

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

Eloise Hidalgo X

Date:
October 26, 2001

Re:
FURRS
No. 11-01-10779 SA

PH on Cash Collateral

PH on Motion to Serve Notice of Motion to Convert by by Publication by UST

Attorney for Debtor: Robert Jacobvitz
Attorney for Heller: Paul Fish
Attorney for MetLife: Jennie Behles
Attorney for UCC: William Davis
Attorney for UST: Ron Andazola
Attorney for TOPCO: Dan Behles
Attorney for Union: Peifer

Summary of Proceedings:

Exhibits _____

Testimony _____

FH ON MOTION FOR USE OF CASH COLLATERAL - FH NOV. 14, 2001 @ 11:00

FH ON MOTION TO SERVE NOTICE BY PUBLICATION - FH OCT. 29, 2001 @ 11:00

Ct: No obj. to m/to serve notice by publication?

A: MetLife has some concern. Combine ntc of m/to conv. w/ntc of admin. clm bar date. Try to split cost of direct mail ntc. I would much prefer direct mail ntc.

Ct: Admin. clm bar date?

A: Prefer direct mail ntc. Combine two and reduce cost. Only have auth. for expenditure involved for public. of ntc. Get auth. for several hundred more.

Ct: For what?

A: Splitting costs of admin. clms. One one side of ntc having m/to conv. and other side have admin. clm bar date.

Ct: Goes out in envelope?

A: Yes. Cost if we use a local company would be in neighborhood of \$10k to \$12k. Trying to share costs and send a combined ntc out. More than the ntc by publication of m/to convert. Have to go back and get auth. for expenditure of additional monies.

Ct: M/convert would be \$2k - \$3k?

A: Would be \$1400.

B: Expressed concern about public. ntc was calculated to where it needed to go. So many natl. creds in this case...

Ct: Lubbock Avalanche Journal?

B: Yes. Not natl. Publish in Wall Street Journal. More natl. publication. IF combine ntc w/dtrs on bar date would be about what that kind of ntc would be. Publication ntc is iffy anyway.

Ct: Balancing test. Have to tell you this iss. came up about a month ago in chambers. Someone from clerk's office came up and someone wanted to do public. by ntc. Talked to Margaret Gay and said talking about \$20k to use those folks. That was where she and I talked about ntc for public. Don't know if Mr. Andazola came up w/those #'s. If drew a triangle from Albuquerque to Lubbock and El Paso reached just about everyone. Get majority of folks. Agree public. is not the best form of ntc. Wall Street Journal would prov. better ntc. If we look at it from practical point of view and get more bang for our buck I think newspaper ntc would work. Iss. of admin. clms is more complex. Ques. is is what is likelihood of people who have admin. clms being missed. Not thought about admin. clm aspect until I walked in here today.

More up in air. Already been talk about conversion in this case. Month and a half ago dtr was talking about converting. I don't know who would argue that. Admin. clms could be some little tortilla factory down in Chamborino, NM. Mr. Fish that is a little town in So. NM.

F: Is a winery there, I know where that is.

J: W/respect to sending out a ntc of admin. clm bar date to do it by mail and not public. I think there would be due process iss. Estates w/mil. of \$. Cost of sending ntc locally is \$6800 for postage and \$200 for every pg. inserted in envelope. \$8800 approx. Dtr thinks it is a good idea to send out that ntc. Ntc will need to be sent on m/convert. No reas. to wait. From estates aspect the cost is less. Don't think dtr is asking court to approve ntc by publication. Cost is not overwhelming.

Ct: Take care of your concern Ms. Behles.

B: Yes.

Ct: Sounds like a better way to proceed. What do you propose we do at this point. Have a m/to set a bar date?

J: Ask ct to set a bar date and go ahead and ntc it out. Propose 40 days after we send the ntc. Specify a date certain.

Ct: So no ques. about calculating 3 days. More user friendly.

J: Other thought is that if the unions are in a position on severance clms to assert the emp. is not req. to file a separ. clm. so unions won't get thous. of calls.

Ct: Not get lots of calls. Sounding better all the time. Gets into iss. of class proofs of claim.

J: 10th circ. has a case. Under collected bargaining unit - clm for sever. is collected under collect. bargaining. Ask ct to allow the sever. clms on behalf of work force. Under collective bargaining unit. Union emp. would be bound by result. If ltd, the dtr doesn't obj. to union filing that particular clm. Guess court is right if any iss., not approp. to put in ntc.

