UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
OFFICE OF THE CLERK
2001 AUG 23 PM 4:19
U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

In re:

FURR'S SUPERMARKETS, INC., Case No. 11-01-10779 SA

Debtor.

UNSECURED CREDITORS' COMMITTEE'S OBJECTION TO 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) AND 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 Unsecured Creditors' Committee ("Committee") objects to the Debtor's Motion set out above and would show the court as follows:

I. SALE TO FLEMING

1. The Committee agrees with the Debtor's statement of facts with regard to the court approved sale of assets of the Debtor to Fleming under the Asset Purchase Agreement. As will be set out in further detail below, the Committee believes that the Sale Proceeds as defined by the Debtor should be dispersed in accordance with the priorities set by the Bankruptcy Code and after the resolution of litigation brought by the Committee with regard to challenges to the secured Lender's Security, resolution of the amount due to the estate for the settlement of the Fleming preference, and proper claims objection procedures with regard to the Proofs of Claim filed by the secured lenders. The Committee specifically objects to the assertion made by the Debtor that no funds would be available to the unsecured creditors under any conceivable resolution of the pending Committee adversary proceeding. The application of the Sale Proceeds as proposed by the Debtor

956

is in effect a liquidating plan without any of the required protections for creditor interests provided by the bankruptcy code. For these reasons and other reasons set out below, the motion should be denied.

II. WIND-DOWN BUDGET

2. The Committee specifically objects to the Debtor's characterization of certain of the expenses in the Wind-Down Budget as administrative costs. Some costs are not administrative costs but are unsecured claims while other costs should be surcharged against the collateral of the secured lenders under §506(c) or other provisions of the Bankruptcy Code. Many of the costs identified as administrative costs should be paid from the collateral and should not be in an administrative class.

Specifically:

(a) Operation (6 months) $1,700,000. This amount may be an administrative claim to the extent that this amount is necessary to Wind-Down the operation of the Debtor. No budget is submitted to understand why $1,700,000 would be required after the sale of the operating assets and the closure of the remaining stores. It is unknown what this $1,700,000 would be for or whether or not such an expenditure would be approved by the court as an administrative expense under the requirement of the Bankruptcy Code. In any event, this line item, to the extent that it is or was necessary to the sale of the assets of the estate should be a surcharge against the secured collateral of the secured lenders. In any event, this line item is insufficiently detailed to determine whether or not it is a legitimate expense of the estate or in the alternative, should be surcharged to the Secured Creditors.

(b) Outstanding Payroll and Accounts Payable $2,600,000. Many of the objections with regard to the operations budget are equally applicable to this line item. Certainly if this payroll and the accounts payable where incurred in the preservation of the secured creditors' collateral and ultimately resulted in the successful sale of the assets maximizing the funds available for secured creditors, this amounts should be surchargable to this collateral of the Secured Creditors.

(c) Workmen Compensation Public Liability $1,000,000. It is unclear from its line item whether or not these are pre or post petition obligations of the Debtor. To the extent that these obligations are pre petition they would certainly be an unsecured claim against the estate but would not be an administrative priority charge against the estate. As with all other line items in this budget, there is insufficient information presented to justify the expenditure of $1,000,000 from the estate without a determination of whether this would qualify as an administrative priority or an unsecured claim under the distribution priority scheme set up by the Bankruptcy Code.

(d) Sales and Gross Receipts Tax $1,200,000. If these sales and gross receipts taxes are a post petition claim, these amounts should have been set aside from the collection of these taxes post petition for payment to the appropriate taxing authority. In any event, the collection of these taxes establishes a trust fund being held by the debtor on behalf of the state of New Mexico and would not be subject to the Lien of the Secured Creditors.

(e) Professional Fees $3.8 million. This amount for professional fees was provided in the original cash collateral budget and would be an amount provided by the secured lenders to pay the professional fees of the administration of the estate. The $600,000 per month budget plus the $1.5 million carve out would remove the professional fees line item from an administrative expense and instead would be a reduction from the proceeds from the sale of the assets and would be paid prior to the secured creditors' claims. These professional fees would not be paid as an administrative claim because they would be paid as a surcharge to the collateral or in the alternative, the lenders have contractually agreed to pay these amounts through the DIP Loan and Security Agreement, cash collateral and DIP Orders.

