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DISTRICT OF NEW MEXICO

U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

IN RE:

FURR'S SUPERMARKETS, INC.

Case No. 11-01-10779 SA

Chapter 11

Debtor.

**MEMORANDUM IN SUPPORT OF MOTION FOR ORDER
AUTHORIZING AND COMPELLING DEBTOR TO PAY SUCCESS FEE
PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE**

In March of 2001, Debtor entered into an agreement with George Golleher and an agreement with Gregory Mays to act as chairman and vice-chairman of Debtor, respectively. On or about June 1, 2001, the Court, after notice to creditors and a hearing, approved these agreements. A copy of the approved agreements are attached hereto as Exhibits A and B. The prepetition secured lenders agreed to paragraph 16 of these agreements. The prepetition secured lenders, through Heller Financial, Inc., as agent, and the secured noteholder (hereinafter referred to collectively as "Lenders"), all accepted the benefits of the good results obtained.

Pursuant to the Agreements, Golleher and Mays were responsible for the management of Debtor's business, and were to maximize the value of the estate, including through the sale of Debtor's assets. The compensation plan for Golleher and Mays included a "success bonus," payable "at the closing of any Success Event and as

1487

a condition to such closing.” Exhibits A and B at Section 4(c)(l). A “success event” was “deemed to have occurred if (l) a plan of reorganization or liquidation is confirmed in the Company’s Chapter 11 case or (ii) there is consummated one or more sales or dispositions by the Company of a portion of the Company’s assets” for contractually specified amounts, pursuant to specified calculations. *Id.*

Primarily through the efforts of Golleher and Mays, there was a sale of substantially all assets of the debtor-in-possession to the Fleming Company for approximately \$84,000,000.00. As a result, Golleher and Mays became entitled to Success Bonuses in the combined amount of \$1,500,000.00. This Court reserved \$ 1,500,000.00 from the proceeds of that sale for the Success Bonuses due and payable to Golleher and Mays representing that portion of the success bonus payable from the sale of assets to Fleming Company. The Court further ordered, on September 26, 2001, that \$ 750,000.00 of this amount be paid. Golleher and Mays now seek the remaining \$ 750,000.00.¹

I. By Contract, Golleher and Mays Are Entitled to their Success Bonuses

The Agreements provided that payment of the Success Bonuses was to be made “at the closing... and as a *condition* of such closing”. Accordingly, by contract, the funds generated by the sale of Debtor’s assets did not become part of Debtor’s Estate,

¹ Golleher and Mays reserve the argument whether they are entitled to an additional \$ 323,000, representing additions to their success bonuses derived from certain assets sold or realized after the Fleming transaction or currently pending sale.

because the funds did not exist until the Success Bonuses were vested.² Rather, the Success Bonus was a cost of sale, paid off the top of the sale price. The Success Bonuses are therefore not subject to any prior lien.

A careful reading of Section 4(c)(i) of the Agreements makes clear that the intent of the parties was that the Success Bonuses would be paid as a cost of sale, not as part of the limited funds carved out of the bankruptcy estate for administrative claims. Thus there were two events that could trigger a Success Bonus: either an advantageous sale or confirmation of a Chapter 11 plan. In either instance, Golleher and Mays were assured of compensation for their efforts. If there were a sale of the debtor's assets, then the Success Bonuses, as a condition of sale, would be paid as a cost of sale, not as an administrative claim. By the same token, if the Success Event were the confirmation of a plan of reorganization pursuant to Section 4(c)(I) of the Agreements, all claims, including the Success Bonuses, would be paid, because a condition of confirmation, by law, is one hundred percent payment of all claims against the Estate. 11 U.S.C. Section 1129(a)(9)(A).

Because the payment of the Success Bonuses was a condition of sale, there was no need for the Lenders specifically to waive their Senior Liens. There would be

² Thus, for example, in *United States v. Ruff*, 99 F.3d 1559 (11th Cir. 1996), the bankruptcy trustee was held liable for failure to honor an IRS levy against a broker's commission, after sale of the property but prior to judicial approval of the commission. The United States Court of Appeals for the Eleventh Circuit held that the broker was entitled to a fixed and determinable commission at the time of sale, even though the right to receive payment was deferred to a future date. By the same token, here, Debtor had authority pursuant to 11 U.S.C. Section 506 to enter into an agreement with Golleher and Mays to pay a commission for the disposal of collateral, and, moreover, the Agreements were approved by the Court prior to sale. Accordingly, Golleher and Mays were entitled to the Success Bonuses as a condition precedent to closing, and their Bonuses vested prior to closing, even though payment was deferred until judicial approval.

no prior liens to waive. Thus the apparent position of the Lenders, that the Success Bonuses are omitted from the waiver of secured claims in Section 16, is simply hollow, because to include them in Section 16 would be meaningless: there is nothing to waive.

The position of Golleher and Mays is thus that the Agreements are clear as written, to impose payment of the Success Bonuses as a condition of sale. In this context, Section 16 of the Agreements, upon which the Lenders apparently rely, serves solely as a protection for Golleher and Mays for those fees, costs, and expenses that *would* be subject to Senior Liens. The alternative supposition, that only those fees, costs and expenses listed in Section 16 are exempt from the Senior Liens, renders meaningless the phrase “as a condition to such closing” in Section 4(c)(1), because the Success Bonuses could not then be a condition of closing; the condition becomes impossible to perform.

