

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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In re:

Furr's Supermarkets, Inc.

COURT
ALBUQUERQUE, N.M.
Case No. 11-01-10779 SA

OBJECTION TO MOTION TO CLARIFY OR MODIFY

COMES NOW Heller Financial, Inc., on behalf and as agent for Bank of America, N.A., and Fleet Capital Corporation (jointly "Heller") and objects to the Motion to Clarify or to the Extent Necessary Modify the Financial Financing Order Entered Marcy 14, 2001 to Provide that the Chapter 7 Trustee May Surcharge. Pursuant to § 506(c), the Secured Creditors With Respect to Costs or Expense Incurred During Chapter 11 Case ("Motion to Clarify or Modify") filed by the New Mexico Taxation and Revenue Department ("TRD").

At the commencement of this case, Heller and Furr's Supermarkets, Inc., Debtor-In-Possession ("DIP") negotiated a post-petition loan and sought Court approval. An Interim Order was entered on February 8, 2001. Paragraph 9 of the Interim Order provided that all § 506(c) claims were waived. A second Interim Order was entered on March 2, 2001. It also provided in paragraph 9 a complete waiver of § 506(c) claims. However, by the time of the final hearing, the United States Trustee had objected to the complete waiver. The final hearing was held on March 14, 2001, and the Court ruled that the complete waiver proposed by the parties was not acceptable. The language was modified to add the last sentence to paragraph 9 of the Final Order preserving rights of a Chapter 7 Trustee. There is no dispute that the Chapter 7 Trustee may seek § 506(c) recovery for amounts she expends. However, TRD seeks to have this Court rule that it was the ruling of the Court on March 14, 2001, that the waiver by the DIP of § 506(c)

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claims is reversed in the event a Trustee is appointed so as to allow the Chapter 7 Trustee to seek § 506(c) recoveries for amounts expended by the DIP.

The Trustee and Heller, together with Metropolitan Life Insurance Company have agreed on a resolution of all disputes between them, including the § 506(c) issue, and that matter is pending before the Court. The Motion to Clarify or Modify seeks to derail the settlement with the Chapter 7 Trustee by a determination on the disputed question.

The Motion is inappropriate for three reasons. First, the United States Supreme Court has declared that only the Trustee has standing to assert § 506(c) liability. The claim is a claim held by the Trustee and may be pursued or compromised as the Trustee (subject to Court supervision) deems appropriate. Second, TRD seeks an advisory opinion from this Court. TRD seeks this Court to issue an advisory opinion that if the Trustee chose to pursue a § 506(c) action to recover a Chapter 11 administrative expenses, she would be successful.

Thirdly, the underlying legal position of the Motion to Clarify or Modify is simply incorrect. The Motion to Clarify or Modify refers to the transcript of the hearing of March 14, 2001. The transcript of the hearing on February 8, 2001, is also relevant. A copy of both transcripts is attached to this objection for the convenience of the Court and any other parties in the event the Court deems it appropriate to rule on the merits of the Motion to Clarify or Modify.

In any event, when the Court considers the Motion to Approve the Settlement made by the Trustee, the Court at that time properly should take into consideration whether the decision by the Trustee to settle on the terms and conditions proposed is reasonable given the likelihood of success of the Trustee on any settled claim. Indeed,

that is the proper context for the Court to consider on the matters raised by the Motion to Clarify or Modify. However, Heller will in this objection respond on the merits to the issue of whether the intent of the language in the March 14, 2001 Order is to waive § 506(c) expenses incurred by the DIP even if a Chapter 7 Trustee is subsequently appointed.

I. STANDING.

The Motion to Clarify or Modify is essentially a motion by TRD, an administrative claimant, to have the Court determine that Heller is liable for § 506(c) expenses.

Less than two years ago, the United States Supreme Court definitively resolved the question of whether an administrative creditor can seek, on its own, to use § 506(c) to recover administrative expenses. In *Hartford Underwriters Insurance Co. v. Union Planters Bank, NA*, 530 U.S. 1, 120 S.Ct. 942, 147 L. Ed. 2d 1 (2000) (“*Hen House*”), the United States Supreme Court unanimously ruled that only the trustee may bring an action pursuant to § 506(c). Although the decision clearly turned on the language in § 506(c) which provides, “The trustee may recover . . .” from secured creditors amounts expended, in discussing the various policy arguments of the administrative creditor to bring its own action against secured creditors, the Court noted, “The possibility of being target for such claims by various administrative claimants could make secured creditors less willing to provide postpetition financing.” *Hen House*, 530 U.S. at 13, 120 S.Ct. at 1951. Also applicable here was the comment, “Allowing recovery to be sought at the behest of parties other than the trustee could therefore impair the ability of the bankruptcy court to

coordinate proceedings, as well as the ability of the trustee to manage the estate.” *Hen House*, 530 U.S. at 13, 120 S.Ct. at 1950.

TRD should not be allowed to circumvent the United States Supreme Court ruling that only the trustee has standing to ask for relief pursuant to § 506(c) merely by the characterization of the relief sought.

II. THE COURT SHOULD NOT ISSUE AN ADVISORY OPINION.

In essence, the Motion to Clarify or Modify asks this Court to rule on whether the Chapter 7 Trustee can recover Chapter 11 administrative expenses so as to advise the parties as to whether the proposed settlement with the secured lenders is beneficial. In the alternative, it asks the Court to advise the parties that the language should be modified to reflect the true intent, again to assist the parties in analysis of the settlement and a potential renegotiation. As noted above, the TRD lacks standing to actually seek relief under § 506(c). The purpose of the Motion to Clarify or Modify is, apparently, for the Court to give advice to the Trustee to modify or cancel the proposed settlement (or, if the advice is adverse to the position of TRD, to advise the secured lenders that they gave too much in settlement).

The limitation of court jurisdiction to cases and controversies found its origin in Article III, Section 2 of the United States Constitution. American courts decline a request by a party for an advisory opinion. In this particular case, an advisory opinion would not be beneficial to the administration of this estate. The Trustee and the secured lenders negotiated an agreement with the uncertainty of the § 506(c) issue unresolved. As discussed below, the lenders are quite confident that it was not the intent of the Court on March 14, 2001 to allow a Chapter 7 Trustee to revive a waived Chapter 11 § 506(c)

claim. That issue was part of the negotiations between the parties. At the final hearing on approval of the proposed settlement, the Court can and should consider the strength of the arguments of the parties on both sides, those of TRD and those of the lenders, in determining whether the settlement proposed by the Trustee is fair and reasonable under the circumstances. However, an actual ruling on this or any other contested matter which is proposed to be settled is not necessary or appropriate.

III. THE COURT PROPERLY RULED ON MARCH 14, 2001, THAT THE DIP COULD WAIVE § 506(c), AND IN ANY EVENT TRD WOULD NOT BE ENTITLED TO BENEFIT FROM A § 506(c) CLAIM MADE AT THIS TIME.

On its merits, the Motion to Clarify or Modify should be denied because it is simply wrong. If the Final Order is ambiguous and needs revision, it should be revised to clarify that the DIP could waive its 506(c) claims but to amounts expended by a Chapter 7 trustee would still be the potential subject of a 506(c) claim. However, appointment of a Chapter 7 trustee does not revive previously waived claims.

First, a review of the transcripts of the hearing on February 8, 2001 (Exhibit A hereto), the objection filed by the U.S. Trustee that resulted in the sentence in dispute (Exhibit B hereto) and the transcript of the hearing on March 14, 2001, (Exhibit C hereto) demonstrate that the parties did not argue and the Court did not rule that the Chapter 11 § 506(c) claims would be resurrected upon conversion to Chapter 7. Second, even if such was the case, claims such as those of TRD and others mentioned in the Motion to Clarify or Modify would not be allowable § 506(c) expenses in any event.

A. The Court Did Not Rule That Waived Chapter 11 § 506(c) Expenses Should Be Resurrected.

This bankruptcy was filed because Furr's Supermarkets, Inc., was about to bleed to death. In order to have any hope for a recovery for any creditors, an emergency cash infusion was necessary. The Court understood the condition of the DIP on that first day, and decisions were made to approve funding of up to \$33 million. Although the order was denominated an "Interim Order," all parties knew that it was, in effect, final. For example, Mr. Andazola candidly stated, "As a practical matter, Your Honor, I believe it has already been stated – to call it an interim order is a misnomer, it's in effect a final order." TR 26, February 8, 2001.

All parties recognized that, as Mr. Heller speaking for the lenders stated, once the money was loaned, it would be grossly unfair to refuse to approve the essential deal in a "final order." *See* TR 9-14.

The Court fully understood the importance of the terms of the proposed order.

The Court stated:

Anybody else that wants to address this particular issue? I think that there is certainly an adequate basis for finding that unless this order is approved essentially in the form that it has been submitted to the court . . . [t]hat this reorganization will fail and that this company will fail.

TR 37-8.

A very important term of the proposal was that the exposure of the lenders for the on-going expenses of the Chapter 11 were limited and set. One requirement clearly spelled out in the order was that the lenders would not be liable for a § 506(c) surcharge.

On March 1, 2001, the U.S. Trustee filed an objection to the Final Order. A copy is attached hereto for the convenience of the Court as Exhibit B. The Objection states:

2. In the unlikely event that this matter is converted to a chapter 7 proceeding, it is entirely foreseeable that a chapter 7 trustee would incur costs and expenses in preserving property constituting collateral.

That objection says nothing about resurrecting a § 506(c) claim for expenses incurred in the Chapter 11, and it is obviously a far different proposition than the lenders becoming a guarantor for all Chapter 11 administrative claims, which is essentially the relief TRD seeks in its Motion to Clarify or Modify.

The relevant discussion at the March 14, 2001, hearing regarding § 506(c) began on TR 22 of the transcript (Exhibit C hereto) with the presentation of the objecting party, Ron Andazola on behalf of the U.S. Trustee. The essence of the argument made by Mr. Andazola was stated on TR 24:

Essentially those three cases, I think, stand pretty strongly for the proposition that it is contrary to public policy to essentially hamstring a Chapter 7 potential Chapter 7 Trustee on down the road.

On TR 29, Mr. Andazola made the point:

And certainly in this case it is foreseeable a Trustee may have to secure inventory or possibly have to run a store or to in the event of a conversion for limited period of time.

It is simply not equitable to have a Trustee be put in that position without being able to at least get paid of the expenses that would be incurred in doing that.

The Court agreed with the point, stating on TR 38:

It is just in a particular instance such as Mr. Andazola suggests, if somebody's got to run a store or whatever and in the process administer the collateral or take some steps to actually preserve it.

The Court identified what it characterized as "the fundamental issue" on TR 39 of the transcript of March 14, 2001:

But the fundamental issues comes down to it is really hard to anticipate any specific circumstances that may arise and what we're doing right here is we're making a prediction. If I sign the order exactly as such which says there is not

going to be any circumstance out there in which the Trustee really ought to be running the store or administering any of the collateral for the benefit of anybody including the secured creditors, in essence he does the rest of the work that he or she may do.

The actual ruling of the Court began on TR 62 with some introductory remarks by the Court and then to TR 64 continuing for a number of pages. It is clear from the transcript that the concern of the Court was for effort expended by the Chapter 7 Trustee, not the right of the Chapter 7 Trustee to recover amounts expended before the Trustee was appointed. For example, on TR 67 the Court referred to the need to "pay or reimburse the Trustee for genuine benefit that was derived from the Trustee's efforts." On TR 68 the Court indicated that perhaps the Trustee ought to simply close the doors and allow the lenders to take over the property.

The point of Mr. Athanas on TR 71 of the transcript, the Court's response going onto TR 72 and the conclusion of the Court on TR 73 all indicate the intent of the Court that a Chapter 7 Trustee would be allowed to pursue § 506(c) claims for amounts it expended, even though the Chapter 11 506(c) claims were waived. On TR 73, the Court stated:

I think that the issue that we're actually talking about is, the one that you're addressing here is specifically we're talking about that possibility, remote as can be, I hope, that the Trustee might take some action which might benefit you all and which the Trustee could approve of that would benefit you, would the Trustee have the right to ask for reimbursement.

I'm saying I just don't think it's appropriate for me to waive for that Chapter 7 Trustee, even if the debtor waives it.

I don't have any problem with the debtor waiving, the debtor has obviously got more than competent counsel. It is the Chapter 7 Trustee.

As is clear from a detailed review of the hearings on February 8, 2001, and March 14, 2001, and the Objection that prompted the ruling, the Court clearly ruled that the right

of the Chapter 7 Trustee to recover a § 506(c) claim is limited to that amount expended by the Trustee. There was no suggestion that expenses incurred during the Chapter 11 should be resurrected.

That ruling did not do such damage and injustice to the underlying business deal that it was either egregious or unacceptable to the lenders. After all, at the time of conversion, the lenders could (as they have done) negotiate with the trustee and make a decision accordingly. That was not a huge risk. The narrow change (or what was understood to be a narrow change) was acceptable and made. The Final Order was agreed to and entered by the Court. The spirit of the rulings of the Court on February 8, 2001, and March 14, 2001, should not be changed in such an unfair and inappropriate manner as now sought by TRD.

B. The Amounts Claimed by TRD Would Not Be Given § 506(c) Treatment In Any Event.

Even if the waiver by the DIP of the right to recover administrative expenses against the secured lenders had not been waived or if that waiver was reversed by the conversion to Chapter 7, case law indicates that claims such as those of TRD would not be appropriate § 506(c) surcharge claims in any event.

As the Court noted on the hearing on March 14, 2001, the Trustee seeking to recover under § 506(c) has “a very heavy burden” in order to prove the claim. TR 67. For example, TRD has not been paid the administrative claim. The Fourth Circuit Court of Appeals held that in order to recover under § 506(c), the trustee must prove that it actually expended the money in payment of the administrative claim and then can seek to be reimbursed. *In re K&L Lakeland, Inc.*, 128 F.3d 203 (4th Cir. 1997). In this case, the Trustee does not have and will not have funds sufficient to pay the administrative claims

identified by TRD (or, for that matter, almost any other administrative claims), unless the Trustee enters into the settlement with the secured lenders and by that settlement has operating funds to recover avoidance action and the other amounts allocated to the Trustee under the settlement.

In the case of *In re C.S. Associates*, 29 F.3d 903 (3rd Cir. 1994), a city attempted to recover post-petition real estate taxes and water and sewer rents as § 506(c) surcharges. Although the case was decided before *Hen House* and therefore the claim by the City was not dismissed for lack of standing, the Court held that the real estate taxes and water and sewer rents were not of direct benefit to the creditor holding the security interest in the real estate (a nursing home facility) served by the city.

The Third Circuit ruled in the case of *In re Visual Industries, Inc.*, 57 F.3d 321 (3rd Cir. 1995) that § 506(c) treatment was not available for a trade vendor that it supplied raw material to the debtor in possession. In that case, the debtor in possession used the materials obtained from the trade creditor to manufacture a product, sold the product and paid down the secured lender's debt. Section 506(c) treatment was denied in that case.

As can be seen by the brief review of just three circuit cases ruling on claims under § 506(c), the Court's comment relating to the heavy burden facing a claim for § 506(c) reimbursement was well taken. Of course, Heller is not asking the Court to rule here on the merits of the apparent claim of TRD for a surcharge of the lenders. A proper motion to do so is not before the Court.

As the Court will learn at the hearing on the Motion to Approve the Settlement, the decision of the Chapter 7 Trustee to settle with the lenders was prudent and should be

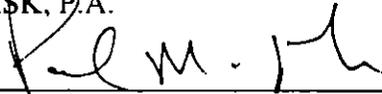
approved by the Court. The Motion to Clarify or Modify is without merit, even if the TRD had standing and if the Court could properly issue an advisory opinion.

IV. CONCLUSION

Heller respectfully requests the Court to deny the Motion to Clarify or Modify. TRD does not have standing to bring such a motion, the Motion seeks an advisory opinion, and, if despite the foregoing the Court rules on the merits, the Motion is not well taken, because it seeks relief to which the Trustee, let alone an administrative claimant, would not be entitled.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS
& 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 this 1st day of
~~February~~, 2002.


