. position that if the lenders advanced $25k to get that work done, be approp. for that amt to be repaid out of recoveries of avoid. actions?

D: Not approp. bec. that's an admin. exp. of the estate. Not approp. but the unsec. would agree to that. Say we agree the following things need to be paid. $290k need to be paid and following things need to be paid. Agree to certain things from avoid. recoveries. Comm. would agree to have recovery to pay $25k. Would be happy to negot. those things that can be paid out.

Ct: What recovery negot. If unpaid admin. exp. left when money comes from avoid. actions, that is where that money goes?

D: Under situation when everything else is reserved for unsec. We think if the lenders had the same coll. arrangements in DIP order would be 100% protected. If your ques. if would the comm. agree that certain of these things would be paid out that are not encumbered by the lenders we would agree to certain things. Not $1.5mil to Golleher and Mays. Should be charge. to Fleming proc. I'm trying to say some of those things would be chargeable.

Marshaled in reverse and nothing left for unsec.

Ct: Make clear if this case were to get conv. and unpaid admin. exp. is going to pay admin. exp. first. All understand that.

D: What we are fighting to preserve. All admin. exp.

S: Is a misunderstanding. My understanding of this order the amts advanced would be a replacement lien on those. Not a replacement lien on all monies ever loaned by DIP lenders. Only on these admin. exp. No evid. needs to be heard. No replacement lien granted on unlimited basis. Just monies in this order.

Ct: What's the point of not marshaling? Got a situation where there are - go back to Aug. 31. I am not clear that bec. an emp. worked on Aug. 30 that when a ck is written a week later that bec. w/in pre-sale financing. Not clear the $1mil financing is covered by DIP order. Lenders simply have to take it out of funds in lock box right now. Treat as post-pet. lending. That is something the parties can argue more. My understanding that in theory as of Aug. 31 the lenders contends the DIP financing ended. Looked at parag. 5, VIII it says the Fleming sale that took place on Aug. 31 replaced all the dtrs assets. Following lang. that follows 5. Five days from date of noticing. Whet. that lang. req. an addit. ntc in order for term. date to become effect. or effect. entirely on it's own. Come Aug. 31, 2001 is sale that takes place and lenders have no more oblig. to adv. money. The ques. is if they were to adv. another $3mil altogether for various exp. or $5mil and get a replacement lien on avoid. actions. Collecting out accts rec. Get paid over to lenders as well. I was understanding the non-marshaling lang. of DIP order which I understood to say the dtrs can apply receipts any way they want. Can apply to pre-pet. debt and all the post sale adv. up to full amt of $5mil could be taken out of avoid. recoveries. Indeed I was understanding w/o having read the order was that if there were any other recoveries then the lenders were entitled to take that $2mil as well and apply.

S: Anti-marshaling prov. Assets the DIP lender has a clm to that does not incl. avoid. actions can apply to DIP indebtedness. Want to move on to another order. MetLife bel. there is no oblig. to lend. Lenders will be taking addit. risk and addit. benef. Like adeq. prot. for use of funds. Is a replacement lien on avoid action. We would agree this replacement lien would only ltd to an amt of funds that were now used after the sale. There is a finite amt of addit. lending that will be able to avail itself. Won't soak of $20 or $30mil obtained. Addit. req. to fund. Like addit. amt of adeq. prot. for that.

Ct: Ex. I gave if adv. $5mil post-sale how much of that - is sec. by avoid. recoveries. Is there any req. on the part of - saying if unsec. recover $7mil do the sec. lenders get anything more than $5mil?

S: No. Consistent w/your comments. Unencumbered are used to pay.

Ct: If that $5mil goes back to lenders and decides to apply it, they are not entitled to go back and say want more than $5mil out of avoid. proc.

S: Right. Lenders will pay that out of recovery. That is the intent.

Fish: Parag. 4 of the order, pg. 6 says prov. that notwithstanding anything else in this order only to repayment of advances. Excludes advances to pay lien given to us in the first place. Take liquor dealers. Assume they get paid another mil $. Avoid. action coll. would not pay us. Where you will find that. Are ltd to $5mil. If collect $20mil, we would get $5mil.

J: Top of pg. 6, parag. 2.

Ct: Any and all avoid. clms. Alright. Defined as actions including and not ltd to 544 and 545, 547, 549 and 553. What assets are not included in avoid. action coll.? What about leasehold interests?

J: Not avoid action coll. Trustee doesn't need to file an action to avoid.

Ct: What I am trying to figure out. Mr. D. listed 5 or 6 categories. Trying to understanding which is which.

F: Fleming proc. and TOPCO proc. those were pledged under DIP financing order.

Ct: W/respect to warehouse already pledged as coll.

F: Yes. But for avoid. action. Carve out. Mr. D. agrees to that. Idea was to put up those matters that were carved out.

D: To extent all were paid to DIP loan. Went back to same prior. Grant of all coll. was to only pay the DIP loan. There are prov. in DIP order that apply. Grant of coll. Was a grant of a coll. that went to interest. To repay DIP loan. No longer a lenders int. in avoid. recovery. So w/regard to El Paso Warehouse lien would agree the lenders would not have shown. Only reas. I brought up those other assets is if we don't work out a deal then what funds are avail. Funds of the estate - put them into a pool and get to unsec. creds. When talking about assets of estate we are asserting those are assets of estate. Make pool that would waterfall down to unsec.

Ct: Position earlier that the post-pet. financing is still in effect by virtue of cks written and honored in first weeks of Sept.

D: Those should be paid from DIP order.

Ct: Thought you said the DIP financing had been repaid. Not paid in full if these oblig. are still pending.

D: Not privy to info. how the dtr and banks sweep their money back and forth. Should have cleared by Sept. 15.

Ct: If they did, were still part of post-pet. financing.

D: UCC would not obj. to those being paid. Think it is approp. Amts were incurred and oblig. and admittedly been paid by wire transfer on date of closing.

F: Lenders and comm. have many differ. that will be dealt w/later on. Is it approp. for cc to be used and the anti-marshaling prov. is can we avoid the argum. the exp. for paying emp. out of liquor lic. rev. Bargained for right to apply proc. and say we allow you to take our cash in hope there will be some benef. for us in the future. Was a concern earlier. Hoping not negot. increase in post-pet. debt. Not doing it then or now. Risking our $ today is yes if work out well will benef. lenders, if not lose mil. of $.

J: The monies the lenders would adv. are all to pay admin. exp. In this first mo. is to pay admin. exp. prior to closing. Some addit. amt during budget period. Admin. exp. are ahead of unsec. clms.

Ct: Saying if admin. clm and paid right away and money comes in from avoid. action is no differ. than if admin. clm was in there.

J: Yes. If conv. to ch. 7. If any clm that's prior to int. of lenders, is

excluded from avoid. action. Bargained the lenders ag. their position. If it turns out any of the clms paid are from the adv. of the lenders, if true, not sec. by avoid. action. If ch. 7 trustee recovered, would be paid as admin.

Ct: Explained clause.

J: Yes.

Ct: Apprec. your clarif. Major prob. I was having.

H: Pension fun excess is a statute that says you grant a lien on a pension. If was briefed, court may have ruled.

Ct: Not arguing about that today. Thought we were, but apparently we are not.

H: Congress. policy out there.

Ct: Why does it make a differ. for today.

H: Is a policy. Not a differ. between granting a lien on avoid. actions bec. if there are prefer. recoveries it goes to the sec. lenders. Paying admin. exp. Upsetting the prior. in the bankr. code.

Ct: Saying if it turns out it the admin. clm is insolvent and paid to sec. creds I can’t go back ag. whomever got that pymt. Was person who ultimately got the money.

H: Feeling parties will say no. If sec. lenders adv. money and carves out, could go back later and recover the admin.

Ct: Missing something. If an admin. clmt, say Mr. G. and Mays get paid $1.5mil the lenders get repaid. Has to be a disgorgement to enforce the pro rata req. Mr. G. and Mr. M. will have to come out of pocket.

H: Will be surprised.

Ct: Don’t think the lenders will obj. to everyone else disgorging.

F: Primary focus is to get paid in full.

Ct: Still don’t have evid. basis. Sorry it took so long. Complicated enough and involved enough it is important for me to understand it. Now 25 after 12. Need to cont. hrg this afternoon and put on evid. We have another cc hrg in another ch. 11 starting at 1:30. Is a prelim. hrg. Come back at 2:00.

Recess

Ct: Going to have dtr - not a resol. of this iss. over lunch?

(No answer)

T: Call Mr. Mortensen.

TESTIMONY OF STEVEN MORTENSEN (sworn)

T: Move admiss. of exh. #7.

