

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.  
a Delaware corporation,

Case No. 07-01-10779 SA  
Chapter 7

Debtor.

**STIPULATION AND CONSENT ORDER (I) APPROVING COMPROMISE AND SETTLEMENT BETWEEN THE TRUSTEE ON BEHALF OF THE ESTATE, HELLER FINANCIAL, INC., BANK OF AMERICA, N.A., FLEET CAPITAL CORPORATION AND METROPOLITAN LIFE INSURANCE COMPANY AND (II) RESOLVING ALL OBJECTIONS THERETO**

This Stipulation and Consent Order (the "Stipulation and Consent Order") is entered into between and among Yvette J. Gonzales, the Chapter 7 Trustee (the "Trustee"), in her capacity as representative of the chapter 7 estate in the above-referenced bankruptcy case (the "Estate"), on the one hand, and Metropolitan Life Insurance Company ("MetLife"), Fleet Capital Corporation ("Fleet"), Bank of America, N.A. ("BofA"), and Heller Financial, Inc., in its individual capacity ("Heller") (Heller, BofA, and Fleet are collectively referred to herein as the "Bank Lenders"), Heller in its capacity as agent for itself, Fleet and BofA under that certain Prepetition Credit Facility dated December 21, 2000, (the "Pre-Petition Agent"), and Heller, in its capacity as agent for itself, Fleet, BofA and MetLife under the DIP Facility (as defined herein) (the "DIP Agent") (the Bank Lenders and MetLife, together with their respective successors, assigns, and transferees are collectively referred to herein as the "Lenders"), on the other hand;

A. On February 8, 2001 (the "Petition Date"), Furr's Supermarkets, Inc. (the "Company" or the "Debtor"), filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C § 101 et seq. (the "Bankruptcy Code");

B. On July 3, 2001, the Court entered an order approving the sale of a substantial portion of the Debtor's assets to Fleming Companies, Inc. ("Fleming"), which sale of assets closed on August 31, 2001;

C. On December 19, 2001, the Debtor's case was converted to a case under chapter 7 of the Bankruptcy Code, and the Trustee was thereafter appointed;

D. During the chapter 11 case this Court entered its Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief dated March 14, 2001 (the "Final DIP Order"), granting the Lenders a security interest in and lien on substantially all of the Debtor's assets except for the Avoidance Actions, to the extent provided therein;

E. The Final DIP Order authorized the Debtor, inter alia, to (i) enter into a \$33,000,000 Post Petition Loan and Security Agreement and related documentation (together with the Final DIP Order, the "DIP Facility") with the Lenders, and (ii) provide adequate protection in respect of the DIP Agent and the Lenders;

F. After the sale of assets to Fleming the Lenders continued to finance the Debtor and the Estate under several orders of this Court, including, without limitation, those dated September 18, 2001, September 26, 2001, October 4, 2001, October 16, 2001, October 26, 2001, and November 15, 2001, some of which granted the Lenders liens on Avoidance Actions (the "Post-Fleming Financing Orders");

G. The official committee of unsecured creditors (the "Committee") in existence during the chapter 11 case commenced certain litigation against the Lenders, and the Debtor and the Trustee also contemplated certain litigation in respect of other matters, including, without limitation, the Trustee seeking a surcharge under Bankruptcy Code § 506 (c);

H. The Lenders defended the litigation commenced by the Committee and advised the Debtor and the Trustee that the Lenders believed that defenses to all asserted and threatened litigation existed and that they would oppose such litigation;

I. The Lenders have advised the Trustee that the Lenders assert substantial superpriority and administrative claims against the Estate granted pursuant to the Final DIP Order that could subsume substantially all unencumbered assets of the Estate;

J. The Lenders and the Trustee have also disputed the amounts owed by the Lenders to certain professional persons retained by the Debtor or the Unsecured Creditors' Committee under the "carve-out" language of the Final DIP Order;

K. The parties hereto have weighed the merits of their respective positions, and in order to avoid the risks and extensive costs attendant to litigating the matters, the parties hereto have conducted extensive arm's-length negotiations and have determined to enter into a final, complete and binding settlement of all of the disputes and potential disputes between the Estate on the one hand and the Lenders on the other hand relating to liens, claims, interests, priorities and rights in respect of the Debtor's assets and in respect of any affirmative claims or defenses against the Lenders to the extent and upon the terms and provisions set forth herein (all such terms and provisions, the "Settlement");

L. The Trustee, on behalf of the Estate, and the Lenders believe that this Settlement constitutes the best opportunity to maximize recoveries and minimize costs for the benefit of all parties in interest and the Estate in general;

M. The Trustee has filed a motion dated February 8, 2002 (the "Motion"), seeking the Court's approval of this Settlement;

N. Proper, timely, adequate and sufficient notice of, and an opportunity to be heard in connection with the hearing contemplated by the Motion, has been provided to all parties and entities entitled thereto, and this Court finds that such notice and opportunity for hearing was adequate and appropriate under the circumstances of this case, comported with all due process requirements, and satisfied the requirements of the Federal Rules of Bankruptcy Procedure and no other or further notice is required;

O. Objections to the Motion were filed by a number of parties. All of the objections have either been withdrawn or are resolved by the entry of this Stipulation and Consent Order, the form and substance of which has been agreed to by the remaining objecting parties, as indicated by their signatures below.

