

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:  
June 29, 2001

Re:  
FURRS  
No. 11-01-10779 SA

FH on Motion to Sell by Debtors

Attorney for Debtor: Robert Jacobvitz and David Thuma  
Attorney for UCC: William Davis  
Attorney for Heller: Paul Fish  
Attorney for MetLife: Jennie Behles and Ron Silverman  
Attorney for Premier: Gail Gottlieb  
Attorney for Earth Grains: Don Fenstermacher  
Attorney for Tax and Rev: Don Harris  
Attorney for GE: David Thomas  
Attorney for Broadway Vista Partners et al.: Robert Johnson  
Attorney for MDFC Leasing Equip. Corp.: Jeffrey Fine  
Attorney for AG Assets: Charles Price  
Attorney for Keleher Realty: William Keleher  
Attorney for Weingarten Realty: Emily Franke  
Attorney for Los Alamos County NM: Gerald Velarde  
Attorney for Louis Puccini: Greenleaf  
Attorney for Kim Middlebrooks: Joe Maloof & Co.  
Attorney for Desert Eagle: Robert Feuille  
Attorney for Ector County et al.: David Aelvout  
Attorney for Adrian Baca and La Feria Park and Shop: Carlos Miranda  
Attorney for LSF Bassett: Kevin White  
Attorney for Los Lunas Shopping Center: Duncan Scott  
Attorney for County of Brewster et al.: Michael Reed  
Attorney for City of Andrews et al.: Laura Monroe  
Attorney for Pinnacle and Countrywide Logistics: Michelle Henry  
Attorney for UST: Ron Andazola

Summary of Proceedings:

Exhibits   X  

Testimony   X  

MOTION GRANTED

JACOBVITZ WILL SUBMIT ORDER

Ct: I want to talk about procedure. What the dtr has done is decided to have sale. In best interest of estate. Now bringing best contract it could get to court for approval. All standard bankr. proced. I'm going to hear evid. and argum. about overall contract and whet. it ought to be approved. Many obj. Individ. landlords. Taxing auth. and other folks. These obj. will not be heard today. Contract allows dtr and Fleming to work out future performance. Third parties that Fleming might sell the stores to if approved today. Parties and potential purch. will have a period of time to negot. If can't reach settlement then they can come to the court. Not doing all those things today. Another type of obj. is you are selling prop. and I have ques. how much you are selling it for. If I approve this sale, proc. will go into acct. Can assert their rights. Rights in prop. are moved from prop. to cash. They can negot. how much those entities can get. If can't work out agmt, can come to court and litig. Also standard procedure. Not be deciding specif. amts of clms today. If this sale is approved and money goes into an acct, won't be distrib. unless further ntc to court. Today is ltd to whet. it makes sense for dtr to sell stores than remain under same situation it is in today. Other parties such as unsec. comm. will take part in this process. Will exam. the witnesses. Include sec. creds. After test. is pres. will be allowed brief argum. to court. I will decide whet. to approve this contract or not. Talk about rules for partic. in this hrg today. Only folks so far who have introd. themselves are lawyers. Parties may partic. in the process. As is also the case in most courts, corp. may only partic. thru a lawyer. Means if your bus. is a sole proprietorship you can partic. also. This is what the rules of procedure govern. If someone wants to be heard at end of case, you can do so. Will need to stand up and i.d. yourself and then make a brief stmt. I would expect all stmts that are made will be brief. Read materials and have considerable background w/this matter. When I make a decis. I will give reas. for doing that. Addr. the motion of Premier Distrib. and NM Beverage who have moved to cont. this hrg. Ms. Gottlieb and Mr. Cadigan are you ready.

G: I thought I lost this motion on Tuesday?

Ct: My thought too.

G: I promised to bring in an order.

Ct: My thought too. Motion to approve contract of sale to Fleming. Would expect for those partic. the dtr to make a brief opening stmt to summarize where we are. Nobody is req. to bel. me. If opposed, may make a brief opening stmt.

J: Will cover the opening remarks. Mr. Thuma will cross exam. the witnesses.

Ct: Can you all hear?

J: Case was filed Feb. 8 this year. Dtr filed m/to sell. Dtr marketed prop. in early April. On June 26 dtr entered into an asset purch. agmt w/Fleming, Inc. Ct also approved a term. fee of \$3mil so that if Fleming were overbid and that bid was approved by ct Fleming would be compensated. Serve as stocking horse. Auction was held June 27. Auction was sort of a private bid type auction. Prov. copies of asset agmt to parties interested. Encouraged interested parties to talk to dtr. Dtr concluded it was unable to put together something other than the Fleming bid. The fact that the ct approval is the ct will find the lenders support the sale. Comm. supports the sale. No obj. by the UST. Few iss. where those parties have biggest stake are in some kind of disagreement. Evid. will show there is a sound bus. justif. The DIP lenders will expire Aug. 10. W/o that the dtr will be unable to cont. oper. Right to term.

