

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

Irene Delgado X

Date:
Friday, April 06, 2001

In Re:
FURRS SUPERMARKETS, INC.
No. 11-01-10779 SA

PH on Application to Employ Skadden, Arps filed Feb. 8, 2001

PH on Application to Employ Price Waterhouse

Attorney for Debtor: Robert Jacobvitz and Richard Levin
Attorney for Price Waterhouse: Charles Beckham, Trey Monsuer and Loretta Cross
Attorney for UCC: William Davis
Attorney for UST: Ron Andazola and Leonard Martinez-Metzgar
Attorney for Heller Financial: Paul Fish

Summary of Proceedings:

Exhibits _____

Testimony _____

FH TENTATIVELY SET FOR APRIL 20, 2001

SUPPLEMENTAL OBJECTIONS DUE APRIL 16, 2001

RESPONSE DUE APRIL 19, 2001

Ct: Wanted a prelim. hrg. Encourage possib. people will talk to ea. other. Make sure when we get down to a final hrg. everyone is working off the same rules. No misunderstandings of what will be done on date of fh. Useful at ph that we can addr. some iss. Let you know what is on my mind of what needs to be put on at a fh. Given local rates are lower than these applic. What do these prof. bring to table that lower priced folks don't. Policy so far is if there is an applic. for a rate of \$200 an hr. I usually don't allow that except if justif. why that parties serv. are worth more. Are some extraord. fine lawyers that never ask for as much as \$200 an hr. Only two firms that have asked for fees of over \$200 an hr. When I made that ruling, nobody has asked for the addit. hrg to justify a rate above \$200 an hr. What my policy has been. Furrs case is somewhat unique in this district. Perhaps higher cost of living in NY or wherever. Concerns I have. Keep in mind. What will need to be put on by both prof. Put on proof of what prof. are asking for in this case is what they chg. other clients for comparable types of work. Clear since the code went into effect in 1979 that is what the standard has been. May also be approp. for the prof. to put on proof of what they are asking is similar in other types of bankr. cases. Standard by which compens. is awarded is the ultimate result. How well the case is disposed of. Starting point of measurement of calcul. is Lodestar calcul. Once rate is set should not chg. Mandate of 328 (a). Once set will pretty much be that way. Couple of pragmatic consider. Necess. for the parties who are looking at case to be able to budget at costs. Plan purposes, cash flow, etc. Ought to be able to count on a certain cash flow coming in. Pymt down the road or at an interim basis. Only seems to be fair. Throw out a few other matters. When we had the first day motions Mr. Goffman resp. to a ques. of mine by saying there was a rough budget of \$600k per mo. for prof. Mr. G. estimated the case would last about 9 mos. What turns out to be the case down the road may turn out to be something differ. That figure is tucked in my mind and hasn't left. Was a sugg. in the PWC applic., but may have been chg'd by Ms. C. If chgs in billing rates, will have to be noticed out. W/respect to Skadden, Arps applic. is it April 15 the rates go up as to Assoc.?

L: Bel. it is correct. Is \$250, not \$280.

Ct: Assumed \$250 an hr.

L: Post April 1.

Ct: Rate of 75% of fees and 100% of costs on an interim basis based on approval of a final fee applic. I think also the InterWest case decided in 1989 is the governing law w/respect to decis. made w/respect to potential conflicts of interest. InterWest case says ct has discret. in making those decis. Second to last parag. Seems to me the 10th circ. meant that to be the ruling. Suspect it may arise here. Will treat Interwest case as dicta. Match w/fairly black and white lang. in the code. Bound by 10th circ. Iss. of retainers I don't think there is a prob. w/retainers as such if reas. I do think a retainer needs to be put in a trust acct. Not sure of the stmt in Ms. C. second affidavit. Says will put retainer in w/all the others. Close to the same function served as a trust acct. Is fine. Bill on that retainer. Also a stmt at end of Ms. C. affidavit. Means of mediation. Not thought of that in case like this. May be a good idea. My concerns and policies that I have had in effect and abided by since coming on the bench. If anybody wants to argue these iss. at a fh, may do so. Not precluded from arguing there ought not to be any retainers at all. One of my functions ought to be what I am thinking. Can deal w/my concerns. That's my thought. I guess I would like to find out if we need to deal w/sched. Thoughts?

L: Have a cite for the InterWest case. 1994 case. It seems based on what you said today is that your exam. and consider. of these applic. goes beyond the obj. filed. Did I understand that correctly?

Ct: My conc. were implicit in the obj. raised including by the UST and the UCC.

L: UST phrased that even though the rates were excessive sounded differ. than what you said. Only thing the UST stated is there should be further disclosure. Agree there should be as much discl. as possible. Sounded like you were going to the subst. iss.

Ct: Legimate ques. UCC said they were doing an exam. Trying to say if we get to the fh and somebody says there is a conflict and there is a prob. bec. this is an emp. applic. this is the standard I ought to be following.

