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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 MOTION FOR AUTHORIZATION TO (a) IMPLEMENT EMPLOYEE RETENTION, SEVERANCE, AND SUCCESS BONUS PLANS; (b) ENTER INTO TRANSITION AGREEMENT WITH THOMAS DAHLEN; AND (c) ENTER INTO CONSULTING AGREEMENTS WITH GEORGE GOLLEHER AND GREG MAYS

The Debtor hereby files its brief in support of the above-titled motion. Certain relevant facts are set forth in the Declarations of Thomas J. Sikorski, George Golleher, and Greg Mays filed herewith. Also filed herewith is a binder of exhibits supporting the Motion.

I.

**THE DEBTOR IS REVISING ITS RETENTION,
SEVERANCE, AND BONUS PLAN**

The Debtor has determined to modify the employee retention, severance, and success bonus plan previously filed with the Court. Accordingly, the

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Debtor will not go forward with its request for approval of the plan. The Debtor will seek approval of the revised plan as soon as it is finalized.

II.

THE DEBTOR HAS MODIFIED THE COMPENSATION PAYABLE TO THOMAS DAHLEN

With respect to the Transition Agreement with Thomas Dahlen, the Debtor and Dahlen have agreed to modify the agreement to eliminate the \$100,000 payment to Dahlen due 90 days after the end of the Initial Period. The Debtor only seeks authorization to pay Dahlen \$30,000, as provided in the Transition Agreement, for consulting services on an as-needed basis for the six-week period after the Initial Period. A copy of the modified Transition Agreement with Dahlen is included with the other exhibits filed with the Court in support of this Motion.

The Debtor submits that this payment –\$5,000 per week for consulting services during the difficult leadership transition period – is eminently reasonable and should be approved.

III.

THE COURT SHOULD APPROVE THE GOLLEHER AND MAYS AGREEMENTS

A. Introduction

George Golleher and Greg Mays assumed executive leadership of the Debtor more than one month ago, after Thomas Dahlen announced that he was leaving the company. Golleher serves as the Debtor's Non-Executive Chairman and Mays is the Non-Executive Vice-Chairman. In these capacities, they have aggressively undertaken to review the Debtor's finances, management personnel and structure, overhead, and operations. They have considered various strategic alternatives, including potential transactions. They have met several times with the Committee and with various Committee members in an effort to improve the Debtor's relationship with the Committee and the key vendors on the Committee.

The Court has not yet approved their Agreements, and the Committee and the U.S. Trustee have objected to the Agreements. Nonetheless, Mays works, on average, between 50-60 hours/week on the Debtor's business, and Golleher works approximately 50 hours/week.¹

Under the proposed Agreements, Golleher and Mays will share a signing bonus of \$125,000 and monthly compensation of \$50,000 and will receive a

¹ Golleher Declaration ¶¶ 11-13; Mays Declaration, ¶¶ 11-13.

success fee at the end of the case. The minimum success fee will be \$750,000, and may be more depending on the size of any transaction.

As the following demonstrates, Golleher and Mays are not "professionals" within the meaning of, and need not be retained under, Bankruptcy Code § 327. Their proposed compensation is well within the range typically paid to crisis managers in large chapter 11 cases, and less than the Debtor would likely incur if it had to engage a search firm to find a replacement executive.

B. Golleher and Mays Are Not § 327 "Professionals"

The U.S. Trustee contends that Golleher and Mays are "professionals" within the meaning of, and must be retained in accordance with, Bankruptcy Code § 327(a). This objection is meritless for two reasons.

First, to clarify the issue, all references in the Agreements to Golleher and Mays as "consultants" or "independent contractors" have been deleted as unnecessary. Golleher and Mays are members of the Debtor's Board. They have agreed as Board members to assume the additional executive duties described in the Agreements, and the Debtor has agreed to compensate them for doing so.

Second, even if Golleher and Mays had no previous connection with the Debtor, and the Debtor was proposing to hire them from outside as new executives, they would still not be § 327 professionals.

The Bankruptcy Code does not define the phrase "professional person." In the leading case of In re Seatrain Lines, Inc.,² the bankruptcy court held that newly-hired maritime engineers, who would play a critical role in the operation of the Debtor (a maritime shipping firm), were not § 327 professionals. It stated:

For the purposes of section 327(a), "professional person" is limited to persons in those occupations which play a central role in the administration of the debtor proceeding. Court approval is required to the retention of attorneys, accountants, appraisers, auctioneers and persons in other professions intimately involved in the administration of the debtor's estate.

Golleher and Mays are not providing legal, accounting, appraisal, or auctioneering services, or other services identified with a specific "profession" involved in the administration of insolvent estates. Their ability to serve, jointly, as the Debtor's chief executive is not based on professional training relating to insolvency but on years of experience with the Debtor and the supermarket industry.

Courts have emphasized that even if a person plays a central role in the reorganization case, that person is not a "professional person" under the Code if the services would have been performed regardless of the pendency of the chapter 11 case. As the bankruptcy court noted in the Park Ave. Partners case, discussing the Seatrain decision:

² 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981).

