

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 Troske

Date:

WEDNESDAY, JANUARY 16, 2002

In Re:

FURRS

No. 7-01-10779 SA

FH on Motion for Order Authorizing and Compelling Debtor to Pay Success Fee to
Golleher and Mays

Attorney for Debtor: Robert Jacobvitz

Attorney for Golleher and Mays: Michael Messina

Attorney for Heller: Paul Fish

Attorney for Furrs: Terry Wallach

Summary of Proceedings:

Exhibits X

Testimony X

MOTION GRANTED - MESSINA WILL SUBMIT ORDER

Ct: Gone over contracts and read Mr. Messina's brief. Found it fairly persuasive. Inclined to let other folks take shots at what you have done. Thinking it would make sense to let the other folks take a shot at what you have already done. Leave you feeling deprived for chance to have oral argument.

M: Mr. Wallach is here to be a witness and will call Mr. Golleher and Mr. Mays.

Ct: Tell you where I am coming from. Can tell me whether you want testimony or not. First of all, the initial ques. I have is based on my recollection of the hrg in Nov. My recollect. is I asked a # of ques. of Mr. Messina and Mr. T. answered them quite clearly. My ques. was I was concerned about req. immed. pymt to Mr. G. and Mr. M. would further complicate iss. of disgorgement. Mr. T. said that is not an iss. bec. whatever money doesn't go to Mr. G. and Mr. M. doesn't go to admin. clmts. Goes to lenders. Thought they agreed to that. Talking about a pymt to Golleher and Mays that gets treated other than a carve out. Does that ring a bell w/anybody here.

M: Yes. Mr. T. pointed out there was a cost of sale. Why it should be paid. Ms. Behles was here and didn't obj. Said get an order approved reflecting that, but couldn't get that agmt.

F: We were not here. Don't recall being notif. of hrg. Like to explain to you why agmt was clear. Didn't subord. to second \$750k. Subj. to disgorgement. Like to addr. it.

Ct: Go ahead and do that. Treating first and second figures as differ.?

F: Yes, based on contract. Subord. Looking at Mr. G. contract. They are almost identical. Exh. A attached to memorandum of success fee. Looking at one that I printed off website.

Ct: Consulting agmt?

F: Yes. Pg. 9 - get to subord. part. Parag. 16. No identif. of anybody on signature pgs. Not signed. Not going there. Know there was an agmt. Not be right to stand on that.

Ct: Didn't I approve that consulting agmt?

F: Yes. Not going there. Parag. B is subord. clause. To extent does not have cash to pay any portion of signing bonus, min. bonus or reimburs. exp. Not success bonus.

Ct: Agree.

F: Get into what is min. bonus. Were paid the min. bonus. If go to part talking about bonus, pg. 3 on compens. Mr. G. sect. 4 (c) (1). Success bonus is this calculated amt. First \$750. That's the success bonus. Minim. is in last - pg. 5, parag. E. Identifies there is a min. bonus of \$750k paid no matter what. Do they get that second \$750k. Not the deal. I have two exhibits I have given to Mr. M. and Mr. J. One is a letter. Are copies out of my file. Ltr from Thuma to D. Heller. 3 weeks after ct approved this transaction. Concern was - agmt between lenders, parag. 16 (b). Success bonus less the min. bonus may not be paid or not paid in full if case is adminis. insolvent. Talks about subord. Subj. to disgorgement risk. Ltr back from Heller to Mr. T. saying he agrees w/the analysis. Said he would see if he could chg it. Not chg'd. Split \$750k. Paid that right away and had no obj. to it. For the rest of their success bonus entitled to admin. clm. If entitled to recover, get paid in full or part. We think they ought to get paid the \$750k they got paid, but no more. Refuse to subord. to it. Agreed to deal.

Ct: Was there a success event that occurred here?

F: Yes, why entitled to admin. clm.

Ct: Consulting agmt in parag. 4 - pg. 5. 4 (c) (II) (e). (Read) Doesn't apply. Talking about success bonus. It was - it is my recollection that the reas. they got paid \$750k initially it was clear whatever the disgorgement turned out to be I was thinking at that time it might apply. Easy to grant \$750k. That was in the context of awarding success bonus based on success event. Subsec. E doesn't come into play at all. For all practical purp. the senior lending had a prior. over adminis. clms. Those in which the lenders said we will make an except. here. Contained in parag. 16. Also w/respect - not necess. subord. If success bonus is treated as success of sale, it wouldn't have necess. even fit into this parag. 16.