The Success Bonus, as a cost of sale, is analogous to the fee owed to Peter J. Solomon Company (“PJSC”) upon the closing of a transaction. Under the PJSC contract, also approved by the Court, PJSC was owed a minimum fee in the amount of \$1.5 million upon the closing of a sale plus a \$15,000 monthly advisory fee. An order has been agreed to providing that PJSC was allowed a fee of \$1.5 million as a cost of sale, prior to the lien of the Lenders. The PJSC fee, like the Success Bonus, was due at closing and was earned as the result of a sale having closed. The PJSC fee, like the Success Bonus, included a minimum fee of \$1.5 million upon the occurrence of a qualified sale, plus an additional amount based on a percentage of the amount of the sale over a specified amount. Further, both the Success Bonus and PJSC fees

included assumed liabilities in the calculation of the aggregate value of the sale. Separate reserves each in the amount of \$1.5 million were established in the first post-closing debtor in possession financing order for PJSC and Golleher and Mays, representing, respectively, the minimum transaction fee and minimum Success Bonus due upon the closing of the Fleming sale. The Success Bonus, like the fee owed to PJSC, is a cost of sale prior to the lien of the Lenders to be paid prior to disbursement of sale proceeds to the Lenders and other creditors.

Since the lowest success bonus threshold of \$ 50,000,000.00 would not even generate enough proceeds fully to pay any of the secured lenders (other than the DIP financing), clearly the parties intended that the success bonus would come off the top and out of the proceeds of such sale. Consequently, it was not included in paragraph 16, again because it was unnecessary.

"[O]ne of the first canons of construction is that a contract shall be interpreted as a harmonious whole to effectuate the intention of the parties. Every word, phrase or part of a contract should be given a meaning and significance according to its importance in the context of the contract." *Phillips Petroleum Co. v. McCormick*, 211 F.2d 361, 364 (10th Cir. 1954). The Lenders cannot use Section 16 to obviate the clear language of Section 4(c)(I).

At most, the Lenders' reliance on Section 16 to contradict Section 4, and the reliance of Golleher and Mays on Section 4 to interpret Section 16, makes the Agreements ambiguous. See *In re Vidal*, 234 B.R. 114 (D.N.M.Bankr. 1999) (circular arguments may render a contract ambiguous); See also *Creson v. Amoco Production*

Company, 129 N.M. 529 (Ct.App. 2000); *Segura v. Kaiser Steel Corporation*, 102 N.M. 535, 697 P.2d 954 (Ct.App. 1984). In that case, the Court must again look to New Mexico canons of construction to discern the intent of the parties from the four corners of the contract and the surrounding circumstances. *Id.*

The primary rule of construction is that “the law favors a reasonable rather than an unreasonable interpretation.” *State of New Mexico ex rel. Udall v. Colonial Penn Insurance Co.*, 112 N.M. 123, 130, 812 P.2d 777, 784, (1991). Indeed, this is so even if a contract is considered unambiguous, the interpretation must be reasonable. *Id.* at n.8.

Common sense dictates that part of the canon of reasonable interpretation is that “[a]n interpretation rendering a contract such that reasonable men would not enter into it is disfavored.” *Smith v. Tinley*, 100 N.M. 663, 665, 674 P.2d 1123, 1125 (1984), *as cited in Stock v. Grantham*, 125 N.M. 564, 571, 964 P.2d 125, 133 (Ct.App. 1998). Thus a party will not agree to “perform an act that both parties must have known to be impossible at the time the contract was executed.” *Id.* Thus here, the parties would not agree that Golleher and Mays would earn a Success Bonus they might not have the ability to collect.

The Agreements are clear on their face that payment of the Success Bonus was assured, regardless of whether there were sufficient assets to pay all creditors. Moreover, a careful reading of the entire agreement, in light of the circumstances surrounding the agreement, makes clear that any contrary interpretation renders the Success Bonus meaningless. Thus the Agreements expressly provide that upon the

sale of assets yielding an Aggregate Value of \$ 50 million or more, the Success Bonus shall be paid "at the closing of [such] Success Event . . . and as a condition to such closing." Exhibits A and B at Section 4(c)(i). Since a Success Bonus of \$ 1.5 million would be due upon a sale yielding an Aggregate Value of \$ 50 million, the parties *necessarily* contemplated the Success Bonus would be treated as a cost of sale, payable prior to the liens of the Lenders. Otherwise, the Debtor could never honor its obligation to pay a \$ 1.5 million dollar Success Bonus under the circumstances contemplated by the contract, because the pre-petition secured claims of the Lenders would necessarily then swallow up the Success Bonus in this administratively insolvent estate. If the Lenders are correct, the Debtor entered into an agreement already in breach, which is absolutely contrary to hornbook principles of contract construction. See *Stock*, 125 N.M. at 571, 964 P.2d at 133.

The Lenders, of course, were not part of the entire Agreements. They are estopped, however, from picking and choosing what part of the Agreements they will and will not accept. Prepetition Secured Lenders have been paid in full, including costs and attorney's fees. Metropolitan Life would not have received as much return as they have, without the efforts of Golleher and Mays. Having eaten most of the fruit, however, the Lenders now seek to chop down the tree. This is not only greedy, it is contrary to law: "[I]t is fundamental that one who accepts the benefits of a contract must assume the detriments." *Local Federal Savings and Loan Association v. Burkhalter*, 1987 Ok.Civ.App. 23, ___, 735 P.2d 1202, 1206 (Okla.Ct.App. 1987).