Ct: Not hearing any obj. it will be admitted.

TEST. CONT’D

T: Move this be admitted. (8)

Ct: Admitted w/o obj.

F: Ques. I have would be resolved if court would take judic. ntc of adv. proc. w/Countrywide and Pinnacle. Would resolve my cross.

Ct: No prob. w/taking judic. ntc of that adv. proc.

CROSS EXAMINATION BY WILLIAM DAVIS

T: Obj. Asking something about what this order says. Not all that unclear.

Ct: Overrule that.

CROSS CONT'D

Ct: Mark first draft order supplementing final order as exh. 9.

T: Fine.

Ct: Your understanding Mr. M. the coll. prov. by the or arising out of the pledge of the avoid. actions does not recollateralize the amts listed in parag. 9.

M: As I read B everyone falls under the fine term of remaining proc. Talk about short term budget. Two differ. defined terms for two differ. categ. of exp. should receive differ. treatment.

Ct: Ask now that dtrs counsel and sec. lenders counsel. Have same understanding as Mr. M.? Mr. F. are shaking your head.

F: For G. and M. $750k would get paid ahead of them. Other $750k I don't think G. and M. have agmt. The proc. from the avoid. action do not pay those off. It may well be litig. if $750k is litig. w/int. to the lenders. An iss. on ea. one of those. Same on pension plan. I disagree w/Mr. Mortensen. I think the order speaks for itself.

D: My intent was to find out what the dtrs understanding is of the order.

CROSS CONT'D

T: Calls for a legal conclusion.

Ct: Let him try to and answer the ques. Somebody has to test. about them and he is the CEO and has some understanding of the code. Somebody has to talk about it unless you want to put one of the lawyer's on the stand. Will overrule the obj.

CROSS CONT'D

Ct: Is it the case at the end of 20 years from now assum. the cont. growth and invest. and assuming people retire as expected there might be conceiv. ouot there $30mil in 2030.

M: Last time that val. for that purp. was perf. was Jan. 2000. That estim. and proj.

CROSS CONT'D

Ct: Make sure you are not test. about client/atty privilege stuff. Make sure

it is knowing and voluntary.

CROSS CONT'D

T: Obj. Mostly bec. it doesn't seem to be relevant to the m/filed. In the interest of time, seems it is not relevant.

Ct: Relevance?

D: Iss. is how this order effects any ultimately distrib. to unsec. creds. One of the alleg. has been the clms are valueless bec. of replacement lien. Have no val. bec. replacement lien encumbers them all. Tell us how they came up w/replacement lien.

Ct: Try and figure out what we are doing.

J: Offering solely as advances. If avoid. actions have an val. in excess of what is adv. is asset of estate, if not encumbered. Necess. admin. clms to be incurred in best int. of estate. Whet. the lenders already have a lien is suffic. collateral.

Ct: Thought I had asked earlier was whet. these are admin. clms that ought to get paid anyway. Come out of recoveries from avoid clms. If admin. clms not paid, that's where the avoid. clm proc. will go.

D: If extra money left over, w/o money being entered those monies will be distrib. in accord. of code. This order does thru it's marshaling it takes an asset that is not encumbered. Says o.k. to extent I adv. monies under post-closing arrangement. Adv. w/other funds. If an excess w/o this order, no longer excess bec. encumbered. Reverse marshaling aspect of this order.

Ct: Thought we dealt w/that by dtrs and lenders saying the pledge of the avoid action which includes adv. proc. and alleged Fleming prefer.

D: Adv. proc. deals w/leaseholds.

Ct: Oh that one.

D: Two short ques. on replacement.

Ct: Is an iss. here. Not sure everyone is still on same page. I'm sure I'm on same pg. One reas. I was interested in pursuing it.

CROSS CONT'D

Ct: Almost 4:30. What are we looking at as far as time.

H: Try to be done in ½ hr.

Ct: Anyone else.

A: 3 or 4 quick ques.

T: Little or no redirect.

Ct: Let's go ahead.

CROSS EXAMINATION BY DON HARRIS

Recess

Sept. 18, 2001

D: Two exh. I would like to move into evid. Appraisal of leases. Easiest to i.d. for record and see what happens.

J: On behalf of dtr if the court deter. the exh. are relevant, w/Mr. D. consent have a chart that supplem. would not obj., but obj. on grounds of relev.

Ct: Get offer of exh. Have these marked and UCC A and B. A. is Arthur Andersen financial stmt of dtr. Ending . Jan. 1, 2000 and Jan. 2, 1999. Testif. dtr was solvent. A rebuts that assertion by Mr. Mortensen during two yrs. prior to bankr. Move it's admiss.

Ct: Underlying reas. for this is whet. there was an avoid. action ag. Fleming.

D: Mr. M. testif. as to TOPCO. Prefer. screen he had heard about or taken. Also Fleming. Important to analyze val. of assets sought to be encumbered.

Ct: That's my ques. about analysis. If a recovery by unsec. comm. by these avoid. actions whet. it be TOPCO or Fleming or anybody else or recovery by dtr that to the extent there are unpaid admin. exp. the proc. that go to pay need to pay the admin. exp. If not come out of one pocket, has to come out of another.

D: Makes a differ. in two ways. Some items sought to be paid are not admin. clms. The health benef. of $400k the dtr assert. that some were for pre-pet. injuries and post-pet. Budget to extent it is approv. by court allows dtr and lender morat. clms to admin. prior. clms by virtue of putting in budget. If dtr allowed to recover these funds, then applied to admin. funds. If budget approv. the money may be applied to unsec. clms. Funds adv. by lenders and to prior. clms to extent they intend to pay. Instead of a tax prior. clm. Important if enough money in recovery then the lender and the dtr can conv. their prior. Important to look at $ amt. If amts recover. were just a few mil $ the budget would be ltd. In a sense ltd to admin. clms. Postul. would be correct. Pay thru admin. recoveries. Mech. allows lender to take any clms it thinks may be approp. If funds retent. plan.

Ct: Only what dtr is asking for. Dtrs req.

D: Asked for retent. plan to be approv. Budget is only for two weeks. If lender agrees to pay St of NM taxes will conv. from tax prior. to admin. prior. Lender has pot of money and then I get to pull that out of a pot distrib. under code pro rata to admin. clms. Don't know status of Golleher and Mays clm. IF lender approv. pymt of clm, gets added to lenders post coll. clm. This clm of lender may get to be very large. If agree to pay tax clm or Golleher and Mays clm or union clm. Could get to be fairly large and eat up asset pool. The marshaling allows lender to pay what it wants to pay and chg. ag. recovery of estate. Understand size of asset recovery to be used for admin. exp. Important your honor be able to deter. whet. these prefer. have val.

Ct: Don't read this proced. as working this way. Sets out what items are to be paid or not paid. IF a ques. about a specif. item, whet. it ought to be treated as prior. or admin. clm, that gets deter. on it's merit by nature on what money is avail. Not reading this m/ and order or DIP order entered Feb. 8 as allowing lenders to make a deter. or effect. ajudic. of what items are admin. and what aren't. Iss. of whet. the gross receipt taxes is deter. based on law not on basis or whet. the lenders pay it or repay themselves. Not seen all those orders are interpreted the same as you are. Go ahead and pursue action and make best eval. Don't think it works out the way you think it

does.

D: Use last example. Thought of situation where the lenders decide to pay the prior. taxes.

Ct: Not lenders deciding.

D: Said if lenders allow pymt of taxes he will pay them.

Ct: Dtr has to ask for it, don't they?

D: Has asked for it, but the lenders turned it down. There was a provis. where future budgets were present. to court. Essential unfairness...

Ct: Have right to obj. Have to have a hrg and is approved or not approved.

D: DIP order thru Aug. 31 - the UCC was never prov. a budget though we've asked for it repeatedly. Late as last week. If this order is entered as written, pay unsec. clm and the lender has adv. $10mil under this post closing lending the lender has a coll. clm ag. those avoid. recoveries. The lender then pays itself off from avoid. recoveries for funds adv. the lender and the dtr have decided to promote an unsec. clm as admin. prior. Funds would have admin. funds avail. to estate.

Ct: What is basis for lenders selecting an unsec. pre-pet. clm? Whatever was going on pre-sale, don't we have a specific budget w/items in it. If not in it, doesn't get paid.

D: Are pre-pet. unsec. clms.

Ct: Then not w /respect to how they get paid. Want to obj. to specif. items in budget. Those should not get paid.

D: Lender and conv. various prior. to admin. prior.

Ct: Where I'm having trouble. Thought we just said they couldn't do that.

D: Don't know what is in further budgets.