F: Diffic. I have w/it is parag. 16 starts out w/a specif. refer. Prior lien. Waive that lien for specif. things. That specif. understanding of parties after contract memo they recog. the prob.

Ct: That seems to be a separ. argument you are making. Tie together. My analysis is based on reading contract.

F: Prob. w/cost of sale theory is you have a specif. prov. in this contract that first recog. the prepet. Prior lien on all assets. Waiver of subord of lien of lenders. Specif. agreed. Not the rest. That specif. clause is refer. to cost of sale. Was the intent of the parties. Why G. and M. were concerned when they realized the estate may be insolvent.

Ct: Seems to me that what parag. 16 was contemplating and parag. 4 (c) (II) (e) was contemplating was possib. there wouldn't be a sale. Was a fallback provision. If not a success event, get reimb. for costs and signing bonus. If success event, certain amt of that doesn't become important anymore. Have a defined thing called a success event. Bring in a chunk of money. Ought to be entitled to get paid.

F: If enough to pay off lenders. If adminis. insolvent, don't get it. Only covers the minim. bonus. Come in and spend time and will guarantee you \$750k. Any more that that get adminis. clm. Guar. \$750k. We get paid and you get adminis. clm for rest. When a specif. clause for entire lien of lenders, is a specif. subord. it could have said success bonus. Clearly was not the intent of these parties.

Ct: If governing law is State of NM - Loretto Mall case. Wasn't it Judge Montgomery that decided that. Said every piece of evid. you can put in comes into this thing to deter. what the parties agmt. is. Does seem to me what the discuss. were might turn out to be relevant.

F: Call performance of parties of contract. Recog. pledge. Was a prioritization.

Ct: Your argum. is the success bonus has an even lower prior. using that term loosely than - gets treated as a regular adminis. clm.

F: Use that word priority. Agreed to be paid, but assuming there is enough money in prior. scheme.

Ct: Parag. 7 (b) says will be referred to Triple A. What is situation there?

M: Haven't discussed it and don't think it applies. Identif. Agmt is between Furrs and Golleher and Furrs and Mays. Dtr in possess. are not in disagreement over this. I don't think it comes into play.

Ct: Agree w/his analysis?

F: Happy to have it resolved here. Have to show consent of lenders.

M: Like to respond and put on evid.

Ct: Does trustee have anything to say in connect. w/this. Go ahead Mr. M.

M: General specif. argument is disingenuous. Lenders agreed to parag. 16 bec. they had to. Required subord. Bound by other terms of agmt. Mr. F. point that the success bonus is not mentioned in parag. 16 is my point. Not covered. Go back to parag. 4 (c) (ii) (e) it gives you a definition of minimum bonus. Minimum bonus only occurs if only no success event. Refer. to \$750k doesn't exist. Parag. 16 doesn't apply to a success event. Differ. term and dealt w/specif. in beginning of parag. 4.

Ct: Wouldn't it have been easy to put in parag. 16 a sentence that says doesn't apply as success bonus. Treated as cost of sale.

M: Sure, when in a dispute can come up w/language. No subord. if there is a success event.

Ct: Doesn't say explicitly in here.

M: Don't think so. They only subord. to what they agreed to. Had to be included in 16. Standard contract interpretation. Means if totally insolvent. If these guys were unsuccessful, get zero. Specif. provis.

dealing w/success bonus is parag. 4. Lang. out of proceeds of sale.

Ct: Where does it say that?

M: Parag. 4 (c) (1). Under the caption success bonus. (Read) Very specif. about that. Mr. F. argum. says it doesn't mean anything. Why put it in there. The repres. of Heller told Mr. Mays and maybe Mr. G. Expressly negot. they didn't need it bec. it was covered. Mr. J. will tell you he wasn't part of this negot. Skadden, Arps was involved. Was mistaken about it. These guys were so upset bec. they thought the lenders were pulling plug. Worried about being paid from get go. On Monday you entered an agreed order that gave Solomon their \$1.5mil as a cost of sale and not subj. to prior lien. Approach you w/copy of Solomon agmt. Want to compare language.