Moreover, the Lenders' assurances to Golleher and Mays encouraged both to

continue their efforts to close the sale. Indeed, representatives of Heller Financial, managing agent of the Secured Lenders, made clear prior to the closing, that Golleher and Mays would be paid "off the top." This is significant for two reasons. First, the conversation demonstrates that the intent of the parties was to effectuate the Agreements as written, to pay the Success Bonuses as a condition of sale. Second, the conversation, and the general position of the Secured Lenders to encourage the sale as advantageous to their interests, estops the Secured Lenders from now claiming that the Success Bonuses must be paid out of the administrative carve out.

Golleher and Mays entered into the Agreements with the expectation that their Success Bonuses would be paid. If the Senior Liens are given priority over the Success Bonuses, then the contractual language making payment of the Success Bonuses a condition of sale becomes meaningless, contrary to fundamental canons of construction. What is more, Secured Lenders, having acquiesced to the Agreements, and accepted the benefits thereof, will be the only parties to benefit, receiving a windfall that was never intended by the parties. Indeed, the only beneficiaries of this position are the Secured Lenders. If the Success Bonuses are paid out of the administrative carve out, then not only may Golleher and Mays not receive the compensation they are owed, but the amounts paid to other administrative claimants may be substantially reduced by the claim of Golleher and Mays.

II. Conclusion

For the foregoing reasons, claimants request that this Court order payment of

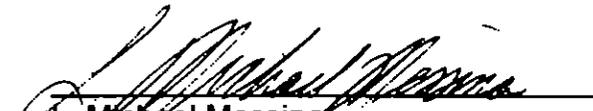
their Success Bonuses in the amount of \$750,000.00, along with any interest actually accrued thereon.

RESPECTFULLY SUBMITTED,

L. Michael Messina, P.A.

By: 
L. Michael Messina
20 First Plaza NW, Suite 306
Albuquerque, NM 87102
(505) 243-0503

I hereby certify that on January 14, 2002, a copy of the foregoing Memorandum with enclosures was hand-delivered to Ron D. Andazola, Robert Jacobvitz, Paul Fish, Jennie Deden Behles and William Davis.


L. Michael Messina

COPY

CONSULTING AGREEMENT

This Consulting Agreement (the "Agreement"), dated as of the ___ day of March, 2001 (the "Execution Date"), is by and between Furr's Supermarkets, Inc., a Delaware corporation (the "Company"), and George Golleher (the "Chairman").

WHEREAS, the Company considers it essential to the best interests of the Company that it have the Chairman's advice available to it on an advisory basis, and the Chairman desires to provide such advice to the Company;

NOW, THEREFORE, in consideration of the mutual promises expressed herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Chairman hereby agree as follows:

1. Service. The Chairman shall provide services to the Company as its Non-Executive Chairman, subject to the terms and conditions set forth in this Agreement. Notwithstanding any other provision hereof, this Agreement is subject to, and shall be effective only upon, the approval of the United States Bankruptcy Court for the District of New Mexico where the Company's Chapter 11 case is currently pending (the date of such approval, the "Effective Date"); *provided, however,* that Section 8 of this Agreement shall be effective as of the Execution Date. The Company will submit the Agreement for approval at the earliest practicable date.

2. Responsibilities and Duties. The Chairman shall provide services to the Company at such times, and to such an extent, as are mutually agreeable to the Chairman and the Company, and shall report directly to the Board of Directors of the Company (the "Board of Directors"). The Board will grant the Chairman authority consistent with the services he is asked to perform. The Company acknowledges and accepts that the Chairman provides or may provide consulting, management and other services to other companies. During the Service Term (as such term is defined in Section 3 below), the Chairman agrees to comply with all applicable reasonable policies, rules and regulations of the Company. During the Service Term, the Company shall cause the Chairman to be reelected to the Board of Directors.

EXHIBIT

A

3. Term and Termination.

(a) The term of the service of the Chairman (the "Service Term") under this Agreement shall begin on March 26, 2001 and shall continue until the earliest to occur of the following:

- (i) a termination of the service of the Chairman by the Board of Directors at any time for "just cause", which shall be defined as a termination for any of the following reasons, provided the Board of Directors provides the Chairman with written notice of any such termination and the reasons therefor at least two weeks prior to its effectiveness: (A) the breach by the Chairman of any of the material terms of, or failure to perform any material covenant contained in, this Agreement, which breach or failure continues uncured for a period of 30 days following written notice from the Company, (B) the commission by the Chairman of an act of fraud, conversion, misappropriation (including the unauthorized use or disclosure of confidential or proprietary information of the Company) or embezzlement with respect to the Company, or (C) a conviction or guilty plea by the Chairman with respect to any crime involving theft, conversion, misappropriation, embezzlement or felony involving moral turpitude;
- (ii) a termination of the service of the Chairman by the Company for any reason other than as set forth in Section 3(a)(i) or (ii) (a "Termination Without Just Cause");
- (iii) the death of the Chairman or the mental or physical inability of the Chairman to perform his required duties;
- (iv) the voluntary resignation by the Chairman; or
- (v) December 31, 2002, or, at the option of the Chairman, upon any earlier payment of any Success Bonus payable hereunder.

Except as set forth in Section 3(a)(i) above, any termination of the Chairman's service hereunder (other than a termination by reason of the Chairman's death) shall be communicated in writing to the other party at least 60 days prior to its effectiveness.

