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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

In re

Case No. 11-01-10779-SA
Chapter 11

FURR'S SUPERMARKETS, INC.,

Debtor.

**DEBTOR'S BRIEF IN SUPPORT OF APPLICATION
TO RETAIN PETER J. SOLOMON COMPANY LIMITED**

Introduction

Once again the Debtor is obliged to refute the notion that its professionals should be required to render services for a lower rate, and under different terms, just because the chapter 11 case has been filed. The Debtor cannot obtain investment banking services for free, and cannot expect Peter J. Solomon Company Limited ("PJS") or any other competent investment banker to accept work in chapter 11 cases under less favorable terms than those available outside chapter 11. PJS's rates are comparable to those charged by other investment bankers in similar transactions, and therefore should be approved.

PJS's indemnification provisions are typical of provisions appearing in virtually every engagement agreement with a financial advisor in complex

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restructuring cases. They are also fully consistent with non-bankruptcy law, including corporate law authorizing a corporation to indemnify its agents.

The Court should approve the Debtor's application to retain PJS at its usual rates and terms, and overrule the Objections in their entirety.

A. **Under 11 U.S.C. 330's "Market Approach," Bankruptcy Professionals Are Entitled to the Same Compensation As They Would Receive Outside Bankruptcy**

In *In re Busy Beaver Building Ctrs.*,¹ the Third Circuit squarely held that professionals engaged in bankruptcy cases are entitled to the same compensation that they would receive in non-bankruptcy matters. It stated that courts should apply a "market approach" in considering the reasonableness of compensation under Bankruptcy Code § 330.² The Third Circuit's approach finds support in opinions from Courts of Appeal for the Second, Seventh, Ninth and Eleventh Circuits.³

¹ 19 F.3d 833 (3rd Cir. 1994).

² *Id.* at 848. Section 330 authorizes the court to award "reasonable compensation" to professionals retained by the court. 11 U.S.C. § 330(a).

³ *Stroock & Stroock & Lavan v. Hillsborough Holding Corp. (In re Hillsborough Holding Corp.)*, 127 F.3d 1398 (11th Cir. 1997) ("Congress has recently indicated a desire to promote the same billing practices in bankruptcy cases as in other branches of legal practice"); *In re Ames Department Stores, Inc.*, 76 F.3d 66, 71 (2nd Cir. 1996) (Bankruptcy Code "aims that attorneys be reasonably compensated and that future attorneys not be deterred from taking bankruptcy cases due to a failure to pay adequate compensa-

(continued...)

PJS's retention agreement, including its fees and indemnification provisions, reflect PJS's standard terms for the type of work it will perform in this case. As demonstrated by the exhibits and declarations submitted in support of the Application, these terms are also comparable to those used by investment bankers in other large Chapter 11 cases. Accordingly, the Debtor is entitled to retain PJS on those terms in its bankruptcy case.

B. Bankruptcy Cases Restricting Indemnification Are Inconsistent with 11 U.S.C. § 330's "Market Approach"

The Bankruptcy Code does not prohibit indemnification arrangements, including indemnification for negligence. Nevertheless, three bankruptcy court decisions – all of which are now more than ten years old and predate all but one of the foregoing Circuit Court decisions – have held that indemnification of investment bankers or financial advisors is inappropriate or subject to special

⁴(...continued)

tion."); *In re Matter of UNR Indus., Inc.*, 986 F.2d 207, 208-09 (7th Cir. 1993) ("In section 330 and its legislative history Congress expressed its intent that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non-bankruptcy cases."); *Burgess v. Klenske (In re Manoa Fin. Co.)*, 853 F.2d 687, 690 (9th Cir.1988) (quoting Senator DeConcini's testimony that the policy under § 330 "is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services [on the market]").

restrictions in bankruptcy cases.⁴

The Debtor submits that these decisions are flatly inconsistent with the "market approach" that Congress adopted in section 330. As a bankruptcy court in the Southern District of New York recently explained:

While the reactions of the courts in the few reported decisions are understandable, they are also visceral. They overlook the common law principles permitting indemnity of fiduciaries, and *the idea that a fiduciary cannot be indemnified for negligence, or that such indemnification is contrary to public policy, is just plain wrong.*⁵

The evidence here shows that firms like PJS do not include the cost of insuring against the threat of litigation in setting their fees - they seek indemnification instead. PJS is entitled to do the same here.

