UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURRS SUPERMARKETS, INC.
Debtor. No. 11-01-10779 SA

ORDER ALLOWING ATTORNEY FEES, COSTS AND APPLICABLE TAXES FOR FIRST AND SECOND APPLICATIONS OF DAVIS & PIERCE, P.C. FOR COMPENSATION AS COUNSEL FOR THE UNSECURED CREDITORS' COMMITTEE

This matter is before the Court on the First and Second Applications of Davis & Pierce, P.C. ("Davis & Pierce" or "Applicant") for fees, costs and applicable New Mexico gross receipts tax for the respective periods of February 14, 2001 through June 30, 2001, and July 1, 2001 through October 31, 2001. Docs 742 and 759, and 1305 respectively. Davis & Pierce were co-counsel for the Unsecured Creditors' Committee during the chapter 11 phase of this case.

Davis & Pierce has tendered an agreed upon (negotiated) order ruling on both applications, approved by counsel for the trustee, the United States Trustee and Heller Financial, Inc. for itself and as agent for Bank of America, N.A., Fleet Capital Corporation and Metropolitan Life Insurance Corporation. The proposed order (attached hereto) recites that the total amount requested in both applications is $267,830.84, less $7,406.88 in fees and applicable gross receipts tax. The $7,406.88 represents the sum which Davis &

Pierce is “writing off” the application in return for the agreement of the trustee, the United States Trustee and Heller Financial. (No other parties objected to either application.) Thus, Davis & Pierce request the Court to allow a total of $260,423.96 for these two applications (Davis & Pierce intend to file a third and final application for the subsequent time period), of which the firm has already been paid or reimbursed $132,383.21, leaving an unpaid balance of $128,040.75.

The Court is not bound to accept the agreement of the parties as to compensation, and may (and indeed may be required to) independently make a determination of the amount of compensation that should be allowed. In re Albrecht, 245 B.R. 666, 672 (10th Cir. B.A.P. 2000) (bankruptcy court has an independent duty to review professional fee applications, even if no party in interest objects), affirmed In re Albrecht, 233 F.3d 1258 (10th Cir. 2000). And an overarching standard for the award of fees is what value the services contributed to the estate, regardless of what the lodestar figure (rates times hours) is. Rubner & Kutner, P.C. v. U.S. Trustee (In re Lederman), 997 F.2d 1321, 1323 (10th Cir. 1993).

At the preliminary hearing conducted by this Court on the various fee and other compensation applications, the Court informed the various applicants of its concerns about how the

case has turned out and what value the various applicants contributed to the estate. And the Court informed the applicants of specific concerns about the various applications, at the same time both encouraging the parties to settle and not deciding the issues so that the parties might present whatever evidence they wished with respect to the applications.

The primary events or actions that contributed the substantial value to this estate were the Fleming sale, the slowing of the massive losses being suffered by the estate so that the estate's assets were preserved long enough to be sold (in this case, to Fleming)[1], and the day-to-day work of administering the estate, including but not limited to implementing the Fleming sale and ensuring that the W-2's and 1099's will be issued timely and the employees' pension and 401(k) funds are safe and available to the employees. The Unsecured Creditors' Committee ("UCC") and its professionals will have contributed value to the estate to the extent that their efforts helped bring about those benefits and to the

[1] A substantial added benefit for Furrs employees of the partial turnaround that prevented most of the stores from "going dark" before a sale was the continued employment of thousands of the employees.

extent that the UCC (including its professionals) benefitted its constituency.

From a review of the file and the applications, and subject to the presentation to the Court of evidence to the contrary, it appears that the UCC on the whole provided relatively little benefit to the estate. The sale to Fleming was brought about largely by the efforts of Messrs. Golleher and Mays, Pater J. Solomon Company and the estate's counsel (Skadden, Arps, Slate, Meagher & Flom, and Jacobvitz, Thuma & Walker). The partial turnaround of the company came around largely as a result of the management skills of Messrs. Golleher and Mays. And the day-to-day work of pushing the estate through the chapter 11 liquidation process (including preparing the estate for the conversion to chapter 7) was due in large part to the efforts of Jacobvitz, Thuma & Walker. In none of these three areas did the UCC play a significant affirmative role. That being the case, counsel for the UCC – and their client, the UCC -- cannot show that their services were "necessary" for the estate, In re Lederman, 997 F.2d at 1323-24 (inability of debtor in possession to develop and complete a plan should have been apparent to counsel from commencement of the case, and thus debtor's counsel's work was not necessary and would not be compensated), at least to the

extent needed to justify payment of the amounts sought in the applications. The UCC (and its professionals) did monitor the sale, the turnaround and the administration of the chapter 11 case, and for that compensation is due, since that function is necessary for the estate. So some compensation is due to the UCC counsel on that basis, and the Court's award of compensation takes that into account.

With respect to services rendered to its client's constituency, Applicant performed a valuable function by, among other things, monitoring the proceedings, having a presence where needed (for the most part) at hearings (rather than having co-counsel appear at a much higher rate), and answering the inquiries of unrepresented unsecured creditors including (or especially) employees of Furrs (a particularly valuable function). For this Applicant should be fully compensated.