[The engineers in Seatrain were] important to the functioning mechanics of the debtor's business, but their employment was not sought because of a need that arose incident to the bankruptcy. Such a role may be contrasted with that of an attorney who appears in bankruptcy proceedings, an appraiser required to value property of the estate, a realtor disposing of property of the estate, or an accountant responsible for tax and court reporting requirements.³

The Park Ave. Partners court held that property managers, hired by the debtor to manage its only asset, were not § 327 professionals.

Similarly, in the D'Lites of America case, the debtor retained an outside team of management personnel to replace departed employees in its operations, marketing, accounting and finance divisions. The court held that, even though they were hired to "keep the ailing company in operation," the individuals were not "professional persons" within the meaning of § 327.⁴

Golleher and Mays are providing executive services of the type that every corporation requires. They are not providing professional services relating specifically to insolvency. They are not "professional persons," and § 327's provisions relating to employment and compensation are therefore inapplicable.

³ In re Park Ave. Partners Ltd. Partnership, 95 B.R. 605, 616 (Bankr. E.D. Wis. 1988).

⁴ In re D'Lites of America, Inc., 108 B.R. 352, 355 (Bankr. N.D. Ga. 1989).

C. Golleher and Mays' Compensation Is Reasonable and Comparable to that Paid to Crisis Managers in Other Chapter 11 Cases

Attached hereto is a chart showing the compensation paid to outside crisis managers in large chapter 11 cases. The information in the chart is derived from pleadings in those cases, copies of which are in the Debtor's binder of exhibits supporting the Motion. The chart shows that Golleher and Mays' compensation is well within the range typically paid for similar services.

Thus, in the Glenoit Universal case, the court approved payments of \$250,000/month for management services, to be principally performed by four people. In contrast, Golleher and Mays will receive together \$50,000/month. Even considering the \$125,000 signing bonus, after the first month their services will cost substantially less than Glenoit's managers. In addition, the consulting firm providing the four individuals to Glenoit would receive a transaction fee of 1.5% of the consideration in any merger or sale, comparable to the fee payable to Golleher and Mays.

In the Video Update case, the outside firm provided two management officers for a monthly fee of \$110,000, more than twice that charged by Golleher and Mays. In the Iridium case, the outside consulting firm providing two management employees would receive \$250,000 per month plus \$2 million at the end of the case.

Golleher and Mays' compensation also compares favorable with that in cases where the "loaned" management received compensation at an hourly rate. Golleher and Mays testified that, so far, they are working 50-60 hours/week on the Debtor's business. Assuming, however, that Golleher and Mays each work a 40-hour week, at 4.3 weeks to the month their individual hourly rate is approximately \$145/hour.⁵ In the Brazos Sportswear case, the "loaned" management employees were paid \$300/hour. In Bugle Boy, \$400/hour. In Harnischfeger Industries, \$450-530/hour.

In most of the cases summarized on the chart, the outside consulting firm was retained under § 327. As shown above, Golleher and Mays are not "outside" consultants. They are Board members who, in that capacity, have agreed to assume additional duties. For that reason, § 327 is inapplicable here. But these cases demonstrate that their proposed compensation is well within the normal range for the critical services that they provide.

Thomas Sikorski, who negotiated their compensation on behalf of the Debtor's Board, stated in his Declaration that the negotiations were intense and conducted at arm's-length, and that the final compensation terms were less than Golleher and Mays originally requested. He also testified that retaining a search firm

⁵ $\$50,000 \div (4.3 \text{ weeks} \times 40 \text{ hours} \times 2 \text{ individuals}) = \$145.35/\text{hour}.$

to conduct a search for a replacement executive would entail significant costs and, importantly, distract the Board from its other responsibilities and leave the Debtor without executive leadership during this critical period. Accordingly, he concluded that the Debtor is better-served, from a timing and financial perspective, to have the immediate services of Golleher and Mays than to have to wait for the uncertain results of an executive search.⁶

D. The Court Should Approve the Agreements Under Bankruptcy Code § 363(b)(1)

In the Motion, the Debtor showed that the Court may approve the Golleher and Mays Agreements under Bankruptcy Code § 363(b)(1). That section permits a debtor to use property of the estate "other than in the ordinary course of business," after notice and a hearing. As shown in the Motion, approval under that section is appropriate if the Debtor, in the exercise of its business judgment, has shown a valid business justification for its decision.⁷

Here, the Debtor elected to replace its departing President and Chief Executive Officer by assigning additional duties to two Board members with extensive experience in the supermarket industry and in transactional, financial, and

⁶ Sikorski Declaration, ¶¶ 15-16.

⁷ See the discussion of § 363(b)(1) at pp. 11-13 of the Motion.

restructuring matters. It negotiated compensation well within the range payable to outside consultants for these services. By engaging Golleher and Mays, the Debtor insured continuity of leadership and saved the time, expense, and uncertainty that would result from conducting an executive search.

Under these circumstances, and in light of the valuable services that Golleher and Mays have already performed, the decisions of the Debtor and its Board clearly represent a sound exercise of good business judgment. The Court should approve the Agreements under § 363(b)(1).