Ct: Talking about Debtor in Possession when you say DIP.

J: Yes. Dtr and advisor P. J. Solomon gener. best proposal. Gave the dtr flex. Marketed for 2 ½ mos. Time was adeq. to market the property. Dtr is currently oper. at a subst. loss. Any delay of the sale will increase losses. If sale is not approved, the dtr will not be able to improve oper. Decline to a great extent. W/o DIP Financing dtr will likely not be able to cont. oper. Under these circum. the evid. will show the purch. agmt is in best interest of the estate. \$57mil in cash at closing. Inventory at cost. Around \$50mil. Could vary bec. of inventory levels at the time of closing. The agmt covers all 66 oper. stores. Fleming has a right to carve out up to 26 stores. 30 days from entry of order approv. sale which stores to carve out. Fleming carving out will not lower the purch. price. Other provis. that effect the provis. Evid. will show dtr and Fleming are not affiliates. W/mutual understanding the offer could be subj. to overbid. No undisclosed agmts between dtr and Fleming. Purch. price to be paid by Fleming is best offer. Will prov. greater return. Decis. to enter into agmt constitute sound exercise of bus. judg. Fair consider. of assets. Urge court to approve the sale.

F: The sec. lenders supp. the sale. No resp. alter. at this time. Liquor dealers have filed an obj. Some of them we need to consider today. Parties are in agmt that we should treat liquor dealers differ. Will do what we need to do. Up to court to decide at a later date. Tht will simplify this.

Ct: Another category that will not be decided today. Your understanding?

G: Yes. Sale under 263 will be pursued today.

J: Yes.

D: On behalf of unsec. creds comm. which orig. filed an obj. the UCC would like to approve the sale today. Prior to the obj. date the obj. addr. the procedures. Close the data room and second. the proposal to not allow bidders who had not made bids. As it turned out, the data room was kept open. Allowed to partic. in the sale process. Bidders who had not subm. bids were allowed to partic. in the auction. Comm. only has one concern. It will raise today. Has to do w/the wording. One iss. in this 363 sale. A little out of ordinary. The estate and the comm. has a clm that it has asserted ag. Fleming. Not a clm ag. the assets. To the extent that the clms ag. assets which are attached to assets, this course of events is differ. Unusual circum. is the dtr has avoid. clms ag. purchasers. Avoid. clms would be funds that may not be encumbered by the lenders. Ct will have to addr. val. of those released clsm. Carve out portion of clms. Instead of normal course the estate has a clm ag. Fleming. Not ordinary course. Test. will show the mutual release is a bargain for condition of asset bargain agmt. Only thing we will ask is when the order is subm. to the court it sets out it is part of the bargain. Clm of the estate w/regard to avoid. action will be adjudicated at a later date. Parties agree to these facts. Like to have that clm and that resol. set forth in the order. Other than that, we completely supp. the sale. One of the iss. addr. is whet. or not the prepet. lenders would attach. Agreed the DIP lenders clms would attach to avoid. actions. Would be avoid. recovery. Should go to the estate. Will pres. evid. w/regard to preserv. of that clm.

Ct: Not going to argue the merits of the clm ag. Fleming today or the specif. how it is you are entitled to carve this out and keep money away from sec. lenders?

D: Not prefer. clm. Avoid. recovery. All parties agree there is that clm and some portion will pay for the release. Only put a few factual predicates when witnesses are testifying.

Ct: Won't decide that today.

D: I will put on Mr. Mike Esquibel in regards to his partic. Will show the comm. had access to the negot.

Ct: What Mr. Davis has said refers to the fact that sometime last summer Fleming gave up it's ownership. Prev. owed \$16mil. Dtr paid \$4mil. Saying the estate ought to get some or all of that \$4mil. If don't give it back, will be avail. for distrib. Do I have that correct?

D: Yes.

B: Do support the sale. Want to make it clear we think the court is on the right track to preserve all parties rights. The sale order should be neutral to all parties. Valid., prior., extent or val.

Ct: The sale should go forward so cash ends up in one big pot. Anymore opening stmts? (No answer)

Thuma: Dtr is going to call 4 witnesses today. Call a Fleming repres. Will call a Chanin repres. Call George Golleher and B. Dietz.

TESTIMONY OF MICHAEL FREEMAN (sworn)

T: Admit exh. 1. Asset Purch. Agmt.

Ct: Obj. No obj. it will be admitted.

TEST. CONT'D

T: Move admiss. of exh. 2 and 3?

D: Have them avail.?

T: Yes.

D: Look at it for one second. No obj.

Ct: Exh. 2 and 3 will be admitted.