Ct: Sheffelman case was a - Standard Metals filed bankr. while one or two fraud causes pending in NJ. Organized a couple of suits or lead pltf in one of them. Mass proof of claims. Distinction between that kind of circum. - not sure if they had ntc or had Mr. S. repres. them. Where the union is a desig. agent here that really works. Don't want to think about getting admin. clms that have to be processed.

F: On the union iss. the court could order that the union members not need file clms under collect. bargaining agent. Given a time to file a clm. The other thing is under rule 2002 (a) (7). 303 (c). Concerned that were are extending ntc to Dec. 2001. Not sure it will cont. in Dec. Have deadline during ch. 11 rather than being conv. Have deadline run during this next cc period. Gotten that done during cc. Give people two weeks to get ntc in mail. I think it would be useful to have bar date.

Ct: W/respect to appt. of a trustee and ques. whet. it overlaps.

B: Other reas. it would be handy to get ntc out is some ques. between UCC and sec. lenders about way to do a consensual plan. Might help us to get a deal cut. Nice if we could do it.

Ct: Saw mention of a plan. I had been thinking really talking about conv. and only real iss.is when.

D: Unfairness about sending out ntc. Texas emp. have to go thru some set of procedures. W/regard to union not sure on the fly if there doesn't become a conflict w/positions the unions have taken. Union has been in here asking for pymts of trust fund. Trust is not the individual clms. Health fund repres. those people w/health clms. Differ. in amt and differ. than those w/severance clms. Seems to me on the fly when some conflict iss. might come about. It would have to be clear if union recovered money have to go to individuals.

Ct: Assumed latter would be the case. W/respect to those people repres. by a union, not sure req. those folks to file - sense of equalitarianism. Like thought for practical aspect the notion of allowing union to file on behalf of a lot of these folks. Keep paperwork down. Help people who are admin. this. Benef. individuals. If someone has clm for sever. benef. rather have someone deal w/it for them.

D: If repres. by a union, shouldn't they contact union. Talking about opt in vs. opt out. May not want to pursue an admin. clm. W/o indication of admin. clm. Have to call up union or send postcard to union saying please repres. me in this. Sugg. at least the people should notify the union that they want the union to repres. them.

P: We don't want to approve something that would prejudice someone. Collect. bargain. agmt is between dtr and union. Emp. are not typically in a class. Rights between parties. In position that it will show we are in a position to bring these clms on behalf of members. Don't have immed. comment on trusts.

Ct: Trusts are differ. than unions.

P: Yes. Little less knowl. about Texas situation.

Ct: Not going to make a decis. today. Will be gone next Wed., Thurs. and Fri. Following week I will have court for a couple of days. Thurs. morn. Nov. 8 want to see some of the stuff we do. Be an ideal time. Designed to deal w/things like this.

F: I had another suggest. Dtr has power to file poc for people. Makes no sense if severance - no clue what rights people in Texas would have had. If the same - say Union would file a poc. Perhaps the dtr could file these clms that the union has asserted as admin. clms. Court could hold hrgs and resolve them. Throw that out as a way to cut admin. burden. Whet. they win or lose that is a separ. iss.

Ct: Based on records of who was working when.

J: Dtr disputes the severance clms so dtr wouldn't want to file clm.

F: If clm valid, is amt. Deemed their poc. Before court w/o this nightmare of filing or not filing poc.

J: Like oppor. to talk to unions to work out a solution. File clms for constituency. Rule on filing tax clms. May req. they file w/in so many days. Dtr would prob. prefer not getting into bus. of filing admin. clms. Hope we can work something out w/unions.

Ct: Local 1564 and 540 for West Texas and parts of NM the major. of emp. are repres. by those two unions.

P: Correct.

J: Non-union employees and four stores that weren't part of a union. About 550 total non-union employees.

Ct: 11 - 12%?

J: Yes.

D: Just so this ques. won't be driven by emp. interest keep in mind there are ivy league post-pet. vendors who will have admin. clms and landlords. Shouldn't be forgotten. Are a large # of post-pet. vendors. Sure there are other groups of people I can't think of.

Ct: Good point. Came up on serving ntc to conv. on public. Dtr has right to conv. as a matter of right from 11 - 7. W/o ntc to anybody. Want to put heads together and figure out what you want to do. Ques. would be what kind of timing. Comfortable that 20 days plus 3 days is suffic.?