(f) <u>Retention Plan $3,200,000.</u> This amount, as explained in the motion, would be a completely discretionary fund of the debtor to pay out $3.2 million as the debtor deems fit. To the extent that the debtor has acknowledged that payments under the retention plan are strictly within the discretion of the debtor, then there is no legitimate obligation to the debtor to pay these amounts. In effect, the debtor proposes to pay, after the closure or transfer of all the stores of the debtor, a bonus for services performed for which the debtor is not contractually obligated to pay. This amount is clearly not an administrative claim against the estate but perhaps reflects the debtors intention to implement a retention plan which was withdrawn previously in the proceeding after objections were raised by the Committee. Unfortunately, Exhibit B provides no breakdown of what amounts would be available to what employees under the plan. The $3,200,000 distributed evenly among 447 employees would result in a bonus of $7,158.84 for the six months from the time the petition was filed until the close of the estate. There is clearly insufficient information to make a determination on whether or not the distribution of $3,200,000 is in the best interest of the debtor. Apparently, there was no need for a retention plan, because the debtor has successfully operated its stores through closing without having a retention plan in place. The estate cannot be responsible for representations made by the Debtor's management which has not been approved by the Bankruptcy Court.

(g) <u>Third Party Services $800,000.</u> Its is impossible to determine whether or not this unsubstantiated amount would be an administrative priority of the estate or in the alternative, might be chargeable to the collateral of the secured lenders. The Committee feels that this amount should be sufficiently substantiated to understand whether or not this amount would qualify as an administrative priority under the bankruptcy code.

(h) Carrying/Closure Cost /Warehouse $650,000. Once again, this amount should be surchargable to the collateral of the secured lenders. It is impossible to tell what amounts are proposed to be paid for what services and whether or not those costs are pre or post petition. There is certainly insufficient information to justify giving $650,000 to the debtors discretion for its expenditures as it sees fit

(i) Carrying/Closure Cost/Stores $750,000. Once again, a $750,000 expenditure of an asset of the debtor is completely unsubstantiated. It is impossible to tell whether or not this amount would be for a pre or post petition claim and whether or not it would be an administrative priority under the provisions of the Bankruptcy Code.

In summary, the Wind-Down budget is completely devoid of any information which would support the expenditure of $15,700,000 of the debtor's funds. The secured lenders' and debtor's assertion that these funds completely belong to the secured lenders is unsupported by the facts. It is clear that whatever amount of money the court determines was paid for the Fleming release of the preference claim would be an asset of the estate and secondly, whatever funds are recovered through the Committee adversary proceeding (including the portion of the sale proceeds attributable to the leases) would also be funds of the estate. The Debtor's and lenders' assertion that this is all money belonging to the secured creditors should be disregarded out of hand.

3. The Committee objects to giving the debtor absolute discretion on how the $15,700, 000 in the Wind-Down budget is spent. The debtor should comply with the distribution priority set forth in the Bankruptcy Code. Claimants who are not administrative claimants, for instance, those

claimants set forth in the retention plan should not be paid any amount until all other administrative and priority expenses are paid. In addition, the $3.2 million set aside for the retention plan should be paid to the unsecured creditor class to be distributed to unsecured creditor claimants in proportion to their allowed claims. There is no urgency after the sale to Fleming and collection of the Sale Proceeds to necessitate giving the debtor absolute unbridled discretion with how $15.7 million of the estate funds would be distributed.