Ct: I've got a ques. I need to ask Mr. Fish and then let Mr. J. talk. Go ahead.

M: Only lang. that gives rise to trans. that fee was a cost of sale. Other lang. in here. # of items where we needed a subord. In their contract -

Ct: More concerned about specif. agmt. What I do need to hear from Mr. F. is his resp. to lang. of parag. 4 (c) (1) that says success bonus shall be paid at success event and closing.

F: Are several resp. to that. The success events under ch. 11 would have been paid at closing. Not relevant. Real answer is the lenders involvement in this contract is sect. 16. Refers to an agmt of pre-pet. senior lenders. Early part of contract is between Golleher and Mays and dtr. Like dtr hiring a lawyer. At closing lenders have right. Well and good. Get our loan paid first. Wouldn't have agreed to this. Agreed to take \$25k a mo. ea. and \$750k guaranteed bonus. Was the deal. If get more, they get more. If dtr enters into contract and lenders are not party to that contract waive cash coll. rights. Lenders have to agree to that subord. No subord. to success lenders. Have a valid adminis. clm. Not supported it. That is where we part company. We didn't waive or subord.

Ct: Where I am having a prob. Had a hrg on this contract and no appeal taken. Seemed to me at point at which this contract was being approved by court if the lenders position that these folks should not be paid out of closing costs, somebody should have stood up and said not like a title co. who is going to get paid as standard cost of closing. Not going to agree they get paid out of our cash. How do you have a condition to such closing and have them get treated as an adminis. expense. Those don't work.

F: Not something we agreed to.

Ct: Aren't you bound?

F: Yes and No. Have lawyers that were hired. Are carve outs regarding pymt of those lawyers. Ct said you will be paid after applic. this much and that much. Court entered order approving it.

Ct: None were to be paid out of closing and success event.

F: Bound as every party of this bankr. is. Not bound to waive on collateral. Not bound to use cash coll. Is sect. 16. What was the deal. Have specif. provision. Not success fee, minim. bonus. This was - didn't cross examine Mr. T. as to who he repres. Talked about what we understood the deal to be. At that time Mr. G. and Mr. M. were running the dtr. Was faxed to me on June 22. Subj. to disgorgement. On Solomon it is totally irrelevant. Put into carve out. Unfair to refer to another deal. Whoever drafted the attachment to Mr. T. e-mail understood.

Ct: Treating all this as opening stmt.

J: The position of ch. 7 trustee is clear on it's face. Ought to get paid. Financing order a \$1.5mil was reserved in connect. w/this bonus. Doesn't cover the avoid. actions. If pymt made that is jr. to lien of lenders doesn't cover avoid. action. Under Solomon order is a provis. the \$1.5mil was paid as cost of sale. Effect of that provis. is under the first financing order doesn't encumber avoid. actions. Ch. 7 trustee's position is the pymt to Mr. G. and Mr. M. is a cost of sale. Not a cost that the estate bears at this point. If the ct should deter. it is not a cost of sale and a general admin. clm would dilute recovery to all admin. clmts. Reduce amt of clms to be paid. Have to await the outcome.

Ct: Irrelevant right now whet. estate has money to pay all admin. clms.

J: Right. Under contract it is a cost of sale. Is relevant. Only paid if cost of sale. W/respect to the memo from Mr. T., that commun. was made when dtr was negot. a wind down agmt w/lenders. Made in supp. of lang. Not admissible for that reas. W/o repeating too much the arguments already made it is the trustee's position it is clear under agmt is differ. than min. bonus. If there was no subord. and no success, that fee wouldn't get paid. Some protection. Made sense for contract to be structured the way it was. If a success event, a differ. mech. to pay.

Ct: Mr. M. argum.

J: Yes. Prepet. lien of lenders was in excess of \$750k. If had a success event of sale more than \$50mil. the case would be insolvent. Was req. that money be paid at closing. Even under circum. there would be no money to pay it even if cost of sale. Parties wouldn't have intended to be obligated.

M: Call Terry Wallach.

TESTIMONY OF TERRY WALLACH (sworn)

M: Offer exh. A and B.

