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United States Bankruptcy Court
Albuquerque, New Mexico

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In Re:

FURR'S SUPERMARKETS, INC.,

Chapter 11
Case Nos. 01-10779-SA

Debtor.
_____/

OBJECTION OF OFFICIAL UNSECURED CREDITORS' COMMITTEE TO DEBTOR'S MOTION FOR (i) ORDER EXTENDING EXCLUSIVE PERIODS IN WHICH ONLY DEBTOR MAY FILE A PLAN AND (ii) IF NECESSARY, A BRIDGE ORDER EXTENDING EXCLUSIVITY UNTIL HEARING

PEPPER HAMILTON LLP and DAVIS & PIERCE PC, on behalf of the Official Unsecured Creditors' Committee (the "Committee"), and in support of its Objection (the "Objection") to the Debtor's Motion for Order Extending Exclusive Periods in Which Only Debtor May File a Plan (the "Exclusivity Motion") respectfully states as follows:

1. On February 8, 2001, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code (the "Code").

2. On or about February 13, 2001, the United States Trustee appointed the Committee under Section 1102 of the Code.

3. On May 14, the Debtor filed its Exclusivity Motion, seeking a four month extension of the June 8 deadline by which it has the exclusive right to file a plan of reorganization and the August 8 deadline by which it may solicit acceptances thereof (collectively, the "Exclusivity Periods").

4. On Friday, June 1, the Committee filed, under seal, a Motion for the Appointment of a Trustee (the "Trustee Motion"). The Motion was filed under seal out of an abundance of

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caution and in order to avoid the possibility that any confidential information would be unintentionally disclosed in violation of a Confidentiality Agreement entered into between the Committee members and the Debtor.

5. Nevertheless, and without risking the disclosure of confidential information, the very fact that the Committee has *filed* the Trustee Motion demonstrates that the Committee lacks *any* confidence whatsoever in the Debtor's management's ability to fulfill its fiduciary duties to the Debtor's unsecured creditors and to administer the chapter 11 case in a manner designed to maximize a distribution to unsecured creditors and/or to successfully reorganize.

6. Given the pending Trustee Motion, as well as the Committee's grave concerns regarding the Debtor's ability to reorganize and maximize distribution to unsecured creditors, the Committee submits that the Debtor's requested extension of exclusivity is **not** in the best interests of creditors, and that exclusivity should be lifted in a limited fashion to allow only the Committee to file a competing plan of reorganization.

7. Terminating exclusivity to allow *only* the Committee to file a competing plan would minimize any disruptions to the Debtor, and would ensure that the interests of **all** creditors are being fully and fairly represented in these proceedings.

8. Contrary to the assertions in the Debtor's Exclusivity Motion, the Committee submits that the Debtor has not made significant "good faith" progress toward reorganization, but rather has exhibited precisely the opposite, as evidenced by the pending Motion to Appoint a Trustee filed by the Committee. The impetus to file the Trustee Motion was borne out of the Committee's extreme frustration in its relationship with the Debtor, and to grant the Debtor a further extension of exclusivity would only serve to further increase the gulf which has grown between the Debtor and the Committee, further isolating and insulating the Debtor from the concerns of the unsecured creditors.

9. The Committee strongly believes that it is in the bests interests of the estate and its creditors for the Debtor to emerge from Chapter 11 as soon as reasonably possible. The Debtor's business, operations and management have all been adversely affected by the pending Chapter 11 case, and many of the adverse effects will continue until this case is over. Moreover, creditors are harmed by any unnecessary delay in obtaining recoveries on their claims.

10. **Equally important, the Debtor's current intention to pursue a sale of the Debtor's assets within the ensuing three weeks, either as a going concern or in piecemeal form, evidences a singular intent to liquidate this company without any opportunity for a reorganization. *For this reason alone, the Court should deny the Debtor's Exclusivity Motion* and authorize the Committee to consider and propose a competing plan that might lead to a reorganization that benefits the interests of all creditors.**

11. The Debtors seek an extension of the Exclusivity Period without prejudice, of course, to their right to seek additional extensions.