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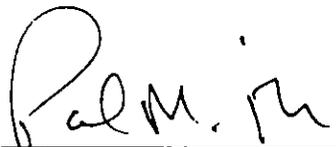
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By: 

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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW MEXICO

3 In re:
4 FURR'S SUPERMARKETS, INC., Case No. 01-10779-SA
5 Debtor.
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10 BE IT REMEMBERED that the above-entitled matter came
11 on for hearing on February 8, 2001, in the United States
12 Bankruptcy Court before the Honorable James S.
13 Starzynski, beginning at 8:05 p.m. in Albuquerque, New
14 Mexico.
15

16 A P P E A R A N C E S

17 For the Debtor: Alan J. Carr, Esq.
Jay M. Goffman, Esq.
18 Robert H. Jacobvitz, Esq.
19 For Heller David S. Heller, Esq.
Financial: Paul M. Fish, Esq.
20

For Creditor Ronald J. Silverman, Esq.
21 Metropolitan: Mr. Steven Savoia, Esq.
Jennie D. Behles, Esq.
22

For Creditors William F. Davis, Esq.
23 Nestle's, Kraft
and Conagra:
24
25



COPY

1 THE COURT: With respect to the second
2 shift. We should resume at least briefly the custom of
3 identifying yourself before you start to speak so that
4 the reporter can get down who you are and properly enter
5 your words of wisdom.

6 Where we left off, what we were dealing with
7 was the proposed financing order. I think that's where
8 we are. Mr. Goffman.

9 MR. GOFFMAN: Jay Goffman on behalf of
10 Furr's. We are happy to come back to present an agreed
11 upon interim order to authorize the debtor to obtain
12 secured interim financing pursuant to the debt.

13 All the language in the DIP order has been
14 agreed upon by all parties. The U.S. Trustee will make
15 notice, subject to the committee.

16 Our hope would be that we present the order to
17 Your Honor tonight, and explain generally what is in
18 there.

19 Again, I will review why we need the DIP
20 financing immediately and then we have business people
21 and other lawyers still back at the offices, we are
22 finalizing the exhibits which are a term sheet which sets
23 forth the various covenants and a budget. Recognizing
24 that the order says that it's effective upon signing, we
25 want to ask Your Honor to sign this tonight.

1 We would hope to get Your Honor's agreement
2 that subject to presenting the exhibits in the morning
3 with this attached to it, that we could get the order
4 entered at that time.

5 THE COURT: Do you want me to address
6 that issue right now? That was one of the issues that
7 struck me when I was looking over the draft that I
8 received shortly after you-all left for the Modrall Firm,
9 which I think is not too difficult, but is a little
10 different from the next version, the black line version.

11 The very last paragraph there basically said
12 that the order was effective on signing. I don't know
13 that I could even do that if I wanted to, pursuant to --
14 there is about four rules, Federal Rules of Civil
15 Procedure and the Bankruptcy Rules and so forth which
16 effectively seem to me to say that an order becomes an
17 order and effective as an order upon its entry on the
18 docket.

19 Here with the electronic filing, Ms. Anderson
20 effectively tomorrow morning at about 8:10 Mountain Time
21 can enter the order and it will be docketed at that time,
22 although I would think from Furr's perspective, this is
23 what I gather the debtor is concerned about, is to be
24 able to walk out of here tonight and when Larry Barker or
25 Conroy Chino or somebody sticks a microphone in your

1 face, you can say, yes, we have the financing worked out
2 and we have already taken care of people today and we are
3 going to take care of them tomorrow and everything else.
4 I assume that's what the debtor is concerned about.

5 MR. GOFFMAN: Yes. I think if that
6 would happen we could say we have an agreed upon order we
7 can present to the court and we suspect with the
8 attachments to be filed in the morning, will be entered
9 the first thing in the morning.

10 THE COURT: Okay. Are you done on
11 that issue, Mr. Goffman?

12 MR. GOFFMAN: Yes.

13 THE COURT: Mr. Heller.

14 MR. HELLER: I would just at some
15 point like to speak to the support of the order and the
16 process and if Mr. Goffman has more comments I will wait.

17 THE COURT: The same for everybody
18 else.

19 MR. SILVERMAN: Likewise, Your Honor.

20 MR. HELLER: And Your Honor, it kills
21 me to wait for him.

22 MR. GOFFMAN: Your Honor, this is a
23 very good order for the debtor and for all constituencies
24 in the case. It is a DIP order for \$33 million, which is
25 the money that we need to restock the stores. If we can

1 start drawing on this the first thing tomorrow morning we
2 will have product in the store for people and the
3 weekend. That will bring the customers back, drive the
4 sales up and bring the cash flow back. That will allow
5 us to meet the budget that we agreed upon with the
6 lenders and get the company back on the right footing
7 toward realization.

8 This is a good order for a number of reasons.
9 It is a clean order. There is nothing that I would
10 classify as out of the ordinary. There is no rolling
11 forward of any interest. The only prime I guess is that
12 the DIP fund is priming themselves.

13 The issue that we previously discussed about
14 security interest and preference and fraudulent transfers
15 has been removed.

16 DIP lenders are not seeking nor are they
17 getting security interests in fraudulent transfers or
18 preferences.

19 The order is fair in terms of the pricing.
20 It is on market terms. It has appropriate carve-outs,
21 including for the unsecured committee and their
22 professionals and the U.S. Trustee's fees. It gives us
23 sufficient time to get this company back on a reasonable
24 footing and get a plan confirmed without delaying the
25 final resolution of this case.

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1 I would note that when we served notice this
2 morning by fax on the 21 largest unsecured creditors, on
3 the IRS, on the Securities and Exchange Commission, on
4 the attorneys general for Texas and for the State of New
5 Mexico, and the secured creditors are represented here, I
6 would also note that we have a very strong representation
7 asserted by major unsecured creditors here, but the
8 notice we sent out not only said they were going to seek
9 interim financing, but that's what generated the terms.
10 It made it clear, it talked about the liens that were
11 going to be granted. So, there has been broader notice
12 of a first interim DIP than I have ever seen in a Chapter
13 11 case.
14 Now, I recognize that the debtor will be
15 drawing down a substantial amount in the first week and
16 that is somewhat unusual, but that is necessitated in
17 this case.
18 Every case stands on its own. What the code
19 and the rules say is that what should be authorized is
20 what is necessary. What is necessary is to get product
21 back into these stores. If we don't get the product back
22 into the stores we can't bring the customers back and we
23 are going to have a continually downside spiraling and we
24 would not be able to meet the budget that forms the
25 predicate for this loan.

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1 immediately.
2 THE COURT: Should I address with you
3 while you are there the brief issue of scheduling?
4 MR. GOFFMAN: Yes, Your Honor.
5 THE COURT: March 4th, is that a
6 mistake or did you-all want this entered on Sunday?
7 MR. GOFFMAN: That was a mistake, Your
8 Honor.
9 THE COURT: I'm not sure what the
10 revised date is. My calendar is such that we could give
11 you- - I guess we need to give folks 15 days' notice to
12 object. The best we could do is to have an objection
13 deadline of Monday, February 26th. I hope having given
14 you-all a hard time about Monday, March the 4th that
15 February 26th is okay.
16 Then a final hearing at 9:00 on Friday, March
17 the 2nd. What does that do for you all? Is that going
18 to fit.
19 MR. GOFFMAN: That's fine, Your Honor.
20 That works very well with our schedule. I have a request
21 for an afternoon hearing.
22 THE COURT: I don't have any problem
23 with an afternoon hearing. Friday is the day we don't
24 have hearings, usually, but this has got to be fit in.
25 If you all want to do it in the afternoon, that's fine.

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1 They are putting up \$33 million of new money
2 in order to protect in essence \$48 million of existing
3 money. That is a very significant loan and certainly by
4 comparison of their pre-petition amount it's a
5 significant loan.
6 It is a fair agreement. It is a balanced
7 agreement. It is in the company's best interest. I
8 believe it's in the secured creditors' best interest. I
9 also believe it's in the unsecured creditors' best
10 interest and the trade. The money to be used is used to
11 buy inventory from the trade. We are going to pay COD,
12 wire transfer, whatever, to get this back in to make the
13 trade comfortable. They are going to make money on this.
14 As I explained in my conversations with
15 counsel for the unsecured creditors, everybody's best
16 chance to get paid is to create the strongest most viable
17 company we can. The stronger the company the better the
18 cash flow. The better the sales, the more value there is
19 at the end of the day, the more claims we are able to pay
20 under any plan. That's in everybody's best interest and
21 that's why we are proceeding this way.
22 I know we are going to get some comments from
23 the U.S. Trustee about delaying this somewhat. I urge
24 Your Honor in this context we cannot delay. We need the
25 order in the morning. We need to begin drawing down

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1 My only concern is my druthers would not to be another at
2 8:15 Friday evening as opposed to 4:15 Friday afternoon.
3 MR. SILVERMAN: One can easily see
4 that you are the judge.
5 THE COURT: Bill Arland calls it the
6 PGO, penetrating glimpse into the obvious. If that works
7 for you-all that's what we will do.
8 MR. GOFFMAN: That works very well.
9 THE COURT: Mr. Heller?
10 MR. HELLER: I want to say a couple of
11 things. First of all, I can't thank you enough for
12 allowing levity into this. It's great to get to a great
13 court without having to stop by Philadelphia, and watch
14 the Skadden rates slashed.
15 Your Honor, I do agree with you on the order
16 and I want to share something with you. Your comments
17 were shared with me with respect to the rollover. I want
18 to share with you, the battle I had with the bank group
19 about the issue of the rollover.
20 Given the circumstances in the case, I shared
21 with my clients the absolute necessity of not trying
22 anything. It's embarrassing to rise and brag about what
23 I didn't get, but in addition what Mr. Goffman told you
24 about, we didn't get cross collateralization, but under
25 the case law, there is a perfect example given the nature

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1 of the collateral, we might have sought it. We didn't
2 get any waiver or releases or findings of fact or
3 prejudice anybody's rights.
4 The difficulty I have, Judge, is changing with
5 you an issue built into these circumstances which I
6 assure you were not engineered. In the old days we
7 engineered these, create the false crises and come in
8 with a panic and saw what we could get and the courts got
9 smart and we stopped it.
10 I got involved in this a couple of days after
11 Mr. Goffman, that was last Friday. Furr's realized that
12 they had some liquidity needs for whatever reason. We
13 will fill in the whole. I appreciate Your Honor's need
14 for the final hearing date, but I have to tell you if
15 anybody objects to the final order most of the money is
16 going to be in. If this estate had a chance of paying me
17 back, I would say, Your Honor, whatever they do at the
18 final hearing is fine as long as they pay me back.
19 There is no way that this estate is going to
20 be able to pay us back.
21 One of the reasons that we negotiated for what
22 we thought we had to have is that because we understand
23 that we are asking you and the U.S. Trustee's office to
24 allow most of the money to go out. Although it's an
25 interim order, what happens in the interim period is a

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1 Our local counsel and my new partnership, Mr.
2 Fish, told me if I played chicken you would win. Now we
3 know you are the judge. I'm sure. I will tell you we are
4 not playing chicken. I can tell you on oath having read
5 the rules, this is the best I can do.
6 There is absolutely no more give in this
7 order. I believe because they have been candid with us,
8 and Mr. Goffman and the U.S. Trustee advise indicating
9 that they have a problem with notice, but that there is
10 nothing in here that offends them. And if they find
11 something I will work it out with them. If Your Honor
12 came across something I will try to work it out with you.
13 I don't think there is anything that can offend.
14 The question of due process and notice can be
15 raised. I have had this situation all over the country.
16 I had a couple in Detroit and one or two in Delaware.
17 What I would suggest, due process is that process which
18 is due under the circumstances and the notice provisions
19 of the code and specifically 4001(c)(3) contemplate that
20 something has to happen to to prevent irreparable injury
21 and if the lender acts in good faith that it has these
22 protections and might not believe or might not fund
23 without those good faith protections.
24 If somebody files an objection on the 26th, I
25 have to tell Your Honor in all candor there isn't going

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1 matter of business necessity, is that this thing is
2 locked in mode. If there is something in here that is
3 offensive to anybody, and I haven't heard of it yet, that
4 it hasn't been removed. It's locked and loaded. There
5 is no way, they can't give us the money back. They can't
6 shoot the company. I don't want it to liquidate.
7 Most of these remedies will be locked because
8 of the massive pressure on Furr's and the corresponding
9 voluminous of lenders to give Furr's the jump start it
10 needs.
11 What I want to assure Your Honor is that we
12 could keep you here all night parading in cashiers to
13 managers telling you that that jump start is necessary to
14 prevent irreparable injury.
15 Our clients are \$48 million into this deal and
16 together with The Met. they are putting in \$33 million.
17 Your Honor, to protect 48.
18 So, you can imagine the commitment that we are
19 making to this company and the importance that we feel
20 about the continued viability of Furr's, and we are
21 making it on nominal terms because if somebody could say
22 to me that I could have until next Thursday to negotiate
23 the terms of this order with the Trustee and UCC, I would
24 be in favor of it, but I don't have that luxury, Judge.
25 I gave until it hurts.

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1 to be much we can do because most of the money is going
2 to be out in reliance under the terms of this order as a
3 matter of business necessity.
4 We believe also, Your Honor, and I would make
5 an offer of proof, march witnesses through the courtroom
6 for the rest of the evening if you could stand it, that
7 will tell you the only alternative to this since neither
8 my clients or I are bluffing, Your Honor, is a
9 liquidation. So that if we were to give notice and that
10 notice created a circumstance in which the company
11 suffered irreparable injury, there would have been more
12 process, but what they would have gotten is a notice of
13 the death of the company. That is not the process that
14 is due when you consider an interim order that is
15 designed to prevent irreparable injury.
16 The fact that this amount of money is
17 necessary is a fact that was handed to these lenders. We
18 didn't have time to engineer it. We didn't have the
19 motive to engineer it. We didn't have the opportunity to
20 engineer it. We are as much a victim of that fact as the
21 company itself.
22 As Mr. Goffman stated so articulately. This
23 represents the solution. This represents the retention
24 of all those jobs. It represents an opportunity for
25 Furr's to get back on its feet and maximize value for all

1 the constituencies. I regret that I have to ask you to
2 lock and load it tonight, but those are the realities
3 that we are presented with. I can tell you with as much
4 sincerity that I can muster having appeared before you
5 today, we are not bluffing. There isn't anything that we
6 can give.
7 What we are doing right now is getting beat-up
8 back at the farm on the term sheet and the budget and I
9 want to assure Your Honor on my oath that we will give
10 and deliver on those two documents. Our position will be
11 as to those two documents if somebody can't live with
12 them, if she dies, she dies. We want the company to
13 continue. We regret the circumstances such as they are,
14 but given such circumstances. Your Honor, we believe that
15 this result is in the best interest of all the creditors,
16 including those folks who can't be here given the
17 circumstances. It's on that basis. Your Honor we are
18 going to ask you to sign this order and to really mean
19 it, because I will tell you that our cash is money good.
20 THE COURT: Can I interrupt just a for
21 second? Before I forget, are there people that need an
22 order admitting them pro hac vice. Can we do that before
23 I forget.
24 MS. BEHLES: Mr. Silverman was
25 conditionally admitted. He has read and reviewed the

1 crisis. In The Met's view along with the other lenders,
2 it's critical to support the company again, but to do so
3 at this immediate juncture. As the company said and the
4 bank lenders have said, the need for the capital and
5 infusion is immediate. It's a very simple concept. They
6 need to put food on the shelves. I want to emphasize the
7 severity of the problem.
8 In working with the company, every day, every
9 week that the company is in peril, doesn't have adequate
10 cash facilities, the problems they have, they worsen
11 drastically. It's very worse.
12 That's what brings an institution like The Met
13 to decide after it has put in \$85 million in this company
14 of investment, to put in another \$15 million is a very
15 serious situation. This is after much soul searching,
16 this seems to be the best, probably the only way to
17 maximize the value of this company for all the parties in
18 interest, but I want to impress upon our Honor, from the
19 perspective of an institution that has such an investment
20 in the company, to put in this money at this quick pace
21 when the company asks, it emphasizes the need for it.
22 I want to reiterate. The bank is putting in
23 money, cash, to protect \$48 million. They have a risk.
24 We have more money invested in this company. You can
25 imagine how concerned we are that we get finality and

1 rules.
2 MR. SILVERMAN: I have.
3 THE COURT: I needed to hear him say
4 it. He will be admitted pro hac vice if all the sponsors
5 can submit the orders.
6 MR. HELLER: I read the rules as well.
7 THE COURT: You are admitted pro hac
8 vice case. And there was a third person.
9 MS. BEHLES: You submitted Mr. Savora
10 for me because he had read the rules.
11 THE COURT: Anybody not admitted that
12 needs to be? Thank you.
13 MR. SILVERMAN: I'm Ronald Silverman,
14 from Bingham Dana, counsel for The Met. I would like to
15 add to counsel's remarks why I think the institution is
16 making the DIP loan. The circumstances are, I will try
17 to talk a little bit about The Met.
18 The Met is perhaps the company's largest
19 creditor. The Met has been an investor in the company
20 since 1995. It has put substantial money into the
21 company in repeated instances. The Met has approximately
22 \$67 million of debt. The Met has also been asked to put
23 in equity. It puts in equity when asked to do so and has
24 supported the company over the years repeatedly. We come
25 to this juncture and unfortunately the company has a

1 protection when we are putting in yet more money on a
2 very critical juncture. The hour is late and I won't
3 take up more of your time. I did want to explain who The
4 Met was and the history with the company and why these
5 are made at this time.
6 THE COURT: Mr. Davis?
7 MR. DAVIS: First I would like to
8 thank The Met for the \$85 million they gave the debtor.
9 THE COURT: They are putting in
10 another 15 to round it to the nearest hundred.
11 MS. BEHLES: That's a thought.
12 MR. DAVIS: The unsecured creditors
13 would like to express their gratitude. Let me take a
14 moment to tell you who I'm speaking for.
15 I mentioned I came here today with
16 authorization to speak for Nestle's and Kraft up until
17 the appointment of an Unsecured Creditors Committee. My
18 representation of them will end at the time the committee
19 is appointed. On their behalf I reviewed the order.
20 Also a representative from Conagra, who I think is the
21 largest trade creditor talked to me during the dinner
22 break and we discussed the terms of the order and his
23 desires with respect to the order. Those three people I
24 can validly speak for. I can't speak for Frito-Lay, but
25 I entered their Proof of Claim for them as a courtesy. I

1 don't represent Frito-Lay and certainly don't represent
2 the Unsecured Creditors Committee at this time.
3 Speaking for those three unsecured creditors
4 which represent I would say close to \$5 million of the
5 unsecured creditor pie. They will likely be members of
6 the unsecured creditors committee, they believe, without
7 question, and they have been following Furr's progress,
8 for lack of a better word over the last few weeks and
9 have watched as various trade creditors have quit
10 delivering to Furr's Supermarkets and they know the out
11 of stock condition of the Furr's supermarkets at this
12 time.

