

Objection Deadline: October 24, 2001 at 3:00 p.m. (N.M. time)

Hearing Date: October 29 at 11:00 a.m. (N.M. time)

FILED
12:00 MIDNIGHT
OCT 05 2001
DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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In re: :

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Case No. 11-01-10779-SA

FURR'S SUPERMARKETS, INC., : Chapter 11

:

Debtor. :

:

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**MOTION FOR ORDER AUTHORIZING AND COMPELLING
DEBTOR TO PAY PROFESSIONAL FEES AND EXPENSES DUE AND
OWING TO PETER J. SOLOMON COMPANY PURSUANT TO
SECTIONS 328(a) AND 105(a) OF THE BANKRUPTCY CODE**

Peter J. Solomon Company ("PJSC") respectfully represents:

Jurisdiction

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § § 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. § § 1408 and 1409.

The Retention of PJSC

2. On February 26, 2001, Furr's Supermarkets, Inc. (the "Debtor") and PJSC entered into an amended and restated letter agreement (the "Letter Agreement") pursuant to which the Debtor retained PJSC as its investment banker in connection with the Debtor's chapter 11 case. By order dated September 17, 2001 (the "Retention Order"), the Court authorized the retention of PJSC, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code, on the terms and conditions set forth in the Letter Agreement. Copies

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of the Letter Agreement and Retention Order are annexed hereto as Exhibits "A" and "B," respectively.

3. The Debtor retained PJSC as its investment banker due to, among other things, PJSC's extensive background, knowledge and experience in the supermarket industry. Since February 2001, PJSC provided the Debtor with a broad range of financial advisory services in connection with its chapter 11 case, including, but not limited to:

- PJSC reviewed historical and projected financial and operating data to evaluate the Debtor's business operations. PJSC's evaluation of the Debtor's business included a review of internal company data and reports. PJSC analyzed the Debtor's same store sales, gross margins, earnings before interest and taxes, as well as the Debtor's debt structure, liquidity needs and capital requirements. PJSC also reviewed the prevailing conditions in the grocery retail and wholesale industry and the Debtor's ability to compete in its marketplace;
- PJSC conducted multiple store and warehouse due diligence to gain an understanding of individual markets and competition;
- PJSC conducted market and industry research to evaluate the future operating and financial performance of the Debtor;
- PJSC reviewed strategic alternatives on behalf of the Debtor including reorganization and potential transactions with third parties. PJSC reviewed the opportunities and risks associated with these options with the Debtor's management which recommended a course of action to the Debtor's board of directors (the "Board");
- Based upon the Board's decision to pursue a sale of the Debtor, PJSC developed a list of potential investors and strategic acquirers for the Debtor. Additionally, PJSC prepared confidentiality agreements as well as presentation materials summarizing the Debtor's business, attributes and prospects. PJSC also assisted the Debtor in developing a procedure to solicit bids from potential acquirers which would generate the greatest interest in and maximum value for the Debtor's assets. PJSC worked with the Debtor's counsel and management to establish and make available to potential investors and acquirers a data room;
- PJSC contacted and solicited interest from potential investors and acquirers of the Debtor. After a thorough process of soliciting bids and

proposals, PJSC was instrumental in structuring and negotiating the Fleming Transaction (defined below). PJSC and the Debtor's management negotiated an asset purchase agreement with Fleming to achieve a mutually acceptable structure for the sale of the Debtor's assets to Fleming that would generate the maximum value for the Debtor's chapter 11 estate. Absent PJSC's involvement in the Fleming Transaction, the Debtor may not have been able to complete the Fleming Transaction in the time frame required;

- Prior to the completion of the sale to Fleming, PJSC participated with the Debtor's management in discussions with the secured lenders to keep them apprised of the Debtor's ongoing sales process and to facilitate that the Debtor was able to continue operations as a going concern to preserve maximum value for its assets;
- After Fleming and the Debtor agreed to a sale of the Debtor's assets to Fleming, PJSC structured and conducted a bidding process in an attempt to achieve an even greater purchase price for the benefit of the Debtor's chapter 11 estate. No higher or better offers were received. The Debtor, with PJSC's assistance, was able to sell a substantial number of its stores to Fleming in an efficient time frame which permitted the Debtor to both explore various alternatives and ultimately maximize the total value of the Debtor's estate for the benefit of creditors; and
- PJSC's involvement in the Fleming Transaction ensured that the parties engaged in arms'-length good faith negotiations. Specifically, Tom Dahlen, the former Chief Executive Officer of the Debtor (who resigned shortly after the Debtor's chapter 11 filing), was hired by Fleming to head Fleming's retail operations. Because PJSC actively negotiated and structured the Fleming Transaction any potential conflict of interest was alleviated and the Debtor's estate was assured a maximum return for the Debtor's assets.
- In summary, PJSC performed in a highly professional manner and played an instrumental role in maximizing the value of the Debtor's assets for the benefit of its creditors.

The Fleming Transaction

4. As a result of extensive efforts by PJSC on behalf of the Debtor, the Debtor and Fleming Companies, Inc. ("Fleming") entered into an asset purchase agreement, dated June 25, 2001, that provided for the sale of substantially all of the Debtor's assets and the assignment of numerous capital leases (valued at \$29,780,000) (the "Capital Leases") to Fleming in exchange for the payment of gross sale proceeds (the "Fleming Sale Proceeds") to the Debtor of \$84,200,000 (the "Fleming Transaction"). The Court approved the Fleming Transaction on June 30, 2001 and the closing of the Fleming Transaction occurred on August 31, 2001. PJSC is entitled to a Transaction Fee with respect to the Fleming Transaction.

Professional Fees Owed to PJSC

5. The Letter Agreement provides that PJSC is to receive, among other things, the following compensation: (i) a Monthly Fee¹ of \$150,000 (payable in advance on the first day of each month); and (ii) a Transaction Fee equal to one-and-one-half percent (1.5%) of the Aggregate Consideration² paid or payable in connection with each Transaction; provided, however, that total Transaction Fees shall not equal less than \$1.5

¹ Capitalized terms utilized herein but not defined shall have the meanings ascribed to them in the Letter Agreement.

² Aggregate Consideration includes, but is not limited to: (i) all cash paid or payable in connection with a Transaction; (ii) the amount of any short-term debt and long-term liabilities of the Debtor (including the principal amount of any indebtedness for borrowed money and capitalized leases and the full amount of balance sheet financings) (x) repaid or retired in connection with or in anticipation of each Transaction or (y) assumed in connection with such Transaction; and (iii) the value of any current assets not purchased, minus the value of any current liabilities not assumed.

million. Pursuant to the Letter Agreement, PJSC agreed to credit all Monthly Fees, other than the first \$150,000, towards any Transaction Fee or Reorganization Fee paid by the Debtor. "Each Transaction Fee shall be several and shall be contingent upon the consummation of the related Transaction and shall be payable at the closing thereof" (Exhibit "A," Letter Agreement at pg. 3, ¶ 3(d)). The Debtor is also required to reimburse PJSC for its reasonable out-of pocket expenses.

6. To date, PJSC has received no compensation or reimbursement of expenses from the Debtor. Based upon the terms of the Letter Agreement, PJSC is entitled to the following professional fees and expenses (the "Requested Fees and Expenses"):³

Monthly Fees:	\$616,071.43 ⁴
Transaction Fee:	\$1,994,700
Expenses:	\$83,699.05
Subtotal:	<u>\$2,694,470.48</u>
Credited Monthly Fees:	(\$466,071.43)
Total Amount Due:	<u>\$2,228,399.05</u>

³ PJSC reserves its right to supplement the Requested Fees and Expenses in connection with the filing of its final fee application as appropriate and to seek payment of such additional fees and expenses from the Debtor in accordance with the terms of the Letter Agreement.

⁴ The total outstanding Monthly Fees includes \$600,000 for the period of March 2001 – June 2001 and \$16,071.43 for the period of February 26, 2001 -- February 28, 2001.

7. The Transaction Fee is calculated as follows:⁵

Fleming Sale Proceeds:	\$84,200,000
Capital Leases Assumed:	\$29,780,000
Short-term Debt Repaid:	\$19,000,000
Total:	<u>\$132,980,000</u>
	x 1.5%
Total Transaction Fee:	<u>\$1,994,700</u>

**The Debtor has Sufficient Funds to Pay
the Requested Fees and Expenses**

8. In accordance with the Court's September 25, 2001 Order (the "Financing Order"), the Debtor has established a reserve of \$1.5 million (the "PJSC Reserve") out of the Fleming Sale Proceeds for the payment of PJSC's professional fees and reimbursement of its expenses without prejudice to any claim PJSC may make as to the amount owed and to be paid. A copy of the Financing Order is annexed hereto as Exhibit "C."

9. After application of the \$1.5 million in the PJSC Reserve to the Requested Fees and Expenses, PJSC will be owed \$728,399.05 (the "Non-Reserve Fees and Expenses"). The Court, by order dated March 14, 2001 (the "DIP Order"), also approved a carveout (the "Carveout") of the Debtor's secured lenders' cash collateral for the payment of professional fees, including the fees of PJSC, of at least \$3,075,000 in the

⁵ The information for the amount of the Capital Lease Assumed and Short-Term Debt Repaid is based upon the information provided by the Debtor's management.

aggregate. Thus, the Non-Reserve Fees and Expenses should be paid to PJSC from the Carveout.

10. Upon information and belief, to date, the Debtor has paid professional fees of \$500,000 in the aggregate to counsel for the Debtor and statutory creditors' committee from the Carveout. Accordingly, the Carveout remains available to pay the Non-Reserve Fees and Expenses owed to PJSC.

**The Court Should Authorize Payment of
the Requested Fees and Expenses**

11. Notwithstanding the clear and express terms of the Letter Agreement which requires the payment of the Transaction Fee immediately upon the closing of the Fleming Transaction, the Debtor is precluded from disbursing any of the Fleming Sale Proceeds without further order of the Court in accordance with the Court's order approving the Fleming Transaction, dated June 30, 2001 (the "Sale Order").

12. In addition, the Letter Agreement expressly provides that the "Monthly Fee[s] shall be payable in advance on the first day of each month." (Exhibit "A," Letter Agreement at pg. 3, ¶ 3(a)). PJSC ceased charging the Debtor a Monthly Fee as of June 30, 2001. To date, seven months have passed in which PJSC has not received any compensation. PJSC does not believe the Sale Order precludes the Debtor from paying PJSC its Monthly Fees.

13. Accordingly, pursuant to this Motion, PJSC is requesting the Court authorize the payment of the Requested Fees and Expenses to PJSC. Payment of the Requested Fees and Expenses now is consistent with section 328(a) of the Bankruptcy

Code and this Court's previous order approving the retention of PJSC. Section 105(a) of the Bankruptcy Code provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

14. The Retention Order expressly provides that PJSC is to be paid in accordance with the terms of the Letter Agreement which provides that all Transaction Fees are to be paid upon the closing of the sale transaction and all Monthly Fees are to be paid in advance on the first of each month. The closing of the Fleming Transaction occurred on August 31, 2001, more than thirty (30) days from the date hereof. Further, the filing of a final fee application by PJSC and final Court approval of the Requested Fees and Expenses is not a condition precedent for PJSC to obtain payment of the Requested Fees and Expenses. (See Minutes of September 17, 2001 Hearing (the "Retention Hearing") (Court directing PJSC to file a final fee application pursuant to section 330 of the Bankruptcy Code prior to the close of the Debtor's chapter 11 case "albeit the compensation may have already been paid."). A copy of the minutes from the Retention Hearing is annexed hereto as Exhibit "D."

15. Similarly, other courts have permitted financial advisors retained pursuant to section 328 of the Bankruptcy Code to receive compensation and reimbursement of expenses in accordance with the terms of such professional's engagement letter prior to the filing of a final fee application. For example, the United States Bankruptcy Court for the Southern District of New York in In re Sunbeam Corporation, Chapter 11 Case No. 01-40291 (AJG), ordered that the Debtor's financial advisors (retained pursuant to

section 328 of the Bankruptcy Code) be paid in accordance with their governing employment agreements, subject to final approval pursuant to section 330 of the Bankruptcy Code (the “Sunbeam Order”). A copy of the Sunbeam Order is annexed hereto as Exhibit “E.” The same procedure should be adopted in this case.