12. An extension of the exclusive period to file a plan of reorganization is premised upon "cause," 11 U.S.C. §1121(d), which the Debtor, as the moving party, bears the burden of establishing. In re Dow Corning Corp., 208 B.R. 661, 663 (Bankr. E.D. Mich. 1997). The case law is clear that the granting of such an extension is neither automatic nor routine. The Debtor bears the burden of establishing sufficient cause to justify an extension. As the court stated in In re Curry Corp., 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992): "The debtor must make a clear showing of 'cause' to support an extension of the exclusivity period." See also, In re Southwest Oil Co. of Jourdanton, Inc., 84 B.R. 448, 450 (Bankr. W.D.Tex. 1987) (exclusivity extensions are "not routinely grant[ed]" and "have not [been] favored."

13. In establishing cause, the Debtor argues that the "case is large and complex, " and that "it has made significant progress in its case to date." As for the latter contention, the Committee

would point again to its Motion to Appoint a Trustee filed under seal, and the facts stated therein. As for the contention that the case's complexity require an extension of the Exclusivity Periods, the Committee counters that this case is not as complex as the Debtor has suggested, and, moreover, the Debtor has engaged a panoply of highly compensated professionals to assist it. Given all of the professional skills at its disposal, if the Debtor, due to what it perceives to be a "large" and "complex" case is unable to appropriately administer the case and propose a plan of reorganization during the time periods provided by the Code, such a lack of progress lends further support to the Committee's request that exclusivity be terminated in order to allow the Committee to file a competing plan.

14. By virtue of this Objection, the Committee is essentially requesting "co-exclusivity" with the Debtor, which should allay any concerns the Debtor may have about "multiple competing plans" and "unwarranted confrontations." Exclusivity Motion at ¶12. Courts and commentators alike have observed that the "judicious use of co-exclusivity can temper the concern over loss of control..." and that "co-exclusivity encourages a debtor to negotiate responsibly, but avoids the adverse consequences that might flow from a wholesale termination of the debtor's exclusive right to file a plan." 2 Queenan, Hendel and Hillinger, "Chapter 11 Theory and Practice," §10.29 (LRP Publications, 1994). See, e.g., In re Texaco, 81 B.R. 806 (Bankr. S.D.N.Y. 1988); In re United Press Int'l, Inc., 60 B.R. 265, 270-71 (Bankr. D.C. 1986).

15. In addition, the Debtor has not shown that it will be prejudiced in any way if the Committee is allowed to file a plan. The underlying purpose of §1121(d), after all, is to "allow...both creditors and debtors an opportunity to file a plan." In re Ravenna Industries, Inc., 20 B.R. 886, 889 (Bankr. N.D.Ohio 1982). Moreover, the Debtor's contention that lifting exclusivity at this juncture will interfere with the reorganization process is unavailing, and, as a matter of law, does not constitute "cause." See, In re Parker St. Florist & Garden Ctr., 31 B.R. 206,

207 (Bankr. D. Mass. 1983) (holding that debtor's "wish to prevent" a creditor from interfering with its reorganization [by] proposal of a plan" cannot constitute cause"); In re Southwest Oil Co. of Jourdanton, Inc., 84 B.R. 448, 453 (Bankr. W.D.Tex. 1987) (extensions cannot be used to "prevent a creditor from interfering with the debtor's reorganization and proposal of a plan").

16. Further support for the Committee's Objection herein is set forth in the Committee's Motion to Appoint a Trustee, which has been filed under seal with this Court and which is incorporated herein by reference.

WHEREFORE, the Committee prays that this Honorable Court deny the Debtor's Exclusivity Motion in order to allow the Committee to propose a competing plan of reorganization.

Respectfully submitted,

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The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed this 4th day of June, 2001.

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