

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

Joe Jameson X

Date:
TUESDAY, JUNE 26, 2001

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

STATUS CONFERENCE ON SALE PROCEDURE

EMERGENCY MOTION TO APPROVE TERMINATION FEE BY DEBTOR

EMERGENCY MOTION TO CONTINUE HEARING ON MOTION TO SELL BY PREMIER DISTRIBUTING

Atty for Debtor: Robert Jacobvitz and David Thuma
Atty for Heller: Paul Fish
Atty for UCC: William Davis and William Cohen and Stuart Hertzberg
Atty for Met Life: Jennie Behles
Atty for UST: Ron Andazola
Atty for NM Beverage: Michael Cadigan
Atty for Premier: Gail Gottlieb

Summary of Proceedings:

Exhibits X

Testimony X

M/APPROVE TERM. FEE GRANTED - ORDER SUBMITTED AND SIGNED

M/CONT. HEARING ON M/SELL - DENIED; GOTTLIEB WILL SUBMIT ORDER

Gottlieb: He told me if they had estimates of val. did you say you would look into whet. you would get it for me?

J: I said I would contact the co. after the hrg if feas. w/one except. If internal val. made that the co. didn't use, t hat is PWC did a lease analysis.

G: Neither the dtr or other parties are pres. val. evid. on Friday?

J: Correct.

G: Same w/Met Life and Heller?

F: Not going to do that.

Behles: Not on Friday.

G: Will have to be content that there will not be a bid higher than Fleming bid. I'm trying to work out so court won't be treated to floundering around on Friday.

Ct: I cont. to have concerns about confidentiality offers and the bidding process as a general rule. I think that w/respect to disclosures about what the situation is I would give Mr. J. and Ms. G. a chance to talk after bidding process tomorrow afternoon and get w/me if they come up w/something that works for them. By the time we get to the hrg on Fri. it will become much more public then. My concern it is in the interest in every party in this case that the highest bid is rec'd. Tend to defer to the bus. judg. of the dtr to make sure those proced. happen. A failure in due process could vitiate down the road. Still get max. price and still due adeq. disclosure. Will not make a specif. ruling til you and Mr. J. have a chance to talk. Given the provis. in the purch. agmt that prov. among other things that there cannot be a decrease in the price. Regardless of who is the purch. to keep everyone on the line. I am comfort. if anyone is protected and do reas. well it would be the liquor wholesalers.

G: Should I take that as a ruling denying my motion and since I am the trouble maker I shall prepare the order.

Ct: Wouldn't char. you as a troublemaker, but the rest of it Yes. Take on term. fee.

J: Rationale that why the dtr bel. the fee is best.

A: UST would normally have conc. w/term. clause, but in case such as this will not obj.

Cohen: Comm. has been at a disadvantage. Not a spoiler. Interested in best purch. price. I understand the court's conc. over confidentiality. Diffic. it has put the prof. in we are making recommend. Comm. has not reviewed the purch. agmts. Not prov. to anyone on the committee. Have an agmt w/co. on this. D and T have worked dilig. w/the comm. They disclosed the relat. that they have w/parties in interest. Ask Mr. J. is they would agree as prof. if they would agree that we could share w/Mr. F. and his comm. Put our thoughts together before the hrg on Fri. Mr. J. has no obj. to that prov. they signed the same confid. agmt. Will make sure those are signed or discuss the terms of anybody's asset agmt.

J: What Mr. C. says is correct. Dtr has agreed to that. Expand scope of which parties shall have access to that info. Put in packs and sent to comm. prof. We do reserve the right to obj. to Chanin's applic. Need to consult D and T makes us wonder why.

C: Randall Lambert arrived late and not able to speak to him. I talked to him on Mon. and discussed the draft. \$3mil may be in excess of 3%. On high end of approp. term. fee. Obj. to amt. In my exper. it is excessive. I'm arguing as a prof. In my exper. 2 ½% is high end. Know price being offerred for stores. Total amt ultimately paid will be in excess of 3%. Left him a voice mail on the way over here. We think the term. fee should be no more than 2 ½%. If Fleming is a purch. whose final bid is outbid. Coming out of our funds. If a bid that would exceed the bid and didn't have to increase by \$3mil.

Ct: Say that again.

C: Relates to the adv. proc. we have w/sec. creds. I antic. the sec. creds will take position that any term. fee will come out of their coll. Our position the greater the pot avail. for all creds. So to say at exp. of sec. creds is not accurate.

Thuma: Call George Golleher.

TESTIMONY OF GEORGE GOLLEHER (sworn)

CROSS EXAMINATION BY WILLIAM COHEN

Ct: What is admitted?