F: No obj.

Ct: Will be admitted.

TEST. CONT'D

M: Offer Exh. C.

F: No obj.

J: No obj.

Ct: Fine.

TEST. CONT'D

J: Bel. contract is clear on it's face.

Ct: When all is said and done the way I need to addr. this is look at all test. and to violate the rule I think I need to sort all those things out and will go forward. Will take it under advisement for lack of a better term.

M: Agree w/trustee. But, want to get all of it in.

Ct: That's the approach I am taking. Anything cross from trustee.

J: No.

CROSS EXAMINATION BY P. FISH

Ct: If paid in full, I understand w/except the possib. of disgorgement they wouldn't obj. to this pymt. Small enough to point where it would make sense to treat them as paid in full. If subj. to disgorgement for some amt of money, then taking that into consideration any award would be subj. to disgorgement. Not being any other obj., presented here today we could make that award to Mr. G. and Mr. M.

F: Terms of disgorgement have been a great # of discuss. I'm not as confident that we will disgorge. If paid to Mr. G. and Mays w/same provis. we are facing, if says we have to give it back, we give it back then argue. Track our disgorgement lang. Is reasonable and if we don't have to disgorge. Will be delighted for them to get their money, just not out of our pocket.

Ct: Does that work?

M: My clients would be paid remain. \$750k now. Subj. to same req. of disgorgement that prepet. Senior lenders would. Still reserve right to assert our claim. My clients just want to make sure it is pro rata. Their amt of disgorgement is proportionate. If req. to repay \$3mil, don't have to come up w/all money.

F: If we wanted them to disgorge, we would have filed a m/. Argue about whet. they are entitled. Anybody is a target for disgorgement.

M: Haven't seen the disgorgement order. Apprec. the explanation.

Ct: Everyone needs to be on same pg.

M: Have a minute to talk about Mr. Jacobvitz.

F: Take a brief recess and dig up that language.

J: Ask for a point of clarification. Concern it doesn't encumber avoid. actions. If willing to agree this pymt would not...

F: Everything is up in air.

Ct: No money that has come in on the avoid. action.

J: Correct.

Ct: I want to make this clear for my own thinking. Heller's concern is if it has to disgorge, that it will somehow have lost some rights. Wants to get all money back to the estate. Wants to assert it's full senior lender rights. Doesn't want anything coming out of this as lender. If Heller has to put up \$3mil will expect Golleher and Mays to refund on a contingent basis the full \$750k. May be wrong, but may do to help make up \$3mil. G. and M. would have use of \$750k and not ever have to put it up. Saying this out loud. I don't think in those circum. it would be approp. to ask senior lenders to give up those rights until the money shows up. My thinking about where we are. Want us to get you a copy of that order?

F: Would be useful.

M: Other aspect is not waiving rights to assert their clms. MetLife did not obj.

Ct: Right.

M: Jennie Behles indicated she didn't have an obj.

Ct: MetLife was at that one. Regardless MetLife is not here today, Heller is in it's capacity of lender. Take a break.

RECESS

M: This isn't going to work. Clients don't want to come back and forth. Wan to get over with. Thought we had it settled.

J: Ch. 7 trustee takes position it is a cost of sale.

Ct: Want to go forward?

J: Yes.

F: Makes more sense to not go forward if there is no disgorgement by us. If our disgorge then this should be factored in. Think \$750k is not that big a deal.

M: It is a big deal to come up w/\$750k. Have hour of testimony. They are here.

Ct: It seems w/due respect Mr. M. having to pay back the \$750k is subst. differ. than not getting it at all. I'm struggling w/this standing issue. It makes sense we are here today and ready to go forward. Apprec. insight Mr. F. prov. to court about definition about whose ox is subj. to getting gored here.

Into this hrg and have people back in for this. Go ahead and have hrg. Make decis. on merits. Mr. Wallach resume stand.

M: Done w/him.

Ct: Have redirect?

M: No. Call Mr. Golleher.

TESTIMONY OF GEORGE GOLLEHER (sworn)

M: Offer Exh. D.

F: No obj.

Ct: Admitted.

TEST. CONT'D

F: Obj. Hearsay.

M: Is not hearsay.