13 There is no doubt as to those trade creditors
14 that I'm speaking for tonight that Furr's must have some
15 groceries on a very immediate basis.

16 One of issues that my clients have raised is
17 that customers just don't come back the next day once
18 they have been through the store, say on this weekend on
19 Saturday and Sunday and once they have been through the
20 store and couldn't find what they are looking for.

21 It does have irreparable damage impact in
22 terms of the whole revenue stream, just what customers we
23 might turn away in the next few days.

24 I have had the opportunity to read several of
25 the drafts of the motion and order with regard to DIP

1 financing and I would say initially there were a few
2 provisions in there that didn't seem to me to be quite on
3 a level table, but I think every single one of those
4 provisions or I represent to the court that every one of
5 those provisions that I would call in any way unfair to
6 unsecured creditors are the three that I represent here
7 today. Those have been removed from the order.

8 On ballots I always support notice to everyone
9 so everyone can have their say so, but I think Mr. Heller
10 said it very eloquently when he said a death notice is no
11 good notice. If the funds that the debtor needs to fund
12 this DIP financing are delayed past tomorrow morning,
13 because I know the trade creditors are waiting for a
14 phone call to say there is money to pay for stuff so they
15 can ship it tomorrow and get paid and there will be
16 groceries over the weekend, hopefully. I would like to
17 say strongly that on behalf of those unsecured creditors,
18 they believe irreparable harm will result if there isn't
19 the funds available to pay to have the groceries
20 delivered. Thank you, Your Honor.

21 THE COURT: If I understand, Mr.
22 Davis, when we were having the informational conversation
23 before you-all broke at about 5:30 or whenever it was, my
24 recollection was that there were rumblings coming from
25 your direction that maybe the best thing to do is let it

1 go into a 7 and we will make more money recovering
2 preferences. That is not your position now? Those
3 concerns have been allayed on behalf of the three
4 creditors that you either represent or have spoken with
5 and the three creditors are firmly behind signing of this
6 proposed order?

7 MR. DAVIS: That's correct, Your
8 Honor. The primary issue was securing the DIP financing
9 to avoidance actions. My clients believe that there are
10 some issues with regard to avoidance actions and they
11 believe if they had to give that away in order to get
12 financing, they wouldn't want to proceed under those
13 circumstances.

14 Your Honor identified the issue of rolling
15 over the pre-petition to the post-petition security
16 interests.

17 We had a long discussion about a carve out for
18 trade financing and we settled on the solution of we will
19 only deliver if you pay us cash. So, those issues - -
20 Or check.

21 MR. HELLER: I won another one.

22 MR. DAVIS: Those issues were all
23 resolved. We do believe putting some grocery on - - I
24 have to say candidly that no trade creditor is certain
25 that this company is going to successfully reorganize.

1 but we don't think that the trade creditors will be hurt
2 in any fashion by allowing this cash infusion so that
3 groceries can be put on the shelves and we can see where
4 we are in a couple of weeks down the road.

5 THE COURT: Okay. Thank you.

6 THE COURT: Ms. Behles, your
7 co-counsel has spoken.

8 MS. BEHLES: I have nothing further to
9 say on behalf of The Met.

10 THE COURT: Mr. Atkins?

11 MR. ATKINS: I will echo Mr. Heller's
12 remarks.

13 THE COURT: Start on this side. I
14 realize three debtors' lawyers are on one side of the
15 table and two U.S. Trustees on the other. Mr. Goffman
16 has spoken for you-all?

17 MR. CARR: Yes, Your Honor.

18 THE COURT: Mr. Andazola.

19 MR. ANDAZOLA: Your Honor, our primary
20 concern with the order is with paragraph 20 of the
21 interim order. That provision states, "All of the
22 provisions of this order shall be final and binding on
23 debtor and all creditors and other parties in interest
24 and their successors and assigns upon entry."

25 Your Honor, essentially our concern is that

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1 provision in essence writes out rule 4001(c) of the
2 bankruptcy rules.
3 At this point, Your Honor, I certainly don't
4 doubt the good faith of all counsel here present and
5 perhaps I don't understand all the complexities of this
6 matter, but it would appear to me that at least some
7 interim financing could be agreed to and that a final
8 hearing could perhaps be held early next week in this
9 matter, that this court could authorize the release of at
10 least enough money to keep the debtor operating through
11 the next few days.
12 4001(c) does state that if a motion requests
13 the court may conduct a hearing before such 15-day period
14 expires.
15 The court may authorize the obtaining of
16 credit only to the extent necessary to avoid immediate
17 and irreparable harm to the estate pending a final
18 hearing. Our concern, Your Honor is essentially that we
19 have two unsecured creditors who are present, represented
20 here today. We have indications that a third would be
21 supportive of this.
22 Your Honor, we would commit to the court to,
23 first, immediately in the morning, form a UCC committee
24 to conduct a conference call to conduct the first meeting
25 of that UCC and place before the UCC the motion and the

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1 this matter.
2 Again, Your Honor, I do hate to be the one
3 discord voice with regard to this proposed financing.
4 However, I do believe that I have a statutory duty to
5 bring this to the court's attention and I will certainly
6 abide by the decision of the court in this matter.
7 THE COURT: Wait just a minute. I see
8 you have copies of the Code in your hand. I just want to
9 address a couple of questions, Mr. Andazola.
10 First of all, the United States Trustee has
11 certain institutional duties and I never criticize the
12 U.S. Trustee for pursuing those even if it assumes
13 frequently you are swimming upstream. That's not a
14 problem. I guess I sort of had a question in some ways,
15 with respect to due process. I'm not clear that I
16 exactly see - I understand the necessity of notice and
17 that sort of thing, but what we are really talking about
18 here in part are secured creditors who are willing to
19 lend more money, who are fully informed what is going on
20 and advancing another 2/3 of what they have already
21 advanced. What we are talking about as well is a
22 debtor-in-possession who obviously knows what is going on
23 and we are talking about at least a couple of unsecured
24 creditors. I understand they don't represent the whole
25 creditor body, but they are certainly sophisticated and

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1 order that are submitted to the court this evening.
2 Your Honor, we understand that there is a dire
3 need for the debtor to obtain financing in these
4 circumstances. However, we firmly believe that there is
5 a due process requirement set forth in the Constitution
6 that perhaps cries out for stronger attention, even with
7 these financial requirements.
8 Your Honor, I believe the drafters of the Code
9 and the Rules were well aware that there would be many
10 situations like this.
11 They have chosen in their wisdom to require
12 that certain due process requirements be made, even in
13 dire financial situations.
14 We respectfully submit, Your Honor, that the
15 minimum requirements of the rule would require that some
16 minimum due process be afforded in this situation. It
17 would be certainly my -- again my commitment to the court
18 to form a committee as soon as possible and to conduct an
19 initial meeting as soon as possible.
20 My hope would be and my expectation would be
21 that that would occur tomorrow morning and we would
22 commit to providing all this documentation to the
23 individual members and then at that point, leaving to
24 that committee the decision as to whether or not on
25 behalf of the creditors they can support the financing in

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1 big enough and certainly smart enough to hire
2 sophisticated counsel. So, it's sort of like that piece
3 of cloth that people put on their sail boat to tell them
4 which way the wind is blowing. It seems to me that we
5 can rely on it. I know there is a nautical term for
6 that, but since this isn't Judge McFeeley's court, we
7 can't figure out what that is. The point is, that
8 concerns me as well.
9 The other thing, with respect to due process,
10 I sort of wonder what it really is.
11 The due process that these folks are entitled
12 to are what the Code and the Rules require to begin with.
13 I mention these things and I welcome your responses and
14 you-all can jump in here as well.
15 With respect to the Rules 4001(a)(3) and the
16 other section, 4001(c)(2), which basically talks about I
17 can grant the relief requested to avoid irreparable harm.
18 I'm looking at that and thinking that with respect to due
19 process, with respect to keeping folks employed, number 2
20 and number 1, 20 unsecured creditors paid off. It seems
21 to me from what I have heard so far and from the two
22 declarations of Mr. Mortenson, there seems to be
23 substantial or at least enough support for the
24 proposition that if this financing doesn't happen there
25 is going to be folks out of work, unsecured creditors who

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1 have a significantly greater chance of recovering less
2 than they would if the financing were to end.
3 So, I wonder how that plays into the argument
4 about due process. Do you want to address that? I have
5 a couple of other questions as well. I'm sorry, that was
6 one of those long rambling questions that went on longer
7 than the answer I'm sure.
8 MR. ANDAZOLA: I believe there is room
9 for interpretation in 4001(c) to allow a hearing before
10 15 days from the filing of the motion. Secondly, Your
11 Honor, although there may be logistical difficulties, I
12 believe that authorization of a smaller amount than the
13 entire 30 million could be authorized to serve the
14 debtor's needs until a hearing could be held.
15 I believe that a hearing could be held at some
16 point next week to give full opportunity for creditors to
17 review all of the terms of the motion and the proposed
18 interim order.
19 As a practical matter, Your Honor, I believe
20 it has already been stated -- to call it an interim order
21 is a misnomer, it's in effect a final order.
22 We respectfully submit that interim financing
23 in a smaller amount could be granted to prevent
24 irreparable harm while at the same time be more in
25 compliance with the requirement of the rule that notice

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1 frankly what your committee can do. Suppose you get your
2 committee organized by tomorrow? Are they going to rush
3 out and hire counsel and visit and do all this stuff so,
4 say by next Wednesday or a week from today, they are
5 prepared to go forward and argue the points in connection
6 with this agreement, at which point if I have signed this
7 agreement already it sounds to me like most or all of the
8 \$33 million will have already been spent. If it hasn't
9 been spent because the order hasn't been entered, Furr's
10 is going to be dead. That's just what it seems like we
11 are looking at this evening.
12 MR. ANDAZOLA: Well, Your Honor, I
13 haven't seen a budget yet. I can point to the
14 declaration which the CFO of the company stated that
15 their requirements were approximately 1.2 million for
16 inventory a day.
17 Knowing that, for the next five days or so, I
18 believe that would come out to approximately 7 to 10
19 million dollars. I believe the debtor would be in a
20 better position to say why the entire \$30 million is
21 needed for the coming week. From the documents that have
22 been produced, I don't see the justification. I don't
23 see the need. I don't see that. I have not seen the
24 budget at this point, Your Honor. I'm just relying on
25 what has been stated in the declaration.

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1 be given to the 20 largest or as I have said to the
2 court, to the UCC upon its formation, which I fully
3 intend to complete tomorrow.
4 THE COURT: What number would you have
5 in mind? What I'm hearing from everybody here, within a
6 few days the whole 30 million or so would be used. It's
7 because they need to restock the shelves and basically
8 prime the pump, right?
9 MR. HELLER: Yes, sir. If I may, I
10 want to give the Trustee an assurance and that I know Mr.
11 Goffman joins. There are people right now, I can't reach
12 them right now. If we have to submit a supplemental
13 affidavit we will, but I want to assure you, Your Honor,
14 if we want to re-visit financing on Wednesday, we are
15 only financing the amount that the company believes would
16 prevent irreparable harm between now and Wednesday. It
17 may be 30. There are times that the company told us it
18 was 40. I can only tell you this, Your Honor. We are
19 not eager to willy-nilly send money across the transit.
20 I think this order is good enough. If I'm going to ask
21 for a long time, I may ask for things I didn't get for
22 the rest of the money. We are coming in with the minimum
23 request we can.
24 THE COURT: Let me finish and you-all
25 can get a chance to talk again. I just don't know

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1 THE COURT: Did you ask for a draft of
2 the budget or anything? I understand that they have been
3 working on it.
4 MR. HELLER: It's available and will
5 continue to be available. The Trustee has been great and
6 I hope he thinks we are forthcoming. It is being revised
7 and will be revised.
8 MR. ANDAZOLA: I'm aware of the
9 difficulties that counsel is operating under.
10 THE COURT: We are all working under a
11 draft. I have a draft that is yellow-lined that is two
12 generations old. I hear what you are saying, Mr.
13 Andazola.
14 Is there anybody else before we get into the
15 rebuttal responses? It doesn't look like there is
16 anybody here except the remaining foods broker? Do you
17 want to get in this fight.
18 FROM THE AUDIENCE: I will stay out.
19 THE COURT: All right.
20 MR. GOFFMAN: First of all, we do know
21 that the U.S. Trustee is doing his job and is very
22 professional about it. We know that the Trustee prefers
23 notice.
24 Notwithstanding that, let me see if I can
25 address the issue. First, with respect to the notice,

1 4001(c) says in Section 1, "A motion for authority to
2 obtain credit shall be made in accordance with rule 9014
3 and shall be served on any committee elected," or if it's
4 a Chapter 11 reorganization case no committee of
5 unsecured creditors has been appointed on the creditors,
6 on the list of the Rule 1007(d). 1007(d) is the list of
7 20 largest creditors. Therefore we have complied with
8 the specific rules that are set forth.

9 With respect to the hearing, Section
10 4001(c)(2), it clearly states that the court is allowed
11 to order, enter an order on less than 15 days' notice
12 authorizing the obtaining of credit only to the extent
13 necessary to avoid immediate and irreparable harm.

14 All the evidence in front of this court, the
15 declaration of the CFO of this company, clearly and
16 unequivocally states and show that there is irreparable
17 harm. It's not just a statement, it is logical sense.
18 The stores are there. We are losing customers every
19 single day. Every single day that goes by without food
20 in the stores means that we are continuing to deplete our
21 resources in the stores. It means we are losing
22 customers. It means our employees are getting more and
23 more concerned.

24 If we can't restock those stores by this
25 weekend, knowing that this company is already in Chapter

1 11. people will go to the stores this weekend to see what
2 it is like for this company in Chapter 11.

3 If they are barren, they won't come back and
4 if they don't come back, we can't make this case work.
5 We need the customers, therefore we need the product, and
6 we need it now. If I could have come in and said, I only
7 need a few million dollars to carry me a few days I would
8 have said so. It was a very difficult discussion to meet
9 with the banks and other lenders on basically 24 hours'
10 notice and say we need \$33 million and we need it
11 basically all day 1.

12 Their reaction was similar, why do you need it
13 all day 1? When we walked them through the analysis,
14 they came to the same conclusion we did. You need to
15 prime the pump. You need to jump start the business.
16 You need to bring the customers back. The attorney
17 representing some of our most significant trade creditors
18 have some of those significant concerns. We spent the
19 last couple of hours talking through the order and
20 analysis and I'm happy to say that we have their full
21 support.