T: Exh. 1 and 2. Call Brad Dietz.

TESTIMONY OF BRAD DIETZ (sworn)

VOIR DIRE BY WILLIAM COHEN

C: Not had exper. in sales of this type and not competent to testify on sales of this type.

Ct: Rules to qualify experts is a low bar. Once the witness meets the min. criterion is met the iss. gets down to credibility. Can be brought out in exam. I will rule this expert is qualified to give test. about term. fee.

TEST. CONT'D

C: No cross.

Ct: Have 3 exh.

T: Not that important. Didn't admit it into evid.

Ct: No further exam. Dtr rests?

J: Yes.

Ct: Sec. creds are backing this.

F: No evid. to put on.

Ct: Want to put on a case as well?

C: No.

Ct: Argument.

J: Dtr submits the court should approve the \$3mil breakup fee. Only obj. is

on the iss. of reasonableness. Deter. whet. the break up fee was w/in scope of bus. judg. was reasonable thing to do. This amount is reas. and approp. Breakup fee was heavily negot. item. Will not go forward w/o this breakup fee. Serves as a benef. to the dtrs going into the auction. That floor is necess. to protect co. on downside. Test. is a breakup fee is customary. Could consider that 3% is w/in the high end and w/in a range of breakup fees. Auction is sched. to begin tomorrow morning. Very essential the court approve a breakup fee as proposed.

C: Mr. J. is right on one point. Comm. does not oppose breakup fee. Bel. it is excess. Will supp. a fee that is 2 ½% of whatever the purch. price is. Risk that inventory will be less. If inventory turns out to be less at time of closing, our position that given a sale of this type it is approp. to have a term. fee and not a flat fee. Not treated as a lien claim. Treated as admin. exp. Challenging sec. lenders fee. Direct effect on the unsec. Approp. that a breakup fee if paid at all is treated as admin.

Fish: Ought to i.d. the #'s. \$3mil is 2.7%. The # the comm. agrees on is \$225k. Look at conseq. Dtr negot. something that comm. thinks is high. Not accept. risk. Did the best job they could. Did a great job. 2.5% vs. 2.75%. We need this contract to get a higher sale price. Is material. If someone bids higher than Fleming it is clear they were the stocking horse. Is fair they get their money. Breakup fee should come off the top. We really hope you approve this and don't lose this bec. of this differ.

C: I don't think Mr. F. heard what I said. Not comparing fixed \$. Don't know what \$ is. Understand what a stocking horse is. Not one piece of evid. that Fleming will walk if told the price is 2.5%. What happened in O'Brien case. Court dealt w/term. fee at end of case. Not approved at end of case. Saying it is too high and shouldn't be accorded. Not reas. to allow Fleming to be paid ahead.

Ct: My thought would be as follows: I'm going to approve the term. fee proposed by the dtr and exist in this contract. Exh. 1 and 2. This is part of the deal Fleming agreed to. \$3mil. It will come off top of proceeds and paid first out of whatever superseding bid for the assets whet. by a single bidder or combination. My reas. are as follows: This is the agmt that Fleming agreed to. Negot. by parties and test. is there was some pull and tug w/it. Exh. 2 shows what some of the pull and tug was. For that reas. it is an important provis. The test. of Mr. Golleher is such that sugg. all the prov. in this agmt w/Fleming are all important enough that it is possible that Fleming will walk away if approved. Clearly w/o ques. a bus. judg. rule in this partic. case. The dtr have made a decis. that this is the best deal they can get. It seems to me a second reas. to approve the \$3mil breakup fee. By and large there is not that much differ. If a quarter of a mil. \$, that amt was saved by elim. \$250k - \$300k or a larger amt is made up for by the val. that knowing the Fleming bid is locked in place. If this bid gets accepted, if there were another bid signif. higher and the dtr would have taken it, talking about a bid that would come in \$2mil higher than this bid right now. The dtr having considered a # of interests so far have found the best deal so far is Fleming. What we are talking about is chances this \$3mil bid is such that it would chill someone who would bid more or less. In other words in these partic. circum. unless someone out there that bids a lot more money tomorrow this partic. bid would not be a deterrent. Best to have a deal in place and stocking horse. Small extra amount vs. the UCC is arguing for is such that the extra comfort it prov. or get rid of the risk is feas. worth that amount. For purp. of making that decis. I assume Mr. Lambert is an expert in this area. Treat as evid. pres. here. What I have used in making my decis. now. Disregarded the hearsay test. For those reas. it is approp. to approve the breakup fee.

T: I did prepare a form of order. I did get Fleming's approval and Mr. Fish's approval.

C: May I see it.

Ct: Differ. between bringing value and bringing case. Respect former the latter has a place in this too.