

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT

In Re:

MAY 14 2001

FURR'S SUPERMARKETS, INC.,

Chapter 11

Case Nos. 01-10779-01

DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

Debtor.

Hearing Date: May 22 2001,
1:30 p.m.

**BRIEF OF OFFICIAL UNSECURED CREDITORS' COMMITTEE IN SUPPORT OF
OBJECTION TO DEBTOR'S MOTION FOR AUTHORIZATION TO ENTER INTO
CONSULTING AGREEMENTS WITH GEORGE GOLLEHER AND GREG MAYS**

The Official Committee of Unsecured Creditors of Furr's Supermarkets, Inc. (the "UCC" or the "Committee") by and through its counsel Pepper Hamilton, LLP (Stuart Hertzberg, Esq. and I. William Cohen, Esq.), and local counsel Davis & Pierce, P.C. (William F. Davis, Esq.), and for its Brief in support of its April 18, 2001 Objection to the Debtor's Motion for Authorization to Enter Into Consulting Agreements with George Golleher and Greg Mays (the "Motion"), as required by Court Order resulting from the preliminary hearing in this matter held on April 20, 2001, hereby states as follows:

I. STATEMENT OF FACTS

On March 26, 2001, the Debtor filed its Motion for Order Authorizing Debtor to (a) Implement Employee Retention, Severance, and Success Bonus Plans; (b) Enter Into Transition Agreement with Thomas Dahlen; and (c) Enter Into Consulting Agreement with George Golleher and Greg Mays (the "Employee Motion"). The Committee filed objections to both the Employee Motion as well as the Debtor's Application for Authorization to Retain Peter J. Solomon Company, Limited as Investment Bankers (the "Solomon Application"). Although the Debtor has since withdrawn its request for authorization to implement the Employee Retention,

Severance, and Success Bonus Plans, the Debtor continues to seek approval of the consulting agreements with George Golleher and Greg Mays (the "Golleher and Mays Agreements"). In response to the Committee's Objections, the Debtor revised the Golleher and Mays Agreements, ostensibly reducing the success bonus to be paid based on a range of transaction values. As will be demonstrated below, however, the changes to the Golleher and Mays Agreements are illusory at best.

Simply stated, the Committee believes the proposed compensation as set forth in the Golleher and Mays Agreements is excessive and contrary to sound business judgment. Moreover, the proposed reductions in fees set forth in the revised Agreements fail to provide any savings to the Debtor unless the transaction value is \$220,000,000 or higher. See, Exhibits "A" and "B", attached to the Declaration of Anthony D. Forcum in Support of the Objection of the Committee (the "Forcum Declaration").

The Committee also believes that the Consulting Agreements should provide that the \$250,000 signing bonus paid to the Consultants should be offset against their success fee, that a liquidation should **not** be considered a "success," and that there should not be a fee for serving on the Debtor's board of directors in addition to the \$50,000 in monthly fees to be paid to Golleher and Mays. Additionally, the proposed "Minimum Bonus" of \$750,000 to be paid to Golleher and Mays in the event no sale or reorganization is consummated (essentially a "walk-away bonus") should be eliminated.

As set forth on Exhibit "C" attached to the Forcum Declaration, the requested fees of Golleher and Mays, as a percentage of the transaction value, are far in excess of senior crisis managers in comparable cases. As the Debtor is aware, and the Committee agrees, the roles of Golleher and Mays are truly those of crisis managers in this situation. As such, a comparison

with crisis managers in other cases would prove extremely useful. The comparables set forth on Exhibit C were provided by the Debtor, however when analyzed by the Committee and its professionals, certain factors were glaringly evident.

- The proposed success bonus fee is at the upper echelon of the comparables;
- Only three of the seven comparables had larger compensation packages, than that requested by Gollcher and Mays (Harnischfeger Industries, Iridium and Glenoit). That said, however, Harnischfeger and Iridium are *substantially* larger than this case;
- Investment bankers were retained in three of the seven comparable cases cited by the Debtor. In each of those cases, however, the crisis managers did **not** receive **any** success bonus (Brazos Sportswear, Outboard Marine Corp., Bugle Boy Industries).

As Exhibit C demonstrates, while the mean compensation to crisis managers in comparable cases, measured as a percentage of assets, is .78%, the proposed compensation to Gollcher and Mays is .96%, a number which is shockingly high when considering the size and nature of this particular bankruptcy case.

Moreover, the Committee's financial advisors also conducted an analysis of crisis manager compensation in other cases, as set forth on Exhibit "D," which yielded a mean compensation ratio of .49% . Once again, when considering the fact that the Debtor's proposed Agreements provides for a .96% fee, it is clear that the proposed compensation is far in excess of acceptable standards in the industry and is contrary to any sound business purpose.

II. LEGAL ANALYSIS

Pursuant to 11 U.S.C. section 363(b), the Debtor, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions. See, In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (Bankr. D. Del. 1991); In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983); In re Lady H Coal Co., Inc., 193 B.R. 233, 243 (Bankr. S.D.W. Va. 1996); In re WBQ Partnership, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995); In re Indus. Valley Refrig. & Air Cond. Supplies, 77 B.R. 15, 21 (Bankr. E.D. Pa. 1987).

In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a "business judgment test." See, Collier on Bankruptcy, at 363.02 (15th ed. 1997). In In re Lionel Corp., the Court of Appeals for the Second Circuit listed several factors which a bankruptcy court may consider in its Section 363(b) analysis. In considering this test in the context of a sale of assets under Section 363(b), the Second Circuit stated:

In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. He might, for example, look to such relevant factors as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions, and most importantly perhaps, whether the asset is increasing or decreasing in value.

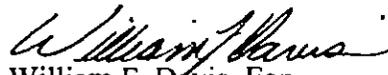
Lionel, at 1071.

In delineating these factors, the Second Circuit cautioned that "this list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge." *Id.*

In applying the factors to the case at bar, and in considering the premium and excessive compensation which the Debtor proposes to pay the crisis managers, it is difficult to comprehend how saddling the Debtor with an excessive compensation package to be paid to its crisis managers will in any way aid in an effective reorganization of this company. The value of this compensation package, when considered as a percentage of the total asset value of the estate, is clearly in excess of that awarded in comparable cases. This is not a case involving two or three billion dollars in assets (see, Exhibit C, Harnischfeger and Iridium cases), nor is this case unduly complex. As such, given the excessive and profligate nature of the compensation package, it is contrary to sound business judgment to authorize the Debtor to enter into the consulting agreements with Golleher and Mays under the revised terms.

WHEREFORE, the Committee prays that this Honorable Court deny the Debtor's Motion for Authorization to Enter Into Consulting Agreements with George Golleher and Greg Mays and for such other and further relief as this Court deems just and proper.

Respectfully submitted,
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The undersigned hereby certifies
that a true and accurate copy of
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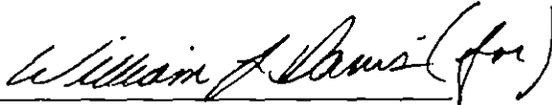
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