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:
TUESDAY, MAY 22, 2001

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

FH on Motion for Order Authorizing Debtor to Implement Employee Retention (#295)

FH on Application to Retain Peter J. Solomon as Investment Banker (#185)

Attorney for Debtor: Robert Jacobvitz and Richard Levin
Attorney for UCC: William Davis and William Cohen
Attorney for Heller: Paul Fish
Attorney for UST: Ron Andazola
Attorney for MetLife: Jennie Behles
Desert Feather: Mr. Craddock

Summary of Proceedings:

Exhibits ___X___

Testimony __X___

TAKEN UNDER ADVISEMENT

Ct: Those who filed declarations I will have take the oath.

L: Mr. C. wanted to raise an iss.

Cohen: For UCC. Rentent. of Chanin and Coe, LLC. Invest. banker comm. has attained. Prob. we have is we filed an applic. w/court filed May 17, 2001. At conf. call an iss. came up about discov. You indicated that you didn't favor discov. motions. If denied, should be pres. to you by telephone. Prob. is I've discussed the fee structure w/Mr. L. He expressed concern. Chairman of comm. spoke to Mr. Mays and I spoke to Mr. L. I was advised - obj. to the fees and engagement was too broad. Eval. offers or other info. Wouldn't lose time and abil. Mr. L. and I talked about the purp. of hiring the invest. banker was to protect the enterprise. Eval. offers to purch. that come in and iss. relat. to purch. of groups of assets. Talking to perspect. purchasers as we speak. On eve of this hrg Mr. Maze said we won't prov. you access and give you time w/mgmt. Will oppose retent. See as separ. Rent. of Chanin and abil. to access info. All the prof. were working in case before retent. were approved. Understanding is prof. did not feel necess. to begin work until approved. We need our invest. bankers so they can advise us. Spoke to invest. brokers and reviewed areas of engagement. If revise and accept., co. will give them access. Don't want to be in position of dickering. Asked what kind of time he felt he would need. Need no more than half a day. Orig. est. was a couple of hours. We are uncomfortable w/speed in which the case is moving. We would ask you to addr. this and have dtr prov. us access.

Ct: Letting Chanin have access to data entitled to get if already approved by this court. P. Solomon data room?

C: It is.

Ct: Access to info. about sales would be second thing and access to Galaher and Maze. Problem w/that?

Levin: Don't agree w/all, but w/some. Prob. is what I would call a slippery slope. 14 subparag. of scope.

Ct: Assuming I were to approve Chanin is there a prob. w/them having access. Somebody will serve role w/UCC. If it doesn't work, it seems it is not inapprop. to let Chanin get started on this. Confid. req. Not sure we shouldn't let them get started. Taking risk.

L: Would take risk, but big concern is not that they should get into data room. We want to know that it is not this scope of work that will eat up advisors. Tremendous risk to co. These people are extremely busy. Trying to hold co. together. ½ day might be fine if that is all it were. Told Mr. C. that would not be the problem. Without further definition when this req. gets started we have no obj. to prov. the data. Want it written down what that scope of work was and fit into the data. Have an idea of how broad.

Ct: Hear them asking for ½ day of Golleher and Mays. Regardless of scope...

L: Had convers. w/P. J. Solomon.

Ct: Don't hear anything that says they shouldn't get those ½ days.

L: If all we are talking about is ½ day I think we can do that. Concerned about the unlimited nature.

Ct: Hearing that is what they want now. In process of narrowing down. Approp. to let UCC to have Chanin have that access. If reach agmt on reach of

scope will make ajudic. as need be.

L: Will encourage committee. Want definition that the letter doc. is not accurate.

Ct: Don't want to go into he said, she said. Burden of ch. 11 is that you have a bigger constituency. Part of process.

L: Totally understand.

Jacobvitz: I'd ask when the dtr comes in to approve agmt - tendency to say they did hundreds of hours of work and need to compensate.

Ct: Normal course of whatever. What standard is.

Fish: Also will oppose Chanin. $100k a mo. is something co. can't afford. Want to put them on ntc of that.

Ct: Is a carve out there. It seems to me the unsec. cred. comm. need to look at this and figure out what can fit in there. Certain amt of risk. Not making any ruling on what the dip financing carve out prov.

Craddock: I'm not an atty as we all know. The dtr obj. to Chanin. Cred. obj. to P. J. Solomon as invest. bankers. Why have two parties get together. One load of work and save money in the process.