TEST. CONT'D

CROSS EXAMINATION BY W. DAVIS

CROSS EXAMINATION BY P. FISH

CROSS EXAMINATION BY J. FINE

CROSS EXAMINATION BY G. GOTTLIEB

CROSS EXAMINATION BY FUEILLE

REDIRECT

T: Call George Golleher.

TESTIMONY OF GEORGE GOLLEHER (sworn)

Ct: Started out w/a set of stores from \$300mil to \$7mil. Did you mean \$7bil?

G: Yes.

TEST. CONT'D

Ct: Shall we take a break. Is a bid that we received this morning.

RECESS

CROSS EXAMINATION BY W. DAVIS

CROSS EXAMINATION BY J. FINE

T: Not at iss. today. Obj. to this line of ques.

F: Not what I am asking about. I am concerned about these 3 leases were entered into just before filing of bankr. If the dtr char. of them and resp. is correct that they are sec. trans. I want to make sure there is \$7mil avail. that my client is entitled to.

Ct: Makes sense.

CROSS EXAM. CONT'D

T: Really asking for a legal conclus. Nature of their clm if a sec. cred. Something Mr. G. prob. can't addr.

Ct: Let him addr. best he can.

CROSS CONT'D

CROSS EXAMINATION BY GAIL GOTTLIEB

T: Obj. Set out in DIP order. Not fair. Diffic. order to understand.

G: Find out how much money will be avail. for those w/sec. clms. If money out of this trans., creds need to know that.

Ct: Ask him what he estim. would be the costs. From first day, were estim. \$5.4 mil. What they estim. when I asked. Not test.

CROSS CONT'D

T: Calls for legal conclus.

G: Help me out by stating whet. it is the dtrs intent.

Ct: Ask if they intend to spend the money.

CROSS CONT'D

CROSS EXAMINATION BY ROBERT FEUILLE

CROSS EXAMINATION BY CARLOS MIRANDA

RECROSS BY JEFFREY FINE

REDIRECT

Ct: What is your basis?

B: Based on one of the ques. by one of the opponents.

RE CROSS BY JENNIE BEHLES

T: Call Brad Dietz.

TESTIMONY OF BRAD DIETZ (sworn)

Ct: You want to ask him some ques. as an expert witness?

T: Yes.

Ct: I need to qualify him as an expert witness.

T: Asking if someone has any obj.

Ct: Have obj. of this person being qualified as an expert witness.

G: Unless AMA Appraiser. Like to reserve obj. until I hear what he has to say. Can't agree that he is an expert on the value.

TEST. CONT'D

T: Move to qualify Mr. D. as an expert witness.

Ct: What will he testify about?

T: Fact witness about sales transaction. Whet. it was properly done to maximize the amt of sale.

G: I don't have an obj. about test. about sales process. When they get into anything about sales val., I have prob. w/that.

Ct: What I hear Mr. T. saying is he is going to talk about procedure. This was the best procedural way to get the max. value. If test. about that, then he clearly is qualif. Standard that Federal Cts have set for experts. If strays from that area, welcome to leap to your feet that he is not qualified. Want to voir dire the witness on his qualif. as an expert?

G: In pursuing this partic. sale?

Ct: Yes.

G: No.

Ct: Then qualif. as an expert witness.

TEST. CONT'D

Recess

TEST. CONT'D

J: Glitch on purch. agmt. Should be a correct. to 5.1 (f) (2).

Ct: At back of document.

J: Is 5 stores the dtr has closed. Dtr already filed a motion to reject 5 leases. Fleming conf. they agreed those stores should be deleted and should be conf. in a ltr. The stores are 871, 903, 944, 946, 951.

CROSS EXAMINATION BY JEFFREY FINE

T: Obj.

F: Have right to know.

Ct: Ms. G. do you want to weigh in?

G: Involved in a # of restructuring. Not sure he has been asked to give a legal conclus. Whet. he is familiar. Can't test. about restructuring, but not be req. to answer ques. about role of liquid.

Ct: Not sure I agree w/that. Sugg. that he is being asked ques. as an expert. It will be effect. allowed to testify as well.

CROSS CONT'D

T: Obj. Is going pretty far field. Is an investment banker, not a bankr. lawyer.

Ct: I pretty much got your point. Get answer and move on to something else.

CROSS CONT'D

CROSS EXAMINATION BY P. FISH

F: Obj. Calls for legal conclus.

CROSS CONT'D

T: That ques. asked and answered.

Ct: Gets to ask it again.

CROSS CONT'D

CROSS EXAMINATION BY ROBERT FEUILLE

CROSS EXAMINATION BY PAUL FISH

CROSS EXAMINATION BY SILVERMAN

RECROSS BY FEUILLE

T: Like to call Greg Mays.

TESTIMONY OF GREG MAYS (sworn)

CROSS EXAMINATION BY JEFFREY FINE

CROSS EXAMINATION BY GAIL GOTTLIEB

T: Beyond scope of my examination.

