

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 25, 2001

Re:
FURRS
No. 11-01-10779 SA

Preliminary Hearing on Motion for Order Authorizing Use of Cash Collateral in
October 2001 filed Sept. 21, 2001 by Debtor

FH on First Post-Closing Motion for Use of Cash Collateral

Attorney for Debtor: Robert Jacobvitz
Attorney for UCC: William Davis
Attorney for Heller: Paul Fish
Attorney for Steinsair
Attorney for Met Life: Jennie Behles and Ron Silverman
Attorney for Premier: Gail Gottlieb
Attorney for Joe G. Maloof: Kim Middlebrooks
Attorney for Furrs 1, 2, 4-9 LLC: John Farrow
Attorney for UST: Ron Andazola

Summary of Proceedings:

Exhibits X

Testimony

**FH ON FIRST POST-CLOSING M/FOR USE OF CASH COLLATERAL - WILL SUBMIT REVISED
ORDER TODAY**

**PH ON SECOND POST-CLOSING M/FOR USE OF CASH COLLATERAL FOR OCT. 2001 - CONT'D
OCT. 16, 2001 @ 1:30.**

J: UST filed an obj. Resolved that obj. Inserting the lenders consent for UST fees at \$10k that accrued in third quarter of 2001 reserving that money and auth. dtr to pay \$10k to UST. Third obj. is by the UCC. Will let Mr. D. articulate that. Assert an obj. to reserve right to appeal. W/those items are prepared to submit an order.

D: After last several hrs on prelim. motion we were able to have one confer. w/counsel includ. chairman of comm. They thought that the approp. course of action was to obj. to making order final to raise obj. that were raised to prelim. order to preserve our obj. and decide what to do w/final order. During my research w/regard to this iss. I came across a case called Saybrook. 11th circ. case rendered in 1992. Good explan. of cross coll. and forward cross coll. Doesn't raise any new obj., but it does analyze this situation from another angle. Disting. cross coll. from pre-pet. debts and disting. from forward cross coll. Pre-pet. debts gain sec. Securitized to post pet. clms thru post-pet. activity. Clms of the sec. lenders would gain sec. When you have an undersec. lender have an unsec. clm. Poured over into unsec. class. When take any proced. that pays pre-pet. clms out of post-pet. coll. Are engaging in forward cross coll. If have cross coll., unsec. portion of sec. lenders clms gets paid in some percentage higher than the rest of unsec. creds. Sec. creds may be able to conv. what would have been an unsec. pre-pet. clm. Conv. clm to being paid. In this case there were certain post-pet. assets of debtor which were clearly unencumbered by clms of lenders. Avoid. recoveries which include Fleming clm. Is some amt of money to be deter. by court. Under your prelim. order the sec. creds thru marshaling would apply some of the post-pet. assets to unsec. post-pet. clm. Not controlling. Wisdom and knowl. of two iss. rests on two stat. provis. 364 specif. prov. 3 kinds of adeq. prot. that the court has auth. to give. Cross coll. is not one of those the court has allowed to give. Mindful of approv. pet. of sec. clm. What has happened in this case by virtue of lenders advancing small amts of money in relation to unsec. lenders clm. Able to marshal coll. Apply coll. tot he post-pet. DIP lending. Gain a sec. status for what would otherwise be a pre-pet. clm. Relief is not relief prov. for in 364. Is unauthorized. Not prot. by 364 (e). Protects auth. lending under the code in good faith. 11th circ. case says not auth. under 364 (e).

Ct: Thought it allowed me to grant a lien that was sec. to somebody else. Doesn't 364 grant?

D: DIP financing or funds under this DIP order. Marshaling system under those 3 orders allows the dtr to in effect pay off out of one group of coll. the DIP financing and then apply the other assets to the pre-pet. loan. I didn't explain it very well the last 3 hrs. Will let this case explain it. 364 (e) does not allow forward cross coll. Embarking on forward cross coll. viol. prior. scheme set up for distrib. Result of these 3 orders. Get more than it would have. W/o post-closing orders.

Ct: Only to MetLife?

D: Not sure of that answer. Interlender agmt. Share in some fashion shortfalls. Only apply to \$25mil note sec. by MetLife. Is a inter-lender agmt that might be a shortfall. Purpose is to say that w /regard to chging this order we didn't waive our obj. w/regard to the prelim. order. Just submit this case as case law that would supp. our position. Will make same argum. w/regard to this next order. Comm. will meet and decide it's options.

F: Case the comm. pres. to court prohibits cash coll. Not done that. Real compl. is that court has granted . Have post-pet.financing When one gives new money court can take assets that were not prev. pledged.

Ct: Pick a # out of air. Turns out the val. or what is recov. exceeds \$3mil.

F: Lien is ltd to amt post-sale.