(b) Upon any termination of service hereunder, the Chairman shall be entitled to, and the Company shall be liable for and shall pay to the Chairman promptly, the portion of the Service Fee (as such term is hereinafter defined) that was earned prior to the date of the termination of the Chairman's service with the Company and, except as explicitly set forth herein, including, without limitation in Section 4(c) below, the Company shall not be liable for any other compensation or benefits that it would otherwise provide to the Chairman or to which the Chairman would otherwise be entitled.

(c) If the Chairman's employment is terminated in a manner that constitutes a Termination Without Just Cause, and if a Success Event (as such term is defined in Section 4(c) below) occurs within twelve months after such termination, the Company shall pay the Success Bonus (as such term is defined in Section 4(c) below) to the Chairman, less any other Success Bonus or Minimum Bonus previously paid to the Chairman

(d) If the Chairman's employment is terminated in a manner that constitutes a Termination Without Just Cause, then, at the time of any such termination the Chairman shall receive a Success Bonus which is the greater (y) of any such bonus earned as a result of a Success Event or (z) the Minimum Bonus described in Section 4(c)(ii)(E) below. In such event, the Success Bonus shall be paid on the first business day following the date of such termination.

4. Compensation.

(1) Service Fee. The Company shall pay to the Chairman a

service fee at the monthly rate of \$25,000 during the Service Term (the "Service Fee"), which amount shall be earned in equal installments each year on a monthly basis and shall be paid at the beginning of each month. The Service Fee may be increased from time to time as may be determined by the Board of Directors at its sole discretion.

(b) Signing Bonus. The Company shall pay to the Chairman, by wire transfer, a signing bonus of \$125,000 (the "Signing Bonus") no later than the end of the first business day following the Effective Date.

(c) Success Bonus.

(i) The Company shall pay to the Chairman two-thirds (2/3) of a success bonus in the amount set forth in Section 4(c)(ii) (the

"Success Bonus") at the closing of any Success Event (with the other one-third (1/3) going to Gregory Mays) and as a condition to such closing. For purposes hereof, a **"Success Event"** shall be deemed to have occurred if (i) a plan of reorganization or liquidation is confirmed in the Company's Chapter 11 case or (ii) there is consummated one or more sales or dispositions by the Company of a portion of the Company's assets, which, in either case, in the aggregate (giving effect to all such sales occurring subsequent to the Effective Date) represents a sale, disposition or reorganization of assets of the Company that were responsible for no less than 60% of the trailing 12-month EBITDA of the Company for the period ended March 24, 2001, as specified on Annex A hereto.

- (ii) The Success Bonus shall be calculated as follows:
- (A) If the aggregate gross asset value of the Company immediately following the confirmation of the plan of reorganization or liquidation, or the consideration received (which shall include the amount of any liabilities assumed by the buyer) in connection with a sale or disposition (each as described in Section 4(c)(i)), as the case may be, excluding the value of any assets or liabilities associated with capital leases (such aggregate value, the "Aggregate Value") is more than \$50 million and less than or equal to \$100 million, then the Success Bonus shall be \$1.5 million.
 - (B) If the Aggregate Value is more than \$100 million and less than or equal to \$150 million, then the Success Bonus shall equal the sum of (1) \$1.5 million and (2) the lesser of (a) 2.5% multiplied by the amount by which the Aggregate Value exceeds \$100 million and (b) \$1.25 million.
 - (C) If the Aggregate Value is more than \$150 million and less than or equal to \$200 million, then the Success Bonus shall equal the sum of (1) the amount calculated pursuant to Section 4(c)(ii)(B) hereof and (2) the lesser of (a) 3% multiplied by the amount by which the Ag-

Aggregate Value exceeds \$150 million and (b) \$1.5 million.

- (D) If the Aggregate Value is more than \$200 million, then the Success Bonus shall equal the sum of (1) the amount calculated pursuant to Section 4(c)(ii)(C) hereof and (2) 4% multiplied by the amount by which the Aggregate Value exceeds \$200 million.
- (E) Notwithstanding the prior provisions of this Section 4(c)(ii), if a Success Event does not occur on or prior to the date that is the later of (y) December 31, 2001 and (z) 30 days after the expiration of the Debtor's debtor-in-possession financing facility (the "DIP Facility"), then the Success Bonus shall be \$750,000 (the "Minimum Bonus"), but paid no later than March 31, 2002, if on or after such date the Chairman voluntarily terminates this Agreement. Such Minimum Bonus shall be paid on the first business day following such date of termination.

(iii) In the event that more than one Success Events occur for which Chairman would be entitled to a Success Fee, Chairman shall receive an amount equal to (y) any Success Bonus that he would be entitled to hereunder as a result of the aggregate amount of the Success Events, less (z) any Success Bonus amounts previously paid to Chairman hereunder.

(d) Expenses. The Company shall reimburse the Chairman for all reasonable costs and expenses incurred by the Chairman in connection with performing services hereunder, including travel, lodging and other expenses incurred in commuting from his principal residence to the Company's principal executive offices ("Reimbursable Expenses").

5. Independence and Discretion.

(a) Nothing herein contained shall be construed to constitute the parties hereto as partners or as joint venturers or as employer and employee. By virtue of the relationship described herein, the Chairman's relationship to the Company during the Service Term shall only be that of an independent contractor and, to the extent authorized by the Board, an agent of the Company, and the Chairman shall

perform all services pursuant to this Agreement as an independent contractor. The Chairman shall not present himself as an employee of the Company.

