

UNITED STATES BANKRUPTCY COURT,  
DISTRICT OF NEW MEXICO

11-01-10779 SA  
JUL 11 3 35 PM '11

In re:

FURR'S SUPERMARKETS, INC.,

Chapter 11

Debtor

Case No. 11-01-10779 SA

**OBJECTION TO THE CHAPTER 7 TRUSTEE'S MOTION TO EMPLOY  
DAVIS & PIERCE, P.C. AS COUNSEL FOR THE TRUSTEE**

Heller Financial, Inc., as agent for itself, Bank of America, N.A. and Fleet Capital Corporation and Metropolitan Life Insurance Company ("Heller") objects to the Chapter 7 Trustee's Motion to Employ Davis & Pierce, P.C. as counsel for the Trustee because such law firm is not disinterested because it is a creditor of the estate and its interests would be in direct conflict with the interests of the estate and other creditors. As more specific grounds for its objection, Heller states:

1. Davis & Pierce, P.C. was hired as counsel to the Official Unsecured Creditors Committee on April 6, 2001, effective as of February 14, 2001. According to Davis & Pierce's Second Application for Allowance and Payment of Compensation for July through October, 2001, the Debtor owes Davis & Pierce \$32,029.87 for fees awarded in the first application. Further, Davis & Pierce is owed an additional balance due of \$103,407.75 for the second period in addition to the amount still owed from the first application. Therefore, Davis & Pierce is a creditor currently owed \$135,447.62 by the Debtor.

2. Other administrative claimants have filed substantial fee applications in this case. The estate is administratively insolvent, so Davis & Pierce will be competing with other administrative claimants for funds to be paid on its administrative claim.

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3. Portions of Davis & Pierce's administrative claim may be paid from the "carve out" provided for under the adequate protection orders entered in the Chapter 11 case. Only a portion of Davis & Pierce's fees may be paid from such "carve out." To the extent Davis & Pierce seeks payment of its fees from the "carve out," it will be competing with other creditors also claiming the funds in the "carve out." The "carve out" funds are insufficient to pay all administrative claims making claims against such "carve out."

4. Davis & Pierce accrued fees while working on claims adverse to the secured lenders. Pursuant to the adequate protection orders, Davis & Pierce may not obtain payment for those fees from the "carve out." To the extent Davis & Pierce will be seeking fees from non "carve out" funds, it will be competing with all of the other unsecured creditors

5. Davis & Pierce will be unable to discharge its fiduciary obligations to all of the creditors of the bankruptcy estate because it will be seeking recovery of its existing claim which is in direct competition with administrative creditors of the bankruptcy estate.

6. As counsel to the unsecured creditor's committee, Davis & Pierce had a fiduciary obligation to the unsecured creditors. It cannot fulfill that fiduciary obligation to the unsecured creditors, while at the same time serving as counsel to the Trustee whose duty is to all of the creditors, not just the unsecured creditors. Davis & Pierce almost certainly learned confidential information while representing the unsecured creditors. The confidential information it learned could be significant in its representation of the Chapter 7 Trustee. Possession of such confidential information creates a direct conflict of interest

between Davis & Pierce's duties to the unsecured creditors and its duties to the Chapter 7 Trustee.

7. Members of the Unsecured Creditors Committee have also filed administrative fee claims. Davis & Pierce has a fiduciary duty to the members of the Unsecured Creditors Committee. It will not be able to discharge its duties to both the Chapter 7 Trustee and the members of the Unsecured Creditors Committee. Therefore, Davis & Pierce should not be hired by the Trustee.

8. Pursuant to §327(a) of the Bankruptcy Code, the Trustee may only employ professionals that "do not hold or represent an interest adverse to the estate" and that are "disinterested persons. . . ." Section 101(14)(E) defines "disinterested person" as a "person that does not have an interest materially adverse to the interest of the estate or of any class of creditors. . . for any. . . reason." As is set forth above, Davis & Pierce is not a "disinterested person" and is therefore disqualified from serving as counsel to the Trustee.

9. As the Court previously found in considering the employment application filed by Skadden, Arps, Slate, Meagher & Flom, L.L.P., a professional may not "hold or represent an interest adverse to the estate." Therefore Skadden was required to waive its prepetition claim against the estate in order to have its employment approved. In this situation, the proposed counsel has more than just a claim for money. It obtained its claim for money while representing the Unsecured Creditors Committee against the estate.

10. As was stated in In re CIC Investment Corporation, 175 B.R. 52 (BAP 9<sup>th</sup> Cir. 1994):

Code Sections 327(a) and 101(14) explicitly provide that a professional with a prepetition claim against the debtor cannot qualify as disinterested.

11. Likewise, representation of persons having claims adverse to the estate disqualifies Davis & Pierce from serving as counsel to the Trustee. In re American Printers & Lithographers, Inc., 148 B. R. 862, 863, (Bankr. N.D. Ill. 1992) (“Professionals may only be employed to represent a debtor-in-possession if they are disinterested and they do not hold or represent any interest adverse to the estate while they are employed thereby.” Citations omitted.) Therefore, an attorney for a debtor-in-possession must be “free of the slightest personal interest which might be reflected in their decisions concerning matters of the debtor’s estate.” Id., citing In re Tinley Plaza, 142 B.R. 272, 177-78 (Bankr. N.D. Ill. 1992).

12. In this case, not only does Davis & Pierce hold a claim adverse to the estate (in the amount of \$135,447.62), it also represented the Unsecured Creditors Committee with respect to its members’ claims against the estate. Additionally, as noted, Davis & Pierce are competing with other administrative claimants for the limited funds available to pay administrative claims. Therefore Davis & Pierce has claims adverse to the estate and other creditors.

13. The facts that Davis & Pierce 1) is owed \$135,442.62; 2) represents the UCC against the estate and 3) has claims adverse to other creditors, are each by themselves sufficient to disqualify Davis & Pierce from representing the Chapter 7 Trustee.

WHEREFORE, Heller respectfully requests that the Trustee's Motion to Employ Davis & Pierce, P.C. be denied, and for such other and further relief as the Court deems appropriate.

Respectfully submitted,

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& SISK, P.A.

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WE HEREBY CERTIFY that a true  
and correct copy of the fore-  
going pleading was mailed to  
the following counsel of record this  
7<sup>th</sup> day of January, 2002.

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