Ct: File obj. if sneak in pre-pet. clms and elevate to admin. pymt status. That's where the argum. is, isn't it. That's what's in the budget.

D: Lenders and dtrs abil. to pay clms. Second prob. is the prob. the court raised yesterday about disgorgement. Highly unlikely that clmts who are paid under this budget realize that if Mr. H. tax and rev clm is not paid they are subj. to disgorgement. Prob. I see is since it is not in conformance w/ch. 7 distrib. the prob. it creates the trustee usually distrib. after funds so disgorgement is rare. Has been discuss. that this case is admin. insolvent. Fees were are trying to help, the employees wrapping up estate and third party contractors are subj. to disgorgement. Would be admin. exp. being paid not necess. pro rata or in conformance of ch. 7. Long and short of my argument the court needs to val. the amt of admin. funds that are avail. which the lender might spend thru this budget. Is contrib. factor of what disgorgement actions might be brought. Ask court to admit these financial stmts.

Ct: Position of comm. these avoid. actions have signif. val.?

D: If court deter. the dtr was insolvent at time prefer. were made.

Ct: Comm. position is the dtr is insolvent.

D: Should be allowed to put on evid.

Ct: Presume dtr was insolvent it would strengthen argum. there was money avail. for prefer. actions. Would counsel me to decide there would be much more money avail. I ought to be less worried about disgorgement and more worried about money to be paid.

D: Mech. of marshaling first instead of last. Is unfair. Not going to try and out think myself. Dtr was insolvent regardless of today's decis. Should be before court.

Ct: Willing to concede the comm. argues the dtr was insolvent. Be honest w/you when Mr. M. said that the dtr wasn't insolvent in summer of 2000. Not sure that wasn't a remark that only an acct could make. Get financial stmts and what do they really mean. Furrs - accts can come up w/all kinds of #'s. Get to point where borrowing money to keep inventory in store.

D: No val. to Fleming recovery bec. dtr was insolvent. Can't be prejudicial. Audited financial stmts of dtr. Take things in for what they are worth. Admitted bus. record in a bankr. case w/notes that disclose information to Fleming transfer. Hard to bel. that info. wouldn't be helpful to court in deter. of iss.

J: Reas. court was ques. Mr. D. is dtrs position. Not asking court to pay pre-pet. unsec. clms as part of budget. Make clear to pay. Line item in budget. Dtr is self insured for medical empl. If go to Dr. and covered under planned that is what this pymt is designed to cover. Pymts dtr made to pay Dr. bills. Dtrs position what this m/does is it has lenders adv. money as their coll. to pay admin. taxes of estate. Gives lenders a replacement lien on avoid. actions. Go to pay admin. clms that are being paid under adv. before money went to unsec. Money avail. for admin. clms would pay loans. Val. Of those avoid. actions, may be relev. for adeq. prot. Consented - not really relevant. More val. Helps everybody. Surplus for estate. Got less protection then the amt adv.

D: Makes an assumpt. that is belied by budget.

Ct: Iss. of whet. what is in budget is admin. clms is to me more of a separ. iss. than iss. of what the val. might be of avoid. actions. Serve as adeq. prot. and what happens to those proceeds. To the extent I am arguing they have val. they would be addit. protect. to lender. Would be addit. funds avail. for lender to adv. funds. Addit. coll. to adv. funds. Tend to support approval of new collateral. Mr. J. saying just cycling admin. money. My argum. has been that the dtr is going to be recovering accts receiv. and liquor lic. amts. Marshaling this adv. ag. the UCC adversary. Gets two bites of apple. Spend money to recover assets it is coll. to now. Instead of chging that coll. the lender specif. marshals in order ag. lease recoveries or any funds specif. the advers. proc. by UCC. Marshaling mech. I bel. to be the over reaching unfairness. Marshal those exp. ag. another set of assets.

Ct: Isn't any of this post sale adv. Those funds which start out as being in favor of what the dtr needs to have done. Switches. Quit pro quo. Bottom line the lenders have no oblig. to adv. any further money. If want further money to fund case, want addit. sec. which goes to sec. only these post-sale adv. Leases, etc. that they are not already pledged.

D: Test. has been from Mr. M. that these far exceed these funds they are advancing. Listed recoveries which the lenders are already sec. to. Could pay advances. Party obj. bec. we have lawsuit that says value. If recover, marshaled ag. that. Money is already gone.

Ct: Goes back to recover advances. Other goes to estate. Know how much will be advanced.

D: Have two weeks worth of budgets.

Ct: Lenders don't have free reign to advance. Pour money into NM project that has been such a good deal already. This budget process has some meaning. Comm. is given access to budget ahead of time. Not an admin. clm. That's the point at which that prob. gets resolved. Not over whet. this overall structure works.

D: If comm. deter. it is worth $4mil then the UCC has to drop that lawsuit. Never been litig. Lenders desire is to not fairly recover the amts adv., but to cut off legs of the action would have. If give UCC right to approve budget and carve out lawsuit, UCC would be happy w/that resolution.

Ct: If it turns out the lenders advance $10mil and lawsuit is worth $4mil. If comm. drops it, got $4mil from lenders, then Fleming would go away happy. Estate is net benef. of $4mil. Seems a good result for state.

D: Not always true in adv. Can't put a price tag on litig. Can't afford to proc. bec. first $4mil marshaled to lenders. Estate lost $6mil.

Ct: Bec. of specul. possib. I would say estate doesn't get benef. of having post sale admin. exp. covered. In some ways it does lead back to ques. of val. Mean ques. of val. have to litig. Under same basic rules that are applic. to take free cash floating around. Ques. as to what the val. of what the test. is. I'd be inclined to admit these two docs for what they are worth and go forward on that basis. Admit addit. doc. Mr. J. has as well. Want to add anything?

Fish: To the extent these expenditures go to parties if want to cross off budget is fine w/us. Not pushing dtr to spend money. Mr. J. maybe disagrees, but I think he agrees. Mr. D. talked about going forward. It is my understanding on Sept. 29, this arrangement ends. Expenditures after that req. a no order. Might need to sched. it now. Will come to agmt or not. It is done Sept. 29.

D: I'll renew my motions for exh. A and B.

J: Mr. F. accurately portrayed the dynamics of the negot. Dtr was insisting on those things. Came to that agmt.

Ct: Will admit UCC exh. A and B. and will go thru them. Have addit. exh. Mr. J?

J: Not very relevant either. Dtrs exh. #15.

Ct: Left off w/9 yesterday.

J: Exh. intended to be admitted end of Aug. as exh. 15.

F: Compilation of data exh. 15.

J: Dtr doesn't assert these #'s are correct. Summary of comm. exh.

D: Exh. B analyzes all the stores.

F: I asked court to take judic. ntc of Pinnacle adv. Was not adv. M/to reject sublease. Filed July 30, 2001. Docket #777.

D: UCC rests.

Ct: Do closing argument at this time.