4. The Committee objects to the characterization of the payment of professional fees as a payment of an administrative claim of the estate. As set out above, the professional fees were provided for in the budget proposed by the secured lenders, in the DIP Order and the DIP Loan and Security Agreement. The professional fees are carved out from the collateral in an amount up to $5,550,000 (6 3/4 X $600,000 + $1,500,000). The restrictions placed on further administrative claims for professional fees set forth in Paragraph 4 set out in Paragraph 1 of the Addendum, are not in accordance with Bankruptcy Code and impose restrictions on the payment of professional fees which are not included in the budget, Orders, and the carve out provisions. The Committee does not object to the payment of professional fees in accordance with the Orders of the Court from the sale proceeds. However the restrictions the debtor seeks to impose through Paragraph 4 are inappropriate and not in agreement with any of the distribution provisions of the Bankruptcy Code or the case law thereunder.

5. The Committee disagrees with the Debtor's assertion that the Wind-Down budget is in the best interest of the Debtor's Estate and creditors. The Debtor and the lenders assume, without argument, that all the proceeds from the sale, and in addition, all of the proceeds from the debtors excluded assets are secured through the secured lenders and are therefore, not subject to any other

Order of the Court. Without question, there is no reason at this point in time to address the issues with regard to cash proceeds from the sale of excluded assets which are not a part of sale proceeds from the sale to Fleming. The Debtor had estimated that the proceeds from the excluded assets are between $28.7 million and $31.6 million. It is certainly not to be assumed that the secured lenders are secured in all of those assets. In particular, the Committee has continued to assert that the secured lenders are not perfected with regard to their security interest in the real estate leases of the Debtor. The substantial value from the sale of leases should be preserved for the Debtor's Estate and would not be subject to the asserted secured interest of the secured lenders.

III. CASH COLLATERAL STIPULATION

6. The Committee objects to the cash collateral stipulation as set out in the Amended Motion because its assumptions are incorrect and its purpose and methods are not in accordance with the Bankruptcy Code. The Debtor's Motion and the cash collateral stipulation are an attempt to deny unsecured creditors the protections provided by the Bankruptcy Code and to eliminate the due process inherent in the procedures set up in the Bankruptcy Code and Rules to have an orderly determination of the issues. The pre petition secured lenders should not be allowed to gain the substantial value of the real estate leases which they failed to properly perfect through a contrived procedure having no basis in law or fact.

(a) The Committee objects to the Wind-Down budget to the extent that it is completely unsubstantiated and does not form a sufficient basis for the distribution of $15.7 million of the assets of the debtor. The Committee further objects to the concept that the debtor and the secured lenders may further modify the Wind-Down budget without notice to the Bankruptcy Court, the US Trustee or any the Committee, or a hearing by the Court to determine whether or not the modifications to the budget would be in accordance with the Bankruptcy Code.

(b) The Committee objects to the marshaling proposals set out throughout this motion but especially objects to the concept that the Wind-Down budget would first be funded from unencumbered estate funds. Specifically, unencumbered estate funds would pass through, after payment of administrative claims, to pay priority claims and ultimately claims of unsecured creditors. To assume that the Wind-Down budget would first be funded by unencumbered estate funds gives secured creditors more than they are entitled to under the bankruptcy code, and denies all other classes of claimants in the estate the protections and due process provided by the bankruptcy code and rules thereunder.

(c) The Committee objects to the characterization or creation of a replacement lien in the contexts of a Motion proposed by the Debtor and supported by the secured lenders. The replacement lien, as defined in Paragraph 6(b) of the Final DIP Order, does not exist in this case. The assets at the time of sale exceed in value the amount that would have been recovered on the filing date. The creation of this illusory "replacement lien" merely serves as a device to try to marshal assets against the other claimants in the Estate. The replacement lien sought in paragraphs B and C of the motion is completely unsupported by the facts and the law and is merely another attempt to deprive unsecured creditors of rights they are guaranteed under the Bankruptcy Code.

(d) The Committee agrees that some amount of the sale proceeds should be allocated to the release given by the debtor to Fleming under the Asset Purchase Agreement. The Committee asserts that $4 million is the correct amount. The Committee does not agree that the portion of the sale proceeds attributable to the release should be spent in accordance with the Debtor's Wind-Down budget. It is simply not in accordance with bankruptcy law.

(e) The Committee agrees that the court will ultimately determine the amount to be allocated for the release given to Fleming in the Asset Purchase Agreement.