16. PJSC entered into an agreement with the Debtor in good faith that was negotiated at great length with the Debtor and the Committee and ultimately approved by this Court. Under the Letter Agreement, PJSC was to receive: (i) the Transaction Fee upon the closing of the Fleming Transaction; (ii) reimbursement of expenses upon the presentation of an invoice to the Debtor; and (iii) Monthly Fees in advance on the first day of each month. PJSC has not been paid at all since its retention more than seven months ago. During that time and despite the lack of payment, PJSC provided critical services to the Debtor and was integral to the consummation of the Fleming Transaction. Indeed, the Court has previously found that “[t]he Debtor and its professionals, including its investment advisor Peter J. Solomon Company, engaged in a marketing process intended to generate the highest and best possible bid for its assets.” (Sale Order at ¶ 2.)

17. The Court has expressly reserved \$1.5 million of the Fleming Sale Proceeds for the payment of PJSC’s professional fees without prejudice to any claim PJSC may make as to the amount owed and to be paid. PJSC should not be required to forego payment of the Requested Fees and Expenses at this time. Indeed, the Letter Agreement expressly provides that PJSC was to receive its Transaction Fee upon the closing of the Fleming Transaction which occurred more than thirty (30) days from the date hereof.

18. The Non-Reserve Fees and Expenses are monies owed to PJSC in excess of the \$1.5 million held in the PJSC Reserve. Payment of the Non-Reserve Fees and Expenses, whether from the Debtor's cash flow (to the extent any exists) or from the Carveout, is appropriate. PJSC should have received its Monthly Fees from the outset of its retention from the Debtor's cash flow. However, PJSC was unable to obtain such fees until the entry of the Retention Order on September 17, 2001. Now that the Court has approved PJSC's retention, the Debtor should be directed to pay the Non-Reserve Fees and Expenses to PJSC. Absent an order authorizing such payment, PJSC will be unable to obtain payment of its professional fees in accordance with the Letter Agreement and Retention Order – a result contrary to the intent of the Retention Order.

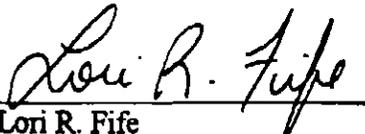
19. Accordingly, in accordance with the Retention Order, Financing Order and DIP Order, the Court should authorize and compel the Debtor to pay the Requested Fees and Expenses in full immediately upon entry of an order granting the relief sought herein. PJSC intends to file a final fee application for final approval of the Requested Fees and Expenses shortly hereafter.

20. No trustee or examiner has been appointed in this chapter 11 case. Notice of this Motion has been provided in accordance with the Sale Order and the Court's order Limiting Notice in Certain Matters, dated, February 15, 2001. PJSC submits that no other or further notice need be given.

WHEREFORE PJSC requests the Court, without prejudice to PJSC's right to seek additional compensation and reimbursement of expenses, to (i) authorize and compel the Debtor to pay the Requested Fees and Expenses immediately upon entry of an

order granting the relief sought herein and (ii) grant PJSC such other and further relief as is just.

Dated: New York, New York
October 5, 2001


Lori R. Fife
Brian E. Greer
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8248

A handwritten capital letter 'A' in black ink. The letter is formed with three strokes: a diagonal line from the top right to the bottom left, a vertical line from the top right to the bottom right, and a horizontal crossbar connecting the two diagonal lines.

AUG-24-01 09:37AM From: PETER J SOLOMON COMPANY

2128081433

T-870 P.02/11 F-002

PETER J. SOLOMON COMPANY
LIMITED

787 FIFTH AVENUE
NEW YORK, NEW YORK 10019

February 26, 2001

Furr's Supermarkets, Inc.
4411 The 25 Way N.E., Suite 100
Albuquerque, NM 87109

Attention: Mr. Steven L. Mortensen
Senior Vice President and Chief Financial Officer

Ladies and Gentlemen:

This letter (the "Agreement") will confirm the understanding and agreement between Furr's Supermarkets, Inc. (along with any affiliated debtors and debtors-in-possession, the "Company") and Peter J. Solomon Company Limited ("PJSC") regarding the scope and terms of the retention of PJSC as the Company's investment banker in connection with its Chapter 11 proceedings and its reorganization before the United States Bankruptcy Court for the District of New Mexico (the "Bankruptcy Court"). It is understood that the retention of PJSC and effectiveness of this Agreement is subject to the approval of the Bankruptcy Court.

Section I. Services to be Rendered. PJSC will perform such services as the Company may request including, but not limited to, the following:

- (a) PJSC will assist the Company in assessing the operating and financial strategies for its business;
- (b) PJSC will review and analyze the business plans and financial projections prepared by the Company including but not limited to testing assumptions and comparing those assumptions to historical Company and industry trends;
- (c) PJSC will assist the Company and its other professionals in formulating and negotiating a plan of reorganization;
- (d) PJSC will value the Company in connection with a plan of reorganization;
- (e) To the extent requested by the Company, PJSC will advise the Company in connection with one or more possible transactions, each between the Company and a different party (each, a "Transaction") or series or combination of Transactions, whereby, directly or indirectly, an ownership interest in the Company, in its business or in all or any portion of its assets is transferred for consideration, including, without limitation, one or

TEL: 212-508-1800 FAX: 212-508-1834 E-MAIL: info@pjsolomon.com

Exhibit "A"

Aug-23-01 06:30am From: PETER J SOLOMON COMPANY

2125001693

T-470 P.03/11 P-302

more transactions involving a sale or exchange of capital stock or assets with or without a purchase option, a merger or consolidation, a tender or exchange offer, a leveraged buy-out, the formation of a joint venture or partnership or any other business combination or similar transaction;

(f) PJSC will advise the Company in restructuring existing indebtedness and, to the extent requested by the Company, arrange new or additional financing;

(g) PJSC will review and analyze any proposals the Company receives from third parties regarding any Transaction;

(h) PJSC will assist or participate in negotiations with the Company and/or any other parties in interest regarding any Transaction;

(i) PJSC will assist in the plan of reorganization confirmation process, including preparation of expert testimony relating to financial matters, if required; and

(j) PJSC will render such other financial advisory and investment banking services as may be agreed upon by PJSC and the Company in connection with the foregoing. In rendering its services to the Company hereunder, PJSC is not assuming any responsibility for the Company's decision to effect any Transaction.

In rendering its services to the Company hereunder, PJSC is not assuming any responsibility for the Company's decision to effect any Transaction.

Section 2. Information Provided by the Company. The Company will furnish PJSC with such information as PJSC and the Company agree is appropriate to enable PJSC to render services hereunder (all such information being the "Information"). The Company recognizes and confirms that PJSC (a) will use and rely primarily on the Information and on information available from generally recognized public sources in performing the services contemplated by this Agreement without having assumed any obligation to independently verify the same, (b) does not assume responsibility for the accuracy or completeness of the Information and such other information, and (c) will not act in the official capacity of an appraiser of specific assets of the Company or any other party. The Company confirms that the Information to be furnished by the Company, when delivered, will be true and correct in all material respects, will be prepared in good faith, and will not contain any material misstatement of fact or omit to state any material fact necessary to make the statements contained therein not misleading. The Company will promptly notify PJSC if it learns of any material inaccuracy or misstatement in, or material omission from, any information theretofore delivered to PJSC. Except as contemplated by the terms hereof or as required by applicable law, PJSC shall keep confidential all non-public Information and shall not disclose such information without the Company's prior approval to any third party, other than in confidence to the Company and its advisors and to such of PJSC's directors, officers, employees, counsel and advisors (whom PJSC shall instruct to maintain the confidentiality of such information in accordance with this Agreement) as PJSC determines to have a need to know in order to render services hereunder.

Section 3. Fees. As compensation for the services rendered hereunder, the Company, and its successors, if any, agrees to pay PISC (via wire transfer or other mutually acceptable means) the following fees in cash:

(a) A monthly cash advisory fee (the "Monthly Fee") equal to \$150,000.00 per month for a minimum of three months. The Monthly Fee shall be payable in advance on the first day of each month, with the Monthly Fee for partial months pro-rated based on services commencing as of the date hereof.

(b) A reorganization fee (the "Reorganization Fee") equal to \$1,500,000.00, based on a reorganization of the Company under Chapter 11 of the Bankruptcy Code that represents assets generating no less than 40% of the trailing twelve months' revenues of the Company measured as of the March 31, 2001 (a "Reorganization") which Reorganization Fee shall be payable on the date of consummation of the plan of reorganization.

(c) A financing fee (the "Financing Fee") shall be negotiated between PISC and the Company if PISC is requested to arrange financing for any secured or unsecured debt, equity or other hybrid security, subject to the approval of the Bankruptcy Court.

(d) A transaction fee (the "Transaction Fee") equal to 1.50% of the Aggregate Consideration (as defined below) paid or payable in connection with each Transaction; provided, however that in no case shall total Transaction Fees aggregate less than \$1,500,000.00. Each Transaction Fee shall be several and shall be contingent upon the consummation of the related Transaction and shall be payable at the closing thereof, provided that compensation attributable to that part of Aggregate Consideration which is contingent upon the realization of future financial performance (e.g. an earn-out or similar provision) shall be paid by the Company to PISC promptly upon the receipt of such Aggregate Consideration by the Company, its shareholders or other parties. Compensation attributable to that part of Aggregate Consideration which is deferred (including without limitation any Aggregate Consideration held in escrow) shall be valued at the total stated amount of such consideration without applying a discount thereto and shall be paid by the Company at the time such consideration is received by the Company. In the event that the Company sells assets or divisions in more than one Transaction, Aggregate Consideration shall be calculated for each Transaction separately and shall not be cumulative for purposes of determining the Transaction Fee.

For purposes hereof, the term "Aggregate Consideration" shall mean the total amount of all cash, securities, contractual arrangements (including any lease arrangements or put or call agreements) and other property paid or payable, directly or indirectly in connection with a Transaction (including, without limitation, amounts paid to holders of any warrants, stock purchase rights or convertible securities of the Company and to holders of any options or stock appreciation rights issued by the Company, whether or not vested). Aggregate Consideration shall also include the amount of any short-term debt and long-term liabilities of the Company (including the principal amount of any indebtedness for borrowed money and capitalized leases and the full amount of any off-balance sheet financings) (x) repaid or retired in connection with or in

anticipation of each Transaction or (y) existing on the Company's balance sheet at the time of each Transaction (if such Transaction takes the form of a merger, consolidation or a sale of stock or partnership interests) or assumed in connection with such Transaction (if such Transaction takes the form of a sale of assets). In the event such Transaction takes the form of a sale of assets, Aggregate Consideration shall include (i) the value of any current assets not purchased, minus (ii) the value of any current liabilities not assumed. In the event such Transaction takes the form of a recapitalization, restructuring, spin-off, split-off or similar transaction, Aggregate Consideration shall include the fair market value of (i) the equity securities of the Company retained by the Company's security holders following such Transaction and (ii) any securities received by the Company's security holders in exchange for or in respect of securities of the Company following such Transaction (all securities received by such security holders being deemed to have been paid to such security holders in such Transaction). The value of securities that are freely tradable in an established public market will be determined on the basis of the last market closing price prior to the consummation of the applicable Transaction. The value of securities, lease payments and other consideration that are not freely tradable or have no established public market, or if the consideration utilized consists of property other than securities, the value of such property shall be the fair market value thereof as determined in good faith by PJSC, provided, however, that all debt securities, except zero coupon or deep discount securities, shall be valued at their stated principal amount without applying a discount thereto.

Section 4. Credit. PJSC shall credit 100.0% of the Monthly Fee's, payable under Section 3(a) excluding the aggregate Monthly Fees paid hereunder for the first one month of PJSC's engagement hereunder, toward any Transaction Fee or Reorganization Fee (the "Credit"); provided, however, that such fees shall be credited only once.

