

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:**

WEDNESDAY, MARCH 14, 2001

**In Re:**

FURR'S SUPERMARKETS, INC.  
No. 11-01-10779 SA

**Final Hearing on Motion for Interim and Final Order Authorizing Debtor to  
Incur Post-Petition Secured Indebtedness, etc.**

Attorney for Debtor: Richard Levin and David Thuma  
Attorney for UST: Ron Andazola  
Attorney for UCC: William Davis  
Attorney for Metropolitan Life: Jennie Behles  
Attorney for Heller Financial, Agent for Met Life, Fleet and Bank of America:  
Paul Fish, William Keleher and Josef Athanas  
Attorney for GE and GE Capital: Dave Thomas  
Attorney for NM Beverage, et al.: Michael Cadigan  
Attorney for Earth Grains Bakery: Don Fenstermacher

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**Summary of Proceedings:**

Exhibits \_\_\_\_\_

Testimony \_\_\_\_\_

**ALL MATTERS RESOLVED EXCEPT FOR ONE ISSUE W/GE LIGHTING. JUDGE HANSEN WILL  
HEAR THAT MATTER AT 3:00 TODAY AND SIGN OFF ON THE FINAL ORDER**

L: Liquor Distributors has been resolved. Ms. G. for Premier asked us to put on record one aspect. Compliment her on her creativity. She has seen an iss. I don't fully understand. Never intended to exclude it. She asserts Premier may have claims ag. bank. Never effected any rights. We never intended to have an effect on those. The obj. of GE Lighting. I don't know if it has been formally w/drawn, but there is...

Ct: Are they a subsid. of GE Electric?

Thomas: Yes.

Ct: Not talk about them.

L: Lang. in the final order that will be pres. today. Same lang. that protects liquor distrib. Is obj. w/UCC. Is lang. that satisfies that. Obj. by UST has not been w/drawn. Mr. Athanas will argue that. Feel like an innocent bystander. If the order is not granted as is, has full discretion to w/draw. We hope they can resolve obj. in a way that allows the lending and bus. to continue. Mr. A. made a refer. to it before. Lenders are not prepared to sign off on the order. Disagreement about agmt they are to sign. Our sugg. is we move forward on the remain. obj. Req. time to come back once lenders have resolved their dispute.

Ct: Thought about present. evid. I reread Mr. M. affidavit on dip order. Resembles financing order. Putting on any evid.?

L: No evid.

Andazola: No evid.

Athanas: Lenders feel the same way.

Ct: I don't recall I admitted into evid. that second affidavit by Mr. M. I entered into evid. the first affidavit. I don't recall the second was admitted. Any reas. not to move it into evid. now?

L: Not aware. Req. to move it into evid. Mr. M. is here.

Ct: Not hearing any obj. it will be admitted. Have some argum. in connect. w/506 (c) obj. by UST. Remain. iss.?

L: Only remain. iss.

Cadigan: Not been contacted.

L: My apologies. It is identical lang. Is priming lang. in the order.

Ct: We rec'd the final draft of the final order on financing?

L: Yes.

Ct: Magic lang.?

L: Parag. 6 (b). Long list of creditors.

Athanas: 6(a).

L: Sorry.

Ct: I see. Thank you.

Behles: There are a couple of lang. changes that need to be interlineated. Are some clarif. we will put in once you have heard the argum.

Ct: Good time to addr. the lang. Not sure you don't need a separ. order.

L: If their obj. has been w/drawn, does that lang. still cause prob. under the canons. Are some canons that are waivable and don't think it is.

Ct: Didn't antic. this prob. Are several copies of the canons in my office. Lots of discuss. about that. Go forward w/what we've got. If there doesn't turn out to be a conflict. Is virtually easy. Have another judge here. Don't think final draft isn't a final draft.

L: I was surprised by Ms. B. comments this morning.

Ct: Diffic. case in terms of financing. Have spent a lot of hours working these out.

