

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 MEMORANDUM IN SUPPORT OF OBJECTION TO  
MOTION FOR ORDER AUTHORIZING DEBTOR TO (A) ENTER INTO  
CONSULTING AGREEMENT WITH GEORGE GOLLEHER AND GREG MAYS AND  
(B) ENTER INTO TRANSITION AGREEMENT WITH THOMAS DAHLEN**

The United States Trustee for the District of New Mexico hereby submits the following memorandum in support of her objection to the Motion for Order Authorizing Debtor to (A) Enter into Consulting Agreement with George Golleher and Greg Mays and (B) Enter into Transition Agreement with Thomas Dahlen (Motion).

**STATEMENT OF FACTS**

1. On March 28, 2001, the Debtor filed the Motion seeking to enter into consulting agreements with George Golleher and Greg Mays and also seeking to enter into a transition agreement with Thomas Dahlen. It is the U.S. Trustee's (UST) understanding that a third portion of the motion, dealing with employee retention, severance, and bonus plans has been temporarily withdrawn.

2. As modified by the Debtors Brief filed in support of the Motion on May 4, 2001, it is the UST's understanding that the compensation proposed for Messrs. Golleher and Mays is as follows:

A. Signing bonuses of \$125,000 each.

B. Monthly salaries of \$25,000 each.

C. Success bonuses to be determined on a formula, but in no case less than \$750,000.

3. While Messrs. Golleher and Mays were originally to be retained as independent contractors, it is the UST's understanding that both individuals will be performing the described services as directors of the Debtor in Possession.

4. With regard to Mr. Dahlen, a \$30,000 transition fee is to be paid. A further proposed payment of \$100,000 has been withdrawn.

### **ARGUMENT**

I. Based on Changes in the Debtor's Position Regarding the "Consulting Agreements" with Messrs. Golleher and Mays, the UST Will Not Pursue Objections on the Basis That They Should Be Considered Professionals under 11 U.S.C. §327 (A).

The Debtor in its brief has agreed not to pursue employment of Messrs. Golleher and Mays as consultants or independent contractors. Apparently, "They have agreed as Board members to assume the additional executive duties described in the Agreements..." Debtor's Brief at p. 4. As a necessary corollary, paragraph 5 of both "Consulting Agreements" attached to the Motion filed on March 28, 2001, should be deleted. That provision deals with (1) defining Golleher and Mays as independent contractors, (2) specifying that the Debtor does not have authority to direct or control Messrs. Golleher and Mays, and (3) relieving the company from liability for withholding taxes. Additionally, insofar as paragraph 8 of both "Consulting Agreements" expands on the indemnity otherwise provided to Messrs. Golleher and Mays under Delaware law, that provision should be modified or deleted.

Based on the above, the UST will not pursue its objection to the “Consulting Agreements” for Messrs. Golleher and Mays on the grounds that they should be considered professionals subject to 11 U.S.C. §327.

## II. Final Approval of the Motion as it Relates to the Agreement with Messrs. Golleher and Mays Should Be Delayed until Such Time as Services Have Been Rendered.

Approval of the Motion is sought by the Debtor pursuant to 11 U.S.C. §363 (b)(1), which permits a debtor to use property of the estate “other than in the ordinary course of business,” after notice and hearing. In so doing, the Debtor has argued that once a valid business justification has been stated, the “business judgment rule” provides a presumption that the proposed action is in the best interest of the Debtor. It is further contended that the application of this rule shields the Chapter 11 debtor from judicial second-guessing. See Motion at ¶ 24. However, even some of the authority cited by the Debtor does not support this position.

As stated by the Bankruptcy Court for the Southern District of New York:

The business judgment rule’s presumption shields corporate decision-makers and their decisions from judicial second-guessing when the following elements are present: “(1) a business decision, (2) disinterestedness, (3) due care, (4) good-faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets.” (Citations omitted) *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y.1992).

In this case, the proposed transaction at issue is with two members of the Board of Directors which is proposing the compensation. This raises issues concerning disinterestedness which must trigger closer scrutiny. Although *Integrated Resources* has been cited by the Debtor to support its position, the rule of that case does not support the easy approval of the Motion.