Ct: Can file obj. Have rule that says that is there is a corp. it has to be repres. by counsel. What has happened prev. and assumed you were repres. yourself. If Desert Feather a NM Corp.?

Craddock: Yes it is.

Ct: Ordinarily would enforce rule. Driven up from Artesia a few times. Approp. to let you go ahead and partic. In future hrgs Desert Feather will have to get counsel. First time in 2 ½ yrs this has happened in this court.

Craddock: Trying to stave off bankr. ourselves. Can't afford counsel.

Ct: Why UCC exists. Can call Mr. Davis and pass on your concerns.

Craddock: Had calls from other small bus. Thought it was great I was here trying to repres. them. Rotten rule. Can it be appealed?

Ct: Yes. Could hire a single atty to repres. a group of you.

Craddock: Most of us are in the same position trying to stave off bankr. Where our money is going.

L: Like to Solomon applic. first.

C: I req. Gallaher and Maze be taken first. Trying to catch the last flight out of Albuq. today. Long trip back to Detroit.

Ct: W/respect to Solomon if we want to ...

C: Supp. retent. of Solomon. Reached econom. settlement.

Ct: Reflected in the Dietz affidavit?

C: Further accomod. Revised engagement ltr. Have an understanding and are satisf.

L: Get it out of the way bec. of that settlement. Mr. D. is here. Move onto longer matter.

Ct: If that much is done, iss. of indemnity agmt. Deal w/the - applic. by Furrs to emp. P. J. Solomon. #185. Series of items that go w/that.

L: Filed applic. Like to complete record. 3 declarations in supp. of this. Call witnesses.

Ct: Does the UST arguing the indemn. iss. w/respect to negligence or addit. obj.

A: Arguing to emp. of P. Solomon.

Ct: Sounds more like a legal argum.

L: Call Thomas Sakorsky.

TESTIMONY OF THOMAS SAKORSKY (sworn)

L: Ask that declar. be admitted.

A: No obj.

Ct: Admitted. Get into evid. the P. J. Solomon.

L: Mr. Dietz will. Call Mr. Bradley Dietz.

TESTIMONY OF BRADLEY DIETZ (sworn)

L: Ask declar. be admitted.

A: No obj.

Ct: Admitted.

TEST. CONT'D

CROSS EXAMINATION BY COHEN

C: Reached an agmt I am uncomfortable w/t hat.

CROSS EXAMINATION BY ANDAZOLA

REDIRECT

Ct: Do argument or in writing? Two iss. is 328 vs. 327 and 330. Indemn. iss. Not sure what I think about that.

L: Useful for us to know what you are thinking.

Ct: Purp. of 328 is to let folks know what compens. arrangements are going to be. Approp. for P. J. Solomon to find out ahead of time what the arrangement were going to be. Invest. bankers get treated in the real world differ. than attys. Carry over into bankr. court. Ought not to be harder to have folks do bankr. work. Seems to me Congress is saying not throw up addit. barriers. One of those barriers would ought not throw up is the fees of Price Waterhouse. Deter. to reduce them somewhat. Not as complex. Negot. that have taken place is rates agreed upon ought to be accepted. Defer to UCC. Indemnity issue. What does Delaware law prov. Looked at case of Joan and David Halpern. Didn't look up case law. Kind of thing that occurs in

marketplace. Rather than have P. Solomon factor in rates it leads that back to dtr for indemn. purp. Invite parties to make addit. comments. Need to think about it some more.

L: In the papers we filed on May 4 we indic. P. J. Solomon would file a final fee applic. Conf. what happened in the case and valid. the fees based upon the trans. We can take that iss. off the table.

Andazola: Solomon is seeking approv. of emp. Asking for approval of indemnity. Asking for classif. of compens. Giving S. of prior. Prov. on advise that they give. Listed these. Overreaching prov. will be approved. Place interested parties under a heavy burden. Effects of these prov. were in prov. Great deal can be antic. To set these in stone would be a disservice to creds.

Ct: UCC is comfort. w/this. UCC money. Doesn’t it conc. you that the UCC isn’t lined up behind you?

A: Several members are large suppliers. That comm. might not be as atuned to local vendors as local vendors would like.

Ct: Saying this comm. is not fairly repres.?

A: No. Saying they take their actions w/a democratic process. Are duly constituted. Saying there may be other points of view that exist out there. 328 (a) - go to the exhibits. Don’t recall if we admitted the 16 exhibits.

L: Ask they be admitted.

A: Exh. 1. Pg. 3, parag. 6. Retent. was not under 327. Under 328 (a). Exh. 3.

