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12:00 MIDNIGHT

MAY 17 2001

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

DROP BOX

United States Bankruptcy Court
Albuquerque, New Mexico

In re

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

FURR'S SUPERMARKETS, INC.,

Debtor.

**DEBTOR'S REPLY TO OBJECTIONS TO MOTION FOR
ORDER AUTHORIZING DEBTOR TO (a) ENTER INTO
CONSULTING AGREEMENT WITH GEORGE GOLLEHER AND
GREG MAYS AND (b) ENTER INTO TRANSITION
AGREEMENT WITH THOMAS DAHLEN**

Introduction

Is it unreasonable to tell individuals how much they are going to be paid before they commence work? Or, must those individuals wait until they have completed their services before finding out how much, if anything, they will be paid for their efforts?

The Debtor has demonstrated the reasonableness of George Golleher's and Gregory Mays' proposed compensation structure, and the terms of their agreements (the "Golleher and Mays Agreements") with the Debtor are reasonable, proper, and demonstrate a sound exercise of the Debtor's business

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judgment. The Debtor has also demonstrated the reasonableness of the significantly reduced payment to Thomas Dahlen under the terms of his revised transition agreement (the "Transition Agreement"). The Court should approve the Debtor's motion authorizing it to enter into the Golleher and Mays Agreements and the Transition Agreement at the negotiated rates and terms and overrule the Objections in their entirety.

I. The Indemnity Provision Does Not Go Beyond Delaware Law

The U.S. Trustee requests that Paragraph 5 of the Golleher and Mays Agreements be deleted. In the amended Golleher and Mays Agreements filed with the Court on May 4, 2001, much of Paragraph 5 has been deleted, including the provisions (i) defining Messrs. Golleher and Mays as independent contractors and (ii) specifying that the Debtor does not have authority to direct or control Messrs. Golleher and Mays.

The U.S. Trustee also requests that the provision in the agreements addressing indemnification of Messrs. Golleher and Mays be amended or deleted to the extent the indemnity expands on that provided under Delaware law. In fact, the indemnity provision does not go beyond Delaware law.

Under Delaware corporate law a corporation may indemnify a "director, officer, employee or agent" who is sued, or threatened with suit, on account of his or her service to the corporation, if "the person acted in good faith

and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation."¹ It also permits a corporation to provide indemnification rights beyond those authorized by statute, stating that the indemnification authorized by "the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification . . . may be entitled under any . . . agreement . . . or otherwise."²

The indemnity provision in the Golleher and Mays Agreements provides:

Indemnity. If the Chairman [or Vice Chairman] is made a party, or is threatened to be made a party, to any action, suit or proceedings, whether criminal, civil, administrative,

¹ DEL. CODE ANN. tit. 8, ' 145. Indeed, the statute *requires* that a corporation indemnify any director, officer, or employee sued for actions relating to the performance of his or her duties, if the defendant prevails on the merits in that suit. *Id.* ' 145(c).

² *Id.* ' 145(f). *See also* Edward P. Welch and Andrew J. Turezyn, FOLK ON THE DELAWARE GENERAL CORPORATION LAW ' 145.7 (Aspen Law of Business ed., 1999) ("one may become entitled to indemnification outside the terms of the statute by virtue of an express contract") (footnote omitted).

investigative or otherwise (a "Proceeding") by reason or arising out of the fact that he is or was a director, officer, employee, . . . or is or was serving at the request of the Company as a director, officer, member, employee, . . . the Company shall indemnify and hold harmless the Chairman [or Vice Chairman] to the fullest extent permitted by law, from and against all costs, expenses, liability, losses (including, without limitation, attorney's fees and expenses, judgements, fines, excise taxes or penalties and amounts paid in settlement) incurred or suffered by the Chairman [or Vice Chairman] in connection therewith³

Surely the Debtor may conclude, in the exercise of its business judgment, that it is appropriate to provide members of its Board of Directors with the protection set out in the Golleher and Mays Agreements.

The Debtor seeks to enter into agreements with Messrs. Golleher and Mays that are in the best interest of the estate under terms that are standard, and enforceable, outside of bankruptcy. The Court should approve the same terms here.

II. The Compensation Proposed in the Golleher and Mays Agreements Is Reasonable

The Objectors argue that the compensation to be paid to Messrs. Golleher and Mays is excessive and unreasonable. The Debtor's evidence in support of the Golleher and Mays Agreements, however, supports the compensation proposed.

