

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

IN RE:)
)
FURR'S SUPERMARKETS, INC.) Case No. 11-01-10779-SA
a Delaware Corporation,)
)
Debtor.)
)

**DANTEX'S OBJECTION TO
DEBTOR'S
AMENDED MOTION FOR (i) APPROVAL OF WIND-DOWN BUDGET, (ii)
APPROVAL OF CASH COLLATERAL STIPULATION, (iii) AUTHORITY TO
APPLY FUNDS AND OPERATE IN ACCORDANCE WITH THE WIND-DOWN
BUDGET WITHOUT FURTHER COURT ORDER, (iv) APPROVAL OF
EMPLOYEE RETENTION PLAN, (v) AN ORDER DIRECTING
DISBURSEMENT OF FLEMING SALE PROCEEDS AND OTHER DEBTOR
PROPERTY, (vi) APPROVING THE SETTLEMENT OF ALL ESTATE CLAIMS
AGAINST THE SECURED LENDERS, AND (vii) ALLOWING CLAIMS OF
SECURED LENDERS**

TO THE HONORABLE JAMES C. STARZYNSKI, CHIEF UNITED STATES BANKRUPTCY JUDGE:

DANTEX CONSTRUCTION COMPANY ("Dantex"), as a secured creditor in this case, objects to the Debtor's "Amended Motion for (i) Approval of Wind-Down Budget, (ii) Approval of Cash Collateral Stipulation, (iii) Authority to Apply Funds and Operate in Accordance With the Wind-Down Budget Without Further Court Order, (iv) Approval of Employee Retention Plan, (v) An Order Directing Disbursement of Fleming Sale Proceeds and Other Debtor Property, (vi) Approving the Settlement of All Estate Claims Against the Secured Lenders, and (vii) Allowing Claims of Secured Lenders" ("the Motion"), filed in this case on or about August 10, 2001. As grounds, Dantex would show the Court as follows:

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1. The disclosures in the Motion are inadequate and hence the notice provided to creditors and interested parties by the Motion is inadequate and insufficient to constitute due and adequate notice of the relief sought by the Debtor.

- a. Paragraphs 2 through 4 of the Motion refer generally to “professionals” whose fees will be paid from the proposed wind-down budget. However, the professionals who will be paid are not identified either by name or by client, nor is any information provided from which to assess the reasonableness or necessity of the fees to be paid. Nor is there an express condition of submission and approval of the applications by professionals. Nor is there any basis upon which to assess the reasonableness of the amount budgeted to professional fees in the wind-down budget.
- b. The wind-down budget contains an allocation for post-petition trade credit, without disclosure or identification of the trade creditor which the Debtor anticipates paying from the wind-down budget the amounts to be paid, or the reason the trade credit included in the wind-down budget is not being paid or has not been paid from proceeds of post-petition DIP financing. See ¶ 4 of the Motion
- c. There is no disclosure of the estimated value of the “unencumbered estate funds” or “funds encumbered only by the Replacement Lien” referenced in paragraph 6(b) of the Motion.
- d. There is no disclosure of the cash collateral stipulations which the Debtor would consider to fall within meaning of the phrase “other customary provisions of cash collateral stipulations, consistent with the particular facts and circumstances of this case”, used by the Debtor in paragraph 6(f) of the Motion. The Debtor seeks approval of undisclosed cash collateral stipulations and provisions, which may or may not affect or impair the rights of other creditors or parties in interest.
- e. The Debtor represents that the Initial Sales Proceeds less the DIP loan balance, less lease cures, less equipment lease cures “would equal at least” \$67.3 million. There is no disclosure of the DIP loan balance, the real-property-lease-cure cost, or the equipment-lease-cure cost for which the Debtor seeks approval. See ¶ 6(h) of the Motion.
- f. In relation to Section 3 of the Motion, there is no disclosure of which employees fall within the budget for employee salaries, there is no disclosure of the amounts to be paid to each employee or position, and there is no basis

upon which to determine whether the proposed salaries or payments are reasonable.

- g. In relation to Section 4 of the Motion, there is no disclosure of the basis for the amount which the Debtor proposes to hold in each category of reserves from the Fleming sales proceeds. In particular, there is no disclosure of the amounts included in the proposed \$4,174,000.00 reserve for the liquor wholesalers or the basis of such inclusion. There is no disclosure of whether the reserves include interest or attorney's fees to which the liquor wholesalers would be entitled as oversecured creditors.. There is no basis upon which to assess the adequacy of the proposed reserves.
- h. There is no disclosure of the amount of Fleming sale proceeds to be paid to Secured Lenders. There is no disclosure of the amount of proceeds from the sale of other assets that will be paid to Secured Lenders. There is no disclosure of the amounts the Debtor proposes to make available to the Unsecured Creditors Committee. See ¶ 18 of the Motion.
- i. There is no disclosure of the balance due to the DIP Lenders on the DIP loan. See ¶ 18(a) of the Motion.
- j. There is no disclosure of the balances due to Heller, Bank of America, and/or Fleet Capital (or other Secured Lenders) on pre-petition bank financing. See ¶ 18(b) of the Motion.
- k. There is no disclosure of the circumstances under which the total amount due to Solomon, Golleher, and/or Mays may not be known at closing or of the maximum amount which may be owing to them. See ¶ 18(b) of the Motion.
- l. In relation to the releases referenced at paragraph 20 of the Motion, there is no disclosure of the potential value of the release to the Secured Lenders, nor is there any assessment of whether any claims are believed to exist in any of the categories being released or of the viability of any claims being released. There is no disclosure of any facts relating to any released claims.
- m. There is no disclosure of the estimated value of assets which will not be sold to Fleming.
- n. There is no liquidation analysis.
- p. There is no disclosure or inadequate of the consequences of approval of the motion to the various classes of secured, administrative, unsecured creditors.