22 No one has pointed to a single provision in
23 this order which anyone objects to, other than the fact
24 that the unsecured committee has not yet been formed.
25 Let's talk about due process. It has been said that due

1 process means the notice due under the circumstances.
2 Under the circumstances of a file that requires \$33
3 million on an interim basis, we did more than what due
4 process would require.

5 We sent out notice to all the parties required
6 under Rule 4001(c) and 1007(d) even before we filed the
7 petition in this case and people showed up.

8 This was a pretty packed courtroom today.
9 There were a lot of people here represented. There is
10 over half of the debt of this company represented. Most
11 of the major players are represented. Met Life is
12 represented, our larger trade creditors are represented.
13 They are all standing up saying "Judge, we have to do
14 this and we have got to do it now." We are satisfied due
15 process, all the evidence shows there will be irreparable
16 harm. We satisfied all the notice provisions and trying
17 to save the company and keep 4900 employees that need to
18 continue to be employed and maximize the value to all the
19 parties. Let's again remember all of that is happening
20 here. The only thing that is happening under this order
21 is that secured lenders who have already put in well over
22 \$100 million in the aggregate are putting in another \$33
23 million to buy more product from unsecured creditors on
24 COD terms to restock the stores. There is no conceivable
25 basis that anyone could have a reasonable objection to

1 it. Nobody is being harmed here.

2 It would truly be a travesty if because of the
3 formality of not having yet formed the creditors
4 committee in this case that we don't approve the DIP
5 financing that is absolutely required to save this
6 company.

7 I firmly believe that if it is approved today
8 we have an excellent chance of having a strong healthy
9 company that will be reorganized. I also firmly believe
10 that if it is not, we have a disaster on our hands.

11 There is no one that will attend an Unsecured
12 Creditors Committee tomorrow who will want to hear, "We
13 turned down the financing today and there is nothing left
14 for you guys to do, you might as well go home, you are
15 not going to get any money." That's irreparable harm.
16 We ask Your Honor to approve the order, subject to the
17 attachments.

18 THE COURT: Mr. Heller.

19 MR. HELLER: Mr. Goffman doesn't leave
20 much to say. I won't repeat it. I'm going to add some
21 points that go beyond that. The Constitutional process
22 for due process is a taking. We are not taking, we are
23 giving. That ought to be abundantly clear.

24 Your Honor, we inadvertently have a
25 typographical error. In paragraph 20 there is reference

1 to the fact and the Trustee points it out. "All of the
2 provisions of this order shall be final and binding on
3 debtor and all creditors and other parties in interest
4 and their successors and assigns upon entry of this
5 order," with the exception of 5 and 8. That exception
6 will be deleted from the order. It's a carryover from
7 the Apple Valley Company case, in which the company went
8 on the cross I might add.

9 Judge, I do want to say something about what
10 the Trustee said. We respect the energy and the
11 professionalism that maybe I invited. This is an interim
12 order. I'm being candid with the court that it has the
13 effect of being final because so much money that can't be
14 paid back is loaded. It is an interim order. I think
15 the Trustee respectfully misapprehends what interim
16 means. Interim means as to that money on an interim
17 basis that's the relief.

18 I have heard the court's attempt to say,
19 "Well, look, you understand this is just interim. You
20 can come back here in three weeks and I can take this all
21 away, in which case we have not funded." That is not
22 what interim means I respectfully suggest. The rules are
23 very clear and the code is clear that what is interim is
24 the first baby step to protect them from irreparable
25 injury. What makes this final is the chunk of cash that

1 you on my behalf and Mr. Goffman's behalf, and I assure
2 the Trustee if we can go down short of that 30 million
3 between now and Wednesday, we will and we will be back
4 here on Wednesday to resume whatever hearing that the
5 Trustee or Your Honor deems appropriate for any unfunded
6 amount.

7 THE COURT: I got lost on the last
8 comment you made, Mr. Heller. I wasn't planning on
9 coming back next Wednesday.

10 MR. HELLER: My point is that's great.
11 I want the record to reflect, Your Honor, that the lender
12 as part of its good faith will do whatever Your Honor
13 believes is required to minimize the amount of money on
14 the basis of this order. I don't think Wednesday is
15 necessary, either. I guess I misread whatever. I want
16 to make sure if Your Honor rules that I'm supposed to be
17 back, we will be here.

18 THE COURT: I'm not ruling that. The
19 assumption I have made is that the budget is as lean as
20 it can be without being so lean that it doesn't do any
21 good. The folks who already have 100 million into this
22 are not enamored with the thought of loaning any more
23 money, but are doing this out of absolute necessity, and
24 the consequence of which the budget is being looked at
25 with a gimlet eye and what gets put into this company is

1 this company has never attempted to pay back. I dare say
2 if the Unsecured Creditors Committee got together and
3 said, "We like that deal, that's a great deal." If they
4 want to band together, they can come up with 30 million.
5 I have seen the names of the creditors, they can take my
6 position. It's something they can reverse in they think
7 I got a sweetheart deal. We know that's not going to
8 happen.

9 Judge, the debtor complied with the rules. We
10 are candid and forthcoming and negotiated to the minimum
11 levels because the necessity of the circumstances give us
12 leverage and we have not overreached. I think, Judge,
13 you get it and I know deep down the Trustee gets it. I
14 know their wives shop at Furr's. I think we all did the
15 right thing there. I think the right thing happens to be
16 in compliance with 4001(c) and happens to be in
17 compliance with the requirements of the code and is
18 appropriate and proper and unless the court is
19 comfortable about that as well, I have been instructed to
20 take a pass. We want people to be as comfortable as they
21 can, not having it revisited. The financial institutions
22 that have committed to this, have committed on this
23 basis. Your Honor, what I understand your instruction to
24 me and Mr. Goffman is to be damn sure we are not
25 borrowing money we don't need. I hear that and I assure

1 less than what the company wants and more than what the
2 lenders want and there is that balance that arises and
3 that will come out in the form of the budget.

4 MR. HELLER: That is exactly what is
5 going on back at the office.

6 THE COURT: Mr. Davis.

7 MR. DAVIS: I just want to address one
8 point that wasn't covered, and that was Mr. Andazola's
9 proposition that 5 million or 10 million might be the
10 better approach in the interim. I just want to say that
11 I don't believe that works and the trade creditors don't
12 believe that works because the company has an operating
13 level of expenses with 70 stores and 4900 employees and
14 partially stocking the shelves doesn't get us to where we
15 want to be and I don't think that's a successful
16 solution. I just want to address the point that a
17 partial purchase of trade goods I don't think is in
18 anybody's interest.

19 THE COURT: I'm sure it is the
20 situation that the more Fritos there are on the shelves,
21 the better the world is.

22 MR. DAVIS: Exactly right.

23 THE COURT: Anybody else that wants to
24 address this particular issue? I think that there is
25 certainly an adequate basis for finding that unless this

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1 order is approved essentially in the form that it has
 2 been submitted to the court, together with the two
 3 attachments that are supposed to go with it, the budget
 4 and the term sheet.
 5 MR. GOFFMAN: Yes, Your Honor.
 6 THE COURT: That this reorganization
 7 will fail, and that this company will fail.
 8 Obviously there is no guarantee that even if
 9 this loan is made that the company won't fail. It is
 10 clear to me that the company will fail and the
 11 reorganization will fail unless this money is put in and
 12 based on the comment that I just made about how I assume
 13 the numbers were arrived at and particularly the \$33
 14 million, it seems to me that to fund it or approve less
 15 than \$33 million is probably the equivalent of doing the
 16 same thing as not funding anything, just making life a
 17 little more miserable for the debtor and everybody else a
 18 little bit longer.
 19 I think that based on the record in front of
 20 me and the presentations of counsel, et cetera and the
 21 record comprised of the declarations of Mr. Mortenson,
 22 together with his testimony this morning affirming or
 23 adopting his first declaration, at least, that this court
 24 ought to approve and therefore will approve an interim
 25 order authorizing the debtor to obtain secured financing

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1 how to enter these orders is Ms. Anderson, that comes in
 2 at 8:00 in the morning. It seems to me that I probably
 3 ought to look at it.
 4 There is a biweekly school function that goes
 5 on that keeps me every other Friday from getting into the
 6 office until 9:30 or a quarter to 10:00. Tomorrow is one
 7 of those days. However, it seems to me that we need to
 8 deal with this problem the first thing in the morning.
 9 I would assume the sooner you can get the word
 10 out to the employees and everybody that you have the
 11 money and the order is docketed, that's what I mean by
 12 entering the order, docketing it, the better off
 13 everybody is going to be. Otherwise we may end up
 14 wasting a substantial part of the goodwill in terms of
 15 just approving this order.
 16 I don't think it's appropriate for me to sign
 17 off on the order until I see the budget and the term
 18 sheet. Can you have one delivered?
 19 MR. GOFFMAN: That's what I was going
 20 to suggest. We can have it delivered anywhere you want.
 21 We have done it in other cases, in emergencies.
 22 THE COURT: Why don't we do the
 23 following. If you don't mind, we need to have two copies
 24 delivered.
 25 First of all, let me ask this question. Do I

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1 and granting adequate protection and granting other
 2 relief. I will do that.
 3 I understand the United States Trustee's
 4 concerns, but I really think the analogy or the metaphor
 5 used by Mr. Heller earlier is really one that makes
 6 sense. You get the committee all convened and everything
 7 and basically tell them, "It's a week after the case is
 8 filed and the debtor is floating belly up. As a
 9 committee you can all stand around and observe." I
 10 suppose. That would not be good it seems to me. Partly
 11 because it definitely benefits the trade creditors and
 12 you are secured creditors and the working folks at this
 13 company. I'm comfortable that order ought to be
 14 approved.
 15 I guess the next question is some mechanics at
 16 this point. You-all need this as early as possible.
 17 MR. GOFFMAN: The question is what is
 18 the earliest time we can present it to Your Honor with
 19 the budget and term sheet attached?
 20 THE COURT: Part of that depends on
 21 when you have the budget and the term sheet ready to go.
 22 MR. GOFFMAN: My instructions are that
 23 nobody goes home until it's done. The people that I can
 24 instruct.
 25 THE COURT: The person that knows best

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1 have a clean copy of the interim order?
 2 MR. GOFFMAN: You have a clean copy.
 3 The only change we want to make is what Mr. Heller
 4 mentioned the typographical error.
 5 THE COURT: Eliminate the section that
 6 says "Except for 5 and 8 which are."
 7 MR. GOFFMAN: Yes. We would give you
 8 a clean copy.
 9 THE COURT: That will be fine. Do
 10 that. Here is what my proposal is. I will sign the
 11 order this evening because what with kids and all it's
 12 just difficult to get in that early on such short notice.
 13 I guess what I'm thinking is this. If I
 14 review the budget, and I will take my copy of this home
 15 basically to match the two together, if I could look at
 16 the budget and term sheet, if you could put it in the
 17 mailbox in my house I will read it by 5:00 or 6:00
 18 tomorrow morning.
 19 MR. HELLER: Thank you.
 20 THE COURT: Have somebody here at 8:00
 21 to walk in the door and walk upstairs to give a copy of
 22 the term sheet and budget to be attached to Exhibits A
 23 and B respectively to this order, to Ms. Anderson.
 24 I will call her at that point and say, in fact
 25 I will leave a message for her before saying, assuming as

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1 soon as you get that, attach it, enter it and there you
2 are. Whoever it is can wait there and get a copy printed
3 out.
4 MR. CARR: Your Honor, guessing, I
5 will be the one doing this. Is that in chambers or the
6 courtroom?
7 THE COURT: Room 209. She usually
8 opens at 8:00 in the morning. Downstairs they open the
9 door at 8:00.
10 MR. CARR: Thank you, Your Honor.
11 MR. GOFFMAN: I assume one has your
12 home address.
13 THE COURT: Actually we are in the
14 phonebook. I will give it to you.
15 MR. FISH: The question is e-mail or
16 both?
17 THE COURT: I can give you my home
18 e-mail number if you want. First of all the street
19 address, 925 Truman, Northeast -- as in the president.
20 The way you get there is you go - Those of you from
21 Albuquerque, you go to San Mateo and Constitution and you
22 go one block west. That's Truman. It comes up from the
23 south and so you turn south, which is left and it's the
24 first house on the right where the big sycamore tree is.
25 You can just drop it in the mailbox at any time, day or

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1 that one. The fourth one this afternoon that we did
2 late.
3 MR. GOFFMAN: The utilities?
4 MR. CARR: The shorten notice, Your
5 Honor, the last one?
6 MR. GOFFMAN: How can we help you?
7 Should we get you a new order?
8 THE COURT: What I want to make sure
9 is just that we get all these orders entered that we all
10 talk about and I assume we can do that tomorrow.
11 MR. GOFFMAN: Mr. Carr will be here
12 tomorrow morning to drop off everything. When Your Honor
13 gets in, Your Honor will get in around 10:00, we will
14 make sure that Mr. Carr or someone else is here with
15 clean copies of all the orders so we can figure out which
16 ones have been entered and make sure Your Honor has
17 copies of those that haven't been.
18 THE COURT: What I was going to
19 suggest is as follows: I don't have to have them here
20 promptly. If you want them entered promptly at 10:00 or
21 9:45, as soon as I get in I will start signing orders if
22 that's soon enough for you. If you want to take a little
23 more time, walk them over at 10:30 or 11:00, I will be
24 here all day.
25 MR. GOFFMAN: I suspect we will be

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1 night.
2 MR. GOFFMAN: We will do that and also
3 e-mail a copy.
4 THE COURT: If you want to e-mail a
5 copy, my AOL, the one at home is Jim Starzynski,
6 JIMSTARZYN@AOL.com.
7 MR. GOFFMAN: We have two clean copies
8 with the changes we discussed.
9 THE COURT: Okay.
10 MR. HELLER: Thank you so much. Your
11 Honor.
12 THE COURT: Sure. We have got some
13 other orders that I approved. I don't think I signed all
14 of them yet.
15 MR. GOFFMAN: I think Your Honor did
16 three.
17 THE COURT: I have entered a total of
18 four, so far. I did the interim cash collateral order.
19 I did the bank arrangement order.
20 MR. GOFFMAN: And the employees.
21 THE COURT: And the employee benefits
22 order.
23 MR. GOFFMAN: The customer practices,
24 the rain check refund?
25 THE COURT: I don't think I entered

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1 here at 9:45.
2 THE COURT: Okay. What I was trying
3 to do is have a look to see if there is a way to just
4 tell.
5 MR. GOFFMAN: The reason for that,
6 Your Honor, so everyone understands, we will be sending
7 memorandums to the employees and press releases and we
8 want it to be accurate when we say we have orders entered
9 approving all of this.
10 THE COURT: Sure.
11 MR. GOFFMAN: That's the only reason.
12 THE COURT: That makes sense to me.
13 In fact, I think that's definitely advisable. Let me see
14 what the fourth one is, if it has already been docketed.
15 MR. GOFFMAN: The claims agent,
16 possibly?
17 THE COURT: No, with respect to the
18 claims agent - No, that one hasn't been entered.
19 You-all are going to come over and talk about that
20 tomorrow.
21 MR. JACOBVITZ: Yes, Your Honor.
22 THE COURT: That needs a little input
23 from the clerk's office, from IT.
24 As a matter of fact, what you-all ought to do
25 is take with you before you leave, on the J-Net, which is

1 the AO's website, we have a whole set of instructions in
2 how to deal with a mega case. One of them deals with
3 claims and how you deal with them and some requirements
4 that they supposedly have. You all may have read these
5 already. I may be telling you what you already know.

6 I have a copy of that. If you want to have a
7 copy look at that so you can be somewhat familiar with it
8 before you come over and talk to Ms. Merryweather or Ms.
9 Gay or Ms. Romero, I would be glad to give that to you
10 before you walk out.

11 MR. JACOBVITZ: That would be helpful
12 to me.

13 THE COURT: What I show we entered an
14 order granting the motion for all pre-petition payment of
15 employee obligations. An emergency stipulated order by
16 and between the U.S. Trustee and Furr's authorizing
17 interim use of cash collateral. An order granting the
18 motion authorizing the maintenance of existing bank
19 accounts, et cetera.

20 Those were the first three that were entered
21 as you are aware and the fourth one that I got this
22 afternoon and I signed it at 4:30 or so, 5:00- - Am I
23 imagining it? There was just those three?

24 MR. GOFFMAN: I think we just had the
25 three done. We will make sure we have all the others

1 here in the morning.

2 THE COURT: I know there was one in
3 there for her to sign right now that hasn't been signed.
4 It has NOT been signed, but is ready for entry.