The Court also notes that the trustee, the United States Trustee and Heller approved the proposed allowance of approximately $260,000. While not binding on the Court, that statement by those parties (particularly the United States Trustee whose statutory responsibilities include monitoring professional compensation) constitute a factor supporting the applications.

However, some other individual items are also worth noting. The UCC's Emergency Motion for the Immediate Appointment of a Trustee was of little if any benefit to the estate; fortunately, Applicant spent only about four hours on that project. Applicant billed almost $25,000.00 in researching and filing the adversary proceeding that sought to preserve certain assets for the estate.[2] At this stage the adversary proceeding has been filed and there is a pending motion to dismiss. It is questionable whether the research and filing should have by themselves cost that much money. The first application also fails to break down the fees by project or topic, and the applications contain a number of entries for conversations with debtor's counsel without a subject of the conversation being described.

In retrospect, this was a case in which initially the parties and the Court anticipated that the case would be of a "national" size and scope (albeit a relatively small "national" or regional case, ultimately ending up with about

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[2] The UCC's co-counsel, Pepper Hamilton, has billed almost nothing in connection with the same project. Pepper Hamilton reached an agreement with the United States Trustee to have Davis & Pierce perform all of this work, since Pepper Hamilton had performed services in unrelated matters for some of the secured creditors whose interests were being challenged and thus wanted to avoid any possible suggestion of impropriety. Pepper Hamilton Second Fee Application, at 7-9. Doc. 1148.

23,000 creditors), such that national rates of compensation for professionals were appropriate. And the UCC treated the case that way in hiring various professionals (two sets of counsel, an accounting firm, an investment banker) and conducting the UCC's business in person and in various places around the country. Fairly soon, however, it became clear that this estate, while long on creditors, was going to be short on money, both for daily operations and especially for distribution to creditors. The case may now become a "national" no-asset chapter 7 case. In any event, as soon as that realization began to sink in, everyone should have begun to govern their conduct accordingly.

The foregoing discussion is not intended to apply the former "economy" rule with respect to compensation that is now proscribed by the Code. Rather, this review is premised on the requirements of the Code (particularly §330(a)). And as the Court made clear at the preliminary hearing, one way of beginning that inquiry is to ask whether an informed and diligent nonbankruptcy client would pay the entire bill for the services rendered. The Court thinks such a hypothetical reasonable client would not.

For the foregoing reasons, the Court will reduce the total amount requested in both applications by 15%; that is, $267,830.84 - $40,144.60 = $227,686.23.

IT IS THEREFORE ORDERED as follows:

1. The proposed order attached hereto and incorporated herein, consisting of six pages including signature pages and an exhibit page, is adopted as the order of this Court, as modified by this writing.
2. The total amount of the allowed fees is hereby reduced by 15% of the total figure originally requested in both applications; to wit, $40,144.61, resulting in an allowance of $227,686.23 for fees, costs and tax.
3. Because Applicant likely has not anticipated this ruling, and because the final hearings on professional compensation applications are set to begin on Tuesday, January 29, the two fee applications dealt with by this order will not be considered at the final hearings scheduled for January 29-31, 2002, unless Applicant wishes to have those matters heard at that time. (Since all the objecting parties approved the higher allowance provided for in the proposed order, resetting these applications for final hearing as originally scheduled on January 30, if the Applicant so requests, should not work

any prejudice against the objecting parties.) And since this is a ruling on interim compensation, Applicant will have the opportunity at a final hearing on compensation to ask the Court to reconsider this ruling.

4. Since this ruling is necessarily an interim ruling, the Court reserves the option of amending this order in light of evidence presented about the other compensation applications, although the Court has reviewed the other applications preliminarily and does not anticipate further reducing the compensation asked for in these two applications.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on January 25, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779-SA

Debtor.

ORDER GRANTING FIRST AND SECOND INTERIM APPLICATIONS FOR FEES BY ATTORNEYS FOR THE UNSECURED CREDITORS' COMMITTEE (Davis & Pierce, P.C.)

THIS MATTER came before the Court on the First Application for Fees by Attorneys for the Unsecured Creditors' Committee for the Period February 14, 2001 through June 30, 2001, and the Second Interim Applications for Fees By Attorneys for the Unsecured Creditors Committee (Davis & Pierce, P.C.) for Allowance and Payment of Compensation for July 1, 2001 through October 31, 2001. The Court, being fully advised, hereby FINDS:

1. The Debtor filed its petition under Chapter 11 of Title 11 of the United States Code on February 8, 2001.

2. Davis & Pierce, P.C. (D&P) has agreed to not seek compensation for services performed on behalf of the Unsecured Creditors' Committee prior to formation of the UCC in the amount of $9,773.15. This amount was not requested in the First Application.

3. Pursuant to post-closing financing orders entered in this bankruptcy case, two separate payments in the amount of $15,000.00 each were paid to D&P for legal services performed after the closing of the sale to Fleming Companies, Inc. The payments were received on October 23 and November 26 of 2001. The first payment is credited as a receipt during the Second Application period. The second payment which was received in November will be credited in the Third and Final Application which will cover the period November 1, 2001 through January 31, 2002.

