

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

Furr's Supermarkets, Inc.

Case No: 11-01-10779 SA

Reply to Heller's Response to
Department's Motion to Clarify or Modify
Final Financing Order

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DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

Now Comes the New Mexico Taxation and Revenue Department ("Department").

by and through its undersigned counsel, states:

A. Standing

1. Heller misconstrues the standing issue. The Department is not seeking to file a § 506(c) lawsuit. Rather, the Department is seeking to clarify a court's order that obviously directly impacts on the percentage of recovery the Department will receive on its \$2.3 million administrative claim.
2. Taken to its logical extent, Heller's standing argument would have denied the U.S. Trustee's Office or any one else being heard on any decision to "waive" a surcharge claim, and therefore deny any creditor to question the extent of the so-called waiver.
3. Under the Circumstances, the standing is a constitutional question, not a statutory one. The prospect of the Department obtaining relief if its motion is successful can hardly be called "too speculative." *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 663-64 (1993). That is the standard the Court should apply.

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B. Hypothetical Question

4. Heller's arguments asserting that the Department's motion is hypothetical presuppose that the Court approves the settlement first and rules on the Department's motion second. However, both motions are pending before the Court.
5. If the Court rules on the Department's motion first, then the Trustee's motion, which will likely be withdrawn, becomes hypothetical, under Heller's analysis.
6. Whether the Court grants the Department's motion will directly affect how much the Department recovers in this case. The Department's motion is not seeking a hypothetical or advisory opinion.

C. The Department Restates Its Arguments on the Merits

7. The Department stands by its initial view that nothing in any of the transcripts forecloses the view that the Court was construing or should construe the so-called "waiver" of the *Chapter 11 Debtor's* right to bring a surcharge as limited to the Debtor as a juridicial entity, and the Court was not limiting the right of a Chapter 7 Trustee, as a separate juridicial entity, to bring any surcharge claim. Cloaked as a "waiver," it is difficult to conceptualize how the Debtor could waive anything for the Chapter 7 Trustee.
8. The Department is not seeking an order where Heller would guarantee all administrative expenses. However, if it can be shown that Heller actually agreed to Furr's incurring expenses, and those expenses were necessary for Heller to

preserve the most valuable measure of its collateral (the going concern value), then a surcharge is appropriate.

C. Surcharge Cases are Very Fact-Specific

9. Heller cites two cases from the Third Circuit Court of Appeals which, according to Heller, prove that the Department cannot be benefited by § 506(c). Heller misconstrues the extent to which § 506(c) cases are driven by the facts and by the equities of the particular case.
10. For instance, in *In re C.S. Associates, Inc.*, 29 F.3d 903 (3rd Cir. 1994), the Court dealt with *property taxes* with regard to a *non-operating debtor*, in a case which preceded the amendments to Code § 362(b)(18) excepting property taxes from the automatic stay. In fact the Court indicated that the property tax creditor was, in effect, seeking to avoid the effect of the automatic stay with regard to establishment of post-petition property tax liens. 29 F.3d at 905.
11. *In re Visual Industries, Inc.*, 57 F.3d 321 (3d Cir. 1995) is also instructive for what the case distinguished. *In Re McKeesport Steel Castings Co.*, 799 F.2d 91 (3d Cir. 1986). *McKeesport* upheld a claim by a utility whose *unpaid* claim was essential in enabling the secured creditor to maintain the going concern value of a business. *Visual Industries* indicated that the utility in *McKeesport* had requested to terminate service, but the bankruptcy court refused, making the utility, like the Department here, an involuntary creditor. The Department in this proceeding, on two different occasions, asked the Court to deny motions unless provisions were made for paying gross receipts taxes—the first time was in

connection with the Flemming sale, and the second time was in connection with approval of a post-closing budget. The Court overruled the Department's objections on both occasions. The Department's position in this case is more akin to the creditor in *McKeesport* than the creditor in *Visual Industries*.

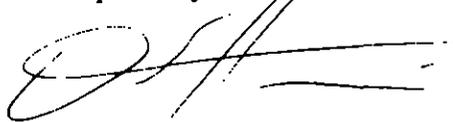
12. To illustrate how the factual context of § 506(c) cases alters the result, consider a bankruptcy court opinion from the Third Circuit. *In re Sharon Steel Corp.*, 206 B.R. 776 (Bankr. W.D. Pa. 1997). In that case Citibank closely monitored a Chapter 11 Debtor who was liquidating Citibank's collateral. The Pennsylvania bankruptcy court, citing all three of the Third Circuit decisions above, ruled that the employees health benefits and severance benefits were surchargeable against Citibank's collateral because Citibank could not have realized the value of its collateral without the help of the employees.
13. Finally, one judge on the Fourth Circuit panel of *In re K&L Lakeland, Inc.*, 128 F.3d 203 (4th Cir. 1997) does state that there should be an actual "expenditure" as opposed to an "expense" (the term the statute uses) in order for Code § 506(c) to apply. Briefly stated, the dissenting judge in *Lakeland* was correct for the reasons stated in that dissenting opinion. *Lakeland*, 128 F.3d at 211-13. In fact, when reviewing the concurring and dissenting opinions, it is clear that the "there must be an actual *expenditure*" analysis only garnered *one vote* on the three-judge panel.
14. The Department would like to add one thing: It makes no sense that Congress would have used the word "expense" in § 503 to mean something unpaid, and

“expense” to mean something unpaid in § 507, but to have a completely different meaning for § 506 purposes. The “normal rule of statutory construction [is] that ‘identical words used in different parts of the same act are intended to have the same meaning.’” *Sullivan v. Strop*, 496 U.S. 478, 484 (1990) (citations omitted).

15. Nevertheless, even the solitary judge who authored that part of the *Lakeland* opinion would appear to allow a surcharge in a case such as the one before the court. *See, Lakeland*, 128 F.3d at 209 n.5.
16. The more persuasive opinion on the actual issue of liability is the three-judge panel opinion that was ultimately reversed by the Supreme Court on the standing issue. *In re Hen House Interstate, Inc.*, 150 F.3d 868 (8th Cir. 1998). It should be noted that two of the three judges on the panel wrote separately to indicate that they disagreed with the standing analysis of an earlier Eighth Circuit panel (but could not reverse it). However, the panel unanimously and persuasively analyzed why the surcharge was appropriate.

WHEREFORE, the Department’s Motion to Clarify or Modify should be GRANTED.

Respectfully submitted,



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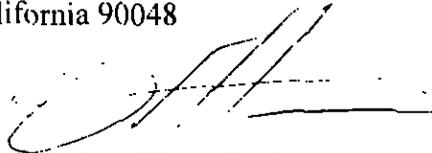
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A handwritten signature in black ink, appearing to read 'Donald F. Harris', with a long horizontal stroke extending to the right.

Donald F. Harris