G: Approp. ques. about money generated.

T: Didn't ask about money generated.

Ct: Let me look.

G: Were ques. about cont. employ.

Ct: Yes. Is relevant.

CROSS CONT'D

T: Obj. Beyond scope.

Ct: Already agreed we are not going to do that.

G: W/draw ques.

REDIRECT

T: Last witness I am going to call. Mr. D. is going to call Chanin witness. Like to have court take judic. ntc of record in this bankr. case. Pending adv. proc. Take ntc of the sched. filed in this case.

Ct: Obj.?

(No answer)

Ct: No obj. I will.

G: What adv. proc?

T: All of them.

Ct: If something specific, you need to tell me what it is or in closing argument.

T: Adv. proc. commenced by Premier puts the Premier lien in dispute. Judic. ntc of action filed by UCC to rebut obj. Subst. amt of proc. is avail. to unsec. Take judic. ntc of that adv. proc.

G: If not allowed to ask witness, then Mr. T. doesn't get to put in silently info. to that same effect.

Ct: W/respect to your tender not inclined to put much weight on litig. w/Premier. Not reviewed either adv. proc. Doesn't tell me if a genuine dispute.

T: Mr. J. warned me that might be your thought. Want to get a part of the record.

Ct: Doesn't tell me anything. Until I can exam. the clms, can't make a conclus. based on that. Won't do any good. W/respect to UCC action I have no basis for making any kind of conclus. If an attempt to free up money from Unsec. lien. I will - I don't know if I can not take judic. ntc of anything that is in the file.

T: Is unusual.

Ct: Or not controversial. I'm not going to take judic. ntc of Premier adv. proc. or UCC adv. proc. You can have that as part of your record that you proffered it.

T: Req. about sched.?

Ct: I will take ntc of the sched.

D: UCC has intended to call a repres. from Chanin. I think the dtr is so enamored w/the test. they wanted it in their case. Will call that witness. To my knowl. Mr. T. hasn't rested his case. Calling witness in his case. Call Mike Espinal.

TESTIMONY OF MIKE ESPINAL (sworn)

CROSS EXAMINATION BY JEFFREY FINE

Ct: Get ready for closing argument. Anymore housekeeping issues. Take a few minutes to look at my notes. Take 20 min. or so.

Recess

Ct: The offer I mentioned this morning is (these are copies of the offer that was handed to a court person this morning and handed to me.) All the bids were supp. to be kept confidential. Never seen those bids. This bid was tendered to court personnel. You will ntc it has a file stamp on it. I was thinking since it was a matter of record sort of silly not to make it avail. to everyone here. Other reason I have made it avail. is whenever anything is given to me I don't want to have ex parte contact. I guess we are ready to begin closing argument at this point.

J: W/respect to this bid we don't consider it a serious offer.

Ct: I understand what you are saying. Important to have it of record. If want to make comments, may do so.

J: I bel. the evid. is estab. the Fleming offer is the highest price avail. to the estate. Prop. was marketed in a manner for best offer. Test. is the dtrs cash burn is \$457k a week. If offer is not accepted, cash burn will be more. I would sugg. if there was ever a case where there was a compelling need to consummate a trans. this is that circum. By not proving this action, could put in jeopardy the jobs of many employees. Dtr perceives one of it's functions is to max. val. of assets. Is a legit. function of the dtr to modify those assets and turn into cash. So parties can adjudic. how those assets can be distributed. Have assets decline in val. w/lesser return to estate. The evid. is clear that this process was conducted in a fair manner. All parties acted in good faith. No collusion and anything other than utmost good faith. We sugg. the court has juris. under sec. 157 1334. Core matter. Court has venue. Stat. predicate includes 363 (b) (e) (f) and (m). Rule 2002, 6004 and 9016. Dtr gave reas. and approp. ntc. I counted 39 obj. that were filed. One was filed yesterday by Greenleaf. Since that iss. is not before the court today, will addr. at a future time if the court approves the sale.

Ct: I did read Greenleaf. Agree will be addr. later.

J: #'s of obj. raised those iss. Won't addr. those obj. The remaining obj. before the court today follow the following categories. Whet. dtr has demons. good faith. Adeq. of marketing efforts. Whet. the dtr may sell free and clear. One obj. relating to a successor liab. iss. Those are the legal arguments. 363 (m) and (n) the evid. is clear. Dtr has complied. Competent test. from Mr. Golleher and Mr. Dietz. Price was obtained, but under a contract. Negot. at arms length vigorously. Contract is tight. Tight closing sched. and a buyer that has financial abil. to close quickly for cash.