Ct: Argum. is partly contradictory. If subm. on basis somebody on other side said X, or did or did not do something it is admissible for that purpose. If an admiss. for a party, I've got a ques. about that. While the trustee is a party here...

M: Don't exist. Offer for first purpose.

Ct: Still have obj.

F: Not my client -

Ct: Understand all that.

TEST. CONT'D

J: No cross.

CROSS EXAMINATION BY P. FISH

REDIRECT

M: Call Mr. Mays.

TESTIMONY OF GREG MAYS (sworn)

RECESS

CROSS EXAMINATION BY JACOBVITZ

CROSS EXAMINATION BY FISH

F: Admit exh. 2.

M: No obj.

Ct: Admitted.

CROSS CONT'D

M: No redirect.

Ct: Are resting?

M: I wanted to offer the order and fixing compens. to P. J. Solomon. Filed Jan. 14, 2002 docket #1484.

Ct: Was it subj. of negotiation?

M: I bel. it was. Talking about -

Ct: Can argue it right now. Mulling over that ques. in my mind. Inclined not to admit that partic. order for purp. of having evid. effect. Not tried. No adjudic. on my part. Raised as compromise of some sort. Court policies gener. don't want to admit comprom. for a variety of reas. If admit, may end up chilling further comprom. in the future. W/that in mind that is what I am thinking.

M: Have a specif. agmt in Solomon agmt. Meaning of lang. in sec. 4 as condition of sale. Test. and evid. uncontroverted. Ltr agmt from Solomon. Enhancement to that lang. Agreed \$1.5mil based on lang. simply was suffic. for them to feel 90%. Bec. of the specif. circum. Don't discount policy action. Agreement of parties it is approp.

F: May I see it and respond.

Ct: No. Should not be admitted. Not close enough to what we are talking about. Sentence out of pg. 3 of doc. has been testif. to. Is suffic. Addit. req. for pymt beyond \$1.5mil. All goes to an iss. of whet. or not what they should have gotten paid. Not relevant enough for what we are doing here today. Agmt admitted into evid. as admiss. of lenders that would serve to elucidate lang. I will refuse to admit what is proposed as exh. E of P.J. Solomon Order. W/that Golleher and Mays are resting their case. Does ch. 7 trustee want to put on case.

J: No evid.

Ct: Any evid.?

F: No.

Ct: Ready for closing argument. Want to do brief closing arguments now and take a break and come back at 1:30 for a ruling.

M: Yes.

CLOSING ARGUMENT

M: Asked Mr. F. what about that lang. He never really answered about that lang. Said weren't parties to that agmt. If the court were to higher a real estate broker could have a cost of sale. Never become lien. Revealing exh. today was resp. exh. 1. Mr. F. made such a big deal about fact the lang. in parag. 16 went from all of the success bonus to everything. Way 16 was finally drafted. Still negot. Didn't make a big deal about fact as a condition to closing. Heard from Mr. G. test. it was belief that was suffic. to make a cost of sale. Solomon contract was the only lang. in there that had refer. to sale. Weaker than this lang. Called a trans. fee. If called a commission would be easy to relate to. Lots of testimony of lenders. Important things to remember in interpret. this is they were assured of being paid 100%. These people have extraord. expertise. Were volunteers. If help solve this prob. only assur. would be paid in full would motivate them. Reasonable person wouldn't enter into this deal unless the contract as written was intended to mean just what they said. Could come up w/20 differ. phrases to make this clear. Cts point earlier was well taken. Maybe lenders didn't sign on. Pushing you hard to approve it. Surprised me they didn't mention our lien would be on these proceeds. Interpret as an entirety as a whole. Renders the lang. payable at sale and condition at sale. Zero meaning. Lang. was put in there to assure they got paid.

J: Under the contract there is an express subord. should there not be a success event. Not make any sense to have a contract to make sure that \$750k got paid w/no protect. at all. Subord. only applies. Min. bonus payable. Consistent w/test. Protect. in case there was no success event. If a success event still have a protection. Cost of sale provision in parag. 4. Subord. was only by bank group in parag. 16. Had first pre-pet. loan. Didn't really need subord. from Met. Jr. lien. If someone is ahead of Met are protected. Cost of sale paid at closing. Uncontroverted evid. What parag. 4 meant. Meant they got paid of the top. Assured that time and again by the lenders that was also the lenders intent. The memo put into evid. by Mr. T. does contain a provis. (read) Mr. T. was attempting to clarify the agmt to make it clearer. Submit that his reading of contract didn't go deep enough. Look at contract carefully is clear that it is payable off top and cost of sale. If pymt is not so construed Mr. G. and Mays have admin. clm.