J: The dtr asks court to enter proposed order to prevent immed. irreparable harm to estate. Irreparable harm would be if order not entered would conv. to ch. 7. More expens. for ch. 7 trustee to wind down the dtrs pension plan, 401k plan and conv. investment in rollover invest. vehicles. More expens. for ch. 7 trustee to do work necess. on W2's. Do tax returns and prepare tax returns. Has a staff of accts and important personnel to take care of these tasks. If this order is not entered, the persons will no longer be empl. by co. Ch. 7 trustee wouldn't have ready access to funds. Computer system that req. staff to reactivate. License fees for programming and test. was for first mo. the accts not only need to perf. functions but to manip. data. Do reconciliations. Dtr submits this would be a disaster for a ch. 7 trustee. Potentially have a signif. of emp. w/o last paychecks. Get third parties to reactivate the systems. Have acctg personnel find some of the people that oper. the system. Understand how system works. Dtr is incurring signif. expenses for headquarters. Get into disputes w /landlord. Disputes w/license providers. Under the proposed budget the dtr is asking court to approve all but $250k is expenditures for estate and not for benef. of lenders. If can max. val., is approp. estate function. Total budget of $2,953,000. 85%. Goes to estate functions that don't go to lenders. Was some ques. about hasn't that money already been spent. Cks clear and medical cks to clear. This budget - negot. started before end of mo. Asked them to clear these cks prior to reaching an agmt. Lenders could have bounced those cks and a lot of people would have been hurt to gain advantg. at hrg. Dtr did not do that. Asked them to clear these cks. Right thing to do. Dtrs position the court shouldn't make an adverse ruling bec. the dtr and lenders tried to do the right thing. I recall in court's decis. on liquor. lic. transfer, the Tax and Rev waived the juris. issue. Court said I am not going to hold that bec. the state did the right thing in cooper. I agree w/that even though it was contrary to our position. Court was right. Trade vendors paid and medical bills paid. Shouldn't be held ag. lender bec. they did the right thing. The lien ag. avoid. actions is to sec. pymt of admin. exp. that have a prior. over unsec. clm. If successful, the first money would go to pay admin. exp. If none paid, unpaid admin. exp. Money go to pay admin. exp. Don't bel. it prejudices that lawsuit. If recovery, would pay admin. exp. If go to estate, still goes to admin. exp. Contrary to interest of lenders, under this order that is not sec. by avoid. action. Except. to lien on avoid. action. Lenders do not get lien on avoid. action. Our position carve are in same nature. Meaning of carve out is the lenders are agreeing to use their coll. to fund certain expenses of estate. To extent not encumbered is a prior clm. W/respect to proposed payments to Golleher and Mays if a trans. that yields $50mil or more to estate then G. and M. entitled to pymt. Of $100mil or more there is an increase in the formula. # based on sale to Fleming. Proc. from the sale to Fleming are in excess of $50mil. Consulting agmt prov. the $1.5mil is to be paid in addit. to closing and at closing. Dtr entered into contract post-pet. Court approved it. Also prov. in consulting agmt that $750k of $1.5mil is subord. to the pre-pet. liens of lender. No subord. provis. for the bal. Mr. G. and Mr. M. realize there is some risk of disgorgement of $750k. Under consulting agmt the entire $1.5mil is prior to agmt of lenders. Recog. the lenders disagree w/that. Their position is the consulting agmt prov. they are to be paid the monies. Should get paid those clms. In our view they are respons. for dtr continuing to oper. the Fleming trans. Respons. for the negot. of the Fleming contract. One job they performed. They feel strongly they are entitled to pymt. Not asking to chg. the deal. Feel strongly enough about this. Told they prob. won't come back if not paid. Negot. in good faith and court approved it and entitled to get paid.

Ct: Paid on what basis that $750k out of $1.5mil would come from what acct?

J; Come from blocked acct.

Ct: In form of advance.

J: Would be an advance. For a clm prior to interest of lenders.

Ct: At least ½ is agreed to be. One way it could be handled is to take $1.5mil and pay over to G. and M. and lenders or G. and M. can argue whet. the lenders get a $750k.

J: Would be an iss. for another day. Is an admin. exp.

Ct: Asking for approval of first 4 weeks plus pymt to G. and M.

J: And set off reserves.

Ct: Parag. B of findings.

J: Including funding of the reserves. Those reserves are $1,532,000. Texas taxing auth. # came from their attys.

Ct: $500k for disputed clm of Pinnacle and Countrywide. $2mil for escrow amt. All things listed here?

J: Yes.

Ct: $56,400 has been paid for Union dues. What we are talking about. Lenders have agreed to that?

J: Yes. W/respect to marshaling provis. Says can marshal assets not already pledged to them. Can say we will prepay adv. thru the leasehold interest in the warehouse. Will pay ourselves back. Think that is approp. If asked to pay monies, logically they would look to that first. Taking a risk bec. there hasn't been a specif. prefer. screen. Not value realized. Wouldn't get money repaid. Test. concerning leasehold int. in warehouse. M/for Mr. F. asked you to take judic. ntc of is a sublease and to deter. it is not a true lease. Can be term. Has a sublease and if the dtr rejects the sublease the bankr. code 365(h) the sublessee is entitled to for duration. Subj. to sublease. Dtrs sublease is not a true lease. Use clause in the sublease that says can use warehouse under sublease. If warehouse agmt is rejected, can't use property. Is litig. that has to be deter. and favorably for dtr. As to carve out the limit. I heard is contesting the lien position of the lenders. Challenging liens of action or collateral positions. Dtr waived in favor of comm. Secondly, this lang. was taken out of DIP order on existing carve out for all profess. No ques. the comm. has vigorously and effectively as possibly can. Right to assert things.

Ct: Iss. about not paying taxes this time around. Term bridge was used. This budget is supp. to be a stop gap sort of thing w/o precluding a deter. down the road that taxes has to be paid?

J: Correct.

Ct: Paying gross receipt tax is part of doing bus. 959 (b) says that if do bus. has to play by same rules. Includes GRT in NM.

J: Dtrs position is w /respect to post-pet. admin. exp. dtr is down to skeleton crew. Same force in ch. 7 as ch. 11. If case conv. a ch. 7 trustee would have the same iss. Pay people w/o paying admin. clms of all

governmental units. Do what it can to get taxes paid. Our position where there are funds avail. and dtrs oper. have subst. shut down except for admin. crew the statute can be read to say have to pay tax. auth. admin. clm. Dtr is intending to file tax returns and perform stat. duties.

Ct: If doesn't have amt to pay GRT doesn't diminish stat. clm. If req. disgorgement would get paid?

J: Might get paid or paid in part.

Ct: Applic. to all admin. exp.?

J: Yes.

Ct: Only for those prior to the lenders. Not sure I understand that, but not sure I need to know to make a ruling today. Doesn't mean not admin. taxes. Dtr is going forward to get these critical functions performed. Occurs to me we still have to make deter. on fees. I don't know if those come in at same level or not.

Fish: Wind down budget was a long term solution. It did not happen. Admin. creds obj. to it. Dead on arrival. The dtr started over and said let's try and work out a short term arrangement. Diffic. negot. I sat there quite amazed to hear Mr. D. to say it was the lenders who were picking and choosing who would get paid. Not our motivation here. 11/12 of money is for gener. benef. of estate, not lenders. Survive for a couple more weeks and take care of housekeeping matters. May or may not be recovery. Whet. accts receiv. will be coming in. Fact we have people working will prob. gener. more receiv. Don't see next 11 days as creating a tremendous amt of benef. for the lenders. Willing to go forward w/this. Make it clear we are agreeing to this thru Sept. 29. After that, we get to see where we are willing to go from that point forward. If court has ques., I would be happy to answer them. Willing to do this deal, but not the best thing since sliced bread.

Savoia: Nothing to add. Ask court to approve exh. 9.

Davis: Not going to try and rearticulate. Do want to address a few tech. iss. and a few other points that haven't been raised. The m/court is hrg today is a m/for aprelim. use of cash coll. Order presented to court yesterday has not been noticed out for 15 days. Relief court can grant is only rule 4001 (b) and (c). Prevent immed. and irreparable harm. Reas. I bring up this matter that in two weeks this order expires. Under rule 4001 (b) would have to be noticed out for another 15 days when this order expires. Main thrust to get future orders w/in 15 days ntc that is prov. for under code.

Ct: What the dtr is arguing this morning it is emergent relief. If doesn't get entered right away, his folks are calling to see if they even have a job. May not show up this morning. Saying not met req. under rule 4001 (b) and (c).

D: Not sure he testif. the items in parag. b were necess. to prevent immed. and irrep. harm. Not sure the pymt Mr. G. and M. if court deter. is necess. Standard would mean immed. and irrep. harm. Have repres. By counsel. No test. that if G. and M. were not paid it would gener. irrep. harm. Surprised Mr. G. and Mr. M. weren't here to make that case.

Ct: Supp. to be paid back at time of closing.

D: If admin. clm, paid pro rata as prov. for in code. I don't think admin. creds ought to be put to burden of pursuing parties for overpayments. Everyone has talked and asserted this is adminis. insolvent. Court can make

pymts. If paid, puts other admin. clmts in position of having to sue for disgorgement. My point is there is not showing. The $750k reserve for contrib. to the union plan, not sure how a reserve can prevent immed. and irrep. harm. No test. about where that reserve would be. I'm addr. those two reserve amts. Asked Mr. M. if reserving those amts would grant lender coll treatment. Not clear whet. lenders are seeking enhanced coll. treatment. Not sure where coming from. Order tended to give to extent those two amts were reserved or moved out of blocked acct. Give lender enhanced coll. treatment. I bel. if it is an admin. clm that $1.5 if paid out of blocked acct would increase the lenders clm ag. enhanced coll. That enhanced coll. position goes to $6mil or more $.

Ct: These in A and B are reserves. If the UCC cont. to take a position that the health and welfare benef. be paid.

D: Dtr took that position, we did not.

Ct: I thought the iss. was - second pymt asserts is to be paid in Sept. for Aug. work. Thought comm. took position it was pre-pet. clms?

D: Differ. iss. One in budget - $450k. Pre and post pet. health benef.

J: Clarify the dtrs position. If owed it should be paid, but dtr didn't think they owed it. Not trying to deprive empl. of something.

Ct: These items in exh. B are largely reserved. If don't need to get paid, no advance, not lien ag. recoveries under avoid. actions?

