

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.
Tax I.D. No. 22-3137244

Case No. 11-01-10779 SA

Debtor.

**UNITED STATES TRUSTEE'S OBJECTION TO
APPLICATION FOR EMPLOYMENT OF PETER J. SOLOMON CO., LTD.**

The United States Trustee for the District of New Mexico hereby objects to the Debtor's Application for Order Authorizing Employment of Peter J. Solomon Co., Ltd. (Application), and as her reasons therefore states the following:

1. As stated by the court in *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13 (Bankr.S.D.N.Y.1991), employment applications submitted by an investment banker/adviser, should contain the following information:

A. The scope and complexity of the assignment, its anticipated duration, expected results, and required resources.

B. A description of the extent to which highly specialized skills may be needed and the extent to which such applicant has them or may be able to obtain them.

C. A statement of the projected salaries of professionals employed by the applicant, billing rate and prevailing fees for comparable services,

D. Current retentions in bankruptcy and any estimated lost opportunity costs due to time exigencies of the employment at issue,

E. A copy of the retention agreement.

F. A description by the debtor-in-possession of the process by which the investment banker/financial adviser was selected

In re Drexel Burnham Lambert Group, Inc. 133 B.R. at 27.

2. With the exception of the copy of the retention agreement, the Application either does not address the above factors or does so only vaguely.

3. The Application requests authorization for employment under 11 U.S.C. §328 (a) which would fix the terms of compensation absent a subsequent showing that they were improvidently approved, “in light of developments not capable of being anticipated....” In these circumstances, Solomon’s employment under this provision of the statute is unwarranted.

4. The Application does not establish the reasonableness of the fees requested therein, and all fees requested by Peter J. Solomon Co., Ltd. (Solomon) should be subject to approval by the Court pursuant to 11 U.S.C. §§330 & 331.

5. The Application provides for a monthly fee of \$150,000 with no specification as to the work to be performed by Solomon on a monthly basis. Further, upon information and belief, Solomon is employed in the Finova bankruptcy, which proceeding is exceedingly large. Solomon’s website indicates that it has a staff of 43 individuals, 26 of whom are investment bankers. In the circumstances, it is unclear what resources Solomon will devote to this matter.

6. The Application provides for transaction fees, with a minimum of \$500,000 per transaction and also provides that aggregate transaction fees shall not be less than \$1,500,000.

A. The method by which transaction fees are computed is not clear.

B. In the event of proposed sales Debtor’s approximately 71 grocery stores, it is unclear whether the transaction fee will be applicable to the sale of each store. If so, the transaction fees may substantially reduce or eliminate potential distributions to unsecured creditors.

7. The Application provides for a reorganization fee. It is unclear if the reorganization fee will be \$1,500,000 or “no less than 40% of the trailing 12 months’ revenue of the Debtor measured on March 31, 2001.” It is also unclear if this fee will be in addition to the transaction fee for the same dealings. If so, the reorganization fee will provide a second layer of compensation for the same work. Further, the reasonableness of this and other fees has not been established.

8. The Application provides for a “financing fee” which shall be negotiated between Solomon and the Debtor in the event that financing is arranged. No details whatsoever are given as to the amount of the financing fee or the reasonableness thereof. Any such financing fee should be subject to Court approval after notice and hearing.

9. The Declaration of Peter J. Solomon in support of the Application indicates that Solomon has substantial connections with Metropolitan Life Insurance Company in this case, as to which Solomon should disclose further information. Further, the Declaration makes vague reference to other creditors and parties in interest of the Debtor as to which Solomon provides services, without specifying who those creditors and parties in interest are. Further information as to these connections should be disclosed as well.

10. The Declaration of Peter J. Solomon in support of the Application further discloses that Solomon’s managing partner, Peter J. Solomon, serves as a member of the New York Administrative Committee of Fleet Bank, N.A., one of the primary secured lenders in this case.

11. Absent further information, it does not appear that Solomon is disinterested within the requirements of 11 U.S.C. §327 (a).