The UST respectfully submits that the better reasoned approach is for the Court to make an active inquiry into what is in the best interests of the estate. *In re America West Airlines*,

*Inc.* 166 B.R. 908, 911 (Bankr.D.Ariz.1994). See also *In re Wild Horse Enterprises* 136 B.R. 830, 841 (Bankr.C.D.Cal.1991); *In re Lionel Corp.* 722 F.2d 1063, 1071 (2d Cir.1983); *In re Hupp Industries* 140 B.R. 191,196(Bankr.N.D.Ohio1992). In another case cited by the Debtor to support its position, *In re America West Airlines, Inc.*, 171 B.R. 674 (Bankr.D.Ariz.1994),the court in evaluating a bonus plan stated as follows, “The Court, on this record, on the history and under the present posture of the case, must determine whether the proposed bonuses are reasonable and fair under these circumstances.” 171 B.R. at 678. Although the court made reference to the business judgment rule, it is clear that the analysis was far deeper than mere acceptance of the debtor’s request. Further, it is interesting to note that the bonus plan which was approved in that case, was only approved after plan confirmation, when the results of the services rendered by management were clear.

Based on the above, the UST respectfully submits that the proper standard for review of the Motion is whether the actions therein recommended are in the best interests of the estate. In this case, the Debtor is requesting that potentially millions of dollars in success fees be awarded to Messrs. Golleher and Mays based on “[a]ggregate gross asset value of the Company immediately following the confirmation of the plan of reorganization or liquidation, or the consideration received...in connection with a sale or disposition...” See Consulting Agreements at ¶4(3)(i). In this regard, Messrs. Golleher and Mays will be entitled to a success bonus in the amount of \$1.5 million if the “aggregate gross asset value” or “consideration” ranges between \$50 million and less than or equal to \$100 million. See Consulting Agreements at ¶4(3)(ii)(A). In reviewing the Summary of Schedules filed herein on March 26, 2001, the Debtor’s total assets are valued at \$164,374,004.49. At first blush, it would not appear reasonable to award a success bonus to

Messrs. Golleher and Mays for obtaining a result ranging from one-third to two-thirds of the Debtor's own estimated asset value. However, given the difficulties of peering into the future and determining the benefit to the estate of as yet unknown transactions, it would be best to leave a judgment as to an appropriate bonus to a later time. Only then, can a determination be made as to what is in the best interests of the estate.

Finally, it should be noted that the Debtor has also proposed to employ Peter J. Solomon Co., Ltd. (PJSC) as its investment banker. Under the terms of that proposed employment, PJSC is to receive a "restructuring fee" of \$1.5 million and/or transaction fees of a minimum of \$1.5 million. Without considering the fees of other professionals in this estate, the executive bonus proposals and the investment banker fees have the potential of mounting to several million dollars. Until a plan of reorganization is proposed, there is no way of knowing whether these fees will be justified in terms of dividends to unsecured creditors or whether they will eliminate any possibility of payment to this class of creditors.

### III. The Proposed Payment to Mr. Dahlen Is Not in the Best Interests of the Estate.

The Debtor proposes to pay \$30,000 to Thomas Dahlen, the former president of the Debtor who left his position on April 6, 2001. Other than vague references to obtaining Mr. Dahlen's cooperation during the transition period, no other justification for this expenditure appears to have been given. In short, there is no basis for determining that this expenditure is in the best interest of the estate. *In re America West Airlines, Inc.* 166 B.R. at 911.

## Conclusion

The United States Trustee respectfully submits that the bonus provisions of the motion as they relate to Messrs. Golleher and Mays be denied without prejudice to a later motion at such time as the results of their services can be evaluated in light of the best interests of the estate. The United States Trustee further submits that the proposed payment to Mr. Dahlen is not justified in the circumstances and should be denied.

Respectfully submitted,

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Filed electronically 5/14/01  
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The undersigned certifies that a true and accurate copy of the foregoing was mailed to the below listed counsel this 14th day of May, 2001.

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