Section 5. Expenses. Without in any way reducing or affecting the provisions of Exhibit A hereto, the Company shall reimburse PJSC for its reasonable out-of-pocket expenses incurred in connection with the provision of services hereunder and the execution and delivery of this letter Agreement, including without limitation the fees, disbursements and other charges of PJSC's counsel. Out-of-pocket expenses also shall include, but not be limited to, travel and lodging, data processing and communication charges, research and courier services. The Company shall promptly reimburse PJSC upon presentation of an invoice or other similar documentation.

Section 6. Indemnity. The Company agrees to the provisions of Exhibit A hereto which provide for certain indemnification by the Company of PJSC and certain related persons. Such indemnification is an integral part of this Agreement and the terms thereof are incorporated by reference herein. Such indemnification shall survive any termination, expiration or completion of PJSC's engagement hereunder.

Section 7. Term. The term of PJSC's engagement shall extend from the date hereof through the date the Company confirms a plan of reorganization; provided, however, that either the Company or PJSC can cancel this Agreement by providing notice in writing (the "Term"); provided further, however, that in the event PJSC cancels this

Agreement, it shall not be entitled to receive any further fees hereunder from the date of cancellation forward, other than any fees payable pursuant to the last sentence of this paragraph and provided further, however, that except in the event of gross negligence or willful misconduct by PJSC, the Company may not cancel this Agreement prior to the expiration of a six-month period from the date hereof, and then, only upon providing thirty (30) days advance notice in writing. If terminated, PJSC shall be entitled to any fees for any monthly period which are due and owing to PJSC upon the effective date of termination; however, such amounts will be pro-rated for any incomplete monthly period of service, and PJSC will be entitled to the reimbursement for the out-of-pocket expenses described in Section 5. Termination of PJSC's engagement hereunder shall not affect or impair the Company's continuing obligation to indemnify PJSC and certain related persons as provided in Exhibit A and its continuing obligations under Section 8 hereof. Without limiting the foregoing, compensation shall be payable under Section 3(b), (c) or (d) above in the event that a Reorganization or Transaction is consummated at any time prior to the expiration of eighteen months after such termination, or a letter of intent or definitive agreement with respect to a Reorganization or Transaction is executed at any time prior to twelve months after such termination (which letter of intent or definitive agreement subsequently results in the consummation of a Reorganization or Transaction at any time), (x) as to which PJSC advised the Company hereunder prior to the termination of this Agreement or (y) which involves a party identified to the Company by PJSC or with whom the Company had discussions regarding a Reorganization or Transaction, in each case during the Term of PJSC's engagement hereunder.

Section 8. Miscellaneous.

(a) In connection with allowances of compensation and reimbursement of expenses, PJSC shall file appropriate applications for allowance of interim and final compensation and reimbursement of expenses in accordance with Sections 330 and 331 of the United States Bankruptcy Code and applicable rules at such times as directed by the Bankruptcy Court or established by administrative order entered in the bankruptcy cases. The fees detailed in Section 3 above have been agreed upon with the express expectation that they are subject to review by the Bankruptcy Court only as provided by Section 328 of the Bankruptcy Code. The Company acknowledges and agrees that the fees payable to PJSC hereunder are reasonable. Furthermore the Company understands that the hours worked, the results achieved in the reorganization or the ultimate benefit to the estate of the work performed may be variable and the Company has taken this into account in setting the fees detailed in Section 3 above. In accordance with the guidelines of the Bankruptcy Court, PJSC shall maintain detailed records of time spent working on this assignment, which records shall be available for submission to the Bankruptcy Court subject to appropriate redactions to preserve confidential or sensitive information. Although PJSC is providing such records, it, as an investment bank, does not have hourly rates for its professionals. PJSC will make every effort to coordinate with the other professionals retained by the Company in these bankruptcy cases in order to eliminate unnecessary duplication or overlap of work.

(b) The Company agrees that PJSC's compensation set forth herein and payments made pursuant to reimbursement provisions of this Agreement shall be entitled to

priority as expenses of administration under Sections 503(b) (1) (A) and 507(a) (1) of the Bankruptcy Code and shall be entitled to the benefits of any "carve-outs" for professional fees and expenses in effect in the Chapter 11 cases pursuant to one or more financing orders now or hereafter in effect.

(c) Sections 2 through 8 shall survive termination or expiration of the Agreement.

(d) PISC shall be under no obligation to provide formal fairness, valuation or solvency opinions (except to the extent valuation opinions are embodied in testimony) with respect to any of the Chapter 11 proceedings or any transactions contemplated thereby or incidental hereto. However, PISC and its affiliates shall be provided the option to do so where such opinions are necessary and are appropriate. The terms of such engagement shall be customary for such services rendered by investment banking firms at the time of the engagement and shall be subject to one or more separate agreements between the Company and PISC, and shall be subject to Bankruptcy Court approval.

(e) PISC acknowledges that the Company shall have no obligation to enter into any Financing or Transaction and shall have the right to reject any Financing or Transaction or to terminate negotiations with respect to any Financing or Transaction at any time.

(f) The advice (oral or written) rendered by PISC pursuant to this Agreement is intended solely for the benefit and use of the Company and its professionals in considering the matters to which this Agreement relates, and the Company agrees that such advice may not be relied upon by any other person, used for any other purpose or reproduced, disseminated, quoted or referred to at any time, in any manner or for any purpose, nor shall any public references to PISC be made by the Company, without the prior written consent of PISC, or as required by the Bankruptcy Code; provided that the Company may share such advice with the Creditors Committee.

(g) The Company agrees that PISC shall have the right after completion of each Transaction to place advertisements in financial and other newspapers and journals at its own expense describing its services hereunder.

(h) This Agreement may not be amended or modified except by a writing executed by each of the parties and this Agreement, including all controversies arising from or relating to performance under this Agreement, shall be governed by and construed in accordance with the laws of the State of New York, without giving effect such state's rules concerning conflicts of law. The provisions of this Agreement, including, without limitation, the obligation to make the payments set forth in Sections 3 and 5, shall be binding on the Company and its successors and assigns.

(i) Any lawsuits with respect to, in connection with or arising out of this Agreement shall be brought in the Bankruptcy Court and the parties hereto consent to the jurisdiction and venue of the Bankruptcy Court as the sole and exclusive forum, unless such court is unavailable, for the resolution of claims by the parties arising under or

Aug-29-01 08:40am From: PETER J SOLOMON COMPANY

2125001833

T-670 P.02/11 P-202

relating to this Agreement. The parties hereto further agree that proper service of process on a party may be made on any agent designated by such party located in the State of New York.

(j) To the extent permitted by applicable law, the Company hereby waives trial by jury, rights of setoff, and the right to impose counterclaims (except those arising out of this Agreement) in any lawsuit with respect to, in connection with or arising out of this Agreement, or any other claim or dispute relating to the engagement of PJSC arising between the parties hereto. The Company hereto confirms that the foregoing waivers are informed and freely made.

(k) The relationship of PJSC to the Company hereunder shall be that of an independent contractor and PJSC shall have no authority to bind, represent or otherwise act as agent for the Company.

Aug-28-01 06:40pm From-PETER J SOLOMON COMPANY

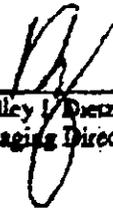
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7-678 P.00/11 P-302

If the foregoing correctly sets forth the understanding and agreement between PJSC and the Company, please so indicate by signing the enclosed copy of this letter, whereupon it shall become a binding agreement between the parties hereto as of the date first above written.

Very truly yours,

PETER J. SOLOMON COMPANY LIMITED

By: 
Bradley J. Dietz
Managing Director

Accepted and Agreed to us of
the day first written above:

FURRS SUPERMARKETS, INC.

By: 
Steven L. Mortensen
Senior Vice President and Chief Financial Officer

Aug-28-01 08:48pm From-PETER J SOLOMON COMPANY

2125081633

T-670 P.10/11 F-802

Exhibit A

The Company shall indemnify and hold harmless PJSC and its affiliates, counsel and other professional advisors, and the respective directors, officers, counselling persons, agents and employees of each of the foregoing (PJSC and all of such other persons collectively, the "Indemnified Parties"), from and against any losses, claims or proceedings including stockholder actions, damages, judgments, assessments, investigation costs, settlement costs, fines, penalties, arbitration awards, other liabilities, costs, fees and expenses (collectively, "Losses") (i) related to or arising out of (A) oral or written information provided by the Company, the Company's employees or other agents, which either the Company or PJSC provides to any persons, or (B) other action or failure to act by the Company, the Company's employees or other agents or PJSC at the Company's request or with the Company's consent, or (ii) otherwise related to or arising out of the engagement of PJSC under this Agreement or any transaction or conduct in connection therewith, provided that this clause (ii) shall not apply if it is finally judicially determined by a court of competent jurisdiction that such Losses arose solely out of the gross negligence or bad faith of such Indemnified Party. If multiple claims are brought against an Indemnified Party in an arbitration, with respect to at least one of which indemnification is permitted under applicable law and provided for under this Agreement, the Company agrees that any arbitration award shall be conclusively deemed to be based on claims as to which indemnification is permitted and provided for, except to the extent the arbitration award expressly states that the award, or any portion thereof, is based solely on a claim as to which indemnification is not available.

The Company shall further reimburse any Indemnified Party promptly for, or as the Indemnified Party's option advance amounts sufficient to cover, any legal or other fees or expenses as they are incurred (i) in investigating, preparing or pursuing any action or other proceeding (whether formal or informal) or threat thereof, whether or not in connection with pending or threatened litigation or arbitration and whether or not any Indemnified Party is a party (an "Action") and (ii) in connection with enforcing such Indemnified Party's rights under this Agreement (including, without limitation, its rights under this Exhibit A); provided, however, that in the event it is finally judicially determined by a court of competent jurisdiction that the Losses of such Indemnified Party arose solely out of the gross negligence or bad faith of such Indemnified Party, such Indemnified Party will promptly remit to the Company any amounts reimbursed or advanced under this paragraph.

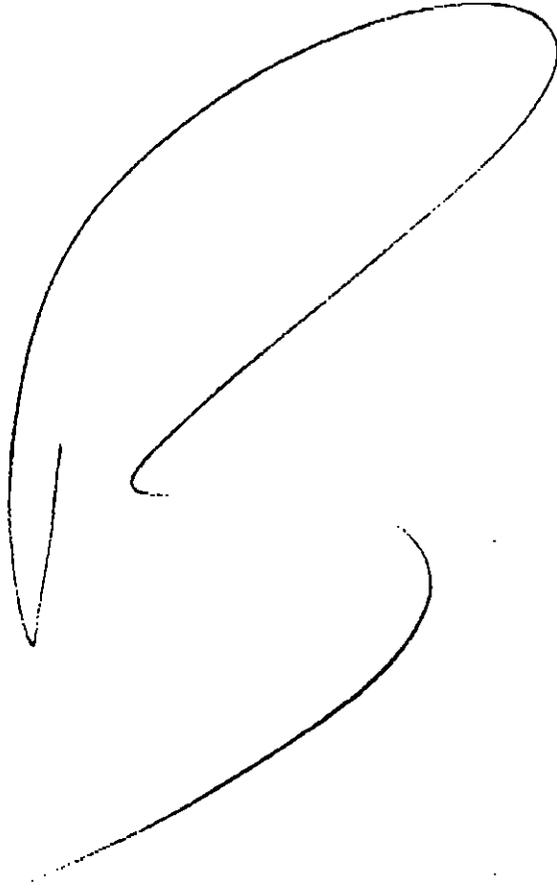
The Company shall, if requested by PJSC, assume the defense of any such Action including the employment of counsel reasonably satisfactory to PJSC and will not settle, compromise, consent or otherwise resolve or seek to terminate any pending or threatened Action (whether or not any Indemnified Party is a party thereto) unless it obtains the prior written consent of PJSC or an express, unconditional release of each Indemnified Party from all liability relating to such Action and the engagement of PJSC under this Agreement. Any Indemnified Party shall be entitled to retain separate counsel of its choice and participate in the defense of any Action in connection with any of the matters to which this Exhibit A relates, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party unless: (i) the Company has failed promptly to assume the defense and employ counsel or (ii) the named parties to any such Action (including any impleaded parties) include such Indemnified Party and the Company, and such Indemnified Person shall have been advised by counsel that there may be one or more legal defenses available to it which are different from or in addition to those available to the Company; provided that the Company shall not in such event be responsible under this Exhibit A for the fees and expenses of

more than one firm of separate counsel (in addition to local counsel) in connection with any such Action in the same jurisdiction.