5 MR. GOFFMAN: Thank you, Your Honor.

6 THE COURT: If somebody wants to come
7 around we can have a look at that and go through the list
8 quickly and see which ones you get entered. We don't
9 need to do that on the record I don't think. We have the
10 pro hac vice orders, and we talked about scheduling. Do
11 the orders write in what the scheduling is?

12 MR. GOFFMAN: Yes.

13 MR. SILVERMAN: There is not an
14 objection, just merely a hearing date. I would ask the
15 court to set the time to send a notice.

16 MR. GOFFMAN: Your Honor gave us the
17 objection date. I will make sure the notice goes out
18 telling the people what the objection date is.

19 THE COURT: Quick question. Paragraph
20 26 says this order will be effective as of the signature
21 by the court.

22 MR. HELLER: I think we can all
23 stipulate when Your Honor- - Your Honor, whatever you
24 please. If you would like to change the language on its
25 face or we recognize the change. However you wish.

1 THE COURT: I'm crossing that out now
2 so there is no question about it. Okay. I signed this
3 interim order authorizing debtor to obtain secured
4 financing, et cetera.

5 This is the one that will be on Ms. Anderson's
6 desk tonight and there to greet her tomorrow morning when
7 she walks in.

8 MR. GOFFMAN: Your Honor, on behalf of
9 the debtor and all its employees, we truly thank you for
10 what you have done today. You have gone above and beyond
11 to be here. I think we have done a good thing. I think
12 we have put the company on good footing.

13 THE COURT: I think you-all have done
14 good work. I do what the government pays me to do. It's
15 the best job in the world.

16 MR. HELLER: Did you say something
17 about gimlets earlier? Is that an order?

18 THE COURT: Mr. Jacobvitz and Mr.
19 Goffman, at least you two can come through here so we can
20 get that stuff done, and otherwise we will be in recess.

21 (Evening recess at 9:18 p.m.)

22 The above hearing was taken stenographically
23 and is true and correct to the best of my ability.

24

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Joe Jameson

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.
Tax I.D. No. 22-3137244

Case No. 11-01-10779 SA

Debtor.

**UNITED STATES TRUSTEE'S OBJECTION TO ENTRY OF FINAL ORDER
(1) AUTHORIZING DEBTOR TO INCUR POST-PETITION SECURED
INDEBTEDNESS, (2) GRANTING SECURITY INTEREST, (3) MODIFYING THE
AUTOMATIC STAY AND (4) GRANTING OTHER RELIEF**

The United States Trustee for the District of New Mexico hereby objects to the entry of a final order (1) Authorizing Debtor to Incur Post-petition Secured Indebtedness, (2) Granting Security Interest, (3) Modifying the Automatic Stay and (4) Granting Other Relief (Final Order)

As her reason therefore, the U.S. Trustee states:

1. The Interim Order preliminarily authorizing the Debtor to incur post-petition secured indebtedness (entered herein on February 9, 2001 at docket no. 32). at paragraph 9 provides that the collateral securing the indebtedness of the post-petition lenders shall not be subject to the provisions of 11 U.S.C. § 506 (c).

2. In the unlikely event that this matter is converted to a chapter 7 proceeding, it is entirely foreseeable that a chapter 7 trustee would incur costs and expenses in preserving property constituting collateral.

3. It is highly inequitable and violative of due process for a Final Order to waive a future chapter 7 trustee's rights under §506 (c) and that provision should be stricken.

4 The U.S. Trustee has been informed that negotiations are ongoing with respect to finalizing loan documentation, including the credit agreement and security agreements. As a



consequence, creditors and interested parties should be given a reasonable time in which to review and object to loan documents, once they have been completed.

Respectfully submitted,
BRENDA MOODY WHINERY
United States Trustee

Filed electronically 3/1/01
Ron E. Andazola
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(505) 248-6544

The undersigned certifies that a true and accurate copy of the foregoing was mailed and sent by telefacsimile to the below listed counsel this 1st day of March, 2001.

Filed electronically 3/1/01
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Debtor.

No. 11-01-10779 SA

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for Final Hearing on Motion for Debtor-In-Possession Financing before The Honorable JAMES STARZYNSKI, United States Bankruptcy Judge, at the hour of 9:00 a.m., on Wednesday, March 14, 2001, in Albuquerque, New Mexico.

A P P E A R A N C E S

For the Debtor: Richard Levin, Esq.
David Thuma, Esq.

For the Lenders: Paul Fish, Esq.
William Keleher, Esq.
Josef Athanas, Esq.

For MetLife: Jennie Deden Behles, Esq.

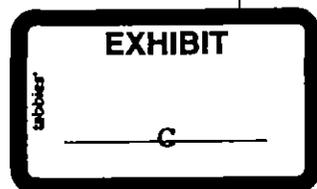
For GE Lighting: Dave Thomas, Esq.

For the UCC: William Davis, Esq.

For NN Beverage, Southern Wine & Spirits, National Distributing: Michael Cadigan, Esq.

For the Office of the United States Trustee: Ron Andazola, Esq.

COPY



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1 THE COURT: Good morning. We are here in
2 Furr's Supermarkets, Inc., Number 11-01-10779, a Chapter
3 11 case.
4 And what is on the docket this morning is
5 essentially a final hearing on the motion for debtor-in-
6 possession financing and the objections thereto.
7 Before we get started, let's take roll and
8 find out who all the folks are here this morning.
9 MR. LEVIN: Good morning, Your Honor.
10 Richard Levi, Skadden, Arps, appearing for debtor and
11 debtor-in-possession. With me is David Thuma of
12 Jacobovitz, Thuma & Walker, also for the debtor and
13 debtor-in-possession.
14 MR. ANDAZOLA: Ron Andazola for the U.S.
15 Trustee's Office.
16 MR. DAVIS: William Davis on behalf of the
17 unsecured creditors committee.
18 MS. BEHLES: Jennie Deden Behles on behalf
19 of Metropolitan Life Insurance Company of New York.
20 MR. FISH: Paul Fish and Bill Keleher from
21 Modrall, Sperling Law Firm. With us is Josef Athanas
22 from Latham & Watkins.
23 THE COURT: Okay. I think we have got
24 everybody then that's listed. For Heller Financial, are
25 you also for the Fleet Capital Corporation and Bank of

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1 sometimes juxtaposed to the other lenders and that is the
2 problem that we have.
3 THE COURT: Okay. Do we have any more
4 folks? Let's see, starting on this side over here
5 because there is fewer on this side.
6 MR. THOMAS: Your Honor, I'm Dave Thomas
7 of Dave Thomas & Associates in town, representing GE and
8 GE Lighting who filed an objection and also GE Capital
9 Business Assets who filed an objection.
10 THE COURT: H-m-m-m-m. Let's get the rest
11 of the appearances down so we can go from there.
12 MR. CADIGAN: Your Honor, I am Mike
13 Cadigan for New Mexico Beverage, Southern Wine & Spirits
14 and for National Distributing Company. We also filed an
15 objection to the interim financing.
16 THE COURT: For New Mexico Beverage is
17 that?
18 MR. CADIGAN: Yes, sir.
19 THE COURT: Are you here for somebody, Mr.
20 Arland?
21 MR. ARLAND: Your Honor, depending on your
22 perspective, I am either serving or working in the
23 shadows but I am not entering an appearance.
24 THE COURT: All right. Mr. Fenstermacher?
25 MR. FENSTERMACHER: Don Fenstermacher,

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1 America as well?
2 MR. FISH: Yes, sir.
3 THE COURT: And then there was a whole --
4 I noticed as we got closer to the filing date on this
5 there were more and more people who were lending more and
6 more money to the debtor essentially.
7 MR. FISH: It is a little convoluted, Your
8 Honor, but Heller is actually the agent for Phalen, Bank
9 of America and Fleet and MetLife, although there are
10 tensions between MetLife and what we call the bank
11 lenders. Ms. Behles is here and will speak for MetLife
12 and some of those tensions, I think, will be the subject
13 of a little bit of discussion this morning because those
14 tensions are ongoing, if that clarifies everything.
15 Judge. If you have any questions, just ask.
16 THE COURT: Did you want to add something,
17 Ms. Behles?
18 MS. BEHLES: I think on behalf of
19 Metropolitan Life it is fair to say Heller is, indeed,
20 the agent for the lender group including MetLife in
21 regard to certain of the loans and certain of the
22 collateral situations.
23 However, there are some loans and some issues
24 that are not covered by the co-lender agreements for
25 which Metropolitan is on their own, as it were, and

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1 Earthgrain Baking Company: we're just here to observe
2 this morning.
3 THE COURT: Oh, okay. Anybody else
4 intending to participate this morning?
5 Okay. Let me ask this question.
6 Mr. Thomas, with respect to GE Capital, have
7 you -- you-all have filed an objection; is that correct?
8 Are you pursuing that objection?
9 MR. THOMAS: For GE Capital, yes, Your
10 Honor. Our objection for GE Capital Business Assets
11 Financing is a very simple objection. I don't think we
12 have a problem --
13 THE COURT: Don't tell me about the
14 objection particularly. I just need to know, and the
15 reason is because I and my family have holdings in
16 General Electric. We own some GE stock.
17 Under The Canons of Judicial Ethics I am not
18 allowed to decide anything in which I have a financial
19 interest and I clearly have, under any definition
20 including that of the Judicial Canons, an interest in GE.
21 So I cannot decide an objection that's raised
22 by GE Capital. That's the problem. I have to either
23 recuse on that specific matter -- I don't think it
24 requires that I recuse from the entire case, but I cannot
25 decide your objection, to the extent it is active. I just

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1 simply can't decide it. I have to recuse from that
 2 matter. We will have to find somebody else to decide
 3 that issue.
 4 MR. ATHANAS: Your Honor, Josef Athanas.
 5 On behalf of the Heller lenders, we believe we will be
 6 able to resolve this at least today to his satisfaction.
 7 If later there is a dispute over validity of liens, it
 8 may be we will need another judge to decide that issue.
 9 MR. THOMAS: It is my understanding that
 10 based on both objections for the two GE entities, we have
 11 at least what I'll call a tentative understanding as a
 12 workout at this point and there's no ongoing dispute per
 13 se about either objection, one being that the equipment
 14 is leased and not encompassed in the lien being primed
 15 here today and the other being that there's a
 16 financing -- we're going to take that part of the -- my
 17 clients finance the light bulb inventory and that's going
 18 to be taken out also as a part of this financing.
 19 MR. ATHANAS: I think we will be able to
 20 resolve this over the course of today. I think there
 21 will be no dispute with GE today. In the future there
 22 could conceivably be, but right now I think I want to go
 23 on record as saying I hope your stock improves.
 24 THE COURT: Well, so do I; thank you.
 25 Well, okay. I think, just to be on the safe

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1 approved by Judge McFeeley, if he thinks it is
 2 appropriate.
 3 Obviously it is an independent decision he
 4 makes without my input.
 5 MR. ATHANAS: Can I make a suggestion,
 6 Your Honor? To speed things up, perhaps we can reach
 7 agreement, they can withdraw their objections and then
 8 you will have never heard the objections and the language
 9 will be in the order, would that work, Your Honor?
 10 THE COURT: Yes. I am not going to even
 11 hear their objection, period. You know, whatever you all
 12 do is okay.
 13 MR. ATHANAS: If we were to withdraw the
 14 objection after resolving our disputes in the order, I
 15 assume then you would have never heard the objection, it
 16 will be withdrawn, you can sign the order?
 17 THE COURT: Sure. That seems to me
 18 appropriate.
 19 MR. ATHANAS: We'll get that at the close
 20 of the hearing, if that's all right. So we can go on
 21 to --
 22 MR. THOMAS: If we can work out the
 23 language, we can work that out.
 24 THE COURT: Okay. We won't -- I will not
 25 be hearing your objection for GE or any related creditor.

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1 side, that what we need to do is not have on the docket
 2 today any consideration of the GE motion. All right.
 3 If you all do have a further dispute with
 4 respect to that, we will send you up to Judge McFeeley or
 5 find some other judge to resolve that issue. That seems
 6 to me a way to make this work.
 7 Is that all right, Mr. Thomas?
 8 MR. THOMAS: In other words, we are not
 9 going to consider my notion that I have here filed today?
 10 THE COURT: I cannot consider your motion
 11 that you have here filed today.
 12 MR. THOMAS: Even if we stipulate? I'm
 13 just trying to -- even if we're able to stipulate to
 14 verbiage in the order and get that, that we could agree
 15 to?
 16 THE COURT: As I read the Canons, I am not
 17 allowed to, I think, even pass on or to approve an agreed
 18 upon order.
 19 What I have done in previous circumstances
 20 such as this, if there is an agreed upon order, is ask
 21 Judge McFeeley to pass on it, sign the order if
 22 necessary.
 23 If there is a settlement, for example, what I
 24 have done before is ask the parties to go upstairs to the
 25 sixth floor, read the settlement into the record, have it

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1 MR. THOMAS: I understand. I appreciate
 2 your position, Your Honor.
 3 THE COURT: But we can -- there is a way
 4 to get you a decision relatively quickly, get the parties
 5 a decision relatively quickly, we will simply use another
 6 judge.
 7 MR. ATHANAS: If we don't reach agreement,
 8 which I am sure we will, we will ask for that.
 9 THE COURT: All right. Good stuff. Thank
 10 you, Mr. Thomas.
 11 MR. THOMAS: Thank you.
 12 THE COURT: And, Mr. Athanas, thank you as
 13 well.
 14 With respect to what is going on this morning,
 15 what are the remaining objections that we still have to
 16 deal with.
 17 MR. LEVIN: Good morning, Your Honor. The
 18 liquor license, the liquor distributors' objections have
 19 been resolved and there is language in the proposed final
 20 DIP order that resolves those objections.
 21 Ms. Gottlieb representing Premier Distributing
 22 asked us, however, to announce on the record one aspect
 23 which I will put on the record at her request.
 24 I must compliment her on her creativity on
 25 this one. She has seen an issue that I still don't fully

1 understand and because neither I nor counsel for the
2 lenders had thought of it, we, of course, never intended
3 in the language of the order to exclude it.

4 And that is, that she asserts that Premier may
5 have claims against some banks, not the lenders, but
6 banks that were processing checks. She wants to make
7 clear that nothing in the order would affect any right
8 she would have against third-party banks upon those
9 checks that they were processing.

10 And we never intended to have any effect on
11 those, we didn't even think of what she thought of. I
12 really salute her for coming up with that theory. I am
13 hoping she will explain it to me when we have a few
14 moments to do that.

15 THE COURT: Okay.

16 MR. LEVIN: The objection of GE Lighting,
17 I don't know if it has formally been withdrawn. I
18 believe there is language in the draft order that
19 resolves that objection and if that is withdrawn, that's
20 not on the table.

21 THE COURT: Let's just -- is GE Lighting a
22 subsidiary of General Electric?

23 MR. THOMAS: Yes.

24 THE COURT: Let's just not talk about GE
25 Lighting or any GE stuff, period.

1 MR. LEVIN: I didn't say anything about
2 them. I withdraw what I said.

3 There are three objections from a variety of
4 taxing agencies in Texas. I have seen pleadings
5 withdrawing each of those objections.

6 Again, there is language in the final DIP
7 order that resolves that that will be presented today.
8 It's the same kind of language that protects the liquor
9 distributors, the same language.

10 And that leaves, I believe -- I'm sorry, there
11 is an objection from the unsecured creditors committee.
12 I'm sure Mr. Davis can speak to that.

13 But our understanding is that the final order
14 has been modified to make them comfortable with the final
15 DIP order and they are not pursuing their objection any
16 further.

17 And finally, there is the objection of the
18 U.S. Trustee related to Section 506(c) that has not been
19 withdrawn and that has not been resolved.

20 Mr. Athanas on behalf of the lender will be
21 arguing that objection. As the debtor in possession on
22 that, although it is our motion and the U.S. Trustee's
23 Office is objecting to our motion, we feel somewhat like
24 an innocent bystander here on this issue. We certainly
25 understand the position of both parties.

1 But the condition to lending is that the order
2 read as it is and if the order is not granted as is, then
3 the lenders have full discretion to withdraw, not lend
4 any further and we close down the company. We are the
5 women and children being held hostage and we hope that
6 they can either resolve it or that the Court will resolve
7 it in a way that allows lending to continue and allows
8 the business to continue.

9 Other than that, I think that covers all of
10 the objections. I think Mr. Athanas made a reference to
11 it before and that is, unfortunately, we understand that
12 the lenders are not yet prepared to sign off on the final
13 order themselves because of intercreditor disputes and
14 disagreements about the intermediate agreement they are
15 supposed to sign in connection with funding this.