(b) Subject only to such specific limitations as are contained in this Agreement, the manner, means, details or methods by which the Chairman performs his obligations under this Agreement shall be solely within the Chairman's discretion. The Company shall not have the authority to, nor shall it, supervise, direct or control the manner, means, details or methods utilized by the Chairman to perform his obligations under this Agreement and nothing in this Agreement shall be construed to grant the Company any such authority.

(c) The Company shall have no responsibility to the Chairman to withhold, and does not intend to withhold, any amounts from payments made to the Chairman on account of withholding taxes or other employment taxes.

6. Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision never comprised a part of this Agreement.

7. Dispute Resolution.

(a) If any dispute shall arise concerning the interpretation or enforcement of this Agreement, and the provisions set forth herein, the parties agree to mutually attempt to resolve such dispute through direct discussion and negotiation and without formal proceedings.

(b) If, notwithstanding the provisions of this Section 7, in the opinion of either party, a resolution of any pending dispute is not possible without formal proceedings, the parties hereby agree to submit any such dispute to a panel of three arbitrators appointed in accordance with the rules, regulations and procedures of the American Arbitration Association ("AAA"). The award and determination of the arbitrators shall be final and binding, and may be entered and enforced in any jurisdiction in which the party against whom such judgment is to be entered may be found.

(c) The situs of arbitration required or requested hereunder shall be Albuquerque, New Mexico.

8. Indemnity. If the Chairman is made a party, or is threatened to be made a party, to any action, suit or proceedings, whether criminal, civil, administrative, investigative or otherwise (a "Proceeding") by reason or arising out of the fact that he is or was a director, officer, employee, consultant, agent or fiduciary of the Company or is or was serving at the request of the Company as a director, officer, member, employee, consultant, agent or fiduciary of another corporation, partnership, joint venture, trust or other enterprise or in connection with any services performed by the Chairman hereunder, the Company shall indemnify and hold harmless the Chairman to the fullest extent permitted by law, from and against all costs, expenses, liability, losses (including, without limitation, attorney's fees and expenses, judgments, fines, excise taxes or penalties and amounts paid in settlement) incurred or suffered by the Chairman in connection therewith (including, without limitation, investigating, preparing for and defending any such Proceeding), and such indemnification shall continue as to the Chairman even if he has ceased to be a director, officer, member, employee, consultant or agent of the Company or other enterprise or is no longer providing services to the Company hereunder, and shall inure to the benefit of the Chairman's heirs, executors, administrators and successors. The Company shall, to the fullest extent permitted by law, advance to the Chairman all costs and expenses incurred by him in connection with a Proceeding within 10 days after receipt by the Company of a written request for such advance. In addition, the Company shall continue and maintain director's and officers' liability insurance, in an amount and on terms reasonably acceptable to the Chairman, covering the Chairman. Notwithstanding any other provision of this Agreement to the contrary, any termination of the Chairman's services or of this Agreement shall have no effect on the continuation of his rights under this Section 8.

9. Notices. Any notices, consents, demands, requests, approvals or other communications to be given by either party to the other shall be deemed to have been duly given if given in writing and personally delivered or sent by registered or certified mail, postage prepaid with return receipt requested, as follows:

If to the Company:

Furr's Supermarkets, Inc.
c/o Windward Capital Partners
Americas Tower
1177 Avenue of the Americas
New York, New York 10036
attn: Tom Sikorski

If to the Chairman:

As Set Forth Beneath the Chairman's Signature hereto.

The above addresses may be changed only by giving notice of such change to the party hereto that will be affected by such change. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three days after mailing.

10. Entire Agreement. This Agreement supersedes any and all other agreements, either oral or written, between the parties hereto with respect to the subject matter hereof and contains all of the covenants and agreements between the parties with respect thereto.

11. Modification and Waiver. No change or modification of this Agreement shall be valid or binding upon the parties hereto unless such change or modification shall be in writing and signed by all the parties hereto. No waiver of any term or condition of this Agreement shall be binding unless such waiver is in writing signed by the party against which or whom such waiver is sought to be enforced. The waiver by the Company of a breach of any provision of this Agreement by the Chairman shall not operate or be construed as a waiver of any subsequent breach by the Chairman.

12. Governing Law. This Agreement, and the rights and obligations of the parties hereto, shall be governed by and construed in accordance with the laws of the State of New Mexico.

13. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original but all of which shall constitute one and the same document.

14. Assignment. The Company shall have the right to assign this Agreement to its successors or assigns. The terms "successors" and "assigns" shall include any person, corporation, partnership or other entity that buy all or substantially all of the Company's assets or all of its stock, or with which the Company merges or consolidates. The rights, duties and benefits to the Chairman hereunder are personal

15. Binding Effect. This Agreement shall be binding upon the parties hereto, together with their respective executors, administrators, successors, personal representatives, heirs and permitted assigns.

16. Prepetition Senior Lenders. The Prepetition Senior Lenders (as identified on the signature pages hereto) have a senior, perfected security interest in and lien against substantially all of the assets of the Company and any proceeds of the disposition of such asset, which security interest and lien is junior only to the liens under the DIP Facility (the "Prepetition Lien"). In consideration for Chairman's services hereunder, the Prepetition Senior Lenders agree to the following:

(a) In the event Chairman becomes entitled to any Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses hereunder, such amounts shall be paid to Chairman free and clear of the Prepetition Lien (but not the lien of the DIP Facility) and any other lien, claim or interest that the Prepetition Senior Lenders may have in the Debtor's assets or the proceeds thereof.