Ct: Last consideration seems to be irrelevant.

J: Agree. Explains trustee's position.

F: WE ought to identify what is undisputed and what is disputed. Disputed there is no subord. Clear, undisputed.

Ct: Undisputed parag. 16 doesn't mention success bonus. When say clear there is no subord. gets into ambiguous lang. Parag. 4 could be construed as subord.

F: Lenders didn't agree. They agreed to first one. Look at top. Consulting agmt. Doesn't say lenders agree to. Test. was likewise that way. Mr. G. said they agreed to subord. to the \$750k. That's the first one. What do you do w/the balance. Both Mr. G. and Mays testif. that everyone in world told them no prob. to getting paid. Have Mr. T. ltr. No pymt risk - do have pymt

risk. DIP facility had to be paid first. Prepet. lenders to part that was subord. to. Have a disgorgement risk. At closing things were paid off the top. Mr. G. and Mr. M. was reserved off top. Plenty of money to do it. When said they would get paid off top the prob. is the disgorgement. If not enough money to pay in full, go back to disgorgement. Phrase is cost of sale. That term is not in bankr. code. What is here is 506 (c). Cost of recovery assets. Many costs of sale approved. In this partic. case the lenders entered into was that off the top we will guar. you pymt after DIP facil. is paid for ½ of bonus. That get paid ahead of our senior lien. When talking to Mr. H. is he going to be paid off top, sure. I'm struck by conflict of this memo and the testimony. G. and M. told them you have no prob. Guar. to be paid. Written commun. is quite clear as being paid as an adminis. expense. Only documentary evid. of what lawyers were telling G. and M. If these parties intended to subord. would have said it. Just put it right here. Guaranteed. Didn't do that. Not this deal. Clm of administration. Ran risk. Right answer is what was proposed earlier by consent. The \$750k should be paid to G. and M. if agreed to same disgorgement the lenders agreed to. We did not subord. to this second \$750k. Mr. G. and Mr. M. both acknowl. and admitted we have a lien on the assets and proceeds. Proper result is we got our money so they get their money, if we have to give back, they have to give back.

M: Mr. Fish said agreed to subord. for \$750k. Not what contract provided. Covered by 4. Trade off for adding that lang. it is uncontroverted. Off the top like a real estate commission.

J: Fish said sec. lenders were paid off the top. Means before disbursements. Heller was paid as lien holder under that order.

Ct: Come back at 1:30.

RECESS

RULING:

1334 and 157; core; 7052

I am ruling that G&M are entitled to be paid a total of \$1.5mm as a cost of sale, of which they have already received \$750m.

I find that the contracts – Ex. A and B respectively – as approved by this Court after an evidentiary hearing, are unambiguous on the relevant terms, and have the meaning argued for by G&M. I also find that the additional or parol evidence presented, properly evaluated, supports the G&M interpretation of the contracts.

More detail:

Has been sufficient notice to all interested parties, including without limitation MetLife.

I also rule that any requirement of arbitration (and not saying that there is any) has been waived by the

conduct of the parties in bringing this matter for resolution here, and has been acquiesced in by anyone who did not object to the matter being litigated and decided here in court.

Para 16 is clearly a subordination agreement, but it applies in other circumstances, at least to some extent. It applies in part when there has been no “Success Event”. (I say “in part” because clearly some of paragraph 16 is applicable, such as the payment of the signing bonus and the monthly payments have priority over the Heller prepetition lien interests.) And in the context of no Success Event, it provides a further minimum payment to G&M.