A: I dissent some. 40 days would be far better. Sending ntc to small vendors and landlords. May not be a reaction to their mail very quickly. Wish court would consider 40 days. Abundant caution.

Ct: Nothing in code that req. that.

A: 40 days is a standard practice in this district. If talking about small businessman, may not be quite as suffic. to responding. In fairness to them, I req. given an addit. period of time. Prob. are not insurmountable. This is only bite of apple these small businessmen will have to get admin. clm paid. May have pre-pet. clms. Only have oppor. to get part of what they've lost. 40 days would not be unreasonable.

Ct: Raises a couple of ques. about this whole process. One of them if make 40 days someone will say we've got plenty of time to deal w/it and then 40 days has come and gone. Other thing is sending out a ntc before the ch. 11 aspect of this. Be the ch. 7 trustee's job to send out ntc. Assuming there won't be too many more admin. clms incurred? Not more vendors and darn few employees.

J: Dtr is paying it's way under budgets. If not paid w/in time budget expires, money would be avail. Don't think admin. exp. are going to be an iss. Think the thinking is that the dtr and lenders in discussing possibility w/obj. of getting admin. clms paid as much as is feas. possible. Try to negot. that. If the case were to convert, 40 days wouldn't make any differ.

Give us time before next budget expires while the cc order is still in effect. Dtr is asking court to approve a cc or dip budget that goes thru Dec. 31. Part of what dtr negot. the new budget would encumber an avoid. action. Prob. the biggest part of the negot. Dtr views it gets enough benef. W/that agmt it is in the best interest of everyone to do that. Have oppor. to see if it can be renegot. Primary obj. is to pay pre-closing admin. clms.

Ct: Not time to come back for another hrg. Sooner we get on road the better off we all are. Think w/in a couple of days can work out?

J: Think there is a hrg sched. on Monday. Everyone that needs to talk is right here. See if we can work something out by that hrg. Can make proposal for relief. If not, that is what we will ask court to hear.

Ct: Simple procedure is one that works. You figure out how to do it. Something that makes it simple to deal w/. We get calls from people who are trying to figure out how to fill out a poc. Amazing how complex it could be. I do have a concern about those people who are being repres. by the union who may not want to clm their severance pay. Hard to believe they would see I would rather make this contribution to the bankruptcy system. That class is so small. Saying not do it. If can't work it out, will deal w/it on Monday. Sounds like we ought to make sure we do something so by Monday afternoon have clear instructions on what to do. Further thoughts on that subject. (No answer) Have this order from Mr. Andazola. Is moot.

A: If can't reach an agmt, like final hrg on motion.

Ct: On m/for publication?

A: Yes.

Ct: Want to do on Monday?

A: Yes.

Ct: Would you do a ntc that says fh is set for Mon. at 11:00. Now on cc hrg. By this date the dtr was intending to have done most of those things that was critical for dtr to perform. Put together documentation. Sense that has largely been done. If conv. to 7 today or tomorrow, not be a nightmare?

J: Yes.

Ct: The first order that I approved on post-closing cc order was based on stmts by counsel that maybe 12% of that amt was actually going to be used by the dtr to work on collecting the cc. Ques. floating around in my head is what is the percentage now and do we have situation where dtr is asking to borrow money from lenders w/interest. Lenders lending money to dtr so dtr can act as collector for lenders? Enlighten me.

J: Dtr believes that if it remains in ch. 11 during Nov. would collect for lenders. Why dtr negot. this sharing arrangement. Only 50% is sec. by avoid. actions. We think if we conv. to ch. 7 now everything is there where trustee could run w/it. Make the trustee's life a lot easier if we converted. I visited the dtrs office about 10 days ago on prefer. screen. Racks of boxes