ARGUMENT:

Recess

Ct: Talk about a couple of differ. things. In connect. w/GE Capital I reviewed the Code of Conduct for Judge's. 1997. Canon 3(c) (1) (c) says the judge shall disqualify himself in a proc. in which the impartiality may be a ques. 3(c) (3) (c) defines financial interest as ownership of an interest however small. Subsec. (d) of Canon 3 a judge disqualified by 3(c) (3) (1) may w/draw and obtain a remittal from parties. 3 (c) (1) (c) is the item we are talking about. Non-waivable requirement from canon of ethics. I cannot decide anything that has to do w/GE or subsidiaries. During the interim I was trying to track down and make arrangements for a decis. today. I was told Judge McFeeley left 20 min. earlier for Roswell. Assuming the iss. cont. to be a live one there are a couple of options. One is for me to try and arrange something w/a U.S. District Judge. I have no idea is someone would be avail. or not. When we get done I will get on the phone. Don't know if you are interested in a U.S. Magistrate Judge. Track down Judge McFeeley. First hrg is not sched. til 3:30. Not sure there is a guarantee if there would be time to have a hrg w/Judge McFeeley.

Fish: Have one small iss. in the GE obj. Two iss. All the other obj. and the specif. matter. If we could have a hrg in front of a District Judge on that specif. iss. that might solve the prob. If we have to start from the beginning and invent the wheel that might solve the prob.

L: The iss. that involves GE is integrated into the order. Discuss. whet. it can be stricken from the order.

Ct: Say the order is fine w/me, but not look at the GE iss.

L: Let the other judge sign the order.

Thomas: Have no prob. of going before a Dist. Judge. Not lead counsel on this obj. I am on one of them and we have that worked out. GE Lighting I have local counsel I am working w/in Cleveland.

Ct: This is a final hrg now. If that person in Cleveland wanted to partic. he needs to be here. You the man!

T: Can have telephonic hrg.

Ct: Nobody req. telephonic hrg.

T: I can't obj. to a District Judge hearing the case.

Fish: We have a prob. w/ a Magistrate.

Ct: I will talk to the District Judge's. I will rule on this 506 (c) issue. When I get done you all have tinkering to do on this order. Somewhere along the line if an order is subm. Mr. Davis would you see your signature is on it and Mr. A. you need to approve as to form. Parag. 9 in sec. 507 (b) superpriority. Do I understand the proposed order? Is it the case that if things crash and burn and not \$33mil of collateral plus interest that then the sec. creds, the post-pet. lenders will assert they have a right to collect until that \$33mil is disbursed.

Athanas: Yes.

Davis: Not correct. Ask if they are sec. on void.

Athanas:

Davis: I will have to look at that. If that is the case I will have to look at it.

Ct: I certainly apprec. counsel's relation of their exper. of what has happened in other court's across the country. Bottom line it seems to me that I have to sustain the tr's obj. Talk about case law. Judge Jacos was correct. Makes case irrelevant. Nobody should be shielded. He insisted on a winding down prov. in the order. Prov. there was sec. or cash coll. lending he insisted there be a prov. of folks prov. funding they got paid. Sugg. that the monolithic nature of the order sought by the sec. creds wouldn't be approved by Judge Jacos. Re: Willingham Investments. Judge pointed out that keeping the doors open. Ques. about what the doc. said. Re: Brown Brothers. Definite stmt who said that such a prov. is not enforceable. No discuss. or any citation to auth. I don't know how convinced I am by that case. It went off on an iss. of ntc to a sec. cred. Even though the tr has cited 3 cases I don't know they are that useful. Don't think the Inhouse case is that relevant. Not helpful. My reasoning comes down to as follows. Have a statute 506 (c). Seems to be equitable that is the sec. gets a benef. it is not inapprop. for sec. cred. to reimburse the tr. Pay the tr for the genuine benef. for their efforts. Congress put that in the statute. Can't be ignored. May means the tr needs to prove up his or her case. If a tr comes in here that tr will have a heavy burden. Talking about having to show that whatever the trustee did to chg. the sec. creds for would be absolutely necess. Was in fact an easily demons. value that was rendered to the sec. creds. Are sophis. sec. creds. Want to take care of coll. on their own. No doubt a trustee were this case to convert would close the doors and turn off electricity. Might be approp. Seems to me that all that being said it is the case that I cannot say that this vantage point right now it would be approp. to award the tr some reimb. Is a poss. for a tr to be no reimb. Can't make that decis. now. Does not eliminate the risk of a clm being made on a sec. lenders coll. Can't solve that prob. If parties get together and approve a carve out, I will consider that. I take seriously the poss. of the sec. lenders saying this constitutes a def., we are out of here. Code was written the way it was. Would violate the spirit of the code for tr to waive that prov. Barring some sort of agmt or the w/drawal of the obj. I would have to sustain the obj. My ruling on this specif. matter today.