Court can auth. sale of assets by motion and without a plan. We've satisf. those oblig. To insist on marketing of assets would prov. a signif. protection to any. Put in jeopardy the jobs of the employees. W/respect to the iss. of sales free and clear under 363 (f) we sugg. the real iss. is adeq. prot. Are the liens that are stripped off and attached do they adeq. prot. the lien holders. 361 - 364. Can use cash coll. Adeq. prot. sale of assets and sale of inventory. Dtr can sell assets under 363 (e). Also runs thru sec. 363 (f). Cite court in addit. Re: Terrace Gardens Park. Re: Becker. In the Becker case the general purp. of 363 (f) (3) is the val. of the property. Allows to sell free and clear of liens. Becker says the purp. of that sec. is to protect a sec. cred. from cashing out collateral. I antic. the liquor vendors may argue the court should not auth. sale under 363 (f) (3). Liquor lenders and stating a super priority lien. Primes all the liens on the liquor licenses. If they are unable to prevail, have a lien jr. to the DIP lenders. Wouldn't need adeq. prot. If lien is good, they are protected. For the liquor lenders to upset the sale on this ground would sugg. some sort of motivation to realize their claim thru some manner other than sale of assets. Wouldn't prejud. clms. 363 (f) (5). Accept one satisf. of clm. # of cases which the court has to approve a sale free and clear of liens. Sugg. in this case if the dtr could adeq. protect a cred. the dtr would have that abil. Re: Grand Slam Inc. E. Dist. of Mich. Re: Terrace Chalet Apts Ltd. Where a creditor can be protected by the lien attach. to proceeds it is normal practice to permit sale free and clear of liens. The court took judic. ntc of the sched. Sched. liquor vendor debt of \$3mil. Dtr sched. \$128k in tax liens. Sched. \$5mil in unsec. prior. tax clms. Test. is the sale price will gener. \$10mil. Court has ample abil. to fashion approp. relief to protect all the parties. Get what they are entitled to. Evid. is clear the fund of money created thru this process is greater than the fund that could be gener. thru any other process. Distrib. a much larger amt of money. Cited PKR Convalescent Centers. Re: Fairchild Aircraft Corp. Re: WBQ Partnership. Have a short resp. to obj.?

Ct: Yes.

J: Ques. whet. dtr will be able to keep oblig. current. Antic. he can keep them current. DIP lenders have say in process. Exercise remedies. DIP lenders supp. the sale. In best interest of those. Company can't assure success. sale, but have every reas. to bel. they can. Not a reason to deny approval of the sale.

D: UCC has w/drawn their obj. to the sale and supp. the sale. Want to say why. Put on record the iss. has been raised and want to make sure the order reflects. Want to sell their merch. in the future. Important to them that this sale go thru. Cont'd oper. of the grocery stores. Recover some of their losses thru future profits. Why Unsec. would supp. this sale. Even though the comm. has w/drawn obj. to order it would like signature req. on order. Are wording iss. still being addr. Is an iss. of notice prior to any disburs. of the funds. Not clear how \$110mil would be kept safe and sound. Subj. to the UCC counsel reviewing the order and adeq. ntc of all phases. Have suffic. ntc of disburs. of funds. W/those caveats we supp. the sale.

F: Unless court has ques. of me would reserve a few min. for rebuttal.

B: MetLife would like to reserve a few min. for rebuttal.

Ct: Anyone else in favor? Okay, Mr. Fine.

Fine: MDFC Leasing Corp. is troubled by the sale process. Feels as though it is between a rock and a hard place. Would have helped if dtr had fully explored liquid. analysis. Dtr would have prod. an analysis clms that antic.

to be approved. Dtr would have made a more complete analysis of the amt of proc. that are realistically going to be avail. May be very relevant to my client. Is troubled by lack of appraisal or data eval. of the stores. We don't know what the val. is of the equip. or fixtures. We don't know what the alter. might be. Hard to make a strong and fast stmt. Diffic. knowing the stores are burning \$450k a week. Hard to make stmt that it would be better to liquid. Hoped the dtrs prof. would have done that analysis. W/o it the best we can do is speculate. No alter. to the proposed sale. Concerned about potential tracks in the purch. agmt. Ques. about Warren Act. If 26 stores are req. from this purch. agmt, the dtr must immed. liquid. those stores or something else.

Ct: Don't they have 60 days to warn folks of layoffs.

Fine: Yes. What concerns me it is not part of the analysis. Can't say what the better thing to do. Prior to lunch from reading the purch. agmt my clients leases were thought to be sold. 3 of my stores are no longer part of this sale. Listed on another part of purch. agmt. Don't know how my client is affected by this. Somewhat troubled - hard to make an analysis. Exh. 1 is the same doc. handed out at auction. Had we known those stores were not in there, I could have done an analysis.

Ct: I've got a whole lot more confidence in your abil. to figure this out. No process is perfect. Are typos in docs we do. A large typo here. Don't know if it makes sense for you to talk to dtr if the leases are to be dropped from other part of contract. If it turns out they have leases, if a sale will be o.k. If not, no differ. than you are now.