³ Golleher and Mays Agreements at & 8.

In some (but not all) of the Committee's cases, crisis managers received less compensation than that proposed for Messrs. Golleher and Mays.⁴ The Debtor has shown that Messrs. Golleher and Mays would receive less than that paid in other cases.⁵ But, a careful review of all exhibits demonstrates that the proposed compensation is well within the range paid for the services that Messrs. Golleher and Mays will provide. Importantly, the fact remains that the Debtor's Board and Messrs. Golleher and Mays agreed on the terms in the Agreements after lengthy, arm's-length negotiations.⁶

The Objectors do not dispute that the monthly fees to Messrs. Golleher and Mays are significantly less than crisis managers typically receive.⁷ Messrs. Golleher and Mays have agreed to defer much of their compensation until the end of the case, partly as an accommodation to the Debtor's cash-flow situation. The proposed back-end payments are not guaranteed, Messrs. Golleher and Mays have the same incentive as all of the parties to reach a successful outcome. Further,

⁴ Committee Exhibits C and D.

⁵ Debtor's May 4, 2001 Brief at Exhibit A.

⁶ *See, Declaration of Thomas J. Sikorski ("Sikorski Declaration") at && 10-16 (testifying as to process employed in finding replacement for Thomas Dahlen and negotiations culminating in the Golleher and Mays Agreements).*

⁷ Debtor's Brief at Exhibit A.

Messrs. Golleher and Mays testify in their Declarations that their proposed compensation is less than what they normally receive for performing similar services.⁸

The Debtor's Board chose Messrs. Golleher and Mays for their years of experience and expertise in the grocery industry, their familiarity with the Debtor's business and its management,⁹ and their ability to step in immediately to guide an otherwise captainless ship. The Debtor believes that the Golleher and Mays Agreements will insure a smooth succession of leadership, with minimal effect on the Debtor's business at this critical stage in the case. The Agreements are structured to provide Messrs. Golleher and Mays with an incentive to assist the Debtor in achieving a successful resolution.

Additionally, Messrs. Golleher and Mays have previously worked with many members of the Creditors' Committee and the secured lenders.¹⁰ In light of the contentious nature of this case, the Committee has objected to almost every motion the Debtor has filed, and the difficult relationship with the secured lenders, the Debtor is hopeful that Messrs Golleher's and Mays' previous relationship with members of the Committee and the secured lenders may assist in moving this case forward more effectively.

⁸ See, Golleher Declaration at & 8; Mays Declaration at & 8.

⁹ See, Sikorski Declaration at && 11-12.

¹⁰ See, Golleher Declaration at & 15; Mays Declaration at & 15.

The Objectors cannot dispute that the Debtor must have capable, experienced executive leadership. They do not contend that Messrs. Golleher and Mays are not eminently qualified, they are only arguing over the price. But, the terms of the Golleher and Mays Agreements were negotiated fairly and are within market terms. All of these considerations demonstrate the Debtor's sound business judgment, as required under Bankruptcy Code section 363(b)(1), in entering into the agreements with Messrs. Golleher and Mays.

III. The Payment to Thomas Dahlen Under Revised Transition Agreement Should Be Approved

The U.S. Trustee objects to the Debtor's reduced payment to Thomas Dahlen, the Debtor's former CEO and President, in the revised Transition Agreement. The Transition Agreement now provides for a \$30,000 payment to Mr. Dahlen for his continued assistance with the Debtor's business during the six weeks after his formal departure. At the time the agreement was entered into and before replacement leadership had been secured, Mr. Dahlen's continued availability to the Debtor for an additional six-week period was crucial to ensure the smooth transition to the new management team, which includes Messrs. Golleher and Mays. The agreement does not enumerate the tasks to be performed by Mr. Dahlen during this six-week period, but Mr. Dahlen has agreed to be available to the Debtor with respect to any matters for which the Debtor may require his consultation and

advice. This payment, \$5,000 per week for six weeks, is reasonable and in the best interests of the estate.

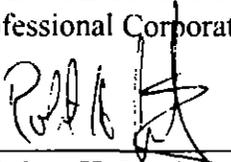
WHEREFORE, the Court should overrule the Objections and

Transition Agreement.

Dated: Albuquerque, New Mexico
May 18, 2001

JACOBVITZ THUMA & WALKER
A Professional Corporation

By: _____


Robert H. Jacobvitz
David T. Thuma