(f) The Committee objects to the Cash Collateral Stipulation to the extent that it has not been seen and, even if it were available under Paragraph f, it may have other customary provisions and may be subject to change.

(g) The Committee specifically objects to the relief sought in Paragraph g. The Committee objects to (i) any orders that would control disbursement of funds to secured lenders without going through the due process provided by the claims objection procedure under Bankruptcy Law. The Committee has not seen any accounting for the amounts claimed by the secured lenders and has no idea whether or not those amounts are appropriate with regard to the loan documentation, (ii). The committee objects to the releases set forth in Article VI which will be addressed more fully below. (iii) The committee objects to the allowance of the claims of the secured lenders without the opportunity to proceed through the claims objection procedure in accordance with bankruptcy code and rules. (iv) the Committee objects to nearly all of the relief requested in this motion and therefore would request the court deny the relief sought in the Cash Collateral Stipulation.

(h) The Committee does not object to the initial sales proceeds being used (i) for the payment of the balance of the DIP loan on the closing date to the extent that an accounting will be provided by the DIP lenders subject to review by the Committee for accuracy and appropriateness. (ii) The Committee does not object to the expenditures of the amounts needed to cure the real property leases which are ultimately assumed and assigned to Fleming or third party purchasers.

(iii) The Committee does not object to the amounts needed to cure or buy out the personal property leases which constitute personal property to be transferred under the Assets Purchase Agreement.

7. The Committee object to the Cash Collateral Stipulation as presented by the Debtor's Motion and would ask this court to consider the requirement of a liquidating plan or in the alternative, conversion to a Chapter 7.

IV. EMPLOYEE RETENTION PLAN

8. The Committee objects to the Employee Retention Plan set forth in Exhibit "B". As set out elsewhere in this Objection, the Employee Retention Plan has no guidelines as to how any amounts might be paid. Additionally, an employee retention plan is generally meant to keep employees during the early stages of a reorganization when the services of those employees would be critical. Such a scenario is not applicable to the facts in this case. First, this case does not appear to be a reorganization, and second, the Debtor has previously withdrawn a Employee Retention Plan at a time when the plan may have benefitted the Estate. This proposed Employee Retention Plan amounts to nothing more than a discretionary bonus to be paid by the Debtor's management with no discernable guidelines or controls. As stated above, the Employee Retention Plan does not

constitute an administrative expense because the Estate has no obligation to pay these amounts. No Employee Retention Plan was approved by the Court, and thus the Estate has no obligation to pay any amounts under such a Plan.

9. The Committee objects to the proposal in Paragraph 9 of the Amended Motion to the extent that it is impossible to figure out what amounts would be paid to any particular employee or class of employees. In addition, the Debtor requests the authority to pay replacement employees a bonus. Certainly replacement employees would have known of the financial situation of the Debtor and there would be no need to pay them a bonus for the employment they undertook.

10. The Committee has objected to the Wind-Down budget and further objects to the assertion that these amounts are paid from amounts that would otherwise go to secured lenders. The Committee has an adversary proceeding which asserts rights in amounts that are claimed by secured lenders.

11. The Committee believes that there is no circumstance under which replacement employees should be paid a retention bonus. Those replacement employees knew of the financial situation of the Debtor at the time of their employment, and there is no circumstance under which an unapproved bonus should be paid to a short-time replacement employee who undertook employment with full knowledge of all of the circumstances.

12. The Debtor's assertions set out in Paragraph 12 of the Amended Motion have been proven false since the initiation of this case. Sufficient numbers of employees remained with the Debtor throughout the bankruptcy so that the Debtor was able to arrive at a closing without the necessity of an Employee Retention Plan. There is certainly no need for the Debtor to maintain employee stability, moral and motivation when all of the Debtor's stores will have been closed prior

to the approval of this Plan.

13. The Committee believes that the assertion that the employees may be looking for other jobs has nothing to due with an Employee Retention Plan. The operation of all stores will be terminated by September 1, 2001. There is no requirement for those employees after that date, and no requirement to pay them a bonus which was not approve by the Bankruptcy Court. Except for minimum Wind-Down managing, there is no need for most of the overhead employees.