Ct: All prof. as well. UCC, Dtrs counsel and PW counsel. If willing to undergo this risk, why - what is it that should lead me to override their prefer.

A: Matter of accountability of prof. Short circuit around court’s discret. Applic. doesn’t state the complex. of this. Doesn’t state which prof. from P. Solomon are working.

Ct: UCC is so lax they have fallen asleep at the switch.

A: Differ. iss. Court has an independ. duty to review. Attempt - content. of the dtr is that this happens all the time in commercial settings. Bankr. is the same situation as a commercial setting. Are limit. Account. that prof. owe to the court. Most of these exh. have provis. Have refused to approved 328 (a) retent. All we are saying let’s look at work done. See if fees should be awarded. What reas. have they shown to be treated differently.

Ct: Retent. of invest. bankers?

A: What basis have they shown that would demons. they would be treated differ. What risk have they undertaken.

Ct: Only got until 5:00. Talk about indemn. iss.

A: # of obj. clauses in the brief. Applies not only to Solomon, but to affiliates. Other prof. advisors. Would apply to Wile, Gottchell. If there is any element of simple neglig. indemn. would apply.

Ct: If gross neglig., then they are not indemnif. from that.

A: Wording in indemn. clause arises out of bad faith

Ct: If engaged in gross neglig., then the dtr can collect damages from them.

A: Addit. prov. that talks about an award in arbitration. Somewhat troublesome. In the 16 exhibits in supp. of the applic. there are several of the orders auth. emp. which subst. modify the indemn. These arise from Delaware. Only circuit which has a bankr. court decis.

Ct: Hear from UCC.

Cohen: Agreed to support the retent. applic. as revised.

L: Addr. the market and the comm. position. Agmt w/Chanin contains the ident. prov. agmt as Solomon. If the comm. opposes this, I don't understand why they signed that agmt. Indic. the comm. will go that far if the court will prov. it.

Ct: Market is what is done outside of bankr. and the consider. the UST raised ought to be deter. by what the market is?

L: Goes beyond that. Four ch. 11 cases which Solomon has been employed. Not just Delaware. All of those things.

Fish: Wanted an invest. banker hired. Dtr chose Solomon. W/the way this oper. is going it would be wonderful w/the way it is going. Very important the court approve the Solomon applic. They have to move quickly.

Ct: Will need to noodle thru the indemn. prov. Will give you a decis. as quickly as possible. Will take under advisement. Dtr amended or revised it's proposal. It was not going to addr. all the matters under #295. 3 obj.

L: Call Mr. Sakorsky.

TESTIMONY OF THOMAS SAKORSKY

L: Ask the applic. be admitted.

A: No obj.

Ct: Admitted.

TEST. CONT'D

CROSS EXAMINATION BY COHEN

Recess

Ct: I haven't read the UCC brief. Means I won't give you a decis. on this iss. today either.

CROSS CONT'D

CROSS EXAMINATION BY CRADDOCK

REDIRECT

Ct: Closing Argument.

Craddock: No prob. w/hiring the two gentlemen. Seemed experienced. Done cks on them through the internet. Have prob. w/giving Mr. Dahlen any further compens. Unfair to unsec. Unfair to anyone else across the board.

Cohen: Want to put Mr. Forkham on stand. My direct exam. would take 10 min.

Levin: I was surprised how long that took. Cross was quite lengthy. Not too lengthy. Few ques. for Mr. F. on cross. Ask exh. be introduced.

Ct: I have them. Objections?

C: None.

Ct: Will be admitted.

L: Like to call Gregory Mays.

TESTIMONY OF GREGORY MAYS (sworn)

L: Ask that the declaration be admitted.

C: No obj.

Ct: Admitted.

TEST. CONT'D

CROSS EXAMINATION BY COHEN

REDIRECT

Recess

L: Call George Golleher.

TESTIMONY OF GEORGE GOLLEHER (sworn)

L: Ask the declaration be admitted.

C: No obj.

Ct: Admitted.

TEST. CONT'D

CROSS EXAMINATION BY COHEN

REDIRECT

L: No further evid. to submit.

Cohen: Call Tony Forkham.

TESTIMONY OF TONY FORKHAM (sworn)

C: Move the declar. be admitted.

L: Like to Voir Dire the witness.

Ct: I don't think that is a reason for keeping it out.

L: To the extent an opinion test. is to help form judg. of court.

Ct: Overrule the obj.

L: Qualifying him as expert?

Ct: Not occurred to me that someone would be specif. qualified as expert as to bankr.