4. On July 12, 2001 D&P filed its First Application for Fees by Attorneys for the Unsecured Creditors' Committee for the Period February 14, 2001 through June 30, 2001 ("First Application") for payment of compensation in the amount of $146,439.00 for fees, $9,472.32 for reimbursable costs and $8,511.77 for gross receipts tax. Of this amount, $117,383.21 has already been paid in accordance with this Court's Order Approving D&P's Motion to Employ Attorneys.

5. Notice of the First Application was mailed on July 12, 2001 to the creditors listed on the limited mailing list, as set forth on the official mailing matrix attached to the original Notice filed herein. The Notice was proper in form and content.

6. Pursuant to the Notice of the First Application filed herein, August 6, 2001 was the deadline to object to the First Application, including three days for mailing.

7. The Office of the United States Trustee filed an objection to the First Application on August 3, 2001, which objection has been resolved as indicated by its approval of the form of this Order.

8. Heller Financial, Inc., as agent for itself, Bank of America, N.A., Fleet Capital Corporation and Metropolitan Life Insurance Company filed an objection to the First Application on July 23, 2001, which objection has been resolved as indicated by its approval of the form of this Order.

9. The Debtor filed an objection on July 31, 2001. This case converted to a case under Chapter 7 on December 19, 2001 and the Debtor's Objection is now being pursued by the Chapter 7 Trustee, Yvette Gonzales. The objection has been resolved as indicated by the approval of the counsel for the Chapter 7 Trustee of the form of this Order.

10. No other objections to the First Application have been filed, timely or otherwise.

11. On November 6, 2001 D&P filed its Second Interim Application for Fees by Attorneys

for the Unsecured Creditors' Committee for Allowance and Payment of Compensation for July through October 2001 ("Second Application"), for payment of compensation in the amount of $96,987.50 for fees, $782.87 for reimbursable costs and $5,637.38 for gross receipts tax. $39,633.00 is remaining unpaid on fees, costs and gross receipts tax billed for the First Application Period and $15,000.00 of which $14,176.02 is compensation and $823.98 is taxes has been received and credited in the Second Application period. The total compensation remaining unpaid that D&P sought in both Fee Applications is $128,040.75 as set out on Exhibit "A".

12. Notice of the Second Application was mailed on November 6, 2001 to the creditors listed on the limited mailing list, as set forth on the official mailing matrix attached to the original Notice filed herein. The Notice was proper in form and content.

13. Pursuant to the Notice of the Second Application filed herein, November 29, 2001 was the deadline to object to the Second Application, including three days for mailing.

14. Heller Financial, Inc., as agent for itself, Bank of America, N.A., Fleet Capital Corporation and Metropolitan Life Insurance Company filed an objection to the Second Application on October 25, 2001, which objection has been resolved as indicated by its approval of the form of this Order.

15. No other objections to the Second Application have been filed, timely or otherwise.

16. D&P has agreed to a reduction of $7,000.00 in fees and $406.88 in taxes from the total amount requested in the First Application and the Second Application. This reduction is satisfactory to resolve Heller's, the United States Trustee's, and the Chapter 7 Trustee's objections to the D&P Fee Applications.

17. All objections, including issues of duplication of services and reasonableness of fees, with regard to all fee applicants, other than D&P First Application and Second Application, are

reserved.

18. The requested fees, costs and taxes as reduced by agreement and stated above are reasonable and necessary, and the compensation sought in the First Application and Second Application should be approved, as modified, and as set out below. For clarification, the requested fees are more fully described in the attached Exhibit "A".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that pursuant to 11 U.S.C. §§330 and 503, the sum of $157,016.21 is allowed as compensation to Davis & Pierce, P.C., as an administrative expense for the First Application Period.

IT IS THEREFORE FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to 11 U.S.C. §§330 and 503, the sum of $103,407.75 is allowed as compensation to Davis & Pierce, P.C., as an administrative expense for the Second Application Period.

THE HONORABLE JAMES S. STARZYNSKI
UNITED STATES BANKRUPTCY JUDGE

SUBMITTED BY:

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DAVIS & PIERCE, P.C. ATTORNEYS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF FURR'S SUPERMARKETS, INC.
FEE APPLICATIONS SUMMARY EXHIBIT

	FIRST FEE APPLICATION	SECOND FEE APPLICATION
AMOUNT REQUESTED:		
FEES	146,439.00	96,987.50
TAXES (5.8125%)	8,511.77	5,637.38
COSTS	9,472.32	782.87
	164,423.09	103,407.75
REDUCTION:		
FEES	7,000.00	0.00
TAXES (5.8125%)	406.88	0.00
	(7,406.88)	0.00
NET	**157,016.21**	**103,407.75**
AMOUNT PAID:		
FEES	101,983.12	14,176.02
TAXES (5.8125%)	5,927.77	823.98
COSTS	9,472.32	0.00
	(117,383.21)	(15,000.00)
AMOUNT UNPAID	**39,633.00**	**88,407.75**
TOTAL DUE ON BOTH FEE APPLICATIONS		**$128,040.75**