D: Yes.

Ct: If deter. they need to get paid, I assume - it is auto. it is sec. by avoid. actions. If they are admin. exp. that need to get paid, that's a decis. that gets made down road. Not a prob. w/granting admin. exp. status. Not a prob. of granting a lien ag. proc. of avoid. action?

D: Only point was as far as today's relief go would there be harm to set up these reserves.

Ct: Think it might be. Folks in Texas to extent it is covered by this the Health and Welfare fund people ought to be prov. assur. Intensity of feeling of employees. If right on law is money to cover those. Serious circum. that needs to be addr. right now.

D: Not an emerg. w/regard to pymt of these funds. Have gone out and sought other means of health insur. Only ques. this $750k addr. is whet. there would be health insur. in Sept. Ms. Pedroza's test. said health pymts term. Aug. 1. Escapes me how it could be emerg. at this time. You must deter. that not reserving this money would bring harm to dtr. If ultimately paid, gain coll. status. Order seems to grant that. Needs to be made clear.

Ct: Taking exh. 9 as doc. negot. Mr. M. not as familiar w/it the doc. by in large speaks for itself. Perhaps misunderstanding of it. Allowed Mr. M. to testify bec. it was important this exh. 9 get on record. If not as helpful, is life. My sense about this is w/respect to those folks who did antic. having coverage and didn't for a lot of those people who live on a more day to day basis than a lot of us who are privil. to have a much higher income that having that ntc that may be able to get Dr. bills paid if they win this fight the money will be there and won't be a useless legal fight to estab. right when no money. Is really important. Where I am coming from.

D: This order prov. the dtr would pay back any amt deemed not due. If deter.

it would be paid back after a contested matter. Don't want to argue that. My point is this amt the lenders will be able to surcharge ag. coll. gets to be a big #.

Ct: It does indeed.

D: I agree w/court the order extends coll. position to amts. I haven't presented properly my argum. w/regard to marshaling. Direct court's attn. - argum. I've made and may have left impress. that the marshaling provis. is adv. under this order. The provis. under parag. 1 addr. how all the assets are marshaled.

Ct: I want to make sure I understand. W/respect to the proceeds of the avoid. action were being collateralized to repay any adv. made pursuant to this post-sale cash coll. order. Also being coll. w/proc. from comm. lease litig. That's my understanding of what this is intended to say. I may be wrong on that. Have a differ. understanding?

D: Talks about aggreg. proceeds.

Ct: Tell me your understanding. Will ask dtr and lenders.

D: In the UCC's adv. proc. there is an important iss. w/regard to marshaling. Marshal DIP repayment. Parag. 1 of exh. 9 allows lenders to marshal all recoveries under all assets of aggregate proc. for all purp. Lang. is born out on the next pg. (Read) Parag. 1 talks about aggreg. proceeds which are all amts rec'd by lender. Not just those avoided by lenders.

Ct: My understanding of term marshaling is that was a term or a equit. remedy where you had two lenders who had loaned money that the jr. lender on one piece of prop. would req. the senior lender collected as much as possible to make the most room or proc. after being paid in full for jr. lender. Talking about here is the lenders are insisting they are not subj. to the marshaling. What we are really talking about? Really mean alloc. or applying funds to repayment of a certain debt and not ag. others. Marshaling doctrine does not apply.

D: Marshaling might not be exactly the term.

Ct: Fine. Think we all understand. That is the comm. interpret. of the parag. 1. Let me ask Mr. J.

J: Have same understanding. Avoid. action the order is clear it has to be paid. Nothing other than advances.

F: I agree w/court's interpret. of marshaling. UCC contends it can force lenders to take - apply money to DIP financing that the lenders can be forced to take money and apply proc. if any from sale of leases. Comm. has done an analysis on the leases. Parag. 10.6 of post-pet. sec. agmt specif. says neither agent or lender shall be under any oblig. to marshal assets. We applied money as we chose. Comm. says we really wish parag. 10.6 were there.

Ct: Don't know about adv. proc. Not in front of us. Do you agree w/what Mr. J. has summarized the effect of that.

F: Applic. of proc. from Fleming sale. Says we can do it as we wish w/o being compelled to marshal.

Ct: Let me ask this again. Not clear what answer is. Respect to post sale lending that post sale lending is coll. by the pre-pet. avoid. actions. Proc. from avoid. actions can only be used by lenders to repay the post sale

lending. Correct?

J: Yes. In parag. 4.

D: I agree w/both attys interpret. Funds adv. is first repaid from avoid. recoveries or at desire of lender. Parag. 1 addr. another item. Those are the sale of those leasehold int. Not avoid. recoveries that constitute DIP recovery. I assume for purp. of this order the DIP indebtedness is post indebtedness. In this order trying to graft in settlement of aspect of adv. proc. Nothing to do w/granting of lien on avoid. recovery. Iss. that exists and try to resolve it as prel.

Ct: Thought taken care of on Sept. 9.

F: It was.

D: It was.

Ct: Aggreg. proc. from sale that constitutes DIP coll. shall be applied to DIP indebtedness. Ask dtr what does that sentence mean? If DIP indebtedness been repaid, talking about new lending.

J: This refers to the DIP indebtedness that has already been repaid.

F: I’m not sure there was ever an order auth. this. Hand written out first by somebody who was stuck in Dover, Delaware bec. the planes stopped flying.

J: Think court approved it on the record.

Ct: True. Don’t think I signed an order.

D: Parag. is intended to addr. where that cash came form. Deter. the first cash is from proc. of cases. Is inapprop. in this order.

Ct: Saying didn’t have right to do this.

D: Saying that in adv. proc. After paid off, paid from lease proc. Takes away that possible recovery. Made argum. the lenders should look at coll. as opposed to expanded collect. rights for DIP. Whet. we are right or wrong, this isn’t the place to resolve that ques.

Ct: Either I say no to this order then there is no funding for the dtr.

D: Say no to prov. of the order.

Ct: I can’t - same iss. we addr. on Sept. 9. Dtr is saying there is not adeq. prot. to enforce non-essential cash coll. on lenders. Cash coll. to prot. the dtrs int.?

D: Yes. Recover from use of cash coll. This order is overreaching of granting resol. of constituted order. Elim. our leasehold int. clm. DIP was $15mil. A major hurdle for us to clear. If granted, that adv. is gone.

Ct: I don’t think I have a basis for saying there is suffic. evid. on record to req. lenders to abide by this - to enforce them to lend other than consensual terms. Either I approve this form of order or I don’t approve any order at all.

D: UCC bel. this order elim. any recovery for unsec. Oppose this order. Better chance to recover under ch. 7 than under this order. We don’t desire conversion to ch. 7, desire cash coll. less draconian.

Ct: Come to place in life where faced w/less than desirable choices.

D: Comm. discussed this in length. Order elim. abil. to recover anything for unsec. If admin. exp. are paid, is a wash. Not a wash if adminis. insolvent. Take judic. ntc of collect. bargain. in 1113 and 1114 of code. If conv. to a 7, will be collect. bargain. contract. Clms may arise and are argum. there are post-pet. admin. clms. May be huge admin. oblig. that would further make estate insolvent. Create likelihood for disgorgement proc. Issued is blurred when taking admin. funds and pay admin. clms. Doesn't pay them proportionately. Mr. M. testif. that he thought this case would end up ch. 7. What will effect of this order be on a ch. 7 trustee. Decredal parag. 5 - granting of coll. as well as the marshaling resol. severely ties hands of ch. 7 trustee which most parties are expecting at some point in time. Req. the comm. or other party seeking pymt from lenders to win case and seek more for pymt. Ask this order in it's present format is not approveable. Lenders ask for relief to resolve other pending adv. matters. No differ. if lenders asked adv. proc. be dismissed w/prejudice. Marshaling aspect is same.

H: Admin. clms of tax and rev. Takes assets used to pay and then it would enforce dept. to sue. Court noted there is congress. statutes. Applies to pre-pet. Bankr. cases in NM get boost. Talking about post-pet. taxes. These lenders wanted these stores open in Aug. I think it is unfortunate - grossly unfair the dept. should be singled out. Pymt to G. and M. is not immed. irreparable harm. Mr. F. said he agreed to strike those out. I've cited those cases in my obj. Dtrs have fiduc. duty to not say pay tax and rev. Rather unrealistic to say hoping to pay taxes not minimizing importance of paying taxes. Court could easily have enough auth. to signal where he would like this to end up. Mr. J. raised the - compared to ch. 7. Fine analogy. Two level admin. exp. Dtr can't have it both ways. Start holding money back. Set up a fund and make clms later. I sense a discrim. in another way. The dept. in addit. to $1.5. Thought it was my duty to do what we could. Comments made to indicate the dept. is a basis for parties to decide not to pay us. Is inapprop.