16 So our suggestion today is that we move
17 forward on the only remaining objection and get that
18 resolved. And then I think we are going to have to ask
19 the Court for a time later today to come back, once the
20 lenders have resolved their own dispute among themselves,
21 so that we can then go forward with a final order.

22 THE COURT: Is there any thought about
23 presenting -- I reread Mr. Mortonson's Affidavit in
24 support of the DIP financing order which I have to say
25 bears a remarkable resemblance to the first five or six

1 or eight pages of the financing order itself by some
2 coincidence.

3 Is anybody planning on putting on any evidence
4 or asking that any evidence be put on? That question is
5 directed not only to the debtor, but to the lenders and
6 to the objecters, particularly the U.S. Trustee's Office.

7 MR. LEVIN: Your Honor, it bears a
8 striking resemblance because we wanted to make sure there
9 was an adequate record to support the findings that the
10 Court made and we don't intend to put on any further
11 evidence today.

12 MR. ANDAZOLA: We don't intend to put on
13 any evidence, strictly legal arguments.

14 MR. ATHANAS: The lenders feel the same
15 way.

16 THE COURT: I don't recall actually from
17 that first day just what -- the 8th of February, I think
18 actually, I don't recall that I actually admitted into
19 evidence that second Affidavit by Mr. Mortonson. My
20 recollection is that I admitted into evidence the first
21 affidavit.

22 In fact, Mr. Mortonson testified, basically
23 stood up and said, "Yes, that's what I meant to say. I
24 still mean it." that sort of thing.

25 I don't recall that the second Affidavit was

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1 ever actually admitted into evidence. It was something
2 that occurred to me later on.
3 Is there any reason not to move it into
4 evidence now so that you have got a record?
5 MR. ATHANAS: I was not aware it had not
6 been entered. I would move admission.
7 Mr. Mortonson, I might add, is present in the
8 courtroom, available to testify and affirm what is in his
9 second declaration.
10 THE COURT: I don't see any need to do that
11 particularly unless there is an objection to its
12 admission now.
13 Is there any objection?
14 Not hearing any, it will be admitted.
15 Okay. It may have been admitted earlier. I
16 didn't remember from my notes, looking at my notes, it
17 had been admitted the first time around.
18 Okay. Then the situation where we go from
19 here is to what, have some argument in connection with
20 the 506(c) objection that was raised by the U.S. Trustee
21 and the second objection as well that was raised by the
22 U.S. Trustee? Is that the remaining issue to be dealt
23 with this morning other than the secured creditors
24 figuring out between themselves what they want to do?
25 MR. ATHANAS: I believe that's the only

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1 to what we're talking about for the liquor distributors,
2 yes, that's the final draft with that one exception.
3 THE COURT: And the magic language you're
4 talking about --
5 MR. LEVIN: It is in Paragraph 6(b) with a
6 parenthetical. In the long paragraph 6(b), "other than
7 the claims of," and there's a long list of creditors,
8 each of whom filed an objection.
9 MR. ATHANAS: It is 6(a), Your Honor.
10 MR. LEVIN: I'm sorry, 6(a).
11 THE COURT: Okay. I see. All right.
12 Thank you. Okay.
13 MR. BEHLES: Your Honor?
14 THE COURT: Yes, ma'am.
15 MS. BEHLES: On behalf of MetLife, I am
16 given to understand that some conversation occurred
17 between Mr. Athanas and my co-counsel Mr. Silverman and I
18 have spoken with the unsecured creditors committee and
19 there are a couple language changes that need to be
20 interlined in this order for the comfort of MetLife.
21 I believe we are able to agree on all of them
22 with everybody with the exception of one as regards the
23 unsecured creditors committee and they are just some
24 clarification that I think we'll put in at the end, once
25 we get -- the Court has heard the argument on the U.S.

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1 remaining issue.
2 MR. CADIGAN: New Mexico Beverage has not
3 been in contact with Furr's to work out language in the
4 order. I am sure the language requested by Premier will
5 probably make New Mexico Liquor Distributors happy. We
6 haven't seen it, however.
7 MR. LEVIN: I'm sorry; that was my
8 oversight. I thought we had been in touch with you. I
9 apologize. It is the identical language.
10 THE COURT: I see you have one of those
11 one-inch orders, also.
12 MR. LEVIN: Just so the record is clear,
13 the purpose of the language is to make clear that nothing
14 in the order primes any valid, perfected, pre-petition
15 lien that the liquor distributors might have.
16 THE COURT: Okay.
17 MR. LEVIN: There is some priming language
18 in the order. The liquor distributors and the Texas
19 taxing agencies are exempted from that priming language.
20 THE COURT: And this is in the -- let me
21 just say this morning about five minutes before we came
22 in, we received the final draft of -- I gather what is
23 the final draft of the final order on financing.
24 MR. LEVIN: Well, except for the objection
25 that we hope will be withdrawn with some language similar

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1 Trustee's objection and so forth.
2 THE COURT: Okay. I think we ought to do
3 that.
4 This would be a good time to address the
5 language that is also in Paragraph 6(a) which
6 specifically includes GE Lighting.
7 I am not sure you don't need a separate order
8 to deal with that is my problem under the Canons.
9 Mr. Levin.
10 MR. LEVIN: It's certainly easily enough
11 done, although I guess the question would be, if their
12 objection has been withdrawn, does that language still
13 pose problems under the Canons?
14 THE COURT: Well --
15 MR. LEVIN: By the way, I understand, Your
16 Honor, there are some Canons that are waivable. I don't
17 know if this is a waivable Canon.
18 THE COURT: I don't think so. I hadn't
19 anticipated this problem before I walked out here just
20 now so what I will do before we make any decision is go
21 back, have a look at the Canons. If you all want an
22 extra copy of the Canons so you can look at them as well,
23 you're welcome to. There are several copies lying around
24 my office.
25 My recollection is financial interest is one

1 of those things that is not waivable explicitly and that
2 there has been lots of decisions and so forth about that.

3 I guess let's go forward with what we have
4 got, then you all can have a look at that. We can --
5 particularly if there doesn't turn out to be a conflict.
6 Even if there is a conflict, we can deal with it, it
7 seems to me, relatively easily by virtue of the fact we
8 have another judge here, we have time today to enter
9 whatever appropriate order needs to be entered.

10 It sounds like the final draft of the -- well,
11 it really isn't a final draft --

12 MR. LEVIN: As it turns out, I had
13 understood from Heller's counsel this morning that they
14 had not agreed on the MetLife changes and MetLife had
15 withdrawn its insistence on those changes. I am a little
16 bit surprised by Ms. Behles' comments this morning. But
17 they are clarifying, they are not substantive changes.

18 THE COURT: None of my comments are
19 intended to be a criticism of anybody. I understand,
20 frankly, my sense is this has been a difficult case in
21 terms of financing so far and that the parties have spent
22 lots of really hard hours trying to work things out for
23 which I really commend counsel and the parties for
24 working on this and getting as far as they have so far.

25 Let's see, would it make sense, Mr. Andazola,

1 to start out with you?

2 MR. ANDAZOLA: Yes, Your Honor.

3 Our objection is based on Paragraph 9 of the
4 interim order authorizing the financing. I apologize if
5 our objection was somewhat inartfully drawn, but I'll try
6 to state what the basis of the objection is, Your Honor.

7 Essentially, Your Honor, Paragraph 9 states, I
8 quote, in the middle of that paragraph -- it is Page 11
9 of the interim order "No costs or expenses of
10 administration or other charge, lien, assessment or claim
11 of any person or entity shall be imposed against the
12 Pre-Petition Senior Lender MetLife or the other Lenders,
13 their pre-petition or post petition claims."

14 Your Honor, there are essentially two bases
15 for the objection. First of all, Your Honor, this
16 provision essentially says that, in effect says that the
17 pre-petition claims of the lenders will have priority
18 over administrative claims.

19 Your Honor, at this point the schedules and
20 statements have not been filed. To the extent there is
21 an unsecured portion of the pre-petition lenders' claims,
22 that would in essence put the unsecured portion in a
23 priority position over administrative claims and also
24 give them preference over payment to unsecured creditors.

25 That's certainly objectionable from our view.

1 THE COURT: I didn't understand that's
2 what the order was purporting to do.

3 My understanding of what the order was
4 purporting to do was to say to the extent that the
5 creditors, secured creditors are, in fact, secured to
6 certain collateral and that there is sufficient depth to
7 use of the value of the collateral, so to speak, that the
8 debtor is basically saying that to the extent there was
9 collateral which was -- in which the secured creditor had
10 a perfected security interest, that that collateral would
11 not be subject to administrative claims.

12 And so that if there was an unsecured portion
13 of the debt, somewhere along the line, I didn't
14 understand that that would take priority over the
15 administrative -- over any administrative claims.

16 MR. ANDAZOLA: If I misunderstood that,
17 Your Honor, then we would certainly withdraw the
18 objection.

19 It is just from reading the language of this
20 particular section that we had some question and it
21 appeared that the interpretation could be made that the
22 unsecured portion of the pre-petition debt could
23 potentially have a priority.

24 If the Court feels that that's not the case,
25 then we would withdraw the objection, at least on that

1 basis, Your Honor.

2 THE COURT: Maybe we should -- I think you
3 have got another objection as well?

4 MR. ANDAZOLA: Yes, Your Honor.

5 THE COURT: The other objection
6 essentially being that folks haven't seen financial
7 documentation, therefore, they reserve the right to file
8 objections.

9 And my thought would be if somebody had an
10 objection on that basis, I think they could have raised
11 it or whatever.

12 But the one that seems to me really
13 significant is the one that you have raised, the first
14 one essentially but let me make sure.

15 Did I misinterpret the order?

16 MR. ATHANAS: Your Honor, you interpret it
17 as we intended it. However, as I read it, you know, the
18 Trustee doesn't necessarily have a bad point. I think it
19 is very inclusive, "No costs or expenses of
20 administration ... shall be imposed against the
21 Pre-Petition Senior Lender MetLife or the Lenders, their
22 pre-petition or post petition claims ... or any of the
23 collateral."

24 And I think what we mean with respect to the
25 pre-petition claims, because the Trustee's point is they

1 are pre-petition secured claims which. Your Honor, is
2 what we intended.

3 THE COURT: Okay.

4 MR. ATHANAS: Well, and that --

5 THE COURT: Does that fix that problem
6 then?

7 MR. ANDAZOLA: Yes, Your Honor. I think
8 that would take care of that prong of the objection.

9 Essentially, the second prong of the
10 objection. Your Honor, other than what was stated in the
11 objection itself is that 506(c) rights should not be
12 waived as to any Chapter 7 Trustee who might be
13 subsequently appointed in this proceeding.

14 And essentially, Your Honor, the research that
15 we have done indicates that a provision waiving the
16 506(c) rights is essentially contrary to public policy
17 and also is imposing or deleting a fiduciary
18 responsibility of a Chapter 7 trustee.

19 Your Honor, for that proposition I have copies
20 of three cases which I would like to cite from and I have
21 copies for the Court and for counsel, if you would like
22 to have those.

23 THE COURT: I can get copies in the
24 library -- I guess what I really need is cites -- if you
25 want to save your copies and pass them out to anybody

1 else here.

2 Have you distributed those already to anybody
3 else?

4 MR. ANDAZOLA: No, Your Honor. I haven't.
5 I'm sorry.

6 THE COURT: All right.

7 MR. ANDAZOLA: Your Honor, the first case
8 is In re Ridgeline Structures, Inc. --

9 THE COURT: What was that, Ridge --

10 MR. ANDAZOLA: Ridgeline Structures, Inc.

11 THE COURT: Ridgeline.

12 MR. ANDAZOLA: Yes, Your Honor. And
13 that's 154 BR 831. It is a Bankruptcy Court case from
14 the District of New Hampshire, a 1998 case.

15 The second case is In re Brown Brothers, Inc.
16 That's 136 BR 470. It is a District Court case from the
17 Western District of Michigan, 1991.

18 And the third case is In re Willingham
19 Investments, and that's at 203 BR 75. And that's a
20 Bankruptcy Court case from the Middle District of
21 Tennessee. That's a 1996 case.

22 THE COURT: That was Willingham?

23 MR. ANDAZOLA: Yes, W-I-L-I-N-G-H-A-M.

24 THE COURT: Okay. All right. And the
25 thrust of that is that you're saying it can't be waived?

1 MR. ANDAZOLA: Yes, Your Honor. The cases
2 make pretty clear that it is contrary to public policy.

3 In particular, the Brown Brothers case at Page 474 of
4 that opinion states, "The cash collateral which grants"
5 -- the creditor in that case was Comerica -- "grants to
6 Comerica a post-petition lien on all of debtor's assets
7 attempts to immunize Comerica from surcharge payment
8 obligations under 11 USC 506(c). Such provision is not
9 enforceable in light of the congressional mandate that a
10 Trustee have the authority to use a portion of secured
11 collateral for its preservation or proper disposal."

12 THE COURT: Okay. I'll just let you know
13 before I rule on this, I have got to read the cases, hear
14 the other side's arguments and that sort of thing as
15 well.

16 MR. ANDAZOLA: Essentially those three
17 cases, I think, stand pretty strongly for the proposition
18 that it is contrary to public policy to essentially
19 hamstring a Chapter 7 -- potential Chapter 7 Trustee on
20 down the road. And the cases have held that those
21 provisions are not enforceable.

22 In these cases we're talking about cash
23 collateral orders, but there is no provision or no reason
24 why they should not apply to DIP financing agreements as
25 well.

1 Now, Your Honor, in addition to the policy
2 that was enunciated in the three cases I have cited,
3 there is, I think, a recent Supreme Court case that
4 speaks to this issue as well. And that's Hartford
5 Underwriters Insurance Company vs. Young Planters Bank
6 case at 530 U.S. Page 1.

7 And that case -- essentially in that case the
8 Court essentially stated that a Trustee's right to pursue
9 claims under 506(c) is not only a right, it is part of a
10 Trustee's fiduciary obligation.

11 Your Honor, apparently the Court did not state
12 this apparently to make maximum recovery for the estate
13 or get reimbursement to the estate for expenses that it
14 incurred in securing collateral that debtor may have
15 liens on.

16 So essentially, Your Honor, what we are saying
17 is that it is a fiduciary duty and the Supreme Court has
18 said it is a fiduciary responsibility of a Chapter 7
19 Trustee that should be pursued.

20 And I would think that would add to the force
21 of the argument that it is contrary to public policy to
22 waive that provision at this point in time.

23 Now I anticipate that the lenders would argue
24 that 506(c) would have the net effect of imposing on
25 their collateral value and reducing the return to them.