14. As of the closing of the Fleming transaction, the Debtor's skeleton crew that remains is already being well compensated. There is no reason to establish multi-million dollar funds for those employees who have already benefitted from the bankruptcy proceeding. It must be kept in mind that the unsecured creditors have lost tens of millions of dollars without any prospect of a payment for the use of their goods and services pre-petition.

15. If an Employee Retention Plan were necessary, it would have been necessary in February or March not in August or September. There is no reason to propose a bonus plan which would be completely at the discretion of management at this time. If management were to propose specific amounts for specific positions under specific circumstances, the Committee would consider supporting such a bonus plan. This Employee Retention Plan is nothing other than a management slush fund, and it is completely in violation of the Bankruptcy Code and the Rules thereunder.

IV. RETENTION AND INVESTMENT OF A PORTION OF THE INITIAL SALE PROCEEDS

16. First, the Committee notes that this is the second Paragraph IV, but will answer the succeeding paragraphs.

16(a). The Committee does not object to a $2,000,000 reserve for an Inventory Refund. The Committee believes that the reserve fund is in accordance with the Asset Purchase Agreement and appropriate under the circumstances. The Committee would assert that the Inventory Refund, to the extent that it is not disbursed prior to the closing of the Debtor Estate, should be assigned to a Creditors' Trust which should be established in this case for all amounts which would be available for unsecured creditors.

16(b). The $2 million fund under the Asset Purchase Agreement, Section 4.1(c) should be set aside under the Asset Purchase Agreement. The S2 million would be returned to the Debtor one year after the closing of the Asset Purchase Agreement. Since the Debtor will not be in existence at that time, the S2 million should be assigned to a Creditors' Trust when those funds are returned.

16(c). The Committee does not object to a set aside of an amount sufficient to provide adequate protection for the alleged lien claims of the liquor wholesalers who have timely asserted required pleadings pursuant to the final DIP Order.

16(d). The Committee does not object to setting aside $350,000 as adequate protection for the alleged pre-petition lien and trust fund claims of New Mexico and Texas taxing authorities until such time as those claims are either allowed or disallowed by the Court.

16(e). The Debtor objects to the $15.7 million as a reserve to fund the Wind-Down budget as set forth throughout this objection.

17. The Committee agrees that the funds not disbursed in accordance with the Order should be held in U.S. Treasury Securities, except for those funds which should be used to fund a Creditors' Trust. The parties responsible for the Creditors' Trust should be able to invest the funds in accordance with their own business judgment or further Order of the Court.

V. DISBURSEMENT OF THE REMAINING SALE PROCEEDS AND CERTAIN OTHER DEBTOR PROPERTY

18. The Committee agrees that the Debtor should have the authority to make certain

disbursements from the Sale Proceeds on the closing date which would include funding the appropriate escrows and disbursements of an Inventory Underpayment in accordance with the Asset Purchase Agreement. The Committee does not believe it is appropriate to fund any other amounts until the Committee's adversary proceeding and the Estate's claim for the Fleming preference is resolved.

18(a). The Committee agrees that the DIP lenders should be paid in full as soon as that amount is determined, subject to a full accounting of debits and credits. The Committee believes that the DIP lenders should submit a full accounting of all disbursements and receipts under the DIP loan and all charges asserted so that the Committee, its financial advisors, the US Trustee and other interested parties can review the accounting for accuracy and compliance with the DIP Lending Agreement.

18(b). The Committee does not object to the payment of the costs of the Sale, including the amounts owed to Solomon and the amounts owed to Golleher and Mays. Those amounts are properly charged against the proceeds of the sale and do not form the basis of an administrative claim.

18(c). The Debtor objects to the disbursements in Paragraph 18(c) until the resolution of the Committee's adversary proceeding and the resolution of the payment of the Fleming preference.