Fine: Except for second iss. Test. was not entirely clear. Not made an analysis. Some carve out. \$600k. Know dtr is saying it will pay oper. leases. Now that I know 3 won't be part of sale - was test. about insolvency. Means my clients admin. exp. clms are not going to be resolved. Sale will go forward on inventory. Not advocating a liquid. I did raise ques. as to whet. it might make sense to postpone final decis. Analyze this. Not sure I am in position to tell you not to approve this sale. Only option they put on the table. Not having a good alter. to propose to you, I don't have much than we want to preserve our rights. Review and sign off of a proposed order. I would sugg. the order req. as adeq. prot. that ongoing lease pymts be made until closing of sale. Like to thank court's indulgence. If I don't catch flight, might be stuck.

Ct: I don't have a prob. on you signing off on order.

Fish: Concerned about this order turning out to be an adeq. prot. order for lease holders. Have to resolve it before he goes.

Ct: Not inclined to put that in. Inclined to approve sale for a variety of reas. W/respect to adeq. prot. if this turns out to be admin. insolvent will be a sharing out across the board. What I have heard so far I think it is a good deal so far. I haven't heard much yet that tells me otherwise. It seems this is a good deal for them as well. Inclined not to add addit. provis. and get into matters that need to be addr. down the road. Leases, liens, etc.

Fine: Very well.

Ct: Like to hear from Ms. Gottlieb.

Gottlieb: I found myself wrestling w/same ques. How can I tell the court not to approve this sale if the dtr will deteriorate and die a horrible death if we don't do this sale. Agree w/Mr. Fine. Wanted to go back to that not for

purpose of saying approving the sale. Make a single refinement that won't make it perfect. Better alter. in a series of differ. alter. Discuss law. Mr. Jacobvitz basis 363 (f) analysis on 3 and 5. I would respectfully disagree w/Mr. J. Is not in either of those sections. 363 (f) (3) (read). Says if you are going to rely on 363 (f) (3) have to show achieving a sale price more than liens on property. I urge the court not to impose that analysis on 363 (f) (3).

Ct: What if I rely on the #'s.

G: Not an evid. predicate for that. All the witnesses agree on cross exam.

Ct: Not iss. here. Are you arguing on behalf of all unsec. or Premier. Ques. I thought you posed to witness isn't it true there are \$4mil worth of liquor liens.

G: I am addr. mech. of sale overall. I feel I have to addr. all the iss. Appears to be eq. above the liens of the liquor wholesalers. Doing the sale w/o knowing who gets what and who is treated in which way. I will happily a money satisf. of my lien interest. Not guaranteed that. I'm at risk of not receiving money satisf. A 363 sale. Reason you can do more under 1129 is creds get to vote. Not as acceptable. A lot of disclosure. What was in Judge McFeeley's mind in Re: Allison. Stressful circum. What he said was he set out the elements. Allison is the law in our district. Lionel has never been cited in our district.

Ct: When you say it is the law are you saying I have to follow it?

G: Encourage you to. Good opinion. Same safeguards. I don't think it makes it impossible for court to approve this sale. One of the prob. is we can't tell what is going to happen. I can tell is this inventory is selling for unbel. more than any other setting. No alloc. and by necess. none of the other 1129 protect. Those w/liens on inventory are not blind. Very hard to liquid. Ask ct to decline to be bound by those alloc. of later distrib. of the assets. Driven by parties w/greatest leverage. Never had leverage otherwise. This iss. could have clearly developed I think we don't have in this case. 363 (f) is being glossed over. I do feel the court can resolve a lot of the most fundamental problems. No alloc. for most people's collateral. Alloc. for fragile collateral. Can resolve by declining to be bound by terms of agmt. Common in sales of assets. Doesn't mean court doesn't have to distrib. those funds later. No evid. predicate under 363 (f). First liens may not be satisf. by the amt of money gener. once all the expenses are paid out of \$57mil. If court is going to approve this sale, to defer the alloc. ques.

Ct: Want to sign off on the order too?

G: I do.

Cadigan: Only bec. of potential the liquor wholesalers made I join in Ms. G. comments. Won't repeat them. Ask that we also sign off on the order.

Feuille: I submit to court but I too agree the req. of 363 (f) have not been met. \$20mil of first liens. I submit to court if an adeq. prot. provision in 363 (f) we would not be adeq. protected. Subst. evid. of what is our rights to the valid. of our lien and our prior. Statute we rely on. Statute says we should get paid at the time of sale. We get a potential pymt later on prov. there is enough money there. Have a prospect of pymt. Undeter. alloc. Adeq. prot. it seems to me if we are req. to be paid it seems there are funds in this sale to pay us if we are paid first. Viable means of resolving the iss.