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1 However, Your Honor, the Hartford Underwriters
2 Insurance Company case has essentially restricted what
3 was, I guess, a practice in other jurisdictions which
4 allowed creditors to come in and pursue rights under
5 506(c).
6 As I'm sure the Court is aware, the Hartford
7 Underwriters case essentially held that it is only the
8 Trustee that can pursue 506(c) rights and as well the
9 Court in that case did not or specifically withheld any
10 decision on whether there is a derivative right under
11 which creditors can come to the Court and ask the Court
12 to exercise the Trustee's right when the Trustee refuses
13 to act on 506(c) claims.
14 Your Honor, even if that's the case, creditors
15 would have to come to this Court to ask for permission to
16 use that derivative right and we would respectfully
17 contend that with that requirement, that the exposure
18 that the creditors would have is severely limited. That
19 essentially creditors would have to come and make a
20 substantial showing to the Court that they would have a
21 derivative right.
22 Finally, Your Honor, we would argue in
23 connection with this that it is the U.S. Trustee's policy
24 that Trustees act in the interest of the creditor body as
25 a whole and not as essentially agents for individual

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1 am anticipating one of the arguments by the lenders. I
2 would assume that they would argue that 506(c) would be
3 used against them by creditors in a case where there was
4 very limited assets that were not subject to liens and
5 that creditors would attempt to abuse 506(c) authority to
6 try to in essence get a preference for themselves in
7 payment of their claims.
8 What I am saying, Your Honor, is that if a
9 creditor comes and tries to manipulate A trustee to get
10 that derivative right to somehow abuse that authority
11 under 506(c), that the U.S. Trustee would take the
12 position that that was not a proper exercise of a
13 Trustee's authority.
14 THE COURT: Okay. That was the reason.
15 also, you were talking about the derivative rights that
16 was not addressed in the Henhouse or Young Planters case,
17 right?
18 MR. ANDAZOLA: Yes, Your Honor.
19 THE COURT: Okay. I see what you're
20 saying.
21 I have to say that I had sort of assumed,
22 basically, with the creditors, what they were essentially
23 saying is that if they were going to lend this other \$33
24 million or \$34 million which my understanding from the
25 previous hearing they have probably already lent by now,

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1 creditors.
2 Essentially what we would contend, Your Honor,
3 is that when a Trustee comes in to exercise 506(c)
4 rights, those rights would be exercised for the benefit
5 of the entire creditor body and not to benefit individual
6 members of that creditor body and essentially benefit one
7 as opposed to benefitting the group as a whole.
8 Your Honor, essentially our argument then is
9 that is contrary to public policy and it also deprives or
10 removes a fiduciary responsibility from a Trustee in a
11 Chapter 7 situation.
12 We respectfully contend that the provision in
13 the DIP financing agreement is violative of those
14 policies and that it should be nonenforceable with regard
15 to a Chapter 7 Trustee, should that become necessary on
16 down the line in this case.
17 THE COURT: And your third point was the
18 Trustee has a duty to represent all creditors instead of
19 just an individual creditor?
20 MR. ANDAZOLA: Yes, Your Honor.
21 THE COURT: Okay. I certainly agree. I
22 don't think anybody would disagree with that proposition.
23 I guess it seems to me -- I guess I'm not quite sure how
24 it is relevant.
25 MR. ANDAZOLA: Well, Your Honor, I guess I

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1 is what little -- from their perspective what little
2 collateral they have, they pretty much don't want
3 anybody, including the Trustee even, standing in his or
4 her own right, taking a chunk of for some reason or
5 other, but okay.
6 MR. ANDAZOLA: I guess in connection with
7 that, Your Honor, I think 506(c) is pretty clear by its
8 terms what the Trustee gets is what the Trustee has
9 incurred in expenses to protect the collateral.
10 And certainly in this case it is foreseeable a
11 Trustee may have to secure inventory or possibly have to
12 run a store or two in the event of a conversion for a
13 limited period of time.
14 It is simply not equitably to have a Trustee
15 be put in that position without being able to at least
16 get paid for the expenses that would be incurred in doing
17 that.
18 THE COURT: Yes, of course, I guess that
19 if that circumstances were to occur, then it would be one
20 thing simply for the Trustee to look at as to whether he
21 or she even wants to make an attempt as opposed to just
22 simply scheduling a 341 meeting and then sifting through
23 the ashes.
24 MR. ANDAZOLA: Yes, Your Honor.
25 Well, I think at this point it is really hard

1 to, I guess, look forward to a situation where a Trustee
2 would be appointed. Certainly if you have got groceries
3 that are sitting on a shelf for whatever reason, they
4 must be disposed of quickly, the Trustee might be called
5 upon to act pretty quickly to take care of them.

6 Your Honor, I guess my experience has been
7 that the circumstances that arise on conversion are not
8 necessarily always easily anticipated and there can be a
9 variety of issues that come up and that it is just not
10 equitable at this point in time to remove a potential
11 recovery of expense or recovery of contribution to
12 collateral from a Trustee's right.

13 And, Your Honor, our position would be that
14 506(c), in fact, benefits the collateral of the lenders
15 and that it is just simply inequitable that they not have
16 to compensate a Trustee for expense which is incurred on
17 their collateral.

18 THE COURT: Okay

19 MR. ANDAZOLA: Thank you.

20 THE COURT: All right. Anybody else want
21 to side with the Trustee on this argument -- with the
22 U.S. Trustee, I'm sorry? I am not quite at that stage
23 yet fortunately.

24 MR. ATHANAS: I am rising because I want
25 to side with them.

1 THE COURT: That would be a stunning
2 development, wouldn't it? Yes, sir. You're going to
3 oppose?

4 MR. ATHANAS: I do oppose them.

5 Your Honor, the secured lenders, when they
6 decided they were going to loan another \$33 million to
7 this company, did not decide to lend them \$34 million or
8 \$35 million, they decided to loan \$33 million.

9 Those cases cited by the U.S. Trustee are
10 cases in which the lender did not do the right thing,
11 like we did. Instead they said, "We are not going to
12 lend you any new money, you can use cash collateral on a
13 limited basis, but we are not going to lend you any new
14 money."

15 The difference here is we're lending \$33
16 million of new money.

17 There are some assets in this case in which we
18 don't have a lien, preference actions, fraudulent
19 conveyance. The Trustee might use that money to do those
20 things, to pay landlords or do other things and might
21 come back to us under 506(c) and ask for more money.

22 When we made this deal, the deal was \$33
23 million and that's it. So part of our bargain for
24 lending the \$33 million was we weren't going to have to
25 loan any more.

1 And so we would like, obviously, for there to
2 be a 506 waiver. We have asked for a 506 waiver in
3 exchange for the \$38 million which we already have put in
4 the company. There's not a lot we can do about it now.

5 THE COURT: Except, of course, that you
6 could then say there's essentially been a default,
7 whatever the technical term is for default.

8 MR. ATHANAS: We could. Maybe we will get
9 to see that Chapter 7 Trustee sooner than we think.

10 Needless to say, I don't think that's in
11 anyone in this courtroom's best interests.

12 With respect to the U.S. Supreme Court case,
13 that case was really all about whether third parties
14 could assert 506(c) claims and the U.S. Supreme Court
15 said we don't think they can and certainly in that
16 particular case, they said they couldn't.

17 THE COURT: The underlying issue was not
18 whether that was their right to make a surcharge under
19 506(c), simply what said demanding to do it right. THE
20 REST of it is essentially dicta, of course, which from
21 the Supreme Court may be a little heavier dicta than
22 somebody else's would be, but it is still dicta.

23 MR. ATHANAS: Right, and I will read a
24 little bit of that dicta to Your Honor.

25 One provision of that order says that, "In any

1 event, we do not sit to assess relative merits of the
2 different approaches to various bankruptcy problems. It
3 suffices that the reading of the text produces the
4 result."

5 And the result was that the debtor or the
6 Trustee has the sole right under 506(c) if they have
7 those rights.

8 And there is not a provision in the Bankruptcy
9 Code that says they can't waive those rights. They can
10 waive rights.

11 We're asking them to waive that right. In
12 return we give them \$33 million. We think they have got
13 the better end of the bargain, frankly.

14 But, you know, we don't want to lend \$34
15 million or \$35 million and we don't want to be made to
16 loan another \$4 million or \$5 million. We don't want an
17 unlimited tail on the loan.

18 It is \$33 million in exchange for, among other
19 things, a 506(c) waiver. That's all.

20 THE COURT: Do you have any case law -- I
21 don't know when you became aware of that specific case
22 law or the nuances of the specific objection that was
23 being raised by the Trustee.

24 Do you have any case law that purports to
25 suggest that Ridgeline and Brown Bothers and Willingham

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1 were wrongly decided?
 2 MR. ATHANAS: Your Honor, because they are
 3 cash collateral cases, I think they are irrelevant but
 4 were they to somehow be deemed to apply to our situation,
 5 to be honest, Your Honor, I didn't anticipate that these
 6 cases would be brought up. I didn't anticipate that they
 7 would suggest the debtor doesn't have the right to waive
 8 506(c) at all.
 9 I personally have been involved in well over
 10 100 cases on behalf of secured lenders and have received,
 11 you know, at least 95 506(c) waivers in courts all over
 12 the country. Never here in New Mexico, Your Honor, but
 13 practically every jurisdiction in the country.
 14 I know that judges do grant that relief and
 15 certainly, although I can't cite a reported case, I have
 16 been involved in cases in which secured lenders have
 17 gotten that relief.
 18 THE COURT: Okay.
 19 MR. LEVIN: Your Honor, if I may be heard?
 20 I know I said Mr. Athanas was going to carry the
 21 argument, but there is some addition points I think might
 22 be useful to consider. Since the company would like to
 23 stay in operation, I am going to press the point a little
 24 bit.
 25 The first point I would like to make is that

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1 are, what the value of them might be. I'm sure there are
 2 actions. Some of them may be valid, some not. But we
 3 certainly don't have any tote up of the value yet.
 4 THE COURT: I think the other thing is
 5 that clearly the Trustee has an obligation under 554 not
 6 to try to administer somebody else's property simply to
 7 generate fees or for any other reason.
 8 MR. LEVIN: In fact, there was a case that
 9 says that under 506, if the trustee is not benefitting
 10 the secured creditor, he should abandon.
 11 THE COURT: No question about it. The
 12 problem is the language is still there in 506(c) which
 13 means that the drafters of the Code in their wisdom --
 14 and I will tell you that as we watch another piece of
 15 bankruptcy reform legislation working its way through
 16 Congress, that the original product that came out of the
 17 1978 Bankruptcy Reform Act was one of the finest pieces
 18 of legislation that Congress ever put together;
 19 internally consistent, addresses a huge number of issues
 20 that the vast majority of us never even think of in our
 21 careers in bankruptcy.
 22 It is wonderful, which leads me to come to the
 23 conclusion that 506(c) is there, it is there clearly for
 24 a reason; that there must be some circumstances in some
 25 instance, some circumstances in which it will come about

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1 Section 554 of the Bankruptcy Code largely deals with
 2 this problem. If the assets are of inconsequential
 3 benefit to -- or I'm sorry, of inconsequential value or
 4 benefit to the estate, the Trustee may abandon them.
 5 I think the point of the debtor-in-possession
 6 financing order and the leaning on waiver of 506(c) is to
 7 say that the secured creditors are going to have to deal
 8 with and dispose of that collateral. In effect they are
 9 not going to burden the Trustee with that. They are not
 10 providing the Trustee direct wherewithal to do that.
 11 Whatever benefit or value there is in those assets is
 12 going to go to the benefit of secured creditors.
 13 We're talking about inventory and other assets
 14 disposal. It's not quite so time sensitive or difficult
 15 in terms of hiring people to deal with them as inventory
 16 is.
 17 So I think 554 deals with that problem
 18 adequately. As Mr. Athanas points out, there are
 19 unencumbered assets for the estate from which the Trustee
 20 can pursue any other costs and expenses of
 21 administration.
 22 THE COURT: We don't really know at this
 23 stage for sure whether there are any preferences or
 24 fraudulent transfers available, do we?
 25 MR. LEVIN: We don't know whether there

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1 that the Trustee is appropriately administering some
 2 property and taking care of some property in which a
 3 secured creditor has an interest and, therefore, ought to
 4 get surcharged.
 5 MR. LEVIN: Your Honor, the provision is
 6 there as a codification of prior case law under the act.
 7 And I am trying to look for the quote of the provision
 8 right now. My recollection is that that provision is
 9 permissive, discretionary with the Court, it is not
 10 mandatory. And, therefore, the concept is --
 11 THE COURT: Are you saying that there is
 12 discretionary language in 506(c)?
 13 MR. LEVIN: Yes, I am looking for the
 14 language right now. Yes.
 15 "The Trustee may recover," may recover, not
 16 shall recover, "the reasonable, necessary costs and
 17 expenses of preserving or disposing of such property to
 18 the extent of any benefit to the holder of such claim."
 19 Reasonable and necessary are very
 20 discretionary words: "to the extent of any benefit."
 21 Those are very discretionary words, not a mandatory
 22 demand by Congress, that there be a carving out of the
 23 secured creditors' collateral whereby the Trustee assumes
 24 the task of disposition or preservation or disposal of
 25 that collateral.

1 Certainly in this case and most cases like
2 this, the secured creditor will have the greatest
3 interest in preservation and disposition of that
4 collateral. Secured creditors will be far more motivated
5 than the Trustee. They are the ones who not only have
6 the \$33 million new money but also 38 million old dollars
7 at stake.

8 I think the bargain that the secured creditors
9 make in this situation is central because the secured
10 creditor is so much more motivated than the Trustee. The
11 secured wants to be able to control disposition rather
12 than being pushed aside by the Trustee and saying, "I
13 know best how to dispose of your collateral." That's
14 part of the bargain here.

15 THE COURT: I think we can all grant those
16 arguments easily.

17 It is just in a particular instance such as
18 Mr. Andazola suggests, if somebody's got to run a store
19 or whatever and in the process administer the collateral
20 or take some steps to actually preserve it. Although we
21 have had cases before here, where, you know, the
22 Trustee -- there were rotting vegetables essentially and
23 the smartest thing that the Trustee did was just look at
24 it and say, "I am going to let them rot. It is not my
25 problem. It is probably the landlord's problem, but not

1 my problem."

2 MR. LEVIN: You start out of by saying if
3 someone's got to run the stores and administer the
4 collateral. The Trustee doesn't have to run the store.
5 There is no obligation on the Trustee in a Chapter 7 to
6 run the store.

7 THE COURT: But the fundamental issue
8 comes down to it is really hard to anticipate any
9 specific circumstances that may arise and what we're
10 doing right here is we're making a prediction. If I sign
11 the order exactly as such which says there is not going
12 to be any circumstance out there in which the Trustee
13 really ought to be running the store or administering any
14 of the collateral for the benefit of anybody including
15 the secured creditors, in essence he does the rest of the
16 work that he or she may do.

17 MR. LEVIN: I must say it is somewhat
18 painful to argue the secured creditor's position here,
19 but nevertheless, I think what we're saying in the order
20 is the deal is the secured creditor get to control its
21 own collateral. That's what we're saying. Whatever the
22 circumstances may be and with advancing all this new
23 money, that's not an unreasonable bargain along that
24 line. This is, as I say, approved by courts all over the
25 country all the time as part of the bargain for the

1 money.

2 Your Honor, turning to these cases. I
3 appreciate Mr. Andazola handing out copies. The first I
4 heard of them, of course, was as he presented them to the
5 Court. It allowed me to, at least, see from a different
6 perspective in addition to Mr. Athanas' perspective, as
7 to why they are distinguishable.

8 First of all, let's turn to the Supreme Court
9 case. As we have already pointed out, that was a
10 standing case, wasn't a substantive case.

11 Let's read a couple sentences in which the
12 Supreme Court made that dicta Mr. Andazola cited talking
13 about policy concerns of the Supreme Court. That would
14 be at page 1949 of 120 Supreme Court 1950.

15 "Although these concerns may be valid policy
16 concerns, it is far from clear that the policy in any
17 case favors petitioner's position. The class of cases in
18 which Section 506(c) would by far belong without non
19 Trustee use is limited by the fact that the Trustee is
20 obligated to seek referral under the section whenever his
21 fiduciary duty so requires."

22 It doesn't say the Trustee has a fiduciary
23 duty to seek recovery, but it simply says when his
24 fiduciary duty requires, he is obligated to go seek
25 recovery. That's the first case.

1 Turning to Ridgeline Structures decided by
2 Judge Yacos, in this case the issue was not a 506(c)
3 waiver per se, but rather an attempt under 506 to
4 insulate the creditor from its own conduct.

5 Judge Yacos in that case at Page 832, the FDIC
6 was ordered -- the FDIC in the proposed stipulations and
7 order -- again this is cash collateral, not DIP
8 lending -- provided for itself that, "no expense of
9 administration will be charged against the secured party
10 under 506(c), no matter what action, inaction or
11 acquiescence by FDIC might occur. That is against public
12 policy and unenforceable per se. This Court is not
13 authorized to and never would insulate any party from the
14 consequences of their conduct no matter how egregious."

15 It was an advance waiver of misconduct that
16 was against public policy, not advance waiver of 506(c).

17 In the comments, Judge Yacos discussed In re
18 Film Equipment Rental decided by the Southern District of
19 New York District Court in which similar use of cash
20 collateral order was enforced and Judge Yacos comments,
21 "However, in that case there was no assertion of any
22 egregious conduct which would render enforcement
23 unconscionable."

24 Clearly that case was, the 506 waiver was a
25 future misconduct waiver.

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1 The Willingham Investment case, if you look at
2 the facts of that case, Your Honor, the creditor, secured
3 creditor who was complaining about the use of 506(c), had
4 actually requested that the compensation be incurred to
5 benefit the collateral. There was an implied waiver
6 argument in that case.

7 THE COURT: I'm sorry, would you say that
8 sentence again?

9 MR. LEVIN: The secured creditor had
10 requested that the 506(c) expense be incurred. It was an
11 implicit request, it wasn't an explicit request, but
12 there was some implied waiver argument in that case
13 rather than it is impermissible or against public policy
14 to waive Section 506(c).

15 That case was not on all fours on its
16 particular facts.

17 In the Brown Brothers case where Comerica was
18 the lender, this was the case of an attorney bringing an
19 action and I believe, if I'm not mistaken, it was a
20 voiding power action where he had a contingent fee
21 secured lender. I don't recall for sure. I read this
22 quickly. It was a voiding power action.