CONCLUSION

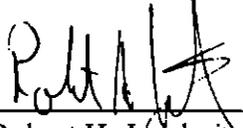
Dahlen's compensation under his revised Transition Agreement – \$30,000 for six weeks' consulting services during a critical period – is reasonable. Golleher and Mays are simply assuming additional executive responsibilities as Board members, so they are not "professionals" subject to § 327. Their proposed compensation is well within the range paid to crisis managers in other cases. The decision to enter into the Agreements shows sound business judgment.

For these reasons, the Court should (i) overrule the Objections, (ii) approve the revised Dahlen Transition Agreement, and (iii) approve the proposed Agreements with Golleher and Mays.

Dated: Albuquerque, New Mexico

May 4, 2001

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Exhibit A

SUMMARY OF ENGAGEMENTS

DEBTOR	CONSULTANT	TERMS	ASSETS*
<p>General Universal Ltd., USBC - D Delaware, Case No. 00-22091 (PW)</p>	<p>Carl Marks Consulting Group LLC, to perform financial and operational advisory services. CMC G would provide a senior management team necessary to assist in the efficient operation of the Debtors and would assist Debtors to minimize their cash requirements and maximize value of assets. Services to be provided pro-rata by four people.</p>	<p>\$150,000 retainer \$250,000 month plus expenses 1.5% of the consideration received in any merger or sale of substantially all assets</p>	<p>\$216,950,000</p>
<p>Valco Pipeline, Inc., USBC - D Delaware, Case No. 00-3773 (HWW)</p>	<p>Crossroads, LLC, as Turnaround Management Consultant. Crossroads would assist the Debtors in negotiating terms for continued use of cash collateral; secure additional financing; help formulate reorganization plans; and assist in financial and operational management. Crossroads to provide full-time services of two Crossroads officers.</p>	<p>\$150,000 retainer (as security) \$110,000/month for services</p>	<p>\$160,030,000</p>
<p>Razon Sportswear, Inc., USBC - D Delaware, Case No. 99-142 (PW)</p>	<p>Osmos & Co., as crisis and restructuring consultants. Gilbert C. Osmos as Interim CEO, and F. Richard Reiden as Interim Executive V.P. Consultants would assist in stabilizing Debtors' financial position, analyzing operational and financial situation, and developing appropriate business plans for operational and financial restructuring. Debtor also retained H.T. Alex Brown as Investment Banker.</p>	<p>\$100,000 deposit (as security) \$300 hour for each of Osmos and Reiden, up to maximum \$80,000/month, plus expenses</p>	<p>\$185,310,000</p>
<p>Highland Marine Corp., USBC - N D Ill., Case No. 00-37405</p>	<p>Development Specialists, Inc., as crisis management consultants, to review Debtors' business plan; review all operating and overhead expenses; assist management in negotiations with creditor constituencies; assist in developing plans to windup or curtail operations; etc. Debtor also retained Houdihan Lokay as Investment Banker.</p>	<p>\$350,000 retainer Hourly rates, ranging from \$95/hour to \$425/hour. Median rate: \$295/hour.</p>	<p>\$848,400,000</p>
<p>Hamschieger Industries, Inc., USBC - D Delaware, Case No. 99-2171 (PW)</p>	<p>Jay Alix & Associates as Financial Advisors, to provide senior management services. JA&A principals will serve as senior management, R. Dargemond as Debtors' Chief Restructuring Officer and L. Eliz Debtors' Interim CFO. Duties include development of operating business plan and manage Debtor's financial performance.</p>	<p>\$250,000 retainer (for security) Hourly rates: for principals - \$450-530/hour - plus - \$2,500,000 confirmation bonus if plan confirmed within 15 months, subject to \$100,000 monthly reduction after 15 months, to minimum of \$1,000,000</p>	<p>\$2,787,260,000</p>
<p>Interim USBC - S D New York, Case No. 99-45005-CB</p>	<p>Alvarez & Marsal, Inc. to provide financial and operating services. A & M managing directors will serve as senior management; Joseph A. Bondi as Chief Restructuring Officer; and David R. Gibson as Interim Chief Financial Advisor. Duties include assisting in the formation of an operating plan and identifying cost reduction opportunities.</p>	<p>\$500,000 deposit as security \$250,000 retainer \$250,000/month for services \$2,000,000 incentive fee upon consummation of plan</p>	<p>\$3,789,000,000</p>
<p>Bugle Boy Industries, Inc., USBC - C D California, Case No. SV 01-10834-GM</p>	<p>BDO Seidman LLP, financial advisors, to provide financial advisory, distressed asset management, valuation and business consulting services. By separate application, Kenneth C. Henry, one of BDO's principals, will serve as debtor's CEO. Debtor also retained Houdihan Lokay as Investment Banker.</p>	<p>\$300,000 retainer \$400/hour for Mr. Henry</p>	<p>\$120,000,000 - \$144,000,000</p>

*Source: New Generation Research, Inc.'s www.bankruptcydata.com (excluding Bugle Boy)