2. The Motion effectively seeks to establish an expedited default claim allowance and distribution solely applicable for the Secured Lenders with inadequate notice and inadequate opportunity to respond, and which is in derogation of the rights and claims of parties with competing and/or prior secured claims against collateral claimed by the Secured Lenders. See ¶¶ 18 and 22 of the Motion. The Motion proposes automatic approval of the Secured Lenders' claims upon a claims procedure designed to apply solely to the Secured Lenders which is at variance with the claim submission and approval procedures set out in Chapter 5 of the Bankruptcy Code, without any justification for such preferential treatment.

3. The Debtor's proposal amounts to a *sub rosa* plan which circumvents all of the requirements for proposing and confirming a plan of reorganization in a Chapter 11 proceeding. While the Debtor sought approval of its sale motion based upon the exigent circumstances which the Debtor then-believed existed, current circumstances do not present the same exigencies, nor do the current exigencies (if any) justify provisions which prefer the Secured Lenders at the expense of competing lienholders, prefer some administrative claims over others, insulate the Secured Lenders lien claims from valid challenges, and foreclose normal claim and priority adjudications, procedures, and challenges. Furthermore, as the court noted in ruling on the Debtor's sale motion, the prospective beneficiaries of the sale included both the Debtor's rank-and-file employees and the creditors who had the prospect of continuing to do business with the buyer (because the proposed sale provided the only then-foreseeable prospect of allowing some or most of the Debtor's stores to remain open and operating). Here, however, approval of the Debtor's motion would benefit, either primarily or exclusively, the Secured Lenders, the Debtor's executive-and-management-level employees, and the professionals. The Debtor proposal is an attempt to obtain approval of a

liquidating plan without adequate disclosure of meaningful information to the creditors and interested parties, without adequate notice, without sufficient opportunity to object, and without an opportunity to vote or otherwise participate in the process in a meaningful way.

4. In addition, approval of the Debtor's motion apparently would release the Secured Lenders from any marshalling claims and marshalling obligations that may be imposed upon them to the benefit of competing secured creditors. The Debtor should not be allowed to insulate the Secured Lenders from marshalling arguments by means of a wind-down motion. Rather, competing creditors should be afforded the opportunities granted to them under existing bankruptcy procedures to assert marshalling claims in the context of an adversary proceeding and the Secured Lenders should be obligated to defend in such a context, if marshalling issues are raised by competing creditors.

5. Dantex owns and holds valid, duly-perfected mechanic's and materialman's liens on certain leases and leaseholds. The Debtor is requesting an order which would distribute to the Secured Lenders all proceeds of the sale of the leases without regard to Dantex's claims and the priority of same and without giving Dantex a fair opportunity to establish its priority. See ¶ 18 of the Motion. Further, the Debtor is requesting an order establishing the Secured Lenders claims as first-priority claims in the leases and other assets of the Debtor outside the usual claims submission and approval process. See ¶ 22 of the Motion. In effect, the Debtor seeks an adjudication of the validity, extent, and priority of the Secured Lenders claims outside the context of an adversary proceeding, subverting the established process for adjudicating such matters under the Federal Rules of Bankruptcy Procedure and depriving Dantex of due process and equal protection of laws guaranteed by the United States Constitution.

6. The Debtor seeks *carte blanche* approval of undisclosed cash collateral stipulations in violation of the due process rights of creditors and interested parties.

7. The Debtor seeks approval of a settlement with the Secured Lenders in the context of a multifarious motion which is confusing and provides inadequate and insufficient disclosure of the terms and potential value of the settlement to the estate and the other creditors.

8. The claim notices submitted by Heller, Met Life, Certain PIK Noteholders, and First Boston Private Equity are inadequate, and the time for reviewing and responding to same is inadequate. The supporting documents for the claims did not become available in Albuquerque until August 22, 2001, and are available only at significant expense. This creditor objects to such claims and requests a fair opportunity to review such claims and to object as this creditor may deem appropriate and on such grounds as may be presented upon review.

9. The Motion will yield no benefit to the estate or the unsecured creditors.

Respectfully submitted,

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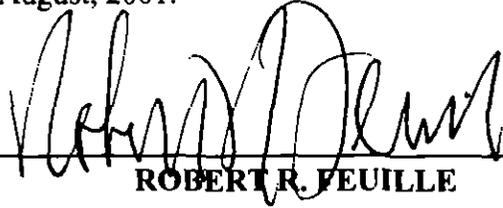
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Objection was or will be served on the Debtor's counsel and on the persons identified in the attached mailing list by e-mail (Adobe format) or by facsimile and by first-class mail on the 23rd day of August, 2001.



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