The Company agrees that if any right of any Indemnified Party set forth in the preceding paragraphs is finally judicially determined to be unavailable (except by reason of the gross negligence or bad faith of such Indemnified Party), or is insufficient to hold such Indemnified Party harmless against such Losses as contemplated herein, then the Company shall contribute to such Losses (i) in such proportion as is appropriate to reflect the relative benefits received by the Company and its stockholders, on the one hand, and such Indemnified Party, on the other hand, in connection with the transactions contemplated hereby, and (ii) if (and only if) the allocation provided in clause (i) is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) but also the relative fault of the Company and such Indemnified Party; provided, however, that in no event shall the amount, if any, to be contributed by all Indemnified Parties exceed the amount of the fees actually received by PJSC hereunder. Benefits received (or anticipated to be received) by the Company and its stockholders shall be deemed to be equal to the aggregate cash consideration and value of securities or any other property payable, exchangeable or transferable in any proposed or potential transactions within the scope of this Agreement, and benefits received by PJSC shall be deemed to be equal to the compensation payable by the Company to PJSC in connection with this Agreement. Relative fault shall be determined by reference to, among other things, whether any alleged untrue statement or omission or any other alleged conduct relates to information provided by the Company or other conduct by the Company (or the Company's employees or other agents) on the one hand or by PJSC on the other hand. The parties hereto agree that it would not be just and equitable if contribution were determined by pro rata allocation or by any other method of allocation which does not take into account the equitable considerations referred to above.

The Company also agrees that no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company for or in connection with advice or services rendered or to be rendered by any Indemnified Party pursuant to this Agreement, the transactions contemplated hereby or any Indemnified Party's actions or inactions in connection with any such advice, services or transactions except for Losses of the Company that are finally judicially determined by a court of competent jurisdiction to have arisen solely out of the gross negligence or bad faith of such Indemnified Party in connection with any such advice, actions, inactions or services.

The rights of the Indemnified Parties hereunder shall be in addition to any other rights that any indemnified Party may have at common law, by statute or otherwise. Except as otherwise expressly provided for in this Exhibit A, if any term, provision, covenant or restriction contained in this Exhibit A is held by a court of competent jurisdiction or other authority to be invalid, void, unenforceable or against its regulatory policy, the remainder of the terms, provisions, covenants and restrictions contained in this Agreement all remain in full force and effect and shall in no way be affected, impaired or invalidated. The reimbursement, indemnity and contribution obligations of the Company set forth herein shall apply to any modification of this Agreement and shall remain in full force and effect regardless of any termination of, or the completion of any Indemnified Person's services under or in connection with, this Agreement.



UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

-----X	
In re:	:
	:
FURR'S SUPERMARKETS, INC.,	:
	:
	:
Debtor.	:
-----X	

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

ORDER APPROVING DEBTOR'S EMPLOYMENT OF PETER J. SOLOMON COMPANY LIMITED AS ITS INVESTMENT BANKER

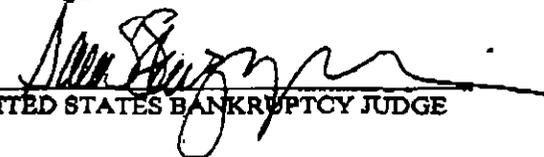
Upon the Debtor's Application for Order Authorizing Employment and Retention of Peter J. Solomon Company Limited as its Investment Banker, filed with the Court on March 5, 2001 (the "Retention Application"), seeking approval of Debtor's employment of Peter J. Solomon Company Limited (PJSC)", pursuant to sections 327(a) and 328(a) of the United States Bankruptcy Code (the "Bankruptcy Code"), to perform services of an investment banker pursuant to the terms and conditions of a certain letter agreement, dated as of February 26, 2001 (the Letter Agreement"); and upon the Declaration of Peter J. Solomon, filed with the Court on March 5, 2001 in support of the Retention Application; and adequate and sufficient notice of the Retention Application having been provided, as evidenced by the Submission of Proof of Service filed with the Court on March 8, 2001 and March 25, 2001; and an objection to the Retention Application having been filed by each of the official committee of unsecured creditors' committee (the "Creditors' Committee") and the United States Trustee; and a hearing having been held on May 22, 2001 in respect of the Retention Application; and upon the appearances of counsel as noted on the record of the hearing; and upon the record of the hearing and arguments of counsel; and the Court having entered into the record its findings of fact

and conclusions of law in respect of the Retention Application, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, as made applicable by Rule 9014 of the Federal Rules of Bankruptcy Procedure; and the Court having overruled each of the objections of the Committee and the United States Trustee to the extent inconsistent with this Order; and after due consideration and sufficient cause appearing therefor, it is hereby

ORDERED that the Debtor's retention of PJSC as its investment banker, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code, on the terms and conditions set forth in an amended and restated Letter Agreement, dated February 26, 2001, a copy of

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which is attached hereto as Exhibit "A," is hereby approved in all respects. PJSC shall comply with the requirements of Bankruptcy Code §§ 330 and 331 with respect to seeking approval of compensation.

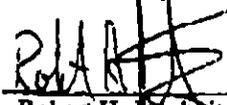

UNITED STATES BANKRUPTCY JUDGE

Submitted by:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Richard Levin (CA State Bar No. 66578)
Stephen J. Lubben (CA State Bar No. 190338)
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
(213) 687-5000

and

JACOBVITZ, THUMA & WALKER,
a Professional Corporation

By: 
Robert H. Jacobvitz
David T. Thuma/500 Marquette N.W., Suite 650
Albuquerque, N.M. 87102
(505) 766-9272/(505) 722-9287 (fax)
Attorneys for the Debtor
and Debtor in Possession

APPROVED:

WEIL, GOTSHAL & MANGES LLP

By: Approved by Telephone
Lori R. Fife *RAF*
767 Fifth Avenue
New York, New York 10153
212-310-8000
212-310-8007 (fax)
Attorneys for Peter J. Solomon Co. Ltd.

APPROVED AT TO FORM ONLY:

PEPPER HAMILTON, L.L.P.
I. William Cohen
100 Renaissance Center, 36th Floor
Detroit, Michigan 48243-1157
(313) 259-7110
(313) 259-7926 (fax)

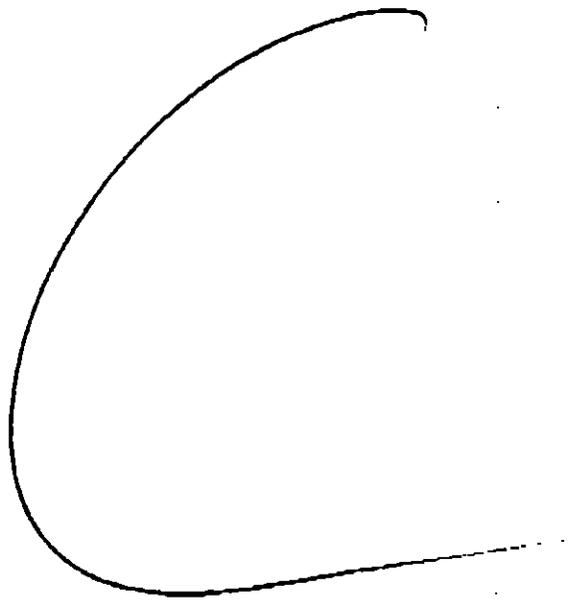
and

DAVIS & PIERCE, P.C.

By: *William F. Davis*
William F. Davis
P.O. Box 6
Albuquerque, New Mexico 87103-0003
(505) 243-6129
(505) 247-3185 (fax)
Attorneys for the Official Committee of
Unsecured Creditors of Furr's Supermarkets, Inc.

BRENDA MOODY WHINERY
United States Trustee

By: Approved by Telephone
Ronald E. Andazola *RAJ*
P.O. Box 608
Albuquerque, New Mexico 87103
(505) 248-6544
(505) 248-6558



UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

MAR 14 2001

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 01-10779-S

Debtor.

Chapter 11

[Signature]
CLERK

**FINAL ORDER (1) AUTHORIZING DEBTOR TO
OBTAIN SECURED FINANCING, (2) GRANTING
ADEQUATE PROTECTION AND (3) GRANTING OTHER RELIEF**

Upon the Motion for An Order (1) Authorizing Debtor to Obtain Secured Credit, (2) Granting Adequate Protection and (3) Granting Other Relief (the "Motion") filed by Furr's Supermarkets, Inc., debtor and debtor in possession (in its prepetition capacity, "Borrower" and in its post-petition capacity, "Debtor") for the entry of an order authorizing it to borrow money and obtain other financial accommodations from Metropolitan Life Insurance Company ("MetLife"), Fleet Capital Corporation ("Fleet"), Bank of America, N.A. ("BoFA"), and Heller Financial, Inc. ("Heller"), for itself as a Lender and as agent for the Lenders (collectively, MetLife, Fleet, BoFA and Heller and any assignees thereof, "Lenders"), and to give security therefor; the Court having examined the Motion, the Interim Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief dated February 8, 2001 and the Second Interim Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief dated March 2, 2001 (collectively, the "Interim Orders"); and upon completion of hearings held on February 8, 2001, March 2, 2001 and March 14, 2001 pursuant to sections 363 and 364 of the United States Bankruptcy Code, 11 U.S.C. §§101-1330 (the "Bankruptcy Code"), and Bankruptcy Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules");

THE COURT FINDS THAT:

A. Filing of Petition. On February 8, 2001 (the "Petition Date"), Debtor filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code (the "Petition"). Pursuant to sections 1107 and 1108 of the Bankruptcy Code, Debtor has retained possession of Debtor's assets and is authorized, as a debtor-in possession, to continue the operation and management of the business previously conducted by the Debtor. A creditors' committee, as provided for under section 1102 of the Bankruptcy Code ("Committee"), has been appointed.

B. Jurisdiction: Core Proceeding. This Court has jurisdiction to enter this Order pursuant to 28 U.S.C. §§157(b)(2) and 1334, and consideration of the Motion is a core proceeding as defined in 28 U.S.C. §§157(b)(2)(A), (D) and (M).

[Handwritten mark]

C. **Notice of Hearing.** Debtor has provided such notice of this hearing and the terms of the Motion as was practicable under the circumstances. Pursuant to 11 U.S.C. §§ 102 and 364, Bankruptcy Rule 4001(c) and (d) and all applicable local rules, such notice is sufficient and appropriate under the circumstances set forth herein and presented to the Court. The Court has received evidence by affidavit of the emergency needs of the Debtor and the consequences to all parties in the event the relief requested by the parties is not granted. Given all of such circumstances, the Court finds that the notice given to the parties to whom it was given in the form it was given was sufficient in the circumstances to afford reasonable notice of the material provisions of the terms hereof.

