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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

In re:	)	Chapter 11
	)	
FURR'S SUPERMARKETS, INC.,	)	
	)	Case No. 11-01-10779 SA
Debtor,	)	
	)	
	)	
-----	)	

**METROPOLITAN LIFE INSURANCE COMPANY'S  
OBJECTION TO NEW MEXICO TAXATION AND REVENUE  
DEPARTMENT'S AMENDED MOTION TO COMPEL  
PAYMENT OF POST-PETITION TAXES OUT OF THE  
AGGREGATE PROCEEDS PURSUANT TO THE  
FIRST CLOSING ORDER AND JOINDER IN HELLER OBJECTION**

Metropolitan Life Insurance Company, in any and all capacities wherein Heller Financial, Inc. ("Heller") does not expressly act as its agent ("MetLife"), by and through its undersigned attorneys, Bingham Dana LLP and J.D. Behles & Associates, a Commercial Law Firm, hereby submits its Objection to New Mexico Taxation and Revenue Department's ("TRD") Amended Motion to Compel Payment of Post-Petition Taxes Out of the Aggregate Proceeds Pursuant to the First Closing Order (the "TRD Motion") and Joinder in Heller Objection, and states as follows:

1. Heller has previously filed with this Court its Objection to Taxation and Revenue Department's Motion to Compel Payment of Post-Petition Taxes Out of the Aggregate Proceeds Pursuant to the First Closing Order (the "Heller Objection").

2. By this Objection, MetLife hereby adopts the arguments and objections set forth in the Heller Objection as if fully set forth herein, reserves its right to submit

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additional and more detailed objections prior to or at any hearing to be held on this matter, and presents certain additional arguments as set forth below.

3. Specifically, MetLife respectfully refers this Court to the case of *United States v. New Mexico*, 581 F.2d 803 (10<sup>th</sup> Cir. 1978), *aff'd*, 455 U.S. 720 (1982), which firmly enunciates the law in this jurisdiction, to wit: “The New Mexico Supreme Court has construed [the gross receipts statute’s] language as placing the legal incidence of the gross receipts tax on the seller” (citing *First Nat’l Bank v. Commissioner of Revenue*, 460 P.2d 64, 70 (N.M. Ct. App.), *cert. denied*, 460 P.2d 72 (1969), *appeal dismissed*, 397 U.S. 661 (1970)). Accordingly, the TRD Motion should be denied as only a seller in New Mexico may be required to pay gross receipts taxes. TRD’s attempt to have the secured lenders pay the outstanding tax obligation of the Debtor is without any statutory support.

4. With respect to certain factual assertions contained in the TRD Motion, MetLife refutes any contention that it was aware the Debtor was in arrears in payment of post-petition tax payments prior to the Fleming Sale or that it refused the Debtor the authority to pay those taxes when they came due. TRD Motion at ¶ 12. MetLife was informed that the Debtor was current on its payment of post-petition gross receipts tax obligations and that the first unpaid scheduled payment occurred after the close of the Fleming sale. At all relevant times, MetLife expected (and contracted for) the Debtor to be in compliance with all applicable laws and regulation as a condition to its debtor-in-possession financing. See Post Petition Loan and Security Agreement dated as of March 14, 2001, approved by the Final Financing Order (as defined in the TRD Motion) ¶ 5.4 Compliance with Laws.

5. As for the equities in altering prior orders of this Court, MetLife submits that it has justifiably relied on each of the Final Financing Order and the First Closing Order in extending credit and other accommodations to the Debtor. The Final Financing Order provided creditors ample opportunity to object to the validity, extent, priority, avoidability or enforceability of MetLife's pre-petition liens on pre-petition assets. Final Financing Order at ¶ 20. No objections under this paragraph have been made and sustained. The force of this Court's order, therefore, ought to stand and not be altered by changed circumstances in this case. *In re Malmgren*, 277 B.R. 755, 759 (Bankr. E.D. Wis. 2002)(courts must enforce their own orders). The claims of the lenders, including MetLife, secured by their valid and perfected liens as acknowledged by this Court, are entitled to priority in payment over the claims of the TRD. No authority has been cited or exists which would justify the Court changing that priority regimen.

6. Finally, as support for the TRD Motion, TRD cites Bankruptcy Code § 552(b)(1), which permits the Court to limit a creditor's pre-petition lien on property acquired by the Debtor post-petition based on the equities of the case. This authority is wholly inapposite to the present circumstance as among the liens which MetLife and the other lenders assert are *replacement* liens granted *post-petition*. Bankruptcy Code § 552 addresses the case of ordinary pre-petition liens attaching to property acquired post-petition. MetLife additionally asserts its interest in the Debtor's property by virtue of replacement liens granted by this Court post-petition and upon which MetLife reasonably relied as adequate protection for the continued (*and still continuing*) use of its cash collateral and its extension of post-petition financing. No case has been identified where Bankruptcy Code § 552 was used to invalidate or limit a judicially granted, post-petition

replacement lien. TRD's reliance upon this statute is misplaced and ought to be disregarded by this Court.

WHEREFORE, MetLife respectfully requests that the Court (i) deny the TRD Motion, and (ii) grant MetLife such other and further relief as the Court deems to be just and proper.

Dated: June 18, 2002  
Albuquerque, New Mexico

Respectfully submitted,

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