Athanas: My ques. is with all of that said can the dtr waive it?

Ct: I think the dtr can waive it. My prob. is waiving it for a ch. 7 trustee who may have interests that are subst. differ. than the dtr in poss. May have interests that are more aligned. I have to say I don't think it would be

approp. to allow that waiver for a ch. 7 dtr.

Athanas: That makes sense. I think we can work it out. I have a sugg. Is possible middle ground. We could chg. this to say the trustee has his 506 (c) rights. Before paid the trustee can't spend our money that doesn't benef. us.

Ct: The trustee can do that anyway. A smart tr will give you a call.

Athanas:

Ct: Heart of iss. that is being decided now. If no agmt, the ques. is what is the tr acts.

A: His or her right under 506 (c) is not waived by this agmt. Asking whet. - how can the tr be acting in our interest and we say No.

Ct: Not approp. for me to waive it. Dtr can waive it.

A: We will go back and speak w/the group about this. Will come back this afternoon and will enter a decis.

Recess

Ct: Give you a status report. Two are at lunch and one is still on the bench. Talked to clerk's about helping us out. I have left messages and will hear back about 1:00 and soon after. Can you do it in 20 minutes?

A: Sounds good.

T: We can do it in 20 - 30 min.

Ct: Come back at 1:00.

Fish: Perhaps talk to the debtor's atty instead of us all coming over here.

L: Good idea for us to get back w/a revised order so that you can approve everything outside of the GE issue. What time should we be back.

Ct: 1:00.

T: Not a final order until a District Judge or you enter an order.

Ct: Will look at everything else except the GE matter. I will look at it and assuming it is fine and will send it over to the District Judge and tell him that everything is just fine. He should sign off on the order.

C: NM Beverage will w/draw our obj.

Ct: Good.

Recess

L: We have a form of order that incorp. all of the chgs. Will hand it up for your review.

Ct: I have two copies.

F: Show the first agreed on chg. Talking about pre-pet. sec. clms. We will make that insertion. One parag. reflects the court's ruling this morning.

Ct: Are you comfortable w/that lang.?

Andazola: Yes.

Davis: Dip lending chging ag. as adminis. clms. I have checked w/the big shots back east and that was their intent.

Thomas: Are a couple of things missing.

Fish: I'm sure we can work it out.

Ct: Judge Hansen is doing a bench trial today. He has agreed that when that is over he will allocate ½ an hour to hear the GE issue. I have explained what the disqualif. is. His bench trial is supp. to be done by 3:00. He sugg. you be there by 3:00 to addr. the iss. My thought is keep it to ½ an hour. Judge Black is conducting a jury trial that ran way past noon so he could be ready to go at 1:30. He said he could hear you all at 5:00. Those offers by those two judge's are illustrative by the judge's in this district. Being a bankr. judge in this district is the best thing in the world. Judge Hansen will be able to deal w/this around 3:00. I told him I had gone thru this and was comfortable w/it. I can't sign off on it as such. He said he would need some evid. as to what this is about. We are sending over to him or he is pulling off the web site the orig. m/w/the obj. that was filed by GE. He will have those lengthy docs in front of him already. I will be here til after 5:00. I don't know whet. I will see you again.

L: Will that order be entered on the bankr. docket?

Ct: Yes. Order is too big to be electronically filed. Want me to hand back this form of order so you can initial them.

F: I want to fix Mr. T. typos.

Ct: I would sign the order so I recommend Judge Hansen do so.

L: My office would have the capability of scanning in the order.

Ct: Not sure about the capacity. System was designed as a demo and not have the capability to have more than 10 users at a time. Have signatures on the order.