D. **Pre-Petition Loan Documents.**

i. From time to time prior to the Petition Date, Fleet, BofA and Heller (collectively, the "Pre-Petition Senior Lenders") loaned money and issued letters of credit to Borrower pursuant to that certain Loan and Security Agreement dated as of December 21, 2000 (as the same has been amended, the "Existing Loan Agreement") and the other Loan Documents (as defined therein) (the Existing Loan Agreement and the other Loan Documents, collectively, the "Pre-Petition Senior Loan Documents"); as of the Petition Date, the approximate amount owed to Pre-Petition Senior Lenders by Borrower was \$48,107,674.94 (including all Letter of Credit Liability included in the Letter of Credit Reserve, as defined in the Existing Loan Agreement, but exclusive of accrued and unpaid pre-petition interest and costs and fees) (such amount, together with all accrued and unpaid interest, costs and fees, including without limitation, professional fees and expenses and other Obligations under and as defined in the Existing Loan Agreement, collectively, the "Pre-Petition Senior Indebtedness").

ii. Debtor does not contest that pursuant to the Pre-Petition Senior Loan Documents, as of the Petition Date, the Pre-Petition Senior Indebtedness is secured by a continuing first, valid and perfected security interest in substantially all of the existing Collateral (as defined in the Existing Loan Agreement) of Borrower, including, without limitation, all of the Debtor's accounts, inventory, general intangibles, intellectual property, documents, instruments, chattel paper, investment property, stock in subsidiaries, deposit accounts, cash and other property in the possession or under the control of any Pre-Petition Senior Lender, books and records that evidence or contain information relating to such collateral, and all proceeds thereof and continuing valid and perfected security interest in Equipment and all proceeds thereof, second only to the security interest of MetLife described below (collectively, the "Pre-Petition Senior Collateral").

iii. Borrower entered into a Note Purchase Agreement dated as of June 30, 1995 (as the same has been amended and restated, the "1995 NPA"), pursuant to which Borrower issued to Met Life two \$12,500,000 promissory notes; as of the Petition Date, the approximate aggregate amount owed to MetLife by Borrower pursuant to these notes was \$25,000,000, exclusive of accrued and unpaid pre-petition interest and costs and fees (such amount, together with all accrued and unpaid interest costs and fees, including, without limitation, professional fees and expenses, collectively, the "Pre-Petition ML Senior Debt").

iv. Debtor does not contest that pursuant to a Collateral Sharing and Security Agreement dated as of June 30, 1995, as replaced and superceded by a Security Agreement dated as of December 21, 2000, the Pre-Petition ML Senior Debt is secured by a continuing first, valid and perfected security interest in the Equipment of Borrower and all proceeds thereof and a valid and perfected security interest in substantially all of the other Pre-Petition Senior Collateral, second only to the security interest of the Pre-Petition Senior Lenders (collectively, the "Pre-Petition ML Collateral").

v. Borrower entered into a Note Purchase Agreement dated as of March 27, 2000 (as the same has been amended and restated, the "March 2000 NPA") with MetLife and Credit Suisse First Boston Private Equity ("CSFB") pursuant to which it issued a senior secured note to MetLife in the principal amount of \$8,773,108.90 and to CSFB in the principal amount of \$6,226,891.10; as of the Petition Date, the approximate aggregate amount owed to MetLife and CSFB pursuant to these notes was \$15,000,000, exclusive of accrued and unpaid pre-petition interest and costs and fees (collectively, the "Pre-Petition March 2000 Debt").

vi. Borrower entered into a Note Purchase Agreement dated as of June 23, 2000 (as amended and restated, the "June 2000 NPA") with MetLife, CSFB, Windward Capital Associates, L.P. ("Windward"), and management noteholders, pursuant to which the Borrower issued to (a) MetLife a note in the principal amount of \$2,193,277.23; (b) CSFB a note in the principal amount of \$1,556,722.77; (c) Windward a note in the principal amount of \$500,000; (d) Tom Dahlen a note in the principal amount of \$100,000; (e) Steve Mortensen a note in the principal amount of \$50,000; (f) Steven Smart a note in the principal amount of \$50,000; (g) Gene Denison a note in the principal amount of \$20,000; (h) Delwyn James a note in the principal amount of \$30,000; (i) Steve Stork a note in the principal amount of \$50,000; (j) E.G. Gonzalez a note in the principal amount of \$25,000; (k) George Coluhor a note in the principal amount of \$100,000; (l) Dick Goodspeed a note in the principal amount of \$200,000; (m) Arthur Typermass a note in the principal amount of \$35,000 and (n) David Morrow a note in the principal amount of \$250,000; as of the Petition Date, the approximate aggregate amount owed pursuant to these notes \$5,160,000, exclusive of accrued and unpaid pre-petition interest and costs and fees (the "Pre-Petition June 2000 Debt").

vii. Borrower entered into a Subordinated Note Agreement dated as of June 30, 1995 (as amended and restated, the "Subordinated Note Agreement") with Fleming Companies, Inc., Windward Merchant, L.P., Windward Merban, L.P., Windward/Northwest, L.P. and MetLife pursuant to which the Borrower issued Subordinated Notes (together with the Subordinated Note Agreement, the "Subordinated Debt Documents") to each of (a) Fleming Companies, Inc. in the principal amount of \$16,142,000.00 (which notes were duly purchased from Fleming Companies, Inc. by the Borrower on June 21, 2000 and canceled); (b) Windward Merchant in the principal amount of \$2,902,114.00; (c) Windward/Merban, L.P. in the principal amount of \$1,934,742.00; (d) Windward/Northwest, L.P. ("Windward/Northwest") in the principal amount of \$4,836,858.00 (which note was sold by Windward/Northwest, to MetLife prior to the date hereof); and (e) MetLife in the principal amount of \$24,184,286.00; as of the Petition Date, the approximate aggregate amount owed pursuant to these Notes was \$33,858,000, exclusive of accrued and unpaid interest and costs and fees (the "Pre-Petition 1995 Subdebt").

viii. The Pre-Petition March 2000 Debt, the Pre-Petition June 2000 Debt and Pre-Petition 1995 Subdebt (collectively, the "Pre-Petition Junior Indebtedness") are subordinated to the Pre-Petition ML Senior Debt and the Pre-Petition Senior Indebtedness pursuant to an Intercreditor Agreement dated December 21, 2000 (the "Intercreditor Agreement") among MetLife, CSFB, Windward, the other holders of Pre-Petition Junior Indebtedness party thereto, Borrower and Heller, as agent for Pre-Petition Senior Lenders. In addition, the Intercreditor Agreement sets forth the relative priorities of the liens on the Pre-Petition Senior Collateral and the Pre-Petition ML Collateral and how the Pre-Petition Senior Lenders and MetLife would allocate the proceeds upon sale of such collateral.

E. Additional Financing Needs. The Debtor desires that the Lenders make available to them postpetition credit in an amount up to \$33,000,000 greater than the amount of the Pre-Petition Senior Indebtedness, pursuant to the terms and conditions described in this Order, the Post-Petition Loan and Security Agreement (the "Post-Petition Loan Agreement"), a copy of which is attached hereto as Exhibit A, and any and all other Loan Documents (as defined therein). The Post-Petition Loan Agreement and the other Loan Documents are collectively referred to herein as the "Post-Petition Loan Documents." (Unless otherwise defined herein, capitalized terms shall have the meanings set forth in the Post-Petition Loan Agreement. Debtor urgently requires financing and credit under Section 364 of the Bankruptcy Code to purchase inventory and to fund its day-to-day operations. A steady and continual stream of inventory is essential to the maintenance and enhancement of Debtor's business and its going concern value. Inability to fund daily operations and purchase inventory in the short term could result in a long term negative impact on the value of the Debtor to the prejudice and detriment of Debtor and its creditors, customers and employees.

F. No Other Sources of Funds; Insufficient Cash Collateral. As contemplated by sections 364(a) and 364(b) of the Bankruptcy Code, Debtor has attempted, but is unable to obtain either unsecured credit or unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense on terms more favorable than those offered by Lenders. Debtor has inadequate working capital, and does not anticipate collecting sufficient cash collateral during the period of the DIP Facility (as defined below) contemplated by this Order to fund the expenses it needs to incur in order to maintain and enhance its operations and preserve its going concern value. Substantially all of Debtor's cash on hand as of the Petition Date is cash collateral in which Lenders have a security interest; Lenders have not consented to the use of such cash collateral other than with respect to proceeds of DIP Loans (as defined below). Pre-Petition Senior Lenders have no further obligation to loan funds under the Existing Loan Agreement.

G. DIP Facility. Subject to the entry of this Order and the conditions set forth herein, Lenders are willing to provide post-petition credit (the "DIP Facility") to Debtor, all as more fully set forth herein and in the Post-Petition Loan Documents.

H. Good Faith. The terms of this Order, the Post-Petition Loan Documents and the DIP Facility contemplated herein and therein have been negotiated at arms-length with all parties represented by experienced counsel, are fair and reasonable under the circumstances, are for

reasonably equivalent value and fair consideration, and are in good faith as that term is used in section 364(e) of the Bankruptcy Code. Accordingly, Lenders, in making advances pursuant to this Order, are entitled to the protections described in section 364(e) of the Bankruptcy Code.

1. Cause Shown. Good cause has been shown for the entry of this Order. Among other things, entry of this Order will minimize further disruption of Debtor's business, will enable Debtor to preserve and maintain its assets and is in the best interests of, Debtor, its creditors and its estate.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Authorization to Borrow Under Post-Petition Loan Documents.

(a) Debtor is hereby authorized to use cash collateral, borrow money, request the issuance of letters of credit and seek other financial accommodations from Lenders and is ordered to perform its obligations hereunder and under the Post-Petition Loan Documents in accordance with the terms herof and thereof. All DIP Loans (as hereinafter defined) and obligations incurred on or after the Petition Date by Debtor to Lenders pursuant to this Order and the Post-Petition Loan Documents are referred to herein as the "DIP Indebtedness" and, together with the Pre-Petition Senior Indebtedness, as the "Indebtedness". All loans advanced hereunder will be advanced by Lenders to Debtor as provided in the Post-Petition Loan Documents.

(b) The terms and conditions of the DIP Facility and the Post-Petition Loan Documents are hereby approved and are deemed fully enforceable against the Debtor. The Lenders and the Debtor may amend, modify, supplement or waive any provision of the Post-Petition Loan Documents except as to principal amount, interest rate and fees without any need to apply to, or receive further approval from, the Court. Upon its appointment, the Debtor shall provide counsel for any Committee prior written notice of any such amendment, modification, supplement or waiver. Any amendment, modification, supplement or waiver regarding principal amount, interest rate or fees shall be subject to approval by the Court on appropriate notice.

(c) Debtor is authorized and directed to do and perform all acts, to make, execute and deliver all instruments, agreements and documents, including, without limitation, the Post-Petition Loan Agreement and the other Post-Petition Loan Documents and to pay all principal, interest, fees and other expenses which may be required or necessary for the Debtor to perform all of its obligations under this Order and the Post-Petition Loan Documents.

2. Committed Advances.

(a) Lenders agree, subject to all of the terms and conditions set forth herein and in the Post-Petition Loan Documents, including entry of this Order, to provide the DIP Facility to Debtor until the Termination Date (as defined below). The DIP Facility will consist of a revolving credit facility of up to \$33,000,000 (the "DIP Revolver Commitment Amount"). Any advances made by Lenders under the DIP Facility shall be referred to as "DIP Loans", and shall be entitled to the benefits of this Order.

the business of Debtor, or Debtor's application for, consent to or acquiescence in any such appointment; (iii) entry of an order for stay, reversal, vacatur, amendment or other modification in any respect (except to the extent acceptable to Lenders in their sole discretion) of this Order; (iv) entry of any order dismissing Debtor's case; (v) any material unpermitted deviation from the Budget, including, without limitation, failure to pay interest on the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt and the DIP Facility as provided by the Budget, to Pre-Petition Senior Lenders, MetLife and Lenders; (vi) upon a material breach of this Order or the Post-Petition Loan Documents by the Debtor; (vii) on any date during the term of the DIP Facility on which PricewaterhouseCoopers or another crisis manager reasonably acceptable to Lenders is not actively engaged on behalf of Debtor; (viii) upon sale of all or substantially all of the Debtor's assets; or (ix) upon the substantive consolidation of Debtor's case with any other case. Five business days following receipt of notice from Heller, as agent for Lenders, by the other Lenders, Debtor, the United States Trustee and the Committee (if the Committee has been appointed) or their respective counsel of the occurrence of the Termination Date, for whatever reason, the DIP Facility shall (unless waived by Lenders) become immediately due and payable, and the automatic stay imposed by Section 362 of the Bankruptcy Code shall be deemed automatically vacated without further notice or action, and Lenders shall be entitled to exercise all rights and remedies available to them under this Order or applicable law; no change in circumstances shall be cause for modification of this provision, the parties having advised the Court that it constitutes an essential part of the negotiations leading up to this Order.