L: Open ended obj. Didn't want to be surprised at the hrg. I hear you saying the obj. are not limiting. Will take this from soup to nuts and I ought to be prepared at fh.

Ct: The less soup and nuts the better off we are. What I think is approp. is to only addr. those iss. specif. raised. If UCC or UST comes up w/a serious conflict of interest, they ought to notify you right away.

L: Perhaps we can set up something procedural. If the supplemental declar. didn't fully addr. the obj., ask them to file something that does so we can addr. them.

Ct: Good time this morning to tell you if addit. prob. Not a case where as a judge I need to take a more than active role. A lot of us have been in cases where there have been prob. No one has foggiest idea of what they are doing. That is not this case. I am not antic. raising iss. that the very competent lawyers here will raise.

L: That is helpful. Will focus our efforts. Not sure it is approp. for me to ask for you to make an advance evid. Asked about my firms billing exper. W/respect to ch. 11 debtors I would give you my declar. in other cases. Will get certified copies if necess., but would like to be warned.

Ct: Just obj. by UCC and UST and ask what you expect.

D: No obj. Subj. to review at fh if we found out something differ.

Ct: If there is an iss. about it, think Mr. L. is saying he will prov. an affidavit and a decis. will be made.

D: Wouldn't contest the affidavit. If some info. developed, not obj. to an affidavit.

Ct: Sounds like the UCC position is the affidavit is fine.

D: W/regard to other cases he has been in.

Ct: Speak for firm?

L: I can. Have pers. knowl. of some. Prov. test. on behalf of the firm. Rule 26 declar. rather than my own pers. knowl.

Ct: Sure. All that I had in mind. Not expect. certif. copies of anything. Merger/acquisition.

L: May turn out to be a merger/acquisition. In many of our merger/acquisition trans. we get fees related to hourly rates. Partic. true when repres. a seller. Brings val. to the seller. Not sugg. that in this case, but reserve the right to request it. Not putting it as an initial propos.

Ct: If somebody does really good work, ought to get credit.

L: Some are just restructurings.

Ct: Work for you too?

A: Essentially. If there is any evid. to chgs by other firms, we would req. certif. copies or orders or applic. If they wants to present chgs of other firms in others cases they are not involved, we would ask that the rules of evid. be complied with. Prov. certif. copies of orders of emp.

Ct: For some other firm?

A: Right.

L: I have w/me today copies of the cited docs. Not certif. copies. Will go back and get certif. copies. On the hourly rates iss. I heard a couple of things that were going in differ. directions. Hourly rates, sec. 330. Not sure how I can put those two stmts together.

Ct: Not sure I can give you anymore guidance. Not sure my thinking has gelled on that issue. I will tell you that one of the iss. is what does the prof. bring. The prof. has brought a lot of val. to this case. Way it was organized and took care of noticing issues. Brought relief to our court process. Working folks cont. to rec. their cks. First day orders allowed this bus. to keep going. Funding prolonged and diffic. Shaky condition of this dtr and persuading Heller and other folks to put in \$33mil.

L: Show them what is in their best interest.

Ct: Don't know that you need to. Considerable val. brought to this case already. Won't be ltd. I raise iss. bec. I have not figured out in my own mind how you reconcile a lawyer getting \$200 an hour and someone else getting \$670.

L: Rate is below that. I'm not getting that rate. My firm is chging at that rate.

Ct: Right. I don't know how to reconcile those two. Bring a lot of val. Rate they will get will be a whole lot higher than \$200 an hr. Smart lawyers in this case. Have useful insights.

L: Mr. Jacobvitz and others have already given us useful insights.

J: Perhaps prov. copies of docs to UST. If still need certif. copies, can prov. them.

A: We will consider that.

D: Obj. by UCC the object was to get addit. info. We don't think it would have been approp. to addr. areas of concern. Info. was forthcoming. Reasonable the obj. be amended. What the committee plans to do. Cont. dialog between comm. prof. and dtrs prof. that peer into these areas. To clear that iss. up the court may want to set a date. The UCC plans to give more specif. w/regard to their specif. areas of concern. Supplemental declar. prov. merely quantified those partic. iss. that were of concern. Process of percolating

and will come up w/a final decis. As to rates, iss. that has been percolating in this district w/regard to certain firms who get paid higher. Good case to resolve that conflict.

Ct: I bet it is.

D: Buy a house in a run down area, the val. go up. Good case to flush out those iss. Extraord. talent this dtr has brought to the case. I would think the evid. and legal argum. should be comprehensive. Local rates vs. work outside the area.

Ct: Hesitating.

D: Formal vs. informal.

Ct: Don't want a formalized rule. Ruling that says you can go beyond \$200 an hr.

D: Case is so complex. \$ val. hasn't been enough to justify weighing in on the iss. Supp. the effort.