Ct: No evid. Of that on the record.

H: Is discrim. ag. dept. Not recog. in bankr. code. Notion of surcharging, eq. subord. Said taxpayers have funded ch. 11 plan to tune of $1.5mil. Court shouldn't tolerate that. To the extend there is a stat. of a lien attaching. If court is intent on granting order take Mr. Fish up on his sugg. rather than have lawsuits later.

A: I think this order presents to say the least an extremely diffic. decis.

Ct: Follow up ques. to Mr. Harris. Not saying these funds the dtr is asking to pay in reserve is to be paid to lenders.

H: If lenders are willing to reserve these - global.

Ct: $52mil in blocked acct. Dtr wants to use some of it. Reserve addit. amts. My ques. is rest of it goes back to lenders. Mean it goes back to lenders.

H: Prob. could go back to lenders or might consent w/o earmarking.

Ct: Don't understand the lenders are agreeing to anything.

F: Head of lenders - want $1.5mil reserved for them or paid to us. As to Health and Welfare court make clear it was going to happen.

Ct: If this gets approved. Got an order and it either stands or falls. Not

suffic. collateral floating around in any of the test. that I can force this on the lenders.

H: Negot. a loan reserve. Consider to be obvious discrim. ag. one admin. clm.

Ct: Whole course of this where we have spent days negot. and still don't have an answer. Extreme amt of negot. I don't have any bus. changing it. Don't have grounds to chg. this.

H: I think court has grounds to approve it. Doesn't leave assets.

A: To say this presents court w/a diffic. decis. is the understatement of the year. Budget that is being presented is under $3mil. Constitute a lien ag. avoid. actions. $7mil likely be a lien ag. avoid. actions. If add up those figures and don't take into acct for potential for lien have $5.2mil in liens ag. avoid. actions. My understanding the primary sources of recovery would be the Fleming avoid. action. Approx. $4mil. TOPCO would be approx. $6mil. W/the net effect.

Ct: $2mil total of $6mil.

A: Yes. What I think is being req. is it approves cash coll. As a corollary Mr. M. testif. it is highly likely this matter will end up in ch. 7. Close down the pension fund. If approved, and subseq. wind down is approved this case will wind up in ch. 7 w/no money for a ch. 7 trustee. Choice between the devil and the deep blue sea. If order is not approved, dtr said it will have to conv. immed. Have a case where cks will bounce. At lease a ch. 7 trustee will have possib. for recovery on this avoid. action. Allow trustees sum for admin. estate and make distrib. pro rata to admin. clmts. If approved, a horrendous situation will be dumped in a trustee's lap w/no money. No good outcomes to this situation. Perhaps the outcome w/the most equitable result down the line would be unfortunately to deny approval of this order. Other concerns we have is the concerns raised by Mr. D. This matter is brought up as an emergency matter which it is. Circum. is that some decis. needs to be made. Ntc has not gone out to general cred. body w/oppor. to get some info. and be heard on what will happen w/remaining assets.

Ct: Ntc gone out to shortened matrix?

A: I bel. it has. This order will be piece meal distrib. to certain admin. exp. that will create some diffic. expensive and timely litig. w/disgorgement iss. As well meaning as order is, the wind down of dtrs affairs the granting of it will create a more diffic. situation than refusing it today. W/great reserv. there are no good outcomes to the situation. Req. court deny approval of order.

J: Don't have a lot to add. W/respect to marshaling concern it is the dtrs view it clearly prov. w/respect to repayment of loan. Comm. is asking court to not enforce DIP order that has already been entered. If DIP order says something, it says the post-pet. loan agmt.

Ct: Intended to be a restatement. Parag. 1?

J: I bel. it is. Point that it req. a contested matter to get money back, that provis. was req. by dtr. Meant lenders have to give some money back. Invoke some cumbersome procedure. Waive any set off clms. Think the order prov. protection to the estate. If paid to lenders, the estate will protect it from returns. Dtr thought it was a protect. to the estate. If some kind of adv. proc., not that hard to get an order. W/respect to disgorgement iss. Most diffic. to respond to. Not an iss. Unsec. comm. iss. Comm. is arguing the estate is insolvent. Arguing about disgorgement iss. Mr. H. has a legit.

concern. I didn't research law of disgorgement for this hrg. Fair amt of eq. discret. given to court to do what is just and fair. Dtrs view to conv. this case right now would cause irreparable harm. Negot. best deal it possibly can. Feas. at the moment. If the order is not entered, the case would get converted. Estate is a lot better off by order. Can help the lenders realize max. val. of collateral. Bargaining in good faith to get as much as possible in exchange. Dtr is doing best it can. Dtrs effort in connect. w/wind down budget was to hit home run for all. Understand on iss. of ntc to get heard prior to closing when had the most leverage. Pay admin. clms in full. Not feas. to send to entire matrix w/in that time frame. Gave best ntc it could under the circumstances. Diffic. was there are creds clming admin. amts and only so many $ to be negot. Covered the admin. clms. Best under the circum. Make a diffic. situation w/best outcome given the factors. Court of equity. Last payroll for employees. Some benef. to doing that. Approp. to doing that. Ask court to approve order.

D: Clarify one point w/regard to DIP order and UCC adv. Mr. J. has said the marshaling provis. provided in DIP order. The parag. 20 of DIP order gave UCC the right to file and serve obj. on complaints. (Read) Raised in adv. proc. the ques. of marshaling. UCC has a lien. To extent marshaling is approved in DIP order by provision of lending agmt. Not disputing what court has entered. Exercised right to bring challenges forward. One challenge is the iss. w/regard to marshaling. Second, asserts that is a restatement in order I would defy them. No stmt w/regard to marshaling that addresses from sale of proc. Not a stmt of marshaling provis.

Ct: Saying parag. 10.6 doesn't addr. that?

J: I have a copy.

D: It has general terms w/regard to what parties may req. the lenders to do. Doesn't state specif. on how applied. A lot of leeway on what is in 10.6. Not a stmt of what is in decredal parag. 1.

Ct: Will accept Mr. J. offer.

D: 10.6 doesn't say what decredal parag. 1 says.

F: Explain why Mr. D. misses the boat. The way the comm. reads parag. 20 is they have until May 23 to file an obj. or adv. proc. obj. to anything in this order. That is totally incorrect. Have right to file adv. Do anything predicated on the avoid. of loan. Did not have right to obj. to rights on DIP Financing. Whet. we have to marshal or not are not predicated upon whet. pre-pet. loan was valid or whet. we had a lien. That action to marshal the post-pet. is not predicated upon. Comm. had no right to wait til May 23 to obj. to DIP financing. Had no right to do that. DIP financing was set in concrete when Judge Black signed this. Right we got for DIP financing.

Ct: Saying once Judge Black entered order on Mar. 15 the prov. out of post-pet. financing order those became binding on folks.

F: Yes.

D: Two differ. iss. at play. Rights the lenders have under the DIP. Rights that survive repayment of DIP. Addr. the valid. And extent of pre-pet. indebtedness. Comm. reading of these two parag. the comm. had until May 23 date to addr. all those iss. set forth in the middle of parag. 20. Reading of term that are predicated upon marshaling the valid. and extent and avoid. or enforce. of pre-pet. indebtedness. Think it was valid to bring the argum. Pre-pet. not sec. to real estate leases. Will be litig. at some point in time. Bec. this lang. says any other prov. that marshaling is brought into

the dispute. Certainly valid for us to raise those enforceability issues. We bel. it is valid to raise the marshal. argum.

Ct: Says comm. shall have until May 23 (read)

D: Have right to raise those arguments. Not right to throw argum. out before we had a chance to make argument.

Ct: Deny argum. today.

D: Not fair to rule on UCC's adv. prior to us presenting it to you. A lot more than the lines in this prov. Is case law and eq. issues. Whole string that would have to be presented to court.

Ct: Reas. I was asking ques. is bec. other side it is clear. Not sure I don't agree w/your read. of lang. More importantly, I don't have a basis to force lenders to lend if they don't want to. Lenders have not agreed to effect. have this ajudic. Order says in so many words the UCC has to give up that clm. As you sugg., that being the case the lenders not agreeing I've either got a choice of overruling the comm. on this or say the comm. obj. I really ought not be deciding this today. That necess. condition hasn't been met then order denied.

D: Committee agrees w/that analysis.

Ct: Final comment?