PJS does not seek indemnity for losses caused by its own gross negligence or willful misconduct. In light of the realities of modern society, the risk that one or more parties disappointed by the outcome of the care might go looking for a "deep pocket" to sue, the ease with which "negligence" is alleged, and the uncertainty of litigation, PJS requires indemnification against an allegation or

⁴ *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991); *In re Mortgage & Realty Trust*, 123 B.R. 626, 630-31 (Bankr. C.D. Cal. 1991); *In re Allegheny Int'l, Inc.*, 100 B.R. 244, 247 (Bankr. W.D. Pa. 1989).

⁵ *In re Joan and David Halpern, Incorporated*, 248 B.R. 43, 46 (Bankr. S.D.N.Y. 2000) (emphasis added), *aff'd*, 2000 U.S. Dist. LEXIS 17589 (S.D.N.Y. Dec. 6, 2000).

finding of negligence.

This indemnification is typical in the corporate context - even for fiduciaries, as the next section demonstrates - and is an integral part of PJS's pricing structure.

C. There Is No Prohibition – in or out of Bankruptcy – Against the Indemnification of Fiduciaries

In non-bankruptcy contexts, it is widely recognized that parties may contract for indemnification against their own negligence.⁶ Similarly, most if not all corporate statutes permit corporations to indemnify officers and directors for acts of negligence.⁷ Bankruptcy courts have, in appropriate circumstances, enforced

⁶ *E.g.*, *Neustrom v. Union Pac. R.R.*, 156 F.3d 1057 (10th Cir. 1998) (decided under Kansas law); *American Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000); *N.P.P. Contrs. v. John Canning & Co.*, 715 A.2d 139, 141 (D.C. 1998); *Minassian v. Ogden Suffolk Downs, Inc.*, 509 N.E.2d 1190, 1193 (Mass. 1987); *Merrimack School Dist. v. Nat'l School Bus Serv.*, 661 A.2d 1197, 1199 (N.H. 1995); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 706-07 (Tex. 1987); *cf. In re Consol. Vista Hills Retaining Wall Litig.*, 119 N.M. 542, 545-46, 893 P.2d 438, 441-42 (1995) (concluding that indemnification rights can arise through express or implied contract).

⁷ *See* CAL. CORP. CODE § 317(b); DEL. CODE ANN. tit. 8, §145(a); N.M. STAT. ANN. § 53-11-4.1; N.Y. BUS. CORP. LAW § 722(a); *see also* N.M. STAT. ANN. § 53-11-4.1, 1, (3) ("a corporation, in addition, shall have the power to indemnify and to advance reasonable expenses to an officer, employee or agent who is not a director to such further extent, consistent with law, as may be provided by its articles of incorporation, bylaws, general or specific action (continued...)

these provisions.⁸

Delaware corporate law – the Debtor is a Delaware corporation expressly provides that a corporation may indemnify a "director, officer, employee or agent" who is sued, or threatened with suit, on account of his or her service to the corporation, if "the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."⁹ It also permits a corporation to provide indemnification rights beyond those authorized by statute, stating that the indemnification authorized by "the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification . . . may be entitled under any . . . agreement . . . or

⁷(...continued)

of its board of directors, or contract.").

⁸ *In re Keene Corp.*, 208 B.R. 112, 115-16 (Bankr. S.D.N.Y. 1997) (citations omitted). The court denied indemnification in *Keene*, among other reasons because the officer sought indemnity for the costs of his personal attorney, whom he engaged without court authorization to duplicate the efforts of the debtor's retained counsel. *See also In re Heck's Properties, Inc.*, 151 B.R. 739, 766-68 (D. W. Va 1992) (officers and directors entitled to indemnification as an administrative expense for cost of defending lawsuits relating to postpetition services to debtor).