(b) To the extent the Company does not have sufficient cash or availability under the DIP Facility to pay any portion of the Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses due hereunder when such Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses becomes due and payable, the Prepetition Senior Lenders shall subordinate any and all of their recovery under the Prepetition Lien to the payment of such Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses. Chairman agrees that payment of the Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses is junior to liens and claims under the DIP Facility. Such fees and expenses shall be paid in full in cash to Chairman before the Prepetition Lenders receive any proceeds or payment (principal on interest) with respect to the obligations secured by the Prepetition Senior Lien.

(c) Chairman's obligations under this Agreement are expressly contingent on the Senior Lenders' agreement to the terms of this paragraph and each subparagraph hereof.

IN WITNESS WHEREOF, the parties hereto have executed
this Agreement as of the date first above written.

FURR'S SUPERMARKETS, INC.

By: _____

George Golleher

Address:

Prepetition Senior Lenders

AGREEMENT

This Agreement (the "Agreement"), dated as of the ___ day of March, 2001 (the "Execution Date"), is by and between Furr's Supermarkets, Inc., a Delaware corporation (the "Company"), and Gregory Mays (the "Vice Chairman").

WHEREAS, the Company considers it essential to the best interests of the Company that it have the Vice Chairman's advice available to it on an advisory basis, and the Vice Chairman desires to provide such advice to the Company;

NOW, THEREFORE, in consideration of the mutual promises expressed herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Vice Chairman hereby agree as follows:

1. Service. The Vice Chairman shall provide services to the Company as its Non-Executive Vice Chairman, subject to the terms and conditions set forth in this Agreement. Notwithstanding any other provision hereof, this Agreement is subject to, and shall be effective only upon, the approval of the United States Bankruptcy Court for the District of New Mexico where the Company's Chapter 11 case is currently pending (the date of such approval, the "Effective Date"); *provided, however*, that Section 8 of this Agreement shall be effective as of the Execution Date. The Company will submit the Agreement for approval at the earliest practicable date.

2. Responsibilities and Duties. The Vice Chairman shall provide services to the Company at such times, and to such an extent, as are mutually agreeable to the Vice Chairman and the Company, and shall report directly to the Board of Directors of the Company (the "Board of Directors"). The Board will grant the Vice Chairman authority consistent with the services he is asked to perform. The Company acknowledges and accepts that the Vice Chairman provides or may provide consulting, management and other services to other companies. During the Service Term (as such term is defined in Section 3 below), the Vice Chairman agrees to comply with all applicable reasonable policies, rules and regulations of the Company. During the Service Term, the Company shall cause the Vice Chairman to be reelected to the Board of Directors.

EXHIBIT

B

3. Term and Termination.

(a) The term of the service of the Vice Chairman (the "Service Term") under this Agreement shall begin on March 26, 2001 and shall continue until the earliest to occur of the following:

- (i) a termination of the service of the Vice Chairman by the Board of Directors at any time for "just cause," which shall be defined as a termination for any of the following reasons, provided the Board of Directors provides the Vice Chairman with written notice of any such termination and the reasons therefor at least two weeks prior to its effectiveness: (A) the breach by the Vice Chairman of any of the material terms of, or failure to perform any material covenant contained in, this Agreement, which breach or failure continues uncured for a period of 30 days following written notice from the Company, (B) the commission by the Vice Chairman of an act of fraud, conversion, misappropriation (including the unauthorized use or disclosure of confidential or proprietary information of the Company) or embezzlement with respect to the Company, or (C) a conviction or guilty plea by the Vice Chairman with respect to any crime involving theft, conversion, misappropriation, embezzlement or felony involving moral turpitude;
- (ii) a termination of the service of the Vice Chairman by the Company for any reason other than as set forth in Section 3(a)(i) or (iii) (a "Termination Without Just Cause");
- (iii) the death of the Vice Chairman or the mental or physical inability of the Vice Chairman to perform his required duties;
- (iv) the voluntary resignation by the Vice Chairman; or
- (v) December 31, 2002, or, at the option of the Vice Chairman, upon any earlier payment of any Success Bonus payable hereunder.

Except as set forth in Section 3(a)(i) above, any termination of the Vice Chairman's service hereunder (other than a termination by reason of the Vice Chairman's death) shall be communicated in writing to the other party at least 60 days prior to its effectiveness.

(b) Upon any termination of service hereunder, the Vice Chairman shall be entitled to, and the Company shall be liable for and shall pay to the Vice Chairman promptly, the portion of the Service Fee (as such term is hereinafter defined) that was earned prior to the date of the termination of the Vice Chairman's service with the Company and, except as explicitly set forth herein, including, without limitation in Section 4(c) below, the Company shall not be liable for any other compensation or benefits that it would otherwise provide to the Vice Chairman or to which the Vice Chairman would otherwise be entitled.

(c) If the Vice Chairman's employment is terminated in a manner that constitutes a Termination Without Just Cause, and if a Success Event (as such term is defined in Section 4(c) below) occurs within twelve months after such termination, the Company shall pay the Success Bonus (as such term is defined in Section 4(c) below) to the Vice Chairman, less any other Success Bonus or Minimum Bonus previously paid to the Vice Chairman.