6. Security: Adequate Protection.

(a) **Security Interests.** The DIP Indebtedness (and, as limited below, the Pre-Petition Senior Indebtedness and Pre-Petition ML Senior Debt) shall be secured by, and Lenders are hereby granted, pursuant to Section 364(c)(2) and 364(c)(3) of the Bankruptcy Code, a first lien, subject only to Prior Claims (as defined below), on all real and personal property and assets of Debtor, of any kind and nature whatsoever, whether now owned or hereafter acquired by Debtor, and all proceeds, rents or profits thereof (as more fully described in the Post-Petition Loan Documents, collectively, the "DIP Collateral"), including, without limitation, all of the Pre-Petition Senior Collateral, all of the Pre-Petition ML Collateral and all claims or recoveries of Debtor under the Bankruptcy Code (but not including avoidance claims and any and all proceeds therefrom under Sections 544, 545, 547, 548 and/or 553, which shall collectively be referred to herein as "Avoidance Actions") and any cash in possession or control of the Debtor, unused or unearned retainers, deposits, and prepaid items. As used herein, the term "Prior Claims" shall mean any non-avoidable, valid, enforceable and perfected liens on and security interests in the assets of Debtor, as pre-petition debtor which existed on the Petition Date, but only to the extent such liens and security interests are superior in priority, after giving effect to any existing subordination or intercreditor arrangements, to Pre-Petition Senior Lenders' and MetLife's respective pre-petition liens on and security interests in the assets of Debtor, as pre-petition debtor; provided, however, that, notwithstanding the foregoing, the pre-petition liens securing the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt and the Pre-Petition Junior Indebtedness and any pre-petition liens on Accounts or Inventory or general intangibles, documents, chattel paper and instruments related thereto or the proceeds thereof

(other than any Prior Claims of Premier Distributing Company, Inc., City of El Paso, Andrews County, Texas, Pecos County, Texas, Ward County, Texas, County of Brewster, Midland Central Appraisal District, Midland County Tax Office, Andrews County Appraisal District, Lubbock Central Appraisal District, Wichita County Tax Office, New Mexico Beverage Company, Southern Wine & Spirits of New Mexico, Inc., National Distributing Company, General Electric Business Asset Funding Corporation (to the extent, if any, that its interest is a security interest) and General Electric Company - GE Lighting) shall not constitute Prior Claims. Other than the first priority liens and security interests in favor of Lenders pursuant to this Order and the Prior Claims, no other claims, liens or security interests shall attach to the DIP Collateral in this or any subsequent proceeding under the Bankruptcy Code prior to the indefeasible payment and satisfaction in full of the DIP Indebtedness without the prior written consent of Lenders. Any prepetition security interest in or lien on the Pre-Petition Senior Collateral which is avoided or otherwise preserved for the benefit of Debtor's estate under Section 551 or any other provisions of the Bankruptcy Code shall be subordinate to the security interests in favor of Lenders on the DIP Collateral but solely to the extent of the DIP Indebtedness. For purposes of this Order, the pre-petition liens securing the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt and the Pre-Petition Junior Indebtedness and any pre-petition liens on Accounts or Inventory or general intangibles, documents, chattel paper and instruments related thereto or the proceeds thereof (other than any Prior Claims of Premier Distributing Company, Inc., City of El Paso, Andrews County, Texas, Pecos County, Texas, Ward County, Texas, County of Brewster, Midland Central Appraisal District, Midland County Tax Office, Andrews County Appraisal District, Lubbock Central Appraisal District, Wichita County Tax Office, New Mexico Beverage Company, Southern Wine & Spirits of New Mexico, Inc., National Distributing Company, General Electric Business Asset Funding Corporation (to the extent, if any, that its interest is a security interest) and General Electric Company - GE Lighting) shall not constitute Prior Claims, and the liens and claims granted to Lenders hereunder shall have priority, pursuant to 11 U.S.C. § 364(d), over the pre-petition liens securing the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt and the Pre-Petition Junior Indebtedness and any pre-petition liens on Accounts or Inventory or general intangibles, documents, chattel paper and instruments related thereto or the proceeds thereof (other than any Prior Claims of Premier Distributing Company, Inc., City of El Paso, Andrews County, Texas, Pecos County, Texas, Ward County, Texas, County of Brewster, Midland Central Appraisal District, Midland County Tax Office, Andrews County Appraisal District, Lubbock Central Appraisal District, Wichita County Tax Office, New Mexico Beverage Company, Southern Wine & Spirits of New Mexico, Inc., National Distributing Company, General Electric Business Asset Funding Corporation (to the extent, if any, that its interest is a security interest) and General Electric Company - GE Lighting.)

(b) **Replacement Liens.** The liens and security interests granted in the DIP Collateral under the Post-Petition Loan Documents and this Order shall secure the Pre-Petition Senior Indebtedness and the Pre-Petition ML Senior Debt, respectively, only to the extent the value of the Pre-Petition Senior Collateral and the Pre-Petition ML Collateral, respectively, plus all net proceeds of sales or collections of Pre-Petition Senior Collateral and Pre-Petition ML Collateral, respectively, applied to the Pre-Petition Senior Indebtedness or the Pre-Petition ML Senior Debt, respectively, as of any post-petition date of determination is less than the value of

the Pre-Petition Senior Collateral or the Pre-Petition ML Collateral, respectively, as of the Petition Date (whether such decline in value is attributable to physical deterioration, consumption, use, shrinkage, decline in market value or otherwise), and Lenders shall be entitled to the rights accorded them pursuant to Section 507(b) of the Bankruptcy Code in respect of any adequate protection granted to any Lender. In addition, to the extent the holders of the Pre-Petition Junior Indebtedness are able to prove, after notice and a hearing, that they had valid, enforceable and unavoidable liens on any of the Debtor's assets as of the Petition Date, and that the value of such assets as of any post-petition date of determination plus the amount of all collections applied to the Pre-Petition Junior Indebtedness secured by such assets is less than the value of such collateral as of the Petition Date, then the holders of the Pre-Petition Junior Indebtedness shall be entitled to replacement liens on the DIP Collateral, subject to subordination pursuant to the terms of the Intercreditor Agreement and the terms of this Order.

(c) **Adequate Protection Payments.** In addition to the replacement liens described above, as further adequate protection for the use of the Pre-Petition Senior Collateral and the Pre-Petition ML Collateral, the Debtor shall pay taxes and insurance in respect of such collateral and the Pre-Petition Senior Lenders and MetLife, respectively, shall be entitled to payments in an amount equal to post-petition interest, fees and reimbursement for reasonable out-of-pocket expenses within 2 days following the date due under the Pre-Petition Senior Loan Documents and the documents governing the Pre-Petition ML Senior Debt or, if interest is payable less frequently than monthly, interest shall be payable monthly, in arrears, within 2 days after the end of each month (the "Adequate Protection Payments"). Interest on the Pre-Petition Senior Indebtedness shall be paid at the same rate as interest on the DIP Indebtedness, which is less than the "Default Rate" in the Existing Loan Agreement. Interest on the Pre-Petition ML Senior Debt shall be paid at the rates set forth in the documents governing the Pre-Petition ML Senior Debt, without giving effect to any default rates set forth therein. Nothing set forth herein shall be deemed a waiver of the rights of the Pre-Petition Senior Lenders and MetLife to claim that such payments do not constitute sufficient adequate protection. Notwithstanding the foregoing, in the event the Court later determines that the Pre-Petition Senior Indebtedness or the Pre-Petition ML Senior Debt, respectively, are undersecured, the Adequate Protection Payments payable to the Pre-Petition Senior Lenders or MetLife, respectively, may be reallocated to principal or subject to disgorgement after notice and a hearing before this Court.

7. **Perfection of New Liens.** All liens and security interests on or in the DIP Collateral granted to Lenders by this Order are deemed duly perfected and recorded under all applicable laws as of the date hereof, and no notice, filing, mortgage recordation, possession, further order or act shall be required to effect or continue such perfection, although Lenders may, in their sole discretion, and at Debtor's expense, make any filings or recordings or other acts it deems appropriate with respect to such perfection.

8. **Waiver.** In consideration of the DIP Facility, Debtor hereby irrevocably waives and is barred from asserting or exercising any right, without (a) Lenders' prior written consent, or (b) prior payment and satisfaction in full of the DIP Indebtedness, to (i) grant or impose, under Section 364 of the Bankruptcy Code or otherwise, senior or equal liens on or security interests in any DIP Collateral; (ii) return goods pursuant to Section 546(g) of the

Bankruptcy Code (or otherwise return goods on account of any pre-petition liabilities) to any creditor of Debtor or to consent to any creditor taking setoff against any pre-petition liabilities based upon any such return pursuant to Section 553(b)(1) of the Bankruptcy Code or otherwise; (iii) use, or seek an order granting Debtor the right to use, cash collateral, or (iv) modify or affect any of the rights of Lenders under this Order.

9. Priority Claims: Limitation on 506(c) Charges. The DIP Indebtedness shall have the highest administrative priority under Section 364(c)(1) of the Bankruptcy Code, and shall have priority over all other costs and expenses of administration, including those specified in, or ordered pursuant to, Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) or 726 or any other provision of the Bankruptcy Code or otherwise (whether incurred in this case, any conversion of this case pursuant to Section 1112 of the Bankruptcy Code, or in any other proceedings related hereto or thereto). No costs or expenses of administration or other charge, lien, assessment or claim of any person or entity (whether incurred after the Petition Date, any conversion of this case pursuant to Section 1112 of the Bankruptcy Code or any other proceedings related hereto or thereto) shall be imposed against the Pre-Petition Senior Lenders, MetLife or the Lenders, their pre-petition secured claims or post-petition claims, or the Pre-Petition Senior Lenders', MetLife's or the Lenders' interest in the Pre-Petition Senior Collateral, the Pre-Petition ML Collateral or the DIP Collateral under Section 506(c) of the Bankruptcy Code or otherwise. Notwithstanding the foregoing, Lenders' liens on and security interests in the DIP Collateral and Lenders' administrative claims under Section 364(c)(1) of the Bankruptcy Code shall be subject to the payment of any unpaid fees payable pursuant to 28 U.S.C. § 1910, any unpaid fees payable to the Clerk of this Court or the United States trustee, and the Carve-Out (to the extent provided in Paragraph 3 hereof). Notwithstanding the foregoing, the waivers and limitations regarding Section 506(c) set forth in this paragraph shall not apply to a claim by a Chapter 7 Trustee for the Debtor.

10. Cash Collection Procedures: Application of Proceeds. All collections and proceeds of any Pre-Petition Senior Collateral, Pre-Petition ML Collateral or DIP Collateral and all other cash or cash equivalents which shall at any time on or after the Petition Date come into the possession or control of Debtor, or to which Debtor shall become entitled at any time ("Post-Petition Collections") shall be deposited into Blocked Accounts with banks acceptable to Lenders or forwarded directly to Heller, as agent for Lenders. Notwithstanding anything in the Intercreditor Agreement or applicable law regarding the relative priorities of the security interests of MetLife and the other Lenders on the Pre-Petition Senior Collateral, the Pre-Petition ML Collateral or the DIP Collateral but subject to the terms of the Co-Lender Agreement dated as of the date hereof (the "Post-Petition Intercreditor Agreement") among Pre-Petition Senior Lenders and MetLife, Post-Petition Collections (a) attributable to Inventory and Accounts sold in the ordinary course of business shall be applied first against the DIP Indebtedness and next against the Pre-Petition Senior Indebtedness and the Pre-Petition ML Senior Debt in accordance with the terms of the Post-Petition Intercreditor Agreement, and (b) attributable to Pre-Petition Senior Collateral, Pre-Petition ML Collateral or DIP Collateral other than Inventory and Accounts sold in the ordinary course of business shall be permanently applied first against the DIP Indebtedness (and the DIP Revolving Commitment shall be permanently reduced) and next against the Pre-Petition Senior Indebtedness and the Pre-Petition ML Senior Debt in accordance with the terms

of the Post-Petition Intercreditor Agreement. All cash and cash equivalents of Debtor currently in any Blocked Account (other than payroll accounts to the extent used to pay pre-petition payroll) or in the possession or control of Debtor constitutes proceeds of the Pre-Petition Senior Collateral or the DIP Collateral and shall be deemed Post-Petition Collections and shall within one business day after the entry of this Order be remitted to Lenders for application against the Pre-Petition Senior Indebtedness. All banks in which any lockboxes, blocked accounts or other accounts of Debtor exist are authorized and directed to comply with any request of Heller, as agent for Lenders, to turn over to Heller, as agent for Lenders, all funds therein, or collected after the Petition Date, without offset or deduction of any kind.