of stuff. Headquarters full of furniture and work stations w/files. Wouldn't it be nice by time it conv. that you would give ntc to landlord that you had term. the lease, prepaid the storage for some period of time. One example. W/respect to the prefer. screens we prioritized. First prior. was to get info. in form that it could be retrieved after conv. If the dtr remained in ch.11 for Nov. would create litig. of court files. Create evid. for litig. Dtr would sort info. Make it easier to complete val. process. Get info. in form that someone could take it in. Sort and screen it so you could better eval. the information. Create actual documentation backup for pursuing clms. Do for prefer. clms. Dual function in facilitating that process. Expand scope of screen. From that effort the dtr has identified \$9mil of potential clms. Not been done in suffic. detail. Clms that need to be investig. further. In addition clm of up to \$4mil. Pension plan wind down the way the dtr explained it to me is the way the info. is assembled that third party needs a client to report to. Certain decis. have to be made. Req. some understanding of ARISA laws and other laws. 401k - trustee would be in a position to do it. Dtr has expertise to do that. Dtr would also intend to create a work plan both for trustee and lenders. Have some kind of written materials on how to finish things up. Info. would be there. Work plan might now have basic knowl. of how to complete. Offered to UST to come out to Furrs and visit w/people. If UST has sugg. to what dtr might do that would be helpful to trustee. Tried to think of projects for dtr this mo. Asked dtr to do a reconciliation of clms of taxing auth. Knowing more feas. to do. Timely and efficient. When the dtr circulated the results, followup project. Pinnacle litig. is sched. for end of Nov. Warehouse costs. I don't know if we conv., if that litig. would cont. as sched. After the end of Nov., the dtr bel. if it did stay in ch. 11, the work force would be just a few people. Dtr also doesn't really wish to come to court every mo. and ask for cc and dip financing. Very expensive and very disruptive. We have been talking to lenders and bel. some prospect of working something out. Those are the reasons. Are smaller things - program for issuing W2's. Computer software is still not avail. Those can be iss. Not in situation where a trustee would have an insurmountable task.

Ct: Is that lending still considered an admin. clm?

J: Still admin. Only sec. by avoid. actions. Dtrs views is lenders have lien. Just encumbering their own collateral. Under secured. Avoid. actions - lenders did not have lien prior to closing. Important from dtrs perspective. Dtr bel. there are 3 potential assets in the estate. Avoid., surcharge clm by ch. 7 trustee or avoid. action recoveries that would free up. The last source is trying to reach agmt w/lenders.

Ct: Addit. money that comes in. Budget calls for \$212k for mo. of Nov.?

J: \$509.

Ct: I looked on wrong line.

J: 5 week budget. Treated as admin. clm? ½ secured by avoid. actions.

Ct: Is dtr paying interest on this?

J: Think we are.

Ct: Maybe ques. is directed to lenders. If 50% goes to collection action for lenders, still puzzled why estate should be treating that amt as admin. clm. Which would lead to ques. I had as well. Why not convert now. Given me a series of reas. as to why.

D: Speak to in favor of not converting and approving the budget. UCC has tried to preserve possible assets avail. for admin. clms. The comm. along w/3 assets has argued and filed an adv. proc. that some of the proc. from some of the leases are not sec. to sec. lenders. That iss. has been obscured to court's ruling on marshaling that we now call allocating. Ques. of how much. DIP financing was \$19mil at the time it was paid off. If El Paso warehouse and liens exceeded that amt. \$15 or \$16mil. Letting lenders allocate the way they want to - if the other lease values that DT did appraisals on were worth more than \$10mil still value left over. Still val. iss. plus 3 iss. Mr. J. mentioned. Very benef. to the estate to have this mo. to explore a possib. of consensual liquid. plan. W/regard to lenders it obviates that iss. of ch. 7 surcharge. As long as not in 7 dtr and comm. can bargain w/lenders w/how much they think they can put in a class. Depending on how the #'s. Talking about up to \$4mil on Fleming piece and \$2mil on TOPCO. W/o ques. those prefer. can be recovered much better w/Mr. J. staff and emp. of dtrs that are in place. The estate and lenders benef. by letting estate proc. to collect those prefer. Not encumbered post closing. The comm. has the oppor. to work towards consensual plan. I didn't see concern w/regard to int. chg. on portion of funds loaned to lenders. On that \$250k that is such a small amt from comm. point of view. 1/2 is going to benef. of dtr. Comm. thinks it is getting a benef. Very happy this thing might go another mo. Major benef. to dtr and give chance to press it's issue. Every mo. that goes by we have more info. from ea. hrg. Millions being recovered on deposits. Another mo. is worthwhile. Take care of admin. clms. Many prof. claimants have sugg. they would like to be paid before Dec. Something about bonuses. Sugg. there is some val. to be paid prior to Dec. 31. Could be signif. savings to estate to work those things out.

Ct: Exh. A to motion for third order supplementing final order. Docket #1229.

D: \$9mil figure includes \$2mil from TOPCO.