(d) If the Vice Chairman's employment is terminated in a manner that constitutes a Termination Without Just Cause, then, at the time of any such termination the Vice Chairman shall receive a Success Bonus which is the greater (y) of any such bonus earned as a result of a Success Event or (z) the Minimum Bonus described in Section 4(c)(ii)(E) below. In such event, the Success Bonus shall be paid on the first business day following the date of such termination.

4. Compensation.

(a) Service Fee. The Company shall pay to the Vice Chairman a service fee at the monthly rate of \$25,000 during the Service Term (the "Service Fee"), which amount shall be earned in equal installments each year on a monthly basis and shall be paid at the beginning of each month. The Service Fee may be increased from time to time as may be determined by the Board of Directors at its sole discretion.

(b) Signing Bonus. The Company shall pay to the Vice Chairman, by wire transfer, a signing bonus of \$125,000 (the "Signing Bonus") no later than the end of the first business day following the Effective Date.

(c) Success Bonus.

(i) The Company shall pay to the Vice Chairman one-thirds (1/3) of a success bonus in the amount set forth in Section 4(c)(ii) (the "Success Bonus") at the closing of any Success Event (with the other two-thirds (2/3) going to George Golleher) and as a condition to such closing. For purposes hereof, a "Success Event" shall be deemed to have occurred if (i) a plan of reorganization or liquidation is confirmed in the Company's Chapter 11 case or (ii) there is consummated one or more sales or dispositions by the Company of a portion of the Company's assets, which, in either case, in the aggregate (giving effect to all such sales occurring subsequent to the Effective Date) represents a sale, disposition or reorganization of assets of the Company that were responsible for no less than 60% of the trailing 12-month EBITDA of the Company for the period ended March 24, 2001, as specified on Annex A hereto.

(ii) The Success Bonus shall be calculated as follows:

(A) If the aggregate gross asset value of the Company immediately following the confirmation of the plan of reorganization or liquidation, or the consideration received (which shall include the amount of any liabilities assumed by the buyer) in connection with a sale or disposition (each as described in Section 4(c)(i)), as the case may be, excluding the value of any assets or liabilities associated with capital leases (such aggregate value, the "Aggregate Value") is more than \$50 million and less than or equal to \$100 million, then the Success Bonus shall be \$1.5 million.

(B) If the Aggregate Value is more than \$100 million and less than or equal to \$150 million, then the Success Bonus shall equal the sum of (1) \$1.5 million and (2)

the lesser of (a) 2.5% multiplied by the amount by which the Aggregate Value exceeds \$100 million and (b) \$1.25 million.

- (C) If the Aggregate Value is more than \$150 million and less than or equal to \$200 million, then the Success Bonus shall equal the sum of (1) the amount calculated pursuant to Section 4(c)(ii)(B) hereof and (2) the lesser of (a) 1.5% multiplied by the amount by which the Aggregate Value exceeds \$150 million and (b) \$1.5 million.
- (D) If the Aggregate Value is more than \$200 million, then the Success Bonus shall equal the sum of (1) the amount calculated pursuant to Section 4(c)(ii)(C) hereof and (2) 1.25% multiplied by the amount by which the Aggregate Value exceeds \$200 million.
- (E) Notwithstanding the prior provisions of this Section 4(c)(ii), if a Success Event does not occur on or prior to the date that is the later of (y) December 31, 2001 and (z) 30 days after the expiration of the Debtor's debtor-in-possession financing facility (the "DIP Facility"), then the Success Bonus shall be \$750,000 (the "Minimum Bonus"), but paid no later than March 31, 2002, if on or after such date the Vice Chairman voluntarily terminates this Agreement. Such Minimum Bonus shall be paid on the first business day following such date of termination.

(iii) In the event that more than one Success Events occur for which Vice Chairman ~~would be entitled to a Success-Fee~~, Vice Chairman shall receive an amount equal to (y) any Success Bonus that he would be entitled to hereunder as a result of the aggregate amount of the Success Events, less (z) any Success Bonus amounts previously paid to Vice Chairman hereunder.

(d) Expenses. The Company shall reimburse the Vice Chairman for all reasonable costs and expenses incurred by the Vice Chairman in connection with performing services hereunder, including travel, lodging and other expenses

incurred in commuting from his principal residence to the Company's principal executive offices ("Reimbursable Expenses").

5. Non-Employee Status.

(a) Nothing herein contained shall be construed to constitute the parties hereto as partners or as joint venturers or as employer and employee. The Vice Chairman shall not present himself as an employee of the Company.

(b) The Company shall have no responsibility to the Vice Chairman to withhold, and does not intend to withhold, any amounts from payments made to the Vice Chairman on account of withholding taxes or other employment taxes.

6. Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision never comprised a part of this Agreement.

7. Dispute Resolution.

(a) If any dispute shall arise concerning the interpretation or enforcement of this Agreement, and the provisions set forth herein, the parties agree to mutually attempt to resolve such dispute through direct discussion and negotiation and without formal proceedings.

(b) If, notwithstanding the provisions of this Section 7, in the opinion of either party, a resolution of any pending dispute is not possible without formal proceedings, the parties hereby agree to submit any such dispute to a panel of three arbitrators appointed in accordance with the rules, regulations and procedures of the American Arbitration Association ("AAA"). The award and determination of the arbitrators shall be final and binding, and may be entered and enforced in any jurisdiction in which the party against whom such judgment is to be entered may be found.

(c) The situs of arbitration required or requested hereunder shall be Albuquerque, New Mexico.