Para 4 of the contracts (Ex A and B) provide unambiguously that in the event of a Sale Event (and it is not disputed that a Sale Event occurred which resulted in net proceeds of about \$84mm), the Success Bonus (defined in 4(c)(i) and (ii) would be paid “at the closing...and as a condition to such closing.” This language clearly contemplates that, in the context of a sale for \$84mm, there would be no closing without G&M being paid the Success Bonus. The treatment of their payment, in other words, is essentially the same as that of a real estate agent who has procured and completed the deal that is effectuated by the closing. Whether one considers this to be a “subordination” is a conclusory statement or semantic dispute, to some extent; what is important is the operative definition and interpretation of the paragraph that I have ascribed to the paragraph.

Para 4 also contains within it an implicit understanding or arrangement that, since the Success Bonus of \$1.5mm is one of the closing costs, in essence, it does not really constitute the cash collateral of the lenders, just as the title company fees and a real estate agent’s fees (were there to have been one), would not be counted as proceeds of the sale of the assets and thus cash collateral. Thus, this part of the contract with G&M differs from the hiring of an attorney for the estate, as an example. In this case the hiring of G&M, approved by the Court pursuant to these contracts, provided an explicit payment mechanism. Estate professionals usually do not get that treatment, although a notable (and perhaps useful) exception is when special counsel is hired to pursue a contingency fee case for the estate and explicit provision is made for the attorney to be paid out of the proceeds of the recovery itself before anything goes back to the estate. In this case, when the Lenders – the Senior Prepetition Lenders (Heller, BofA, and Fleet) and MetLife – did not object to the hiring of G&M, they in effect agreed, at least at that time, that this would be the effect of Para 4 of the contracts and hiring of G&M. Thus, whether technically the \$1.5mm (and it is a Success Bonus of \$1.5mm, rather than a Minimum Bonus of \$750m and an additional payment of \$750m) never is treated as proceeds of the estate’s assets that had been secured to the Lenders, or is treated as having come into the estate and the Lenders are deemed to have consented in Para 4 to its payment to G&M immediately, makes no difference.

And from what has been said, it is clear also that none of the \$1.5mm is subject to disgorgement, any more than the title company fees are subject to disgorgement. The \$1.5mm was part of the cost of sale.

The parol evidence further reinforces this interpretation reached only by consideration of the contract terms.

I find credible all the testimony of Wallach and G&M.

The course of negotiations described by G&M and to some extent by Wallach makes clear that the Success Bonus would be paid as part of the closing. And in this respect, Ex 1 in fact supports the trade off described by G&M wherein the agreement was reached to make it clear that the Success Bonus had different (and in effect even better) treatment than the Signing Bonus, etc. (In fact, this Ex 1 suggests that the Lenders had a lot more to do with the contracts than just Paragraph 16.)

The subsequent affirmations by Messers Hays and O'Neil of Heller, which was uncontradicted by any testimony from them or anyone else, is a further confirmation of Heller's understanding (Heller as lender and agent).

There is Ex 2, the memorandum from David Thuma. However, I find that his memorandum does not accurately reflect what the contracts provided, probably because he did not fully appreciate all the provisions of the contracts, particularly para 4. And Mr. Mays testimony about the background of that request, including particularly the need for JTW to continue working in order to close the sale, is a further explanation of the memorandum which dilutes its impact as opposing evidence.

Additional findings:

G&M were absolutely critical to the estate realizing the substantial value it did out of the sales, in addition to their excellent management skills. And JTW was critical to the functioning of the chapter 11 estate, far more than any other professionals hired by the estate; without JTW and G&M, this estate would have likely crashed and burned before the sale could be accomplished, and there might not have even been enough money to repay the DIP lending facility.

There are other pieces of evidence that further support the Court's ruling, but I have chosen to not explicitly discuss and analyze those in this ruling because what is set out here is sufficient to support my ruling (which I feel very comfortable about) and I assume the parties would rather have the decision sooner than have me spend hours formulating additional explicit findings in support of the ruling. I just wanted to make clear that the above recited findings do not constitute all the evidence that supports the ruling, in the event there is an appeal.

MM to prepare order. No ruling on interest on the second \$750m.

M: Req. in our memor. our clients rec. interest that was earned on \$750k that was set aside. You haven't addr. that one way or other.

Ct: You can raise it. I had not noticed it particularly.

M: I did argue that at the end.

Ct: If think entitled to that, can file something. Won't amend my ruling. Further ques.

M: No.