B: That budget does not include budget money. Creds feel strongly we need these ntc's out. May be some real benef. to getting something negot. I cannot overstress the importance of die cast when someone files complaint in prefer. suit. Sets tone of proc. I think since we have a lien for some of postpet. advances like to see someone who knows everything there is to know about it. Get so far to getting larger prefer. started this mo. When case conv., will be period when trustee is trying to figure out what he is doing. More you wait and more you lose, more facts you lose in recovering some of these prefer. Know every layer you go down, less likely someone will be able to prove those complaints. Hate to see that advantage lost. Adamant about getting ntc out. Talking about this for a mo. or six weeks. Until we have a handle on # won't know. Every mo. we get more.

F: Our clients would agree to the increase in budget for the ntc. There is some benef. to recovery of clms. Prob. have to incur some costs. If case conv., not be that big a deal. Approach trustee about paying actual costs. Avoid. actions are pretty far beyond the amt necess. Worked on investigating

avoid. actions.

Ct: Not talking about spending money on accounts receivable.

F: Benef. my client. Don't think it is a ½ mil \$ worth. Collect more than we are owed. Was a discussion of 506 (c) claim. Ch. 7 trustee could assess the lenders only for admin. exp. he incurs.

Ct: As opposed to 11?

F: Yes. We would approach the trustee and say you can provide us with a benefit. If we couldn't strike a bargain would lift stay.

Ct: Your reading of order on Mar. 14? Reading from code cases?

F: No. Intent of order. Don't know the cases would disagree.

Ct: Curious if comment if everyone else read the cc order the same way.

F: Mr. D. and Mr. J. do not.

A: Can add me onto that list.

F: Been paid in full. Are here because people tell us we will have to give money back. Not excited to keep debt going. Have different perspective than Ms. B. Met has a long way to go before paid back.

Ct: Paragraph 1 of motion says all cash currently held is cc. Securing any unpaid balance owed. VIP loan. Off board.

F: Paid provisionally.

Ct: Paragraph ii - that has been repaid as well subject to disgorgement return?

F: Yes.

Ct: \$25 million loan by MetLife is a long way away from being paid.

F: Is an understatement.

Ct: I had not realized that.

F: No interest being charged.

Ct: Talked about that in chambers.

F: From our perspective we are agreeing to this order. Don't think it is giving us huge benefit. We don't see it benefit us.

Ct: Have money left at stake.

F: According to Mr. D. we do.

Ct: Just talking about Ms. B.?

B: Because of inter creditor agmt is differ. about how you divide up this money. Bec. of alloc. it might be Mr. F. client is not paid in full.

F: May have to give money back. Why we still have cc concerns and rights.

D: Is a fairly signif. iss. w/regard to cc carveout. \$5.5mil. Argum. whet. that reduces the amt paid. Or whet. that carves out the collateral. Mr. F. reads that order differ. Carve out may have a differ. meaning. At some time this court will have to addr. that \$5.5mil. List of funds Mr. J. mentioned. Indications are collections will be more than \$2mil.

F: The prov. Mr. D. is referring to is parag. 3. Says the liens shall be subj. to and then goes on to carve out.

Ct: Not deciding that today and not decide this other iss as well. What is clear is it makes no sense not to let Heller to cont. to attend. Will really focus on what Ms. B. says.

F: It really is talking about Ms. B. clients money and if court would so rule.

Ct: Just a ruling on standing. Not on merits.

A: We will support this post closing cc order. UCC is supp. it. We are not quite as sanglan about ch. 7 liquid. plan as UCC is. Let court know we will take up Mr. J. offer to go out and learn the lay of the land at Furrs and try to be a resource to a potential ch. 7 trustee. Have thought seriously about that and have individ. in mind. Will relay that to that individ. Will do everything we can in eventuality of a conversion. Mr. J. has offered to take us out there and will take him out on that. Also offered to be of assist. to a 7 trustee. In event of a conversion will not be as great a lapse as the parties think there would be. Not as sanglan about a liquid. plan. If benef. admin. clmts, would consider it.

Ct: What kind of ntc would we need on a final hrg on this third cc order. 15 days plus 3 days?

J: Trying to remember - already given ntc of motion. Haven't given ntc of final hrg. 15 day req. is key to giving ntc of motion. Gave ntc of m/on Oct. 19.

F: 15 days after serv. of motion.

Ct: \$11k differ.? Good point.

J: Motion was served Oct. 19.

Ct: Would be Nov. 6. 11:00 on Wed., Nov. 15. Do ntc Mr. J. Need an order.

J: Have one. Will circulate it after hrg.