11. Collateral Sales. No sale, lease or other disposition of DIP Collateral outside of the ordinary course of business (including collection of accounts receivable or any liquidation, auction or other similar sales) may be done through the Termination Date except to the extent permitted in the Post-Petition Loan Documents or consented to by Lenders. Pre-Petition Senior Lenders' and MetLife's right to credit bid Pre-Petition Senior Lenders' or MetLife's claims, respectively, under the Existing Loan Agreement, the documents governing the Pre-Petition ML Senior Debt, the documents governing the Pre-Petition Junior Indebtedness and this Order at any such sales during the period from the date hereof through the Termination Date pursuant to Section 363(k) of the Bankruptcy Code shall be preserved.

12. No Requirement to Accept Title to Collateral. Lenders shall not be obligated to accept title to any portion of the Pre-Petition Senior Collateral or the DIP Collateral in payment of any of the Indebtedness in lieu of payment of cash or cash equivalents or to accept payment in cash or cash equivalents that is encumbered by any interest of any person or entity other than Lenders.

13. Books and Records. Debtor shall permit Lenders and any authorized representatives designated by Lenders, including appraisers engaged by Lenders, reasonable access to visit and inspect any of the properties of Debtor during normal business hours to review Debtor's financial and accounting records, and to make copies and take extracts therefrom, and to discuss Debtor's affairs, finances and business with Debtor's officers, consultants, and accountants, in accordance with the terms of the Existing Loan Agreement, subject to any applicable order of the Court. Without limiting the generality of the foregoing, Debtor shall promptly provide to Lenders and their designated representatives any information or data reasonably requested to monitor Debtor's compliance with the provisions of this Order and the Budget and to perform appraisals or other valuation analyses of any property of Debtor.

14. Effect of Plan of Reorganization. Except as Lenders may consent, the terms of this Order shall not be modified by any final order (including any confirmation order) or by any Plan of Reorganization in this case or any subsequent case under the Bankruptcy Code. Unless Lenders otherwise agree, no Plan of Reorganization in this case shall be confirmed or implemented without the Indebtedness being paid in full in cash as of the effective date of such Plan of Reorganization.

15. Reservation of Additional Rights of Lenders. Nothing in this Order shall constitute a finding with respect to the adequacy of the protection of Pre-Petition Senior Lenders' interests in the Pre-Petition Senior Collateral or the adequacy of the protection of MetLife's interests in the Pre-Petition ML Collateral. Except as otherwise specifically provided herein, Lenders do not waive any rights they have pursuant to the Pre-Petition Senior Loan Documents, the documents governing the Pre-Petition ML Senior Debt, or the documents governing the Pre-Petition Junior Indebtedness, and Lenders shall retain all rights available pursuant to the Bankruptcy Code or any other applicable law. The attachment of the Budget hereto shall not constitute any commitment by Lenders to provide funding beyond the Termination Date.

16. No Waiver. The rights and obligations of Debtor and the rights, claims, liens, security interests and priorities of Lenders arising under this Order are in addition to, and are not intended as a waiver or substitution for, the rights, obligations, claims, liens, security interests and priorities granted by Debtor, as pre-petition debtor, under the Pre-Petition Senior Loan Documents, the documents governing the Pre-Petition ML Senior Debt or the documents governing the Pre-Petition Junior Indebtedness. In addition, nothing contained herein shall serve to bind any party hereto with respect to their positions as to the value of the Pre-Petition Senior Collateral or the Pre-Petition ML Collateral, or the adequacy of any adequate protection provided pursuant hereto, all rights in respect of which are expressly reserved.

17. Order Binding on Successors. The provisions of this Order shall be binding upon and inure to the benefit of Lenders, Debtor and their respective successors and assigns to the maximum extent permissible under applicable law, including, without limitation, any trustee, examiner or responsible person appointed in this case or any subsequent chapter 11 or chapter 7 case.

18. Effect of Dismissal or Conversion. Debtor shall not seek an order dismissing this case under Section 112 of the Bankruptcy Code unless, prior to the entry thereof, the DSP Indebtedness shall have been paid in full in cash. If this case is dismissed or converted, Lenders' rights and remedies under this Order shall remain in full force and effect as if this case had not been dismissed or converted.

19. Waivers and Validation of Pre-Petition Senior Indebtedness and Liens. Subject to Paragraph 20 of this Order, Debtor, on behalf of itself and its estate, hereby waives any and all defenses (including, without limitation, offsets and counterclaims of any nature and kind) as to the validity, perfection, priority, enforceability and nonavoidability (under Sections 510, 544, 545, 547, 548, 550, 552 or 553 of the Bankruptcy Code or otherwise) of the Pre-Petition Senior Indebtedness and the security interests in and liens on the Pre-Petition Senior Collateral in favor of Pre-Petition Senior Lenders and the Pre-Petition ML Senior Debt and the security interest and liens on the Pre-Petition ML Collateral in favor of MetLife (which liens and security interests have the priority described herein). The agreements set forth in this paragraph shall be deemed effective upon the date this Order is entered, subject only to creditors' rights to object on the terms and conditions set forth in Paragraph 20 below.

20. **Objections by Creditors.** All of the provisions of this Order shall be final and binding on Debtor and all creditors and other parties in interest and their successors and assigns upon entry of this Order. All creditors shall have until April 30, 2001 and the Committee shall have until May 23, 2001 to file and to serve upon counsel for Lenders objections or complaints (each a "Claim Objection") respecting the provisions of Paragraph 19 above or any other provisions herein that are predicated upon the validity, extent, priority, avoidability or enforceability of the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt, Pre-Petition Senior Lenders' pre-petition liens on and security interests in the Pre-Petition Senior Collateral and MetLife's pre-petition liens on and security interests in the Pre-Petition ML Collateral. Notwithstanding the Debtor's waiver of defenses set forth herein, the Committee reserves any and all rights the Committee may have to assert such defenses if it files a Claim Objection. If no Claim Objection is filed with this Court and served upon counsel of record for Lenders and Debtor within the time period set forth above, all provisions of this Order shall become final and binding on all parties in interest.

21. **Effect of Modification of Order.** Debtor shall not, without Lenders' prior written consent, seek to modify this Order. Notwithstanding anything contained herein, if any provision of this Order is hereafter modified, by final order of this or any other court, such modifications shall not affect the validity of any DIP Indebtedness outstanding immediately prior to the effective time of such modification, or the validity or enforceability of any lien, priority, or right authorized hereby with respect to any such DIP Indebtedness.

22. **Safe Harbor.** This Court has considered and determined the matters addressed herein pursuant to its powers under the Bankruptcy Code, including the power to authorize Debtor to obtain credit on the terms and conditions upon which Debtor and Lenders have agreed. Thus, each of such terms and conditions constitutes a part of the authorization under Section 364 of the Bankruptcy Code, and is, therefore, subject to the protections contained in Section 364(e) of the Bankruptcy Code except as otherwise provided herein.

23. **Additional Covenants and Conditions.**

(a) **Financial Reporting.** Debtor shall provide Lenders with weekly written reports, by Tuesday of each week for the prior week, comparing actual amounts of collections and expenditures to projected amounts as provided in the Budget, other financial statement reporting as currently required under the terms of the Existing Loan Agreement, collateral reports as required by the Post-Petition Loan Documents, and such other information and reports as may be reasonably requested by any Lender including a daily borrowing base certificate; provided, however, that such reports (other than the Borrowing Base Certificate, shall be deemed timely delivered if delivered within two business days following the date otherwise due. In addition, Debtor shall provide directly to each of the Lenders and to counsel for Heller, as agent for Lenders, immediately upon filing, copies of all reports, pleadings, motions, applications, lists, or other papers or information filed or provided by or on behalf of Debtor with the Court or the United States trustee.

(b) Investment Banker. Debtor has filed appropriate pleadings with this Court seeking authority to engage an investment bank reasonably acceptable to Lenders, on terms and conditions reasonably acceptable to Lenders, for the purpose of pursuing strategic alternatives, which investment bank shall be authorized to communicate directly and indirectly with Lenders (and, subject to the members of the Committee signing a confidentiality agreement reasonably satisfactory to the Committee and the Debtor, contemporaneously the Committee) concerning any matters pertinent to the investment bank's efforts. On or prior to April 6, 2001, Debtor shall obtain an order of the Court approving such investment bank, unless an objection to the retention of such investment bank is filed causing the Court not to enter an order approving such investment bank on or prior to April 6, 2001, in which case, Debtor shall vigorously pursue the retention of such investment bank over such objection as soon as possible but in any event no later than April 6, 2001. Without limiting the foregoing, the Debtor covenants that the investment bank shall make a presentation to Lenders (and, subject to the members of the Committee signing a confidentiality agreement reasonably satisfactory to the Committee and the Debtor, contemporaneously the Committee) within 45 days after the entry of an order retaining such investment bank addressing strategic alternatives, which shall include, consideration of a stand alone plan of reorganization (with or without additional investors) and a potential sale.

(c) Other Covenants. Debtor shall comply with all covenants and agreements set forth in the Post-Petition Loan Documents.

24. Objections Overruled. Except to the extent specifically set forth herein, all objections to the entry of this Order are hereby overruled.

25. Interim Orders Superseded. This Order supercedes the Interim Orders.

26. Secured Post-Petition Trade Credit. The Debtor, the Committee and the Lenders are hereby ordered to meet to discuss in good faith the possibility of vendors providing the Debtor with secured post-petition trade credit; provided, however, that unless (a) Lenders provide their written consent (which may be withheld by Lenders in their sole and absolute discretion) or (b) all DIP Indebtedness is paid and satisfied in full prior to the granting of any security interests to any vendors, such security interests are prohibited in accordance with paragraph 8 of this Order.

27. ~~Lenders Consents, Waivers and Amendments~~. All consents, waivers, amendments and other decisions to be made by Lenders hereunder shall mean the requisite number of Lenders to make such consents, waivers, amendments and other decisions set forth in the Post-Petition Loan Documents.

IT IS SO ORDERED.

Dated as of 3-14, 2001


UNITED STATES BANKRUPTCY JUDGE
DISTRICT

CONSENTED AND APPROVED AS
TO FORM AND SUBSTANCE:

FURR'S SUPERMARKETS, INC., DEBTOR
AND DEBTOR-IN-POSSESSION

By: _____

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**HELLER FINANCIAL, INC., AGENT FOR
LENDERS**

By: _____

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and

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**METROPOLITAN LIFE INSURANCE
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By: _____

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BRENDA MOODY WHINERY
United States Trustee

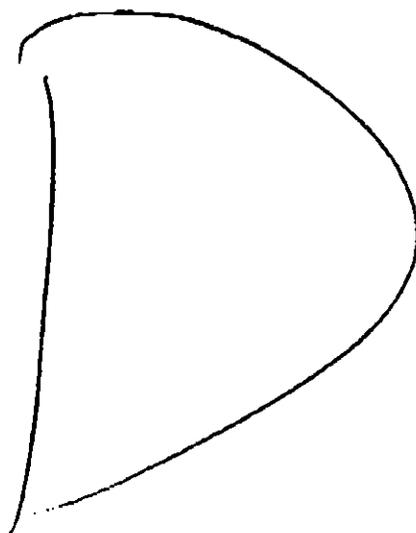
By: _____
Ron E. Andarola
Assistant United States Trustee
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**OFFICIAL UNSECURED CREDITORS
COMMITTEE**

By: _____
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and

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FURRS SUPERMARKETS, INC.