Seems to me it is not adeq. prot. to simply put us in position where we have a prospect of pymt from a pot of funds and have prospect of having to deal w/litig. our rights. My proposal would be to req. pymt to liquor vendors clms.

Ct: No one can ask for money back.

F: They can assert that challenge. In order to make transfer I have to get paid. Show me what you delivered and what you get paid.

Ct: Think the supremacy clause dictate the bankr. code overrides the state law provision?

F: May be an argum. in that regard.

Ct: Well said.

F: Are dealing w/an area of the law. Congress did not intend to release powers to regulate those iss. That would be my alternative.

Ct: Argue that holding on until deter. would exercise police of regulatory power?

F: I bel. it would. We are somewhat concerned about the terms of the structure of the sale. The provisions that allowed Fleming to talk to people really results in collusive bidding. I don't know if I had a bidder talking to other folks and collecting bids that that would not be treated as collusive bidding. This is a waiting matter to talk about this sale and bidding procedures and whet. they were correct. For the record I don't bel. the dtr or the perspective buyer could satisfy the req. of 363 (f). Haven't satisf. the Allison req. I am not arguing the policies today. Not arguing the rights of Congress to invade a police power. Reserved for another day.

Ct: Can I hear from those who wanted to make a closing stmt or argument.

Miranda: When we came back from the auction a couple of days ago we thought we would know who would be our tenant. Two days later we don't know.

Ct: Getting paid?

M: We are getting paid, but not everything we should be. Not opposed to sale order. Willing to live w/if not interpreted to waive our rights.

Ct: I understand that.

M: Is lang. Think they don't intend to abrogate our rights. Addit. we want to know if and when a store is rejected we would like to know that the store is being rejected. Try to work w/the dtr. If a m/to assume is filed, like no less than 20 days ntc. Like to have 20 days ntc if assigned.

Ct: If you need more ntc, can come back to court. Not going to deal w/detail.

M: I understand. Sale order refers to shortened ntc.

Ct: Won't decide what is shortened and what is not tonight.

M: Like some certainty of procedure. Not waiving rights of sale order.

Scott: My landlord client takes no position. Req. dtr to give ntc of 24 hours of rejection.

Ct: Not clear w/respect to ntc. If ques. about further lease iss., deal w/it separately. May have a legit. argument. Consider it when that is the focus of the hrg.

S: I understand. I sugg. it is easier to addr. it now.

Ct: Will be back here shortly anyway.

Middlebrooks: Joe Maloof and Co. does have an interest. Join in argum. by Premier Distrib. and ask we be able to sign off on order.

Aelvout:

Ct: Aren't ISD in best possible position?

A: What we bel.

Harris: W/regard to proceeds. Req. taxes which are attrib. to sales of liquor. Tax and Rev has a super priority lien. Furrs owes dept. \$3.9mil.

Ct: GRT generally. Not based on unpaid taxes for sale of liquor.

H: Is a portion of the GRT I assert has a super priority lien. Some of these argum. have been addr. before. I'd like to sign off on the order.

Ct: Not sure there is anybody left here but lawyers and a few others. If a creditor and owed money, allowed to addr. the court as well. Who wants to start off doing rebuttal.

Jacobvitz: Respect Mr. H. points on Tax and Rev. Deter. w/respect to the order on the m/to sell. Purch. has no successor liab. Can be resolved in a motion.

Ct: Talking about giving them a lien or what would be the equiv. of somekindof hold on funds that they clm the potential taxes would be?

J: Addr. the argum. sugg. there was some collusive bidding bec. Fleming had knowl. of dtrs consent.

Ct: I don't find there is any collusive bidding. Procedure engaged in marketing stores is legit. Doesn't fall near what is prescribed by the code. No evid. of that.

J: 363 (f) have lien holders w/a super priority. Adeq. protected if they prevail.

Fish: Provisions of 363 (f) is the lien could be satisf. Addr. and obj. to Ms. G. She wants to have court to ignore that fact. Theory is hard to liquidate inventory.

Ct: Not her argument at all. Doesn't go for 100%. Had influence w/respect to dtr.

F: No evid. of that. Other assets are easier to liquid. than inventory. Contract says they will pay this amt of money for inventory.

B: Someone preserved the assets. That was the DIP lenders. DIP loan by people who understood it was an important thing to do. Tax conseq. were negot. Can chg facts. Other point I agree w/Ms. G. is adeq. prot. Either the liquor distributors can have the first lien or they are going to be unsec. Either

way they are taken care of. Have two classes of liquor clms. Timely obj. tot he DIP order. Have rights other liquor dealers do not have. There is no possibility that they won't get paid. On successor provis. the law is clear that success. liab. is not going to prime a valid first lien. Are argum. for another day. Didn't hear anything other than that these are the best terms. Sale needs to be approved.