8. Indemnity. If the Vice Chairman is made a party, or is threatened to be made a party, to any action, suit or proceedings, whether criminal, civil, administrative, investigative or otherwise (a "Proceeding") by reason or arising out of the fact that he is or was a director, officer, employee, consultant, agent or fiduciary of the Company or is or was serving at the request of the Company as a director, officer, member, employee, consultant, agent or fiduciary of another corporation, partnership, joint venture, trust or other enterprise or in connection with any services performed by the Vice Chairman hereunder, the Company shall indemnify and hold harmless the Vice Chairman to the fullest extent permitted by law, from and against all costs, expenses, liability, losses (including, without limitation, attorney's fees and expenses, judgements, fines, excise taxes or penalties and amounts paid in settlement) incurred or suffered by the Vice Chairman in connection therewith (including, without limitation, investigating, preparing for and defending any such Proceeding), and such indemnification shall continue as to the Vice Chairman even if he has ceased to be a director, officer, member, employee, consultant or agent of the Company or other enterprise or is no longer providing services to the Company hereunder, and shall inure to the benefit of the Vice Chairman's heirs, executors, administrators and successors. The Company shall, to the fullest extent permitted by law, advance to the Vice Chairman all costs and expenses incurred by him in connection with a Proceeding within 10 days after receipt by the Company of a written request for such advance. In addition, the Company shall continue and maintain director's and officers' liability insurance, in an amount and on terms reasonably acceptable to the Vice Chairman, covering the Vice Chairman. Notwithstanding any other provision of this Agreement to the contrary, any termination of the Vice Chairman's services or of this Agreement shall have no effect on the continuation of his rights under this Section 8.

9. Notices. Any notices, consents, demands, requests, approvals or other communications to be given by either party to the other shall be deemed to have been duly given if given in writing and personally delivered or sent by registered or certified mail, postage prepaid with return receipt requested, as follows:

If to the Company:

Furr's Supermarkets, Inc.
c/o Windward Capital Partners
Americas Tower
1177 Avenue of the Americas
New York, New York 10036
attn: Tom Sikorski

If to the Vice Chairman:

As Set Forth Beneath the Vice Chairman's Signature hereto.

The above addresses may be changed only by giving notice of such change to the party hereto that will be affected by such change. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of three days after mailing.

10. Entire Agreement. This Agreement supersedes any and all other agreements, either oral or written, between the parties hereto with respect to the subject matter hereof and contains all of the covenants and agreements between the parties with respect thereto.

11. Modification and Waiver. No change or modification of this Agreement shall be valid or binding upon the parties hereto unless such change or modification shall be in writing and signed by all the parties hereto. No waiver of any term or condition of this Agreement shall be binding unless such waiver is in writing signed by the party against which or whom such waiver is sought to be enforced. The waiver by the Company of a breach of any provision of this Agreement by the Vice Chairman shall not operate or be construed as a waiver of any subsequent breach by the Vice Chairman.

12. Governing Law. This Agreement, and the rights and obligations of the parties hereto, shall be governed by and construed in accordance with the laws of the State of New Mexico.

13. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original but all of which shall constitute one and the same document.

14. Assignment. The Company shall have the right to assign this Agreement to its successors or assigns. The terms "successors" and "assigns" shall include any person, corporation, partnership or other entity that buy all or substantially all of the Company's assets or all of its stock, or with which the Company merges or consolidates. The rights, duties and benefits to the Vice Chairman hereunder are personal to him, and no such right to benefit may be assigned by him, provided however, that the Vice Chairman shall have the right to assign this Agreement, subject to the express consent of the Company, which consent shall not be reasonably withheld and so long as such assignment contemplates the continued services of Vice Chairman.

15. Binding Effect. This Agreement shall be binding upon the parties hereto, together with their respective executors, administrators, successors, personal representatives, heirs and permitted assigns.

16. Prepetition Senior Lenders. The Prepetition Senior Lenders (as identified on the signature pages hereto) have a senior, perfected security interest in and lien against substantially all of the assets of the Company and any proceeds of the disposition of such asset, which security interest and lien is junior only to the liens under the DIP Facility (the "Prepetition Lien"). In consideration for Vice Chairman's services hereunder, the Prepetition Senior Lenders agree to the following:

(a) ---In the event Vice Chairman becomes entitled to any Signing-Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses hereunder, such amounts shall be paid to Vice Chairman free and clear of the Prepetition Lien (but not the lien of the DIP Facility) and any other lien, claim or interest that the Prepetition Senior Lenders may have in the Debtor's assets or the proceeds thereof.

(b) To the extent the Company does not have sufficient cash or availability under the DIP Facility to pay any portion of the Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses due hereunder when such Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses becomes due and payable, the Prepetition Senior Lenders shall subordinate any and all of their recovery under the Prepetition Lien to the payment of such Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses. Vice Chairman agrees that payment of the Signing Bonus, Service Fee, Minimum Bonus or Reimbursable Expenses is junior to liens and claims under the DIP Facility. Such fees and expenses shall be paid in full in cash to Vice Chairman before the Prepetition Lenders receive any proceeds or payment (principal on interest) with respect to the obligations secured by the Prepetition Senior Lien.

(c) Vice Chairman's obligations under this Agreement are expressly contingent on the Senior Lenders' agreement to the terms of this paragraph and each subparagraph hereof.

IN WITNESS WHEREOF, the parties hereto have executed
this Agreement as of the date first above written.

FURR'S SUPERMARKETS, INC.

By: _____

Gregory Mays

Address:

Prepetition Senior Lenders