Ct: Bec. that tends to be one of those policy iss. - the last time Judge McFeeley went thru that exercise it involved gathering affidavits from 10 differ. law firms about their rates. Don't have a prob. doing that. I would think that would be a branch of the case not everybody would need to partic. in.

D: Rates paid to all the prof. seems to be the iss. Not bifurcated as to non-local prof. Iss. is what prof. should be compens. and scale they are judged against. Rates paid here vs. rates in another practice. Fit together. Exper. bankr. attys are being paid in Dallas, Phoenix and Houston. Wouldn't think the iss. should be carved out separately.

Ct: I understand.

A: We will file supplemental obj. to apprise the applic. of our concerns. Have serious concerns w/potential adverse interests. W/regard to the PW applic. we have been having extensive negot. w/Mr. J. primarily. Gotten their own counsel involved. Most of the iss. are resolved. Sole remain. iss. is about their retainer. \$200k they rec'd on Feb. 1 is prepaid fees. Earned on receipt retainer. Legal argum. on that partic. iss. One of the matters was we agreed not to agree. Stated we would defer that until submission of an interim fee applic. I recog. the court may want to addr. that iss. at this stage. Wanted to inform the court of that.

Ct: Saying you don't agree on the rates and want a ruling now.

A: Defer until subm. of a fee applic. by PW.

B: W/respect to the iss. we have one remain. iss. Pre-pet. retainer. PW rec'd a pre-pet. retainer in amt of \$200k and has reserved the bal. Will be prepared to present evid. on how that was treated.

A: Not the case to deter. fees in this district.

D: Think they are correct on that iss. Not the case to deter. that iss.

L: Talk about proced. You stated on first day hrgs for pymt of prof. that the order would date back to the applic. Concern I had is if the UST or the UCC presses the conflict iss. w/Skadden and Arps and are ultimately success. and

deter. S&A applic. is not approved. Makes me a little bit nervous. Take your stmt on the record as an interim order approving on an interim basis at rates to be deter. Total risk for work done to date and work til final hrg date. Law firms have a diffic. choice to make. Protect our clients or ourselves. True w/respect to hourly rates as well. Not lightened up in any respect. I am concerned the oral stmt of the court if the iss. were appealed might not be adeq. Recent 10th circ. BAP decis. Re: Albrecht.

Ct: Read that decis. Solv-Ex case which after a long period of time there was an emp. applic. I always think back to the decis. rendered by Judge Abrahamson. Still really hesitant to iss. an order bec. I don't think it is necess. I hear what your concern is. Prob. w/iss. an order when look at code the code does not say if you have done a bunch of work and have conflict of interest you get paid and another firm takes over. Not iss. an order at all. Not sure how to provide the comfort you all are looking for. Get done as quickly as possible. Standard used by Judge Abrahamson - I was subj. to one of his rulings. If what happens is a firm does a chunk of work and it is a kind of conflict that may req. that firm from repres. the dtr, but it wasn't very obvious, then the firm ought to get some compens. What seems clear from the appellate cases is courts tend to rely pretty heavily on a sort of that should have been obvious. Is somewhat unjustified. Feel comfortable in seeing they get no compens. and kicked out of case. Life isn't that easy. If something came up and not immed. apparent then there ought to be some award of compens.

L: Iss. are obvious. Disclosed the firms repres. of Metropolitan Life, Heller and Fleet. Up the court's decis. here. We didn't repres. those entities in connect. w/this case. Dtr and dip consented to and waived obj. valid. and prior. of liens. Between dtr and those entities was no conflict. As repres. at the time the only you could say it should have been clear.

Ct: I looked at the declar. and I didn't see a conflict. If I ruled otherwise, you would have firms w/a fairly ltd practice as the only candidate avail. to manage cases like this. Second incarnation of the Furrs case was the Rubus case. I was sitting where Mr. D. was sitting repres. German landlords. Mr. D. was arguing his fee applic.

L: Like to get hearing on as soon as possible. Like to set some dates. Helpful if deadlines for filing supplemental obj. Will reply. Talk about what should be in those supp. obj.

Ct: Mr. D. is there addit. stuff your folks need to do before you can give them a final answer.

D: As to PW we think we are close. W/regard to S&A we are having comm. mtg. on April 18. Will have answer to ques. and could file on the 23rd.

Ct: I guess I hear legit. concern for getting a decis. sooner rather than later.

D: Have periodic telephone calls. Have one next week. I could press that iss. and have it resolved. 16th?

L: Had two weeks already to look at it. 24 days to look and resp. to obj. Depends on how quickly Mr. A. can file his.

A: Can file supp. by April 16.

D: As fast as a pace and I can get the comm. to do it.

Ct: April 16 deadline to file supplemental obj. Conflicts, rates and

authorities. Response due April 19. Hearing April 20. Backup date May 22.

L: Will notify the court as to whet. April 20 works.

Ct: Will give time of hearing later.