12. With regard to the terms of the letter agreement dated February 26, 2001, attached to the Application, it appears that certain services duplicate those proposed to be performed by

PricewaterhouseCoopers (PWC). A statement as to the division of labor between Solomon and PWC should be provided so as to avoid duplication of work and billings.

13. Section 2 of the letter agreement seems to allow Solomon to keep certain information confidential, at its discretion. To the extent that this provision prevents the Debtor from disclosing information which it has a fiduciary duty to disclose to creditors, objection is made thereto.

14. Section 5 of the letter agreement provides that the Debtor will reimburse Solomon for out-of-pocket expenses, including the disbursements and charges of Solomon's counsel. To the extent that this provision authorizes Solomon to retain legal counsel and obtain payment therefor without Court authorization and approval, objection is made thereto.

15. Section 6 of the letter agreement provides for the Debtor to indemnify Solomon, inter alia, for its own acts of professional negligence. Objection is made to this provision as more specifically set forth below.

16. Section 7 provides that the Debtor may not terminate the agreement with Solomon within the first six months of Solomon's employment. Further, this section provides that Solomon would be entitled to (1) any accrued monthly fees at the time of termination and (2) reorganization and transaction fees if any dealings are consummated within 18 months of termination. Such provisions should be subject to the issuance of a Court order terminating Solomon's employment. Further, the amount of any fees due upon termination should be subject to Court approval, after notice and hearing.

17. Section 8 contains a provision by which the Debtor concedes that any fees payable under the Application are reasonable. To the extent that this waives the right of the Debtor or

any party in interest to object to the reasonableness of Solomon's fees upon the submission of fee applications, objection is made thereto.

18. Section 8 (b) provides that Solomon's fees would be entitled to reimbursement under §503 (b)(1)(A), as expenses for preserving the estate. Any such fees should in fact be awarded pursuant to §503 (b)(2) as compensation and reimbursement awarded under §330(a). Further, to the extent that the provision seeks to obtain priority for Solomon's expenses over other administrative expenses, objection is made thereto.

19. Section 8 (f) provides that Solomon's advice may not be relied upon by any person other than the Debtor and further, appears to restrict the dissemination of Solomon's advice. Since Solomon's advice will likely be included in any disclosure statement and plan proposed by the Debtor, creditors should be entitled to rely on opinions or advice given by Solomon. Additionally, no restrictions should be effective on the dissemination of information as required by the Debtor's fiduciary duties.

20. Section 8 (h) provides that the letter agreement shall be governed by the "laws of the State of New York, without giving effect to such state's rules concerning conflicts of law." To the extent that this conflicts with the provisions of federal bankruptcy law, objection is made thereto.

21. Section 8 (i) provides any lawsuits relating to the agreement shall be brought in the Southern District of New York or the Bankruptcy Court. To the extent that this provision deprives the Bankruptcy Court of its jurisdiction in this proceeding, objection is made thereto.

22. Section 8 (j) provides that the Debtor will waive its right to a trial by jury, rights of setoff, and the right to impose counterclaims against Solomon. Such provision in effect compromises claims by the Debtor in advance of their accrual, without any information as to the

amount of the claim, and without approval of the Bankruptcy Court after notice and hearing. This provision is contrary to the requirements of the Bankruptcy Code and public policy and should be void.

23. The indemnification provisions of the letter agreement are over broad, premature, unreasonable, and inconsistent with the Debtor's responsibilities to act as a fiduciary for the estate and creditors thereof. *See, e.g. Realty Trust*, 123 B.R. at 630-31; *In re Drexel Burnham Lambert Group*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991). As the bankruptcy court in *Drexel* noted, professionals "carry coverage to protect themselves from malpractice liability. This expense [is] overhead, usually more than adequately covered by a retainer fee." *Drexel*, 133 B.R. at 27. The United States Trustee believes that the sweeping indemnification agreement that Solomon seeks is entirely inappropriate.

Respectfully submitted,

BRENDA MOODY WHINERY
United States Trustee

Filed electronically 4/16 /01
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The undersigned certifies that a true and accurate copy of the foregoing was mailed to the below listed counsel this 16th day of April, 2001.

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