Ct: It seems to me. This is a matter which court has juris. Are oral findings of fact as permitted by 7052. The court has reviewed the motion and the asset purch. agmt and the related docs. Reviewed obj. Familiar w/most of the case law. Go into the decis. the court is about to make. It is approp. to approve sale to Fleming. Grant the relief req. in the motion seeking approval of the sale. These are my findings and conclus. of law. This is the history of this case. Also in process of talking about bankr. proced. People who don't routinely work in bankr. arena the process is strange. Once you understand it makes sense. This is a dtr that began to exper. major prob. Brought in Mr. Dahlen. Renovated old stores and brought in new stores. Sought more cash. Didn't happen until Dec. 2000. Made decis. to live off inventory. 90% replacement inventory. Furrs ended up w/45%. Big gaps in shelves. Furrs lost 25% of customer base. Huge loss. Co. was in a death spiral. By the time Furrs got loan in late Dec. not enough to put Furrs out of downward spin. Checks were bouncing. Asked Skadden, Arps to file a bankr. pet. Purp. of filing a ch. 11 is to reorg. or sell. Furrs did not know which to do. When new management came in, they realized there was only one way to go. First day orders - arrangement for a sudden infusion of cash. Neighborhood of \$29mil. Made good on checks bouncing. Allowed Furrs to cont. to restock. Make purch. from suppliers. This dtr had already bled to death by Feb. 8. What has happened is the dtr has used the money it has received. Order was entered to keep the emp. paid and keep in place their benef. Not common in ch. 11 cases in NM. In Entertek case the emp. were told they were not allowed money for them or for their families. I don't think that is the way to treat employees. Fortunately, bec. of the exper. Skadden brought to this case that didn't happen. Those emp. were able to retain their jobs and keep working. Dtr also sought to employ Golleher and Mays. They chg'd the philosophy of the dtr and stopped hemorrhaging of dtr. The amt paid to Mr. Dahlen was \$30k, not \$130k. If want to know what is going on in this case, read the decis. of this court and the motions. Are all on the web page. Another comment about Mr. Dahlen is the evid. He has nothing to do w/this sale. If sale goes thru, he may have something to do w/it. No evid. that he engineered a sale to Fleming. Nothing I have read or heard asserts that. Maybe he realized Furrs couldn't remain in bus. and went to Fleming. No evid. of collusion. Hard for some people who blame Mr. Dahlen. That is just reality and not a reas. to do this deal. Furrs thought it in best interest to sell. Did auction. Is stereotypical one. Are also silent auctions. This kind of auction that occurred here increase value to be brought into the estate. Don't do it out in public. Want to do them quietly and discreetly. That is what this auction process was all about. No final deal was reached at that auction anyway. Is the purpose of this hearing today. May not be much money coming out of deal for unsec. creds. That val. was not lost by this procedure. The fact there will not be much for unsec. is not a reas. not to approve it. A # of unsec. who are lessors will benef. from this. In addit. the gener. unsec. creds may benef. if Mr. Davis is successful. Cont. to have a store that is not dark. Will benef. from this. Emp. will cont. to benef. that they cont. to have their jobs. True Fleming has not agreed to honor union contracts. If company goes dark, jobs are not there for employees. Despite Mr. D., not able to recite the benef. # of obj. raised. If sell this, don't need various appraisals. Not selling item by item. P. J. Solomon and Chanin is intending to be an institution. People don't do things for free. Basic test. by Mr. Mays and Mr. D. is there was no liquid analysis done. If talking about dark stores, will sell for a whole lot less. Was

test. from Mr. Mays which constituted a liquid. analysis. Judge McFeeley's decis. in Allison is his ingenious solution to a problem. Enough of an emerg. to justify this. Compelling circum. W/respect to the iss. of having to figure out whet. the dtr would be able to conf. a plan, I'm not sure that is a req. anymore. I am not going to freight this dtr w/req. of proving up a plan to approve this sale. Not necess. Not sure Allison would be written the same way now as req. in 1994. I admire the Allison opin. I don't think it is applic. Argum. about the mo. lease pymts. I am comfortable that there is a small enough risk. Make sure this sale gets to the closing stage. Taxing auth. - whatever happens bec. Texas taxing auth. are going to come out golden. Not too worried about their concerns. Iss. of flip sales - doesn't constitute collusion. I think the evid. I have is the possib. of flip sales has resulted in Fleming being able to make a much higher bid. Important to hear the UCC is in favor of this trans. Their supp. is important. Dtr engaged in this in good faith. Seems it benef. the estate as well. Make a final comment. Ch. 11 itself doesn't generate money. If can't be resurrected, this is the best deal for the creds and employees. Not enough to pay everyone in full. I expect an order to be negot. and subm. as soon as possible.

T: We will circulate that. Have a status confer. next week?

Ct: Yes. Don't want anything slowed down.