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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURRS SUPERMARKETS, INC

Debtor. **Case No. 11-01-10779 SA**

OBJECTION OF NEW MEXICO BEVERAGE COMPANY, INC., SOUTHERN WINE & SPIRITS OF NEW MEXICO, INC. AND NATIONAL DISTRIBUTING, INC. TO DEBTOR'S MOTION FOR ORDER AUTHORIZING DEBTOR TO (a) IMPLEMENT EMPLOYEE RETENTION, SEVERANCE, AND SUCCESS BONUS PLANS; (b) ENTER INTO TRANSITION AGREEMENT WITH THOMAS DAHLEN; AND (c) ENTER INTO CONSULTING AGREEMENTS WITH GEORGE GOLLEHER AND GREG MAYS

Creditors New Mexico Beverage Company, Inc., Southern Wine & Spirits of New Mexico, Inc. and National Distributing Company, Inc., through counsel of record, Hisey & Cadigan, P.C. (Michael J. Cadigan) hereby object to the DEBTOR'S MOTION FOR ORDER AUTHORIZING DEBTOR TO (a) IMPLEMENT EMPLOYEE RETENTION, SEVERANCE, AND SUCCESS BONUS PLANS; (b) ENTER INTO TRANSITION AGREEMENT WITH THOMAS DAHLEN; AND (c) ENTER INTO CONSULTING AGREEMENTS WITH GEORGE GOLLEHER AND GREG MAYS ("the Motion").

New Mexico Beverage Company, Inc., Southern Wine & Spirits of New Mexico, Inc. and National Distributing Company, Inc. ("the Distributors") are wholesale distributors of beer, wine, liquor and non-alcoholic beverages. The Debtor is indebted to the Distributors for shipments of beverages in the pre-petition period of more than $3,000,000.00 collectively. With regard to the alcoholic beverages, pursuant to NMSA §60-6B-3(E), the Distributors hold valid "superpriority" liens on the retail liquor licenses of the Debtor. Western Coin Machines v.

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United New Mexico Bank, 114 B.R. 274 (Bankr. D.N.M. 1990)(A lien pursuant to Section 60-6B-3(E) has a superpriority status over other lienholders).

However, the Debtor is also indebted to the Distributors in the aggregate amount of approximately $73,000.00 for shipments of non-alcoholic beverages which may not be covered by the superpriority lien against the liquor licenses. Because of this significant potentially unsecured claim, the Distributors are concerned that the Motion, if granted, will unnecessarily deplete the funds available to pay the unsecured claims of the Distributors, while bringing little or no value to the Debtor.

I. General Objection

Generally, the Court should look skeptically at the bonus plans because on their face, and in the perception of many unsecured creditors, they smack of self-dealing. The individuals who are most benefited by the plans are those who have the greatest institutional power within the Debtor's company. The perception also exists among some unsecured creditors, as voiced at the §341 Meeting of Creditors, that the plans will reward many individuals who may share some responsibility in the Debtor's financial demise.

In deciding whether to approve retention/success bonuses in a Chapter 11 case, the Court must decide whether the bonuses are fair and reasonable under the circumstances. Matter of Interco, 128 B.R. 229, 234 (Bankr.E.D.Mo. 1991). In light of the circumstances, as more fully described below, the Debtor's plan is not fair and reasonable.

Debtor cites several cases where Courts have approved similar success bonus/retention bonus plans. However, the Court should note the characteristics of those cases that distinguish them from this case. For instance, In re America West Airlines, Inc., 171 B.R. 674 (Bankr. Ariz. 1994) addressed the approval of success bonus plans *after* a successful Chapter 11 reorganization had been completed. The America West court gave approval to the success bonus plan only after a consensual plan of reorganization had been negotiated with creditors and after the Debtor had returned to profitability. Moreover, the bonus to America West's CEO was in stock, not cash as is proposed by the Motion. Giving an executive stock rather than cash offers an additional incentive to see to the financial health of the company.

Similarly, in Matter of Interco, 128 B.R. 229, 233 (Bankr.E.D.Mo. 1991), the Court held that confirmation bonuses should not be authorized until after at least a framework for reorganization has been prepared. In approving bonuses to top executives, the Interco Court also relied on the fact that the retention bonus plan was highly detailed, giving specific performance goals, and was paid over time with greater payments coming toward the end of the plan. In contrast, the Furr's retention plan is not tied to performance and is weighted equally between immediate and future payments.

II. The Retention Plan

The Distributors object to the total cost of the retention plan, $1.89 million. The retention plan focuses too heavily on rewarding high-level executives and fails to recognize the importance of rank and file employees to a successful reorganization. The plan as proposed will likely alienate the cashiers, stockers and drivers who are just as important to the reorganization as are the Senior Vice Presidents. Without increasing the total cost of the plan, it should be re-ordered to recognize the important contributions made by the workers.

The proposal to pay 50 percent of the retention bonus immediately is illogical. If the goal is to retain employees, it should be paid entirely at the end of the emergence from Chapter 11 or at the end of the retention plan period. Paying one half now would allow employees to frustrate the purpose of the plan by taking their half and leaving immediately for a new job. The Debtor will not be benefited by such an occurrence.

The Distributors object to the use of the term "emergence from Chapter 11" as a triggering event for the payment of the retention bonuses. In the event that Debtor executes a liquidation reorganization, the executives would still receive their bonuses but the Debtor and its creditors would receive no value. The retention bonuses should be paid only upon a stand-alone reorganization emergence from Chapter 11. See: In Re Geneva Steel Company, 236 Bankr. 770 (Bankr. Utah 1999)(rejecting retention bonus plan where it failed to require true reorganization rather than a Chapter 11 liquidation).