23 In any event, the secured lender had a
24 security interest in the proceeds of that action and the
25 lawyer was seeking his fee out of recovery in that action

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1 Your Honor, first of all, when we are talking
2 about recovery under 506(c), we are not talking about a
3 huge amount of money, therefore, we are not talking about
4 increasing a line of credit from \$33 million to \$34
5 million.

6 Essentially what we're talking about in terms
7 of the statute are services that are rendered by the
8 Trustee that have a benefit to the collateral of the
9 secured lenders. Why shouldn't the Trustee at least be
10 reimbursed at least for the benefit that's incurred by
11 the lenders from preservation of collateral?

12 Secondly, Your Honor, I think the cases that
13 we have cited certainly bring into question the
14 questionability of putting this provision in the interim
15 financing agreement.

16 I believe it was in the Brown case sort of
17 invalidates that provision as far as the lawyer was
18 concerned since it would be highly inequitable to let a
19 lawyer take nothing from having pursued a preference
20 action and getting recovery for the estate and for the
21 secured lender.

22 THE COURT: Had the lawyer been on notice,
23 by any chance?

24 It sounds to me, without having read the
25 case -- and we're going to take a break, I am going to

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1 long after. 506(c) provision orders had been entered
2 early in the case and the Court said, "This lawyer
3 created these proceeds for the secured lender, I'm not
4 going to enforce 506 orders in this particular case. It
5 is not a public policy issue. 506 waivers are not
6 enforceable."

7 That was based on the facts of the case and
8 the particular recovery that lawyer had made and, of
9 course, we all support those cases where the lawyer
10 should get paid out of the recovery, but --

11 MR. ATHANAS: The lenders may disagree
12 with that.

13 THE COURT: Except secured lenders'
14 lawyers.

15 MR. LEVIN: But the important point is it
16 is very distinguishable from the proposition Mr. Andazola
17 cites this case and all these cases for.

18 On that, we would sit down.

19 THE COURT: Anybody else want to oppose
20 the Trustee's objection, speak in support of the
21 opposition to the Trustee's objection?

22 If you want to follow up with any comments,
23 Mr. Andazola.

24 MR. ANDAZOLA: Yes, Your Honor. Just a
25 couple of comments.

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1 read the case. We're talking about Brown Brothers.
2 Middle District of Tennessee?

3 MR. ANDAZOLA: Actually I think it was
4 Michigan, Western District of Michigan. Your Honor.

5 THE COURT: But you're talking about a
6 situation where early on the lawyer went out, did all the
7 work, got the recovery and then the secured creditor came
8 in and said essentially that's our money, don't give a
9 third of it to the lawyer for the work that was done: is
10 that right?

11 MR. ANDAZOLA: That's right; that's right.

12 THE COURT: So the lawyer essentially took
13 a risk, but the lawyer was not on notice that there would
14 not be any kind of recovery, right, of his fees or her
15 fees, whoever it was?

16 MR. ANDAZOLA: I guess, Your Honor -- I
17 don't remember the facts of that case that well -- I
18 think there was a notice issue in there, but it was
19 notice of the employment of the lawyer was apparently not
20 given to the secured lender in the case.

21 So I'm not -- but I don't recall if there was
22 a notice issue with respect to the lawyer.

23 I guess the other point I would just raise.
24 anybody who wants to -- if the Trustee would want to come
25 and get recovery under 506(c), he's going to have to come

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1 to this Court.
 2 The lenders seem to assume, you know, there is
 3 going to be some bad faith by the Trustee. If the
 4 Trustee comes, he's going to have to present
 5 circumstances that meet the requirements of that statute,
 6 that he incurred necessary costs and expenses and that as
 7 a result of his preservation and disposition of that
 8 property, there was benefit to the creditors.
 9 It seems -- it is hard for me to understand
 10 why a lender or holder of a security interest would be
 11 opposed to compensating a Trustee for a benefit that is
 12 received by that lender.
 13 I guess the other point that I would make,
 14 Your Honor, is that there have been any number of times
 15 where cases have been converted to Chapter 7, the Chapter
 16 7 Trustee, when faced with some emergent circumstance,
 17 isn't going to sit down and pore through documents,
 18 security agreements, financing statements and find out if
 19 a creditor has a security interest in the property.
 20 The first thing that the Trustee is going to
 21 do is try to secure that property before he or she goes
 22 and determines whether or not there is security interest
 23 or whether there's any equity in the estate under that
 24 property.
 25 That is, I think, just a little unreasonable

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1 MR. ANDAZOLA: Probably not, Your Honor.
 2 What we're talking about here is essentially a claim just
 3 for reimbursement by a Trustee that essentially is a
 4 miniscule amount in comparison with the \$33 million of
 5 new financing that has been extended, not to mention the
 6 \$50 million plus in prepetition secured debt from these
 7 lenders.
 8 THE COURT: I guess the question is,
 9 whereas the debtor is not able to tell us what kind of
 10 value there is, recoverable value in the fraudulent
 11 conveyance and preferential transfers, if any, you can't
 12 even say at this point that the amount would be
 13 miniscule, can you? Who knows whether it would be
 14 \$100,000? That claim by the Trustee might be \$100,000,
 15 might be a million. There is no way to really tell that,
 16 is there?
 17 MR. ANDAZOLA: Well, Your Honor, I guess
 18 for -- just for preservation of collateral, in all
 19 likelihood it's not going to be a large amount of money.
 20 THE COURT: How do we know that?
 21 MR. ANDAZOLA: I guess we don't, Your
 22 Honor, and we really don't know either whether or not
 23 this is a deal killer for the lenders.
 24 Looking at cold, hard reality, the lenders are
 25 only going to recover, maximize their recovery if this

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1 in terms of the reality of the situation.
 2 Again, I just concur with the Court's comments
 3 that we just cannot anticipate the circumstances that
 4 might arise in the future in the event of a conversion.
 5 It would be really inequitable to hamstring a
 6 Trustee if he or she finds himself in a position where he
 7 has to secure and preserve property and then tell him,
 8 sorry, your rights to recover for expenses were waived a
 9 year ago when the interim financing order was entered.
 10 THE COURT: Do you take seriously the, for
 11 lack of a better term, the threat of lack of financing
 12 and immediate liquidation that we're hearing this
 13 morning?
 14 MR. ANDAZOLA: Your Honor, I seriously
 15 doubt it. Certainly it's in the interests of the lenders
 16 to see this reorganization succeed. If they pull the
 17 plug at this point, you're talking about liquidation
 18 which is going to substantially reduce the value of the
 19 collateral of the lenders who are the lenders in this
 20 case certainly are not going to opt for liquidation value
 21 of this debtor as opposed to an orderly reorganization or
 22 sale, whatever the reorganization plans are.
 23 THE COURT: Suppose they do pull the plug?
 24 Would the creditors be better off with a Chapter 7
 25 Trustee?

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1 proceeding continues to a successful conclusion. That's
 2 going to be maximization of their recovery.
 3 And again, Your Honor, this is -- this is
 4 something that has to be brought before this Court and a
 5 Trustee has to justify the reasonableness of the call
 6 that he or she make under 506(c).
 7 We're just talking about equity here, Your
 8 Honor, we're not talking about the potential for abuse.
 9 This Court has control over that particular matter.
 10 THE COURT: Okay. Anything else?
 11 MR. ANDAZOLA: No, Your Honor.
 12 THE COURT: Okay. Anything else, folks?
 13 MR. ATHANAS: If I can make just four
 14 quick responses. I do want to move things along.
 15 THE COURT: I guess I can gather what the
 16 first one is.
 17 MR. ATHANAS: We certainly don't like the
 18 Trustee's comment because we have already put up so much,
 19 what's a few million more. We feel very differently and
 20 I'm sure if it was the Trustee's money, he would, too.
 21 Just so Your Honor gets an idea of the volume,
 22 just one month's rent alone is a million to a million and
 23 a half. That's one month. That's one month. Doesn't include
 24 utilities; doesn't include anything else.
 25 So we're talking about real money here to run

1 the stores for one month. You can imagine what kind of
2 dollars we can conceivably be talking about.

3 Point number two, there was a lot of
4 discussion about the Brown Brothers case. That's really
5 a case of some lawyer asserting 506(c), just got
6 overruled by the U.S. Supreme Court.

7 The U.S. Supreme Court says in that case,
8 third parties at least in that particular instance, in
9 most instances, are not allowed to bring 506(c) claims.

10 The third point is, look, we're a financial
11 animal. Secured lenders are in it for the money. We're
12 going to do what's in the best financial interest. If
13 keeping the stores running or a Chapter 7 case is in our
14 best financial interests, I suspect we're going to be the
15 one that funds it and probably we can do it more
16 efficiently than the U.S. Trustee can or the Chapter 7
17 Trustee can, rather.

18 And we're going to do, if we decide a Chapter
19 7 Trustee can do it more efficiently than us, we will
20 probably reach some sort of agreement with the Chapter 7
21 Trustee. We don't want the Trustee deciding that,
22 frankly. We are sophisticated lenders, we can decide
23 that ourselves.

24 Fourth point is, it is interesting to
25 anticipate what a Chapter 7 Trustee will do in this

1 circumstance. The deal here, Your Honor, was we put in
2 \$33 million, either we have a confirmed plan or it is
3 over. And that's the deal.

4 And I had a case which was almost identical to
5 this for Heller Financial called Garden Grove, a case out
6 of Portland, Oregon, ultimately, unfortunately, in that
7 case we didn't get a plan and instead everything blew up,
8 a Chapter 7 Trustee was appointed.

9 I received a phone call from that Trustee and
10 he said, looks like the secured lenders are the only ones
11 with any money here. If you want to file a motion for
12 relief from automatic stay, I won't oppose. In other
13 words, I am not doing anything. This is your money.

14 And I think that's a reasonable position for a
15 Chapter 7 Trustee to take. I think it's the position
16 they should take.

17 We are sophisticated financial institutions.
18 We know what we're doing when it comes to our money.

19 That's all, Your Honor.

20 THE COURT: I thought Point Number One was
21 basically going to be we really do mean it. I gather
22 that's what Point Number Four is. The deal is this order
23 or no deal.

24 MR. ATHANAS: That's correct.

25 MR. LEVIN: To that point, Your Honor. I

1 want to cite a case that happened in Los Angeles in the
2 late 1980s, In re Knudsen Brothers Dairy. In fact, you
3 may know that case.

4 It's the case in which the Ninth Circuit
5 Bankruptcy Appellate Panel set up the interim fee
6 procedure that has now been widely accepted around the
7 country as proper interim fee procedure.

8 But the interesting thing about that case, at
9 the first day orders, which is what we're doing here
10 effectively, the chief financial officer of the debtor
11 testified to post petition financing and Judge Russell,
12 Barry Russell, was hearing that case.

13 And Judge Russell asked the debtor witness,
14 "Where else did you look for financing? Did you shop any
15 other lenders?"

16 And the debtor witness said, "No, this came
17 upon us so quickly, we didn't have time to see what else
18 was out there."

19 Judge Russell said, "As I read 364, it says if
20 nothing better is available. You haven't made that
21 showing, I am denying the order permitting post petition
22 financing."

23 And the company closed that day. That was a
24 company with hundreds of millions of dollars in assets
25 and claims.

1 So one never knows if the threat is real or
2 not. But I am here to tell you, it does happen.

3 THE COURT: Okay. Well, let me just tell
4 you that with respect to -- I appreciate the experience
5 that has been provided by Mr. Athanas and by Mr. Levin.
6 I guess they are not actually a matter of evidence, so
7 I'll treat it as such.

8 I think what we need to do at this point is
9 just take a break and I need to sit down, look at these
10 cases. I assume that given the exigencies of the
11 circumstances here, that this is a matter that needs to
12 be decided right now and that's what I am going to do as
13 opposed to folks taking additional time to do briefing,
14 because it looks to me, again from the comments by Mr.
15 Levin and Mr. Athanas, you all have at least pursued
16 cases quickly enough to respond, we just go from there.

17 So I think what we need to do is take a short
18 recess. Before we do that, let me ask about the status
19 of the -- what the final order is.

20 And I will tell you, I have not read over the
21 final order and all attachments, you could have next
22 Sunday's cartoons in there --

23 MR. ATHANAS: I can attest it doesn't have
24 next Sunday's cartoons.

25 THE COURT: Thank you.

1 MR. ATHANAS: *Although it has everything*
2 *else. What we have got is changes in Section 6(a) --*
3 *that aren't window dressing, the changes to Section 6(a)*
4 *everybody has been discussing today.*

5 However, MetLife has some additional changes
6 which I don't think we will have any problem inserting
7 into it so long as all the other parties are fine with
8 them.

9 Also, Your Honor, we have got to work out our
10 issues with somebody who may be withdrawing objections
11 and we will get that done as well. We can give you a
12 revised order, maybe hand-mark it, depending on how
13 extensive changes are this morning.

14 We would ask just for a few hours because we
15 also have to resolve before we come back in a few hours.
16 your ruling on this issue, we will have a final final
17 order to hand up to you and hopefully we will wrap that
18 up, that will be a very quick, very short hearing.

19 THE COURT: Did we want to then just take
20 a break and I'll figure out how much time I sort of need
21 to noodle through this one issue which will be a brief
22 time without any question. But do you want a decision
23 with respect to this 506(c) thing to know whether to go
24 forward or not?

25 And then obviously you guys can have all --

1 you all can have all the time you want with respect to
2 the work on the ninth draft of the secured lending issue.

3 MR. ATHANAS: That's fine with us. Your
4 Honor, yes.

5 THE COURT: Let's take a break. It will
6 be, at least, by the clock on the back of the wall there,
7 about, at least about quarter to 11:00 before we
8 reconvene. If we are not quite ready to go at that time,
9 we will let you know, okay?

10 Okay. Very good. Thank you.
11 Court is in recesses.

12 (The Hearing was recessed at 10:25 and reconvened
13 at 11:30 as follows:)

14 THE COURT: Okay. Let's talk about a
15 couple different things here.

16 First of all, with respect to the matter that
17 arose earlier in connection with GE Capital, I went back
18 and reviewed the Code of Conduct for United States
19 Judges. This is the March 1997 version which is still
20 current as far as I know and it has been for a while now,
21 since March of 1997, obviously.

22 Canon III(C)(1)(c) says that, "A judge shall
23 disqualify himself or herself in a proceeding in which
24 the judge's impartiality might reasonably be questioned
25 including but not limited to decisions which" -- this is

1 Subsection 1 -- "he knows that he, individually, or as
2 fiduciary, the judge or judge's spouse or minor child
3 residing in the judge's household has a financial
4 interest in the subject matter in controversy or in a
5 party to the proceeding or any other interest that could
6 be affected substantially by the outcome of the
7 proceeding."

8 III(C)(3)(c) defines financial interest as,
9 "ownership of a legal or equitable interest, however
10 small, or relationship as direct adviser or other active
11 participant in the affairs of a party."

12 And then it's got some exceptions that are not
13 applicable here.

14 And then Subsection B of the Canons which
15 deals with remittal and qualifications provides in
16 relevant part, "A judge disqualified by terms of Canon
17 III(C)(1) except in the circumstances specifically set
18 out in Subsection A through E, may instead of withdrawing
19 from the proceeding, disclose on the record the basis of
20 disqualification and then obtain remittal from the
21 parties."

22 And III(C)(1)(c) is the specific item that
23 we're talking about here so that there's -- this is
24 essentially a nonwaivable requirement of the Canons of
25 Ethics.

1 I cannot decide anything with respect to
2 General Electric or any of its subsidiaries. So that
3 matter simply has to be taken care of some other way.

4 During the interim, and one of the reasons
5 this took so long, I was trying to track down and make
6 alternative arrangements to get this matter decided
7 today.

8 It turns out that Judge McFeeley at the time I
9 originally made the statement about him being in Roswell
10 was not quite in Roswell. Part of that calendar got
11 cancelled or was taken off the docket because of
12 settlement.

13 However, when I learned that, I immediately
14 called his office and was told that he had just left 15
15 minutes earlier for Roswell, unfortunately, because there
16 were, in fact, a few matters left. So they are going to
17 go down and deal with those, deal with those late this
18 afternoon.

19 So then rather than make any further calls, I
20 decided to come in and just deal with what we have got
21 here right now, see what the parties want to do.

22 Assuming that the issue continues to be alive,
23 one, with respect to the debt of secured creditor GE
24 Lighting and GE as another secured creditor, perhaps
25 there's a couple of options.