19. The Committee objects to the statement that the disbursement of the funds as set forth in the Debtor's Amended Motion is in the best interest of the creditors. The disbursement profile set forth in the Motion does not provide any payment to unsecured creditors and ignores the distribution provisions in the Bankruptcy Code, Rules and Procedures set forth thereunder. The procedures sought by the Debtor completely ignore the distinction between amounts that should be

surcharged to the collateral, amounts that would be paid as administrative claims, and amounts that would be paid as priority or unsecured claims. The Debtor's Waterfall Motion in affect creates a liquidating plan without the protections to creditors provided by Congress in the Bankruptcy Code and in procedures thereunder.

VI. SETTLEMENT OF ALL CLAIMS AGAINST THE SECURED LENDERS

20. The Committee strongly objects to the settlement of the Committee's adversary proceeding without due process. The Committee believes that the adversary could potentially recover more than $10 million to the Estate. The Committee should be allowed to present evidence and law to the Court in a deliberate resolution of the adversary.

20a. The Committee specifically objects to the provision which would settle the Committee's adversary without payment of any funds to the Committee and without the Agreement of the Committee or any of the creditors.

20b. The Committee specifically objects to the settlement of equitable subordination claims which the Committee may have in its adversary proceeding. The Committee is still investigating issues with regard to equitable subordination and it is inappropriate for those to be settled without the Committee's agreement or opportunity to fully investigate said claims.

20c. The Committee objects to the Debtor's assertion that the secured lenders may not be required to marshal their collateral. The issue of marshaling is raised in the Committee's adversary and is an issue that would have to be resolved after investigation of all the facts and a full research of the law that would cover marshaling in this particular circumstance. The marshaling proposed in the Debtor's Amended Motion would violate the provision of Paragraph 10 of the Final DIP Order.

20d. The Committee's adversary proceeding specifically reserved lien avoidance, preference and other claims against secured lenders. These are claims which should not and could not be settled without the due process set forth under the Bankruptcy Rules for the resolution of an adversary proceeding.

20e. There is absolutely no basis in law or fact for the Debtor to settle all claims, actions, causes of actions, setoff rights, defenses, or avoidance rights against secured lenders which may survive the Fleming closing and the Debtor's Amended Motion.

21. The Debtor's cannot claim that the consideration for releasing the settled claims is the Wind-Down budget. Almost all of the line items in the Wind-Down budget would be surcharges against the lenders' collateral which the lenders would have had to pay in any event. The Wind-Down budget does not benefit the unsecured creditors who have the adversary proceeding, but in fact benefits the secured lenders and the Debtor. The assertions in Paragraph 21, that the replacement lien has any value is not supported by the facts or by the law. The replacement lien in this case is of no value because the amount recovered from the Debtor's assets on the sale date and thereafter will be more than the secured creditors would have recovered on the filing date had the DIP lenders not provided Debtor-in-possession financing. See Paragraph 6(b) of the Final DIP Order. To say this another way, the replacement lien has no value because the secured collateral was more valuable in the sale context to Fleming than it was on the date of the filing of the Petition. To that extent, since there was no diminution in the value of the collateral, their replacement lien has no value.

VII. ALLOWANCE OF SECURED LENDERS CLAIMS

22. The procedures set forth in Paragraph 22 of the Amended Motion to allow the claims

of secured lenders is completely inappropriate and not in compliance with the Bankruptcy Code. The lenders have filed Proofs of Claim with regard to their claims against the Estate. To the extent that the secured lenders have claims against the Estate, they should be subject to an appropriate review and objection procedure and the secured lenders must show their claims and the calculations of the amounts due. There is no reason to short circuit the normal claims allowance procedure in this matter. There are certainly no exigent circumstances requiring an expedited distribution of funds to the secured lenders. The Committee agrees that an expedited process could be set up, but to eliminate any right to even review the accounting and calculation of the secured lenders' claim is inappropriate in this case. The Committee does not object to recognizing the security interests of the liquor wholesalers and the other liens that have been asserted against the Debtor subject to final resolution by the Bankruptcy Court.