J: Comment on this last iss. Direct court to parag. 1(b) in financing order. Pg. 5. Says the terms and condition of DIP facil. are hereby approved. In the post-pet. loan docs. Order of court that deter. 10.6 are approved and fully enforceable ag. dtr. Parag. 19 on pg. 13 the dtr has waived rights to contest pre-pet. rights of dtr. Refer. on terms and conditions set forth in parag. 20. Seems clear to dtr that parag. 20 does not permit an obj. to the terms and conditions of post-pet. loan docs deemed approved and fully enforceable in DIP order itself. Directed to those pre–pet. clms. In state's best int. to not hold up relief bec. the loan doc. has no merit at all.

Ct: Parag. 20. (Read) It seems to me the antecedent word "that" predicated upon deal w/iss. about did you really have a valid lien of these partic. leases as opposed to ques. of marshaling which doesn't seem to mean comprehended in that phrase enforce. and avoid. of pre-pet.

D: Means any one or all of pre-pet. condition. Marshaling argument is sought to addr. Argued the marshaling argum. is part and parcel. Have situation of multiple clmts the thing that is being addr. is the prior. of those clms and whet. persons w/one coll. position can satisfy that lien out of one coll. rather than the other.

Ct: I don't think so. Talks about clm obj. Kind of thing that says pre-pet. You weren't in senior position. That seems to me the clear sense of this lang. Seems to me that's pretty clearly what this lang. is limiting the comm. right to obj. to. To bring in post-pet. iss. Of marshaling after Mar. 14 then it seems the effect of that is the iss. of marshaling as a right that has been granted is prob. off table.

D: That might be your primary gleaning at this time, but haven't had case law presented to you. The UCC's adv. is MetLife was not perfected to leasehold interest. Prepet. clms to proc. gener. by sale of pre-pet. leases.

Ct: If not successful, lose on that iss. anyway.

D: Not only coll. source.

Ct: Use as example. If win, the MetLife doesn't have coll. to clm anyway. Can't ignore marshaling bec. it doesn't have int. in that coll. anyway.

D: MetLife still has lien that is granted by dtrs. It becomes Jr. to the estate position. Unperfected lien and still clms w/regard to this coll. Addr. the dispute which would be who actually gets money from sale of leases, maybe not marshaling is equit. distrib.

Ct: Not MetLife's coll. Nobody else's coll. Doesn't belong to anyone except estate.

D: Not exactly correct. Are other clms to sec. int. in leasehold amts. Clm that comes to mind is the lenders have said they adv. DIP Financing. Bec. DIP coll. gave them the right to have a lien on everything. When granted the DIP loan have a lead on MetLife coll. Saying is that by virtue of DIP order have lien even though DIP financing has been repaid. Assert that repayment was from MetLife coll. Repaid $15mil. Asserting that came from MetLife coll. Iss. I am trying to present to court. Whet. lender can take position that it was repaid when specif. it has $50 - $80mil to be repaid from. Lender should be req. to take it's DIP recovery out of DIP assets and not say that recovery is from the leases. Pro rate the whole recovery. Deter. what percentage is in leasehold int. Properly presented in adv. to court. Eq. power to say that is not fair. Say we raise iss. and should be presented.

Ct: I don't know answer to iss. I need to go thru it.

F: Go back to orig. iss. of marshaling. Can't be compelled to marshal.

Ct: If UCC is successful, then the marshaling rights ...

F: The right to apply as we wish.

Ct: Take all of proc. Entitled to assert - we have a good clm. If that would have pushed MetLife out of way so no val. for them at all would be allowed to do that.

F: MetLife can't force us to alloc. in a way that benef. that jr. cred. Right we bargained for. Post-pet. right.

Ct: Mr. D. are saying you like to argue that, but would like it fully presented.

H: Send it back to bank. Negot. $1.5mil for G. and M. Disgorgement lawsuits...

Ct: Are a pain in the neck. Went thru one one time. I don't which way to go. Up in air. Need time to think about this. Supp. another deadline at 3:30 our time w/transf. of funds.

J: Under midnight deadline could hold for pymt today.

Ct: Makes sense to call you at about 2:45. Come back then.

Recess

ORAL RULING

Ct: Will approve entry of order - exh. #9. Will not approve Mr. Golleher and Mr. Mays being paid today. Second, budget must have in it a $50k amt for a

ch. 7 trustee subj. to conversion. If it does, will approve order. If not, will not approve order.

F: Ask two ques. On Golleher and Mays says the $1.5 is reserve. Draw a line thru that and put...

Ct: Says is auth. to pay $1mil success fee for approval of ct. Will chg. to say dtr is not auth. to paya $1.5mil.

F: Money will be reserved, but not paid.

Ct: Mm, Mm!

F: On $50k. Parag. B where we have reserves. Add $50k distrib. to ch. 7 if one is appt'd have that in mind.

Ct: That works.

J: W/respect to Golleher and Mays will the money be reserved?

Ct: Yes.

J: Agree ½ of that money is applied to int. and dispute relates to other ½. Subord. to amt.

Ct: Forgotten about that. My conc. were from Mr. H. conc. on disgorgement. I think we could chg to say $750k could be paid to Golleher and Mays. That works instead I think. That serves for right now to address the conc. about disgorgement. W/those clarif. does anybody need to make phone calls?

F: I would.

J: As would I.

Recess

Ct: Point in doing findings of fact?

J: Yes. Accept. to dtr and lender.

F: Yes. On pg. 2 in the find. B chg. would be similar in list of items. Just before $1.5mil. Wrote $50k is reserved for a ch. 7 trustee and then in parag. 8 in the decredal portions the $1.5mil success fee is chg'd to $750k.

Ct: I put down dtr is auth. to pay at this time $750k.

F: Put down dtr is not auth. to pay any other than $750k at this time. Used to reserve upon appointment. Get $50k of that.

A: No prob. w/that.

Ct: May not addr your concern as well as you want. Comfortable w/that?

A: Yes.

Ct: That proposed lamg. works for the court.

F: Shall I approach the bench.

Ct: Have cleaner copy?

D: Have decredal portion of order say subj. to interlocutory appeal so I can present that option to the committee.

Ct: Darned important order.

F: Before it got to interl. appeal would have to worry about bond. Have to conv. now if these protections were subj. to reversal. Ask for bond from comm. members. Ask for separ. hrg. Do on emerg. basis. Can't just say sure you can appeal.

Ct: Need to have a final hrg on this. One of the things I am going to order. Iss. of bond doesn't come up unless they take an appeal.

D: Taking interlocutory appeal ...

Ct: Deal when comes up.

J: Comm. can file m/for interl. appeal and court can decide.

Ct: If comm. came back and said they were seriously thinking about taking appeal, have immed. hrg on that subj.?

D: I would still say I think the comm. should have right to appeal. Put in order as a matter of course. Ask you now if you want to stay? Know answer to that. Lenders will be extending large amts of cash promptly under this order. Delayed rights to take appeal. Prejudices their rights.

Ct: If effect. a dispositive order, as of this afternoon I had not given that iss. any thought. I don't feel comfortable enough that I have enough of a grasp to say that is a good idea or not. Talk to Mr. Cohen and decide what you want to do and tell the dtr and lenders and will do something on short ntc if there is relief you need from court.

FINDINGS OF FACT (notes attached)

Ct: I will sign the form of order. Talk about when we should set fh.

D: Bother you to set fh two weeks after order expires. Not sure what iss. would be open.

Ct: Scrambled to deal w/this. Not allowed to have fh in less than 15 days?

D: Yes.

Ct: Don't mean to give you a hard time. Impressed w/counsel. Impressed w/how hard you have worked. Iss. becomes do we know when the 15 days expire?

D: Modified as of today. Under 4001 (b) and (c). Agreed upon order be attached to motion. 4001 (c).

F: If order is agreed upon and not effect. yet. If emergency, differ. situation.

Ct: Wasn't this contested?

D: Started out w/order that not sure if we agreed to or not. Couldn't hear in a contested fashion. Has to fall under rules of agreed to motion.

Ct: Got a ques. about code.

F: 15 day - look at (b) or (c). Are two alternatives. Subparag. 2. Either

have 15 days ntc or if you need for immed. or irreparable harm. Court has found irrep. harm. Can enter order and not sure you need a fh.

D: Has to be a fh and 15 day ntc. Contemplates an agreed order is filed w/motion. Can have prelim. order at any time. Ques. to me was whet. we were under (b) or (c). Think we are under (d). As we moved along, was an agreed order. Under the provis. of (b).

J: Dtr filed m/under (b) and (c). Did not have an agreed order at time. When we did reach an agmt, asked court to approve it. Negot. all along to reach an agmt. Circul. drafts of order. Not sure it makes any differ.

D: Agree w/dtr. Would have to end up under (d).