The Distributors object to the request by the Debtor to pay retention bonuses to employees who join the Debtor after the Order is entered. Anyone who joins the Furr's Supermarkets, by definition, does not need incentive to continue his or her employment there, having already factored in the risks of joining a company in Chapter 11.

III. Severance Plan

Severance plans are ordinarily justified by the employee's need for some job security and a financial cushion in the event the reorganization is not successful. While this is a laudable goal, the Severance Plan, as written is too broad to accomplish this goal. The Distributors object to the Severance Plan because it fails to mitigate payments in the event an executive who is terminated from the Debtor finds new employment. Under the current plan, if an executive is terminated by the Debtor and finds a new job immediately, he or she will still be entitled to payments of, in some cases, hundreds of thousands of dollars. This will result in a windfall to the executives paid for by the unsecured creditors. The Plan should not be approved unless severance benefits are paid over time and are terminated when the executive finds comparable employment. This provision is common in non-Bankruptcy severance packages. See: In Re Geneva Steel Company.

The Distributors also object to the magnitude of the severance packages for senior executives. Paying Vice Presidents a full year's salary fails to recognize the substantial likelihood that highly qualified individuals would be able to find alternative employment well within a year's time. The payment of one-and-one-half year's salary to the Senior Vice Presidents and Chief Financial Officer are even more unreasonable on the same grounds. It is relevant to point out that Debtor's former CEO, Thomas Dahlen has obtained alternative employment with Fleming almost immediately upon the filing of the Bankruptcy. There is no evidence that any executive is likely to be unable to find a new position within one to one-and-a-half years of termination by Furr's. New Mexico Unemployment Compensation is limited to 26 weeks of benefits. NMSA §51-1-4. The Severance Plan should similarly be limited to six months of salary and benefits for all executives.

IV. Success Bonus

The Distributors object to payment of a success bonus. The executives of the Debtor should need no further incentive to act in the best interest of the company than that imposed by the Bankruptcy Code. Such duty is already imposed by law. If, however, success bonuses are paid, they should be paid in the form of stock or other form of equity. This will allow the Debtor's cash to be preserved for paying creditors' claims, while giving the executives a significant financial bonus.

Distributors further object because the plan does not specify what type of sale of the business will be considered a success. Clearly, a sale to one entity at a price that allows unsecured creditors to be paid is a success. A sale of the assets to several companies, at a price equal to the secured debt is not a success from the point of view of the unsecured creditors. Therefore, the plan should specifically set out the definition of a "success" and should permit payments in the event of a sale only upon a sale that is a "success" from the point of view of the unsecured creditors.

V. The Transition Agreement

The Distributors object to the Transition Agreement with Thomas Dahlen on the grounds that it does not benefit the Debtor (and by extension does not benefit the creditors). The only person who will be benefited by the Transition Agreement is Mr. Dahlen.

The Motion proposes to pay Mr. Dahlen $30,000 to "be available on an as-needed basis and to cooperate with the Debtor in the transition process." The motion does not specify what assistance Debtor will or may require from Mr. Dahlen. It appears from the statements of Debtor's new CEO, Mr. Mortenson, that he and his management team are fully capable of executing the reorganization plan without assistance from Mr. Dahlen. Absent some indication of what services from Mr. Dahlen are needed, the $30,000.00 appears to be nothing more than a gift. If the Debtor requires the professional services of Mr. Dahlen during the transition period, he should be paid a reasonable hourly rate and payments should be approved under 11 U.S.C. §327. Any other arrangement operates as a raid on the unsecured creditors' claims and serves only to enrich Mr. Dahlen and impoverish the unsecured creditors.

The $100,000.00 bonus to be paid to Mr. Dahlen in the event he does not hire away Furr's employees is similarly unjustified. The Motion indicates that Mr. Dahlen is subject to a non-compete clause. According to newspaper accounts, Mr. Dahlen has accepted a position with the Flemming Company that gives him management of retail stores. While the Distributors are not familiar with the terms of the Furr's non-compete agreement, it appears that the position with

Fleming may constitute a violation. Therefore, the only consideration Mr. Dahlen needs to encourage him to cooperate with the reorganization should be the release of the non-compete agreement. The $100,000.00 is nothing more than a gift. Again, the Motion fails to describe what kind of cooperation the Debtor needs from Mr. Dahlen in the next 90 days. Without some justification, the $100,000.00 bonus should be rejected.

Finally, the Court should consider that Mr. Dahlen is a secured creditor of the Debtor, holding certain notes payable by Furr's. The prospect of repayment of these notes should give him adequate incentive to cooperate in the successful reorganization of the Company. Additional incentive is not justified by the facts presented by the Debtor.

VI. The Plan Threatens Relations with Creditors

It is critical to the successful reorganization of the Debtor that its trade creditors "keep faith" with the Furr's organization during its Bankruptcy process. Trade creditors who continue to send goods to Furr's shelves and continue to service Furr's needs must be convinced that they are being treated fairly, or they will not be inclined to continue doing business with Furr's, making reorganization impossible. Paying Mr. Dahlen and other executives bonuses, which do not appear to be connected to any actual services provided to Furr's, sends the wrong message to the creditors who are, judging from the emotional presentations at the §341 Meeting, already frustrated with Mr. Dahlen's leadership.

VII. Conclusion

For the reasons stated above, the Distributors request that the Motion be denied. If debtor wishes to provide economic rewards for its executives, it should propose a plan that is better supported by facts, more well specified and more fair to the unsecured creditors. Moreover, any such plan should come after successful plan reorganization is confirmed.

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BY: ______________________

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I hereby certify that a true and correct copy of the foregoing was mailed to the following counsel listed below on this 18 day of April, 2001.

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