23. The Committee objects to any procedure which would terminate the Committee's adversary proceeding without the agreement of the Committee or the due process the Committee should have to proceed with its claims and a final resolution of the claims by the Bankruptcy Court. Any self serving allegations by the Debtor, or the Debtor on behalf of the secured lenders, that the Committee's adversary proceeding is without merit has to be proven by facts and by law. This Waterfall Motion washes away all other claims and merely states that it is all secured creditor money without any appropriate examination of that claim by the Court and all other parties. These assertions by the secured lenders that they are secured to all of the money must be proven in Court and subject to all parties having the opportunity to review the secured lenders' claims to the extent provided by law.

In conclusion, the Sale Proceeds and the proceeds from the excluded assets must first be reduced to pay the amounts required under the carve out for professional fees, then any amounts which should properly be surcharged for the preservation of the collateral and finally the substantial value of the real estate leases which is an asset of the Debtor's estate. The Debtor's motion merely assumes its conclusion without benefit of supporting facts or law.

WHEREFORE, the Unsecured Creditors' Committee would ask this Court to deny this Amended Motion to the extent that it seeks a Wind-Down order which is not in compliance with the Bankruptcy Code, deny any cash collateral stipulation which would deprive the Committee of their rights under the Bankruptcy Code, deny the Wind-Down budget because it is insufficiently documented and in violation of the Bankruptcy Code, deny any distribution from the initial sales proceeds other than those distributions required under the Asset Purchase Agreement and the payment of the DIP financing subject to an accounting, deny the Employee Retention Plan, to deny the Debtor's requested relief with regard to the sales proceeds and the other liquid assets and deny the Debtor's request for omnibus and universal releases of the secured lenders. The Committee would further ask this Court for any further relief the Court deems just and proper in the circumstances.

Respectfully submitted,

DAVIS & PIERCE, P.C.

William F. Davis

William F. Davis, Esq.
PO Box 6
Albuquerque, NM 87103
PH# (505) 243-6129
FX# (505) 247-3185

-and-

Stuart Hertzberg, Esq.
I. William Cohen, Esq.
PEPPER HAMILTON, LLP
100 Renaissance Center, #3600
Detroit, Michigan 48243
PH# (313) 259-7110

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed this 23rd day of August, 2001.

Ron Andazola, Esq.
UNITED STATES TRUSTEE
PO Box 608
Albuquerque, NM 87103-0608

Alan Carr, Esq.
Jay M. Goffman, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLC
Four Times Square
New York, NY 10036

Richard Levin, Esq.
Peter W. Clapp, Esq.
Jamie L. Edmonson, Esq.
Stephen J. Lubben, Esq.
Amy S. Park, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLC
300 South Grand Avenue, Suite 3400
Los Angeles, CA 90071-3144

Robert H. Jacobvitz, Esq.
David T. Thuma, Esq.
JACOBVITZ, THUMA & WALKER, P.C.
500 Marquette NW, Suite 650
Albuquerque, NM 87102

David S. Heller, Esq.
Josef S. Athanas, Esq.
LATHAM & WATKINS
Attorneys for HELLER FINANCIAL, INC.
Sears Towers, Suite 5800
233 South Wacker Drive
Chicago, IL 60606

Paul Fish, Esq.
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Local Counsel for HELLER FINANCIAL, INC.
500 Fourth Street NW
Bank of America Centre, Suite 1000
Albuquerque, NM 87103-2168

Ronald J. Silverman, Esq.
BINGHAM DANA LLP
Attorneys for METROPOLITAN LIFE
INSURANCE COMPANY
399 Park Avenue
New York, NY 10022-4689

Jennie Deden Behles (Walley)
J.D. BEHLES & ASSOCIATES
Local Counsel for METROPOLITAN LIFE
INSURANCE COMPANY
400 Gold Avenue SW, Suite 400
Albuquerque, NM 87103-0849

Don F. Harris, Esq.
Special Assistant Attorney General
Taxation & Revenue Department
PO Box 8485
Albuquerque, NM 87198-8485

William F. Davis

William F. Davis, Esq.

F:\Furrs\Motion Waterfall.wpd:nm