01-10779

September 14, 2001

Ruling: Employment of Peter J. Solomon Co.

On 22 May 2001 the Court conducted final hearings on the motion to approve the employment of Peter J. Solomon Co. ("Solomon") and to engage the services of George Golleher, Greg Mays and Thomas Dahlen. Present were Robert H. Jacobvitz and Richard Levin for the debtor in possession ("Debtor", "company" or "DIP"), William F. Davis and I. William Cohen for the Unsecured Creditor Committee ("UCC" or "Committee"), Paul M. Fish for Heller Financial as lender and as agent for other secured creditors, Ronald Andazola for the United States Trustee ("UST"), Jennie Deden Behles for Metropolitan Life Insurance Company, and Martin Craddock from Desert Feather. 1334 and 157; core; FFCL 7052.

The Solomon motion seeks to employ an investment banker for the DIP; the Court will approve the motion as detailed below.

The final understanding on the Solomon engagement is reflected in a revised engagement letter submitted by Messrs Davis and Thuma (for the UCC and the Debtor respectively), which contains concessions negotiated by the UCC. The revised engagement letter also addresses a number of the objections raised by the UST. This ruling anticipates the execution of that revised engagement letter and the filing of the letter as a separate exhibit in the "pleadings" file in this case.

The primary issue, argued by the UST, is that the indemnification provisions violate the fiduciary obligations of Solomon to the estate. The DIP argues that these provisions are now the standard in the industry, and substitute for insurance, the cost of which would otherwise be passed on to the estate in one form or another. In this instance, UCC wanted and obtained the same treatment for its investment banker Chanin, and secured creditors not object, and it is their money at risk. While the Court has some concerns about how the indemnity process works, the facts that the major parties with stakes in the outcome and assets at risk consent to this arrangement, and that this sort of arrangement is fairly commonplace in the industry, is sufficient in this case to permit it.

The UST also argues that the disclosures concerning Solomon's disinterestedness are insufficient and at the same time suggest impermissible conflicts of interest. The Court finds that the total disclosure provided by Solomon is sufficient, and does not demonstrate any actual conflicts of interest that preclude it from serving the estate as a §327(a) professional.

The UST also argues that Solomon should not be authorized compensation under §328(a), so that Solomon's fees will essentially be paid on some sort of interim (perhaps hourly) basis and perhaps that Solomon's compensation will be subject to closer scrutiny than contemplated by the language "...terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." From the evidence presented, the Court finds that the compensation arrangements for investment bankers are more appropriately comprised of the type of fees described in the engagement letter rather than hourly fees. For that reason, a non-hourly compensation arrangement, such as the one proposed, is appropriate. However, it is also reasonable to permit the Debtor and the creditors an opportunity to review the work of and actual compensation to Solomon before the case is closed, to assure themselves that Solomon has performed the work it was supposed to have performed. This review is not limited to merely a determination of whether there occurred "developments not capable of being anticipated" at this time, it is intended to allow the Debtor

and the creditors to assure themselves that Solomon has in fact done the job it has promised to do. And this is precisely what §330 contemplates.

Note the structure of subchapter II (entitled "Officers") of chapter 3 of the Code. §§321 - 325 deal with the qualifications and appointment of a trustee, and § 326 deals with limitations on - that is, the rates of - the trustee's compensation. Paralleling that structure, § 327 deals with the qualifications and employment of professional persons and §328 deals with limitations on - that is, the rates of -- the professional person's compensation. §§ 330 and 331 then deal with actual allowance and payment to trustees and professionals. § 326 specifies the (maximum) compensation for the trustee for every case; §328(a) permits the employment of the professional on any reasonable terms and conditions, but explicitly provides that the Court may allow compensation different than originally allowed "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." In other words, as with the "published" rates for trustees, §328(a) sets the rates that will govern compensation decisions for the rest of the case barring some fairly unusual event. And this limitation applies to all the professionals, including but not limited to those expecting to be compensated on a lodestar basis (hours times rate).

The approach to compensation embodied in §328(a) is useful in at least two ways. First, it allows everyone in the case to better anticipate and budget for the expenses of each of the professionals. Second, it allows each of the professionals to more accurately anticipate the amount and time of the income the professional expects to receive.

Section 328(a) therefore informs the fee application process provided for in §330. Indeed, the first sentence of §330 states that an award compensation to a professional is subject to §328. At the same time, there is no question that approval of compensation arrangements under §328(a) does not preclude the necessity for a fee application, notice to creditors and parties in interest, and review and approval by the Court.

In this particular application, Solomon must also seek approval of its expenses, including the reimbursement of any of the professionals for which it seeks reimbursement of fees.

The compensation for Solomon essentially is for the investment banking services. If those services are performed, then the fact that Solomon may have in the course of its work done some of the sort of work that PwC was hired for, should not be a basis for decreasing Solomon's compensation. (Indeed, it may not be a basis for decreasing PwC's compensation either, but that is not an issue the Court is addressing in this decision.)

Therefore the Peter J. Solomon Co. agreement with the Debtor, in the form of the revised engagement, is approved, with the additional proviso that at the end of its engagement, Solomon is to file an application for Court approval of its compensation (albeit the compensation may have already been paid) prior to the close of the case.

The approval process will include a review of the expenses of Solomon, particularly any bills for professionals.

RHJ has submitted a proposed order, approved by counsel for UCC, UST, and secured creditors; it only needs Ex A attached to it.

E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----	X	
	:	
In re	:	Chapter 11 Case No.
	:	
SUNBEAM CORPORATION,	:	01-40291 (AJG)
	:	
Debtor.	:	
	:	
-----	X	

**ORDER GRANTING INTERIM ALLOWANCE OF COMPENSATION
FOR PROFESSIONAL SERVICES RENDERED AND FOR
REIMBURSEMENT OF ACTUAL AND NECESSARY EXPENSES
INCURRED FROM FEBRUARY 6, 2001 THROUGH MAY 31, 2001**

Upon consideration of the applications of (i) Weil, Gotshal & Manges LLP, as attorneys for Sunbeam Corporation (the "Debtor"), filed July 5, 2001, (ii) Dresdner Kleinwort Wasserstein, Inc. ("DKW"), as investment banker for the Debtor, (iii) Zolfo Cooper, LLC, as financial advisor for the Debtor, (iv) Jenner & Block, LLP, as ordinary course professional for the Debtor, (v) Ernst & Young LLP, as auditor for the Debtor, (vi) Deloitte & Touche LLP, as accountant for the Debtor, (vii), Skadden, Arps, Slate, Meagher & Flom LLP, as special corporate counsel for the Debtor (collectively, the Debtor's Professionals"), and (a) Kasowitz, Benson, Torres & Friedman LLP, as attorneys for the statutory creditors' committee, and (b) Charin Capital Partners, as financial advisor to the statutory creditors' committee (together, the "Committee's Professionals" and collectively with the Debtor's Professionals, the "Applicants"), seeking allowance of interim compensation for professional services rendered and reimbursement for actual and necessary expenses incurred in connection therewith in the above-captioned chapter 11 case for the period commencing February 6, 2001 through

May 31, 2001 (collectively, the "Applications"); and a hearing having been held on August 28, 2001 before this Court to consider the Applications (the "Hearing"); and the Court having jurisdiction to consider the Applications and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and due notice of the Applications having been provided pursuant to Rule 2002(a)(6) of the Federal Rules of Bankruptcy Procedure, and it appearing that no other or further notice need be given; and for the reasons set forth more fully on the record of the Hearing, and after due deliberation and sufficient cause appearing therefor; it is hereby

ORDERED, that pursuant to 11 U.S.C. §§ 330 and 331, the Applications of the Debtor's Professionals be, and hereby are, granted in full less a five percent (5%) holdback (the "Holdback") as set forth in Schedule A annexed hereto; provided, however, the Application of DKW, consistent with section 328 of title 11 of the United States Code (the "Bankruptcy Code"), is granted and DKW shall be paid by the Debtor in accordance with the governing employment agreements without any Holdback, but subject to an approval for final allowance of compensation and reimbursement of expenses pursuant to section 330 of the Bankruptcy Code; and it is further

ORDERED, that pursuant to 11 U.S.C. §§ 330 and 331, the Applications of the Committee's Professionals be, and hereby are, granted in full less the Holdback as set forth in Schedule A annexed hereto; provided, however, that any payments to the Committee's Professionals are limited to \$600,000 (Chanin Capital Partners - \$350,000 and Kasowitz Benson Torres & Friedman LLP - \$250,000) for compensation and reimbursement of expenses provided for in the budget agreed to by the Statutory Creditors' Committee, the Debtor's senior secured lenders and the Debtor, and

incorporated into the record of the February 27, 2001 hearing on the Debtor's Motion Pursuant to Sections 363 and 364 of the Bankruptcy Code and Bankruptcy Rule 4001 for Authorization to Obtain Secured Credit, Use Cash Collateral and Grant Adequate Protection, subject to further order of the Court upon a motion that may be made by such professionals; and it is further

ORDERED, that the Debtor be, and hereby is, directed and authorized, upon the entry of this Order and receipt of appropriate wiring instructions from each Applicant, to wire-transfer to each such Applicant the fees and expenses as allowed herein.

Dated: New York, New York
August 30, 2001

/s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

SCHEDULE A

<u>Applicant/Nature of Representation</u>	<u>Compensation</u>	
Weil, Gotshal & Manges LLP Counsel for Debtor in Possession	Fees:	\$891,690.50
	Holdback:	<u>\$44,584.52</u>
	Allowed Fees:	\$847,105.98
	Allowed Expenses:	\$100,430.90
Dresdner Kleinwort Wasserstein, Inc. Investment Banker for the Debtor	Fees:	\$189,285.72
	Holdback:	<u>\$0</u>
	Allowed Fees:	\$189,285.72
	Allowed Expenses:	\$13,209.89
Ernst & Young LLP Auditor for Debtor	Fees:	\$121,621.00
	Holdback:	<u>\$6,081.05</u>
	Allowed Fees:	\$115,539.95
	Allowed Expenses:	\$17,452.00
Deloitte & Touche LLP Accountant for Debtor	Fees:	\$2,074,445.30
	Holdback:	<u>\$103,722.26</u>
	Allowed Fees:	\$1,970,723.10
	Allowed Expenses:	\$68,631.35
Skadden, Arps, Slate, Meagher & Flom LLP Special Corporate Counsel for Debtor	Fees:	\$214,749.50
	Holdback:	<u>\$10,737.47</u>
	Allowed Fees:	\$204,012.03
	Allowed Expenses:	\$13,263.98
Jenner & Block, LLC Ordinary Course Professional	Fees:	\$99,588.75
	Holdback:	<u>\$4,979.44</u>
	Allowed Fees:	\$94,609.31
	Allowed Expenses:	\$23,471.35
Kasowitz, Benson, Torres & Friedman LLP Counsel for Statutory Creditors' Committee	Fees:	\$328,464.50
	Holdback:	<u>\$16,423.22</u>
	Fees Less Holdback:	\$312,041.28
	Expenses:	\$13,258.32
	Budget Cap:	<u>\$250,000.00</u>
	Allowed Fees:	\$236,741.68
	Allowed Expenses:	\$13,258.32

Chanin Capital Partners
Financial Advisor for Statutory Creditors' Committee

Fees:	\$562,500.00
Holdback:	<u>\$28,125.00</u>
Fees less Holdback:	\$534,375.00
Expenses:	\$30,445.49
Budget Cap:	<u>\$350,000.00</u>
Allowed Fees:	\$319,554.51
Allowed Expenses:	\$30,445.49

A.J.G.
Initials

8/30/01
Date