L: Would accept it if qualif. as general expert.

Ct: Need a ruling on that?

L: Some ques. I might pursue, but won't if not expert.

Ct: Ask whatever ques. you think are approp. Unless the UCC wants to concede he is not qualif. as an expert.

C: We won't agree to that.

Ct: Go ahead.

CROSS EXAMINATION BY LEVIN

C: No further witnesses.

Ct: Want really brief closing? 3 things for me to focus on. Won't give you a decision today. Need to read everything.

L: Prod. evid. about ranges of compensation. I think we need to focus on is what the standard this court must apply as standard of compens. Iss. is bus. judg. rule. If this court does not accept the bus. judg. rule...

Ct: I accept the bus. judg. rule. Part of my notes.

L: We would stop negot. deals outside of court and come here. That can't work. Bus. judg. rule is the board act fully informed and consider the alter. in good faith. Presumpt. what the board did was reas. Mr. Gollegher was not part of those negot. Extra time would have been damaging. Unless this court wants to take over and decide what is reas. the evid. of what Mr. Sakorsky gave shows why the bus. judg. was - the proced. were followed. UCC would like them to get avg. compens. No showing this was not reas. Not w/in the range.

C: Comm. never said Golleher and Mays should have never been hired. Dtr i.d. them as crisis managers. Currently being paid mo. compens. in the form of salary. Reimb. for their expenses. Paid director fees.

Ct: What are they?

C: Not sure.

Ct: I'll find it.

C: Signing bonus of $250k. Not part of a large corp. Are performing fine serv. on behalf of the co. We can try to polish it and look at it. Measured by function of sale trans. Ch. 11's are not easy. Stepped into a diffic. situation. Whet. complex case is another matter. Paid to perf. a job in a diffic. setting. Whet. they get a success fee to perf. the same serv. P.J. Solomon's agents are performing. I bel. the court can take judic. ntc exec. mgmt will always work along side an invest. banker to sell a bus. Always constituencies to deal w/. Are Unsec. creds. Compens. They are getting is

based upon size of trans. Their success fee makes their compens. excessive. Percent. of trans. is based upon a factor the dtr prov. in their own analysis. Look at all examples in exh. C and D. Relat. between compens. being paid and size of case. If disregard of case, mean size of enterprise. That factor has something to do w/complexity. Percent. of compens. as a function of the size of the trans. places their compens. far in excess of anybody else except two other cases and I bel. one other. Salaries and director fees and success fees should not be paid. Not working on a stand alone plan.

Andazola: W/regard to Golleher and Mays we agree they are qualif. managers. Don’t obj. to signing bonus. Success bonus be delayed until the results are obtained. When tallies are in and plan is conf., they may be entitled to the success fee. Just don’t know success of this ch. 11. Point to exh. subm. by the dtr. Exh. 1-10. In exh. 5 was a reserv. to req. a trans. fee. Exh. 7 the court reserved right to consider success fee later. Exh. H. court reserved the right to approve the success fee. Court’s did what the court’s we cited in our brief determined. Bus. judg. rule isn’t as flex. and contended by the dtr. $30k compens. to Dahlen - agmt by Mr. D. to raise or solicit current emp. of Furrs. Exh. 1 - I haven’t been able to find any prov. in that exh. which deals w/Mr. D. agmt. not to solicit Furrs emp. G. and Mays were unaware w/the depth of prob. w/Furrs. Void of leadership when they came to the co. Serious conc. as to why an addit. $30k would be paid to Mr. D. subseq. to his departure. A prov. relating to Mr. D. agmt not to solicit be added to transition agmt. Req. the pymt to Mr. D. be denied.

Fish: I think the real val. of mgnt is demons. by what doesn’t happen. When these two individ. came in was liquid. prob. Two mos. into this case. Did not come in w/applic. to loan more money. Lenders think the main reas. that did not happen was bec. of Mr. G. and Mr. Mays. Spending the lenders money. Wonder if Mr. G. and Mr. Mays were worth their money. Have proven to us they are worth the money.

L: $19k a year. No evid. the serv. are duplic. of Solomon’s. Success fee - plenty of test. the compens. w/greater risk it would be grossly unfair to say we will take what you gave us. The iss. was the board reas. Did they follow the proced. steps. Thought Mr. C. said their fees were avg. Said below avg.

C: I misspoke. Would be satisfied if they rec’d the avg. of the success fee. Avg. compens. based upon the avg. All of those things are included in compens. Salary and signing bonus.

L: Reply would be differ. Are not avg. people.