Ct: Arguments made Monday or Tuesday by Dept. of Rev. that there was a basis to extend.

D: Argued as alter. to conversion. Only if dtr asked for it. Not sure it makes any differ.

Ct: What would happen if you filed a contested motion. Go to trial and before judge makes a decis. folks stand up and say they do have a settlement. Others say we don't agree w/that. Do this or do that. Approve order in terms agreed to. Hasn't there been a full chance for everybody to argue the iss.?

D: What if agree to prov. in motion. Get to fh and dtr says I will give you these liens we didn't propose to give you.

Ct: Had a chance to hear what those were.

J: Direct attn. to 4001 (d) (4). Answers court's ques.

D: That's the point I was trying to make. (d) (4) comes into play. Something not addr. and wasn't contemplated in orig. motion.

Ct: Approp. for me to ask you what signif. prov. exists in this order I would be approv. that wasn't ntc'd out. On ntc that might come up.

D: Don't think there was any. If the final order or proposed order had been ntc'd out is differ. between m/and order. Order doesn't prov. that. Don't think ntc was proper. Not trying to create a prob. I don't know what I could argue at fh. Think it is my oblig.

J: On point of budget being approved by comm., this was an agmt among the parties. Two week budget thereafter. If comm. didn't agree to it but, we didn't really get to it. Under 4001 (d) (4) the court approved agmt under 4001 (b) and (c). Dtr did not limit ntc strictly to the comm. which it could have done. Ntc'd out m/to ltd matrix.

Ct: Which?

J: M/for use of cash coll. What we are hearing today. M/before court today was ntc'd to ltd matrix.

Ct: Sept. 6 ought to be treated as day ntc started. Add 3 days for mailing. 9th and 15 would be Sept. 24. Next Monday. Set for 3:00 Sept. 25. Folks can appear by phone. One week from today. I have ruled on merits of entire relief requested. Ask dtr to please prepare notice of fh to ltd matrix w/copy of order and exh. attached to order. Prob. ought to max. ntc.

D: Should order entered say Order Resulting from Preliminary Hearing. Might

cause confusion.

Ct: Could say first order arising out of supplemental hrg.

J: Shouldn't have a prob. getting ntc out tomorrow. Set obj. deadline of Monday before the hrg. Ask a copy be served on the dtr by 5:00 by fax or e-mail.

Ct: Fine.

F: 5 min. to mark up order.

ORAL RULING

1334 and 157; core; 7052. I have very briefly reviewed UCC A and B and Ex 15, and the other exhibit tendered at this series of hearings: Ex 1-9, and taken into account the testimony and arguments of counsel.

Will approve the proposed order, with minor typographical corrections, and subject to the parties making two major changes. The first change is that Golleher and Mays may be apid $750m now, but not the rest just yet, but I will consider that at the final hearing on this order, and the second change is that the budget must have at least a $50m amount reserved for a chapter 7 trustee in the event of conversion, subject to the same provisions as this order . If that addition made, will approve; if not, will not approve.

Approve the expenditures attached to Exhibit 9, which are set out in Ex 7, for the first four weeks shown (through 9/29) only. I will also approve the reserve of the funds set out in para B of the findings in the order (page 2-3), except for the $56,400 of union dues which have already been paid over and were never cash collateral to begin with, but none of that is to be paid until further order of the court, except for the $750m to Golleher and Mays.

I find that there exist emergency circumstances in this case, such that unless these expenditures are allowed right now, there will be immediate and irreparable harm to the estate (and that is the language of the rule 4001(b)(2) and (c)(2). And it is absolutely clear from how this case has gone and the evidence presented now that there is no chance of funding from any other source.

We need to schedule FH on this at the end of this hearing.

This order lasts only another week and a half, so the debtor et al need to get to work on another one shortly. When do that, pull in UCC on that, so that they at least have copies of everything as it circulates. Clearly the Debtor represents the estate, not the UCC, but the UCC needs to be kept in the loop on all these negotiations. At the same time, I don't expect major fees to be run up by the UCC in connection with further cash collateral orders.

Ct. will not necessarily approve a subsequent order; depends on what it says and provides.

What this order does is allow the estate to function a little longer to avoid leaving a mess behind. The Lenders and the Debtors have said they want to avoid doing that, and this order is evidence

of that intent and goes a long way to avoiding leaving a mess.

A conversion now to chapter 7 would be a mess, or, more precisely a disaster. Even if the proceeds from the leases adv proceeding is not consumed by an allocation by Heller to use it all up (as Heller no doubt intends to do) and even if the UCC obtains $6mm from the Fleming allocation and Topco preference actions, those funds will not be coming in short term, and thus the chapter 7 trustee would be left without any cash for a substantial period of time. And the trustee would have to rehire, or hire, people who could do the work of issuing the w-2s, the 1099s, and get the pension and 401(k) plans ready for people to convert, take distribution on, etc. That work would take much longer to get done than now by the debtor, and in fact might not get done by the end of Jan. 2002, and anyway it would be an enormous waste of assets for the trustee to spend much more time and money doing that than if the debtor did. Overall, that won't work, and I won't put a trustee through that.

By so ruling, I am in effect overruling the contention of the UCC raised in its adversary that it is entitled to contest the non-marshaling provisions of the Security agreement which is Exhibit A to the final cash collateral order entered by Judge Black on March 14, 2001. (Ex A is doc 242, and the final order is doc 241.) I think that the language of the DIP order (241) at page 20 and of para 10.6 of the security agmt (Ex A) is clear enough in itself and in context that it limits the challenges filed on May 23 to contesting the prepetition lien position of eg, MetLife, and that the right not to have to be subject to a motion to marshal is derived from the approval of the DIP cash collateral or financing order itself and became final 11 days following the entry of the DIP cash collateral order by Judge Black on March 14. Quick ruling, but I think it is clear enough to be able to do that. UCC was aware that the issue was in play, and I think therefore there has been a sufficient opportunity to raise that issue.

And these two findings/conclusions or rulings (the time it would take for cash to come in and the non-marshaling ruling) determine that there is not a need for findings about the value of the actions being brought by the UCC. This is not to say the UCC should stop working on these adv proceedings.

I find that the Lenders cannot, on these facts so far, be compelled to lend more money to the estate. Therefore there must be a voluntary agreement, or none at all. There really is a question about what collateral or protection there is out there that is not already pledged to the Lenders. The Lenders should not be required to repay themselves out of their own collateral.

In this connection, the lenders are getting a benefit out of this order, because they will have about 1/12 of the proceeds being used by the debtor to collect on the secured debt. And if the Debtor's effort is successful for the Lenders, there will be a handsome return to the Lenders. But that money is theirs to begin with, so what the DIP is providing is the service: the service is the consideration, not the proceeds of the collections themselves, which are laredy pledged tot heLendes.. There is nothing in the Code the prevents the debtor from working to benefit all the creditors, including the secured creditors, and that is what is happening here. But more to the point, the 1/12 in this budget is small enough that the exchange of value is fair for the estate. And the determination that the UCC may not challenge the non-marshaling rights of the Lenders

has essentially a tactical or “stalling” value, and therefore is not of much value, or should not be.

Additional benefits of approving this order, if it is approved, are that the payments made to local vendors, workers, etc. will turn out to be good – that is, there will not be checks bouncing on people like there were when this case was first filed --, and there is the assurance that IF the workers are entitled to the medical and welfare fund payments for September, the money will be there. Same goes for other administrative claimants et al that are addressed in para B of the order. and Lenders should not be punished, if at all possible, for having done the right thing.

Concerned about NMT&R not getting paid on this go-around. Given that the sums to be paid are the checks issued to working and recently laid off workers for wages, payroll taxes, etc., it is worth signing the order to get those paid. But a number of the big ticket items are not getting paid this time around, but only reserved for, such as $750m for Golleher and Mays, $1.5mm for Solomon, etc. I am very concerned about disgorgement, and that is the reason the reserved amounts are not getting paid with this order, except for $750m for G&M. In any event, there needs to be serious consideration given to dealing with NMT&R at the next go around, because unless that debt is paid or reserved for, I am not sure that I should be approving additional payments, at least without a pro rate in mind. And that would be a good time to think about this because at this next stage spending is starting to tilt more in favor of the Lenders. Overall the Lenders get a lot more out of this arrangement as time goes by, at least if this spending pattern is projected forward.

No problem with the JTW care-out or its limitations: those are the limits on the DIP itself, and in this case where the DIP order was so heavily negotiated, I am comfortable this is OK. That may not be the case in another case, however; it depends on the facts.

FH: Sept 25, 3.00 pm; deadline for filing objections is Monday, Sept 24, at 5.00 pm.