⁹ DEL. CODE ANN. tit. 8, §145. Indeed, the statute *requires* that a corporation indemnify any director, officer, or employee sued for actions relating to the performance of his or her duties, if the defendant prevails on the merits in that suit. *Id.* § 145(c).

otherwise."¹⁰ Surely the Debtor may conclude, in the exercise of its business judgment, that it is appropriate to provide its financial advisors with this same protection.

Indemnification provides as important a benefit to the corporation as to the indemnified party. As one court concluded:

[Indemnification for officers and directors] should be seen as less an individual benefit arising from personal employment than as a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards. . . . [I]ndemnification benefits the corporation more than the director or officer covered.¹¹

In the present case, the Debtor benefits from indemnification because PJS has not included the costs of potential litigation in its rates.

In a recent case in the Southern District of New York, the bankruptcy court noted that the Bankruptcy Code, like non-bankruptcy law, contains no prohibition against an indemnity clause in a financial advisor retention agreement.¹²

In that case, the United States Trustee, relying on the same three older cases cited

¹⁰ *Id.* § 145(f). See also Edward P. Welch and Andrew J. Turezyn, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 145.7 (Aspen Law of Business ed., 1999) ("one may become entitled to indemnification outside the terms of the statute by virtue of an express contract") (footnote omitted).

¹¹ *Scharf v. Edgcomb Corp.*, C.A. No. 15224, 1997 Del. Ch. LEXIS 169 (Del. Ch. December 2, 1997), at *14-15.

¹² *In re Joan and David Halpern, Incorporated*, 248 B.R. 43, 46 (Bankr. S.D.N.Y. 2000) (emphasis added), *aff'd*, 2000 U.S. Dist. LEXIS 17589 (S.D.N.Y. Dec. 6, 2000).

above, argued that indemnification was *per se* inappropriate. The court rejected this contention, explaining that "the idea that a fiduciary cannot be indemnified for negligence, or that such indemnification is contrary to public policy, is just plain wrong."¹³ The court noted that indemnification of fiduciaries is allowed in myriad non-bankruptcy contexts – from trust law to corporate law – and there was no support for a different conclusion in bankruptcy. The court went on to state that the appropriate inquiry is whether, taken as a whole, the terms of the retention are fair and reasonable.

The *Joan and David* decision is highly apropos in this case. The Debtor has determined that it is in the best interest of the estate to retain PJS under terms that are standard, and enforceable, outside of bankruptcy. The blanket claim that professionals cannot be indemnified for negligence is without support in or out of bankruptcy, and the Court should reject it here.

D. PJS Plays a Distinct Role in the Case

The Debtor seeks to retain PJS to provide it guidance regarding potential transactions, including a business combination with one or more entities, a sale of part or all of its assets, restructuring its existing indebtedness, or obtaining new financing. Messrs. Golleher and Mays are serving as the Debtor's executive officers, providing operational and business direction and seeking to stabilize

¹³ *Id.*

business operations. PricewaterhouseCoopers was retained to provide the Debtor with financial advice, analysis, and reports regarding particular aspects of the Debtor's business. Mr. Golleher has extensive transactional experience, and as the Debtor's new Chairman he will play an important role in any transaction that the Debtor enters into. But as his own Declaration explains, he is currently devoting 50 hours/week to the Debtor's business. The Debtor seeks the separate services of an experienced investment banker to negotiate and structure any of the several types of complex corporate transactions that may form the basis of its reorganization plan.

For these reasons, PJS will not duplicate the services offered by any other person or entity in this case.

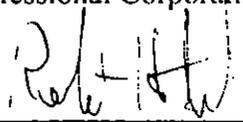
Stated simply, Messrs. Golleher and Mays have been asked to manage the Debtor, PricewaterhouseCoopers will provide accounting and similar financial services, and PJS will structure any of the types of transactions that may form the basis of the Debtor's reorganization plan. Accordingly, PJS's services are not duplicated by the services provided by any other professional.

CONCLUSION

The Court should overrule the Objections and grant the full relief requested in the Application.

Dated: Albuquerque, New Mexico
May 4, 2001

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