P. This Court finds that the Trustee and the Lenders have acted in good faith, responsibly and that the Trustee has fulfilled her duties during this case; and

Q. This Court finds that the Settlement is prudent, fair and reasonable, was negotiated and entered into in good faith by the parties, and is in the best interests of the parties, including the Estate;

NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED, AND ORDERED, as follows:

1. Pursuant to inter alia, Sections 105, 361, 362, 363, 364, 501, 502, 503, 506, and 507 of the Bankruptcy Code and Rule 9019(a) of the Federal Rules of Bankruptcy Procedure, and all other applicable provisions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, this Court hereby grants the Motion as set forth herein, and this Settlement is approved and “so ordered” in its entirety.

2. This Court hereby authorizes the parties to comply with each and every term, condition, and obligation contained in and contemplated under this Stipulation and Consent Order.

3. Definitions. The following terms shall have the following meanings:

“Avoidance Actions” means avoidance claims and any and all proceeds therefrom under Bankruptcy Code sections 544, 545, 547, 548, 550 and/or 553, whether received before or after the commencement of litigation.

“Bank Lenders” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“Bankruptcy Code” has the meaning set forth in Recital A of this Stipulation and Consent Order.

“BofA” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“Carve-Outs” has the meaning set forth in paragraph 8(a) of this Stipulation and Consent Order.

“Closing Escrow” has the meaning set forth in paragraph 15 of this Stipulation and Consent Order.

“Collection Costs” has the meaning set forth in paragraph 6(b) of this Stipulation and Consent Order.

“Committee” means the Official Unsecured Creditors’ Committee appointed in the Debtor’s Chapter 11 case.

“Company” means Furr’s Supermarkets, Inc.

“Court” means the United States Bankruptcy Court for the District of New Mexico.

“D&P” Davis & Pierce, P.C.

“Debtor” means Furr’s Supermarkets, Inc.

“DIP” means Furr’s Supermarkets, Inc., Debtor in Possession.

“DIP Agent” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“DIP Facility” has the meaning set forth in Recital E of this Stipulation and Consent Order.

“Distribution Center Lease” means the Estate’s interest in the long-term lease of the food distribution center on Railroad Drive in El Paso, Texas.

“Estate” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“Final DIP Order” has the meaning set forth in Recital D of this Stipulation and Consent Order.

“Fleet” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“Fleming” has the meaning set forth in Recital B of this Stipulation and Consent Order.

“Heller” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“JTW” means Jacobvitz, Thuma & Walker, P.C.

“JTW Carve-Out” has the meaning set forth in paragraph 8(a) of this Stipulation and Consent Order.

“Lenders” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“MetLife” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“Motion” has the meaning set forth in Recital M of this Stipulation and Consent Order.

“Net Amount” means the amount received by the Trustee on behalf of the Lenders and the Estate for a particular claim or asset (prior to deduction of any applicable 3% Trustee fee), less all applicable Collection Costs.

“Petition Date” has the meaning set forth in Recital A of this Stipulation and Consent Order.

“Post-Closing Carve-Out” has the meaning set forth in paragraph 8(a) of this Stipulation and Consent Order.

“Post-Closing Funding Claim” has the meaning set forth in paragraph 7 of this Stipulation and Consent Order.

“Post-Fleming Financing Orders” has the meaning set forth in Recital F of this Stipulation and Consent Order.

“Pre-Closing Carve-Out” has the meaning set forth in paragraph 8(a) of this Stipulation and Consent Order.

“Pre-Petition Agent” has the meaning set forth in the introductory paragraph of this Stipulation and Consent Order.

“Releases” has the meaning set forth in paragraph 19 of this Stipulation and Consent Order.

“Released Estate Parties” has the meaning set forth in paragraph 21(b) of this Stipulation and Consent Order.

“Released Lender Parties” has the meaning set forth in paragraph 21(a) of this Stipulation and Consent Order.

“Reserved Claims” has the meaning set forth in paragraph 21(a) of this Stipulation and Consent Order.

“Settlement” has the meaning set forth in Recital J of this Stipulation and Consent Order.

“Stipulation and Consent Order” means this Order.

“TRD” means the Taxation and Revenue Department of New Mexico.

“Trustee” means Yvette J. Gonzales, the Chapter 7 trustee in this Chapter 7 bankruptcy case.

“Written consent of the Lenders” shall include consent given by email. Written consent shall be deemed given by any Lender who does not object to a written question within ten business days after a request. Such a request may be made by email to counsel for the Pre-Petition Agent and counsel for MetLife. (A written request by a Lender for further information made within the first five business days of such 10 business day period will start the time limit over for one additional ten day period from the day of the request.) Unless otherwise validly instructed by the Lenders, such consent shall be given or withheld from both a representative of the Pre-Petition Agent (on behalf of the Bank Lenders), and a representative of MetLife. Consent given by counsel shall suffice.

4. The DIP Agent's Liens on Avoidance Actions. The DIP Agent's liens on behalf of the Lenders against recoveries from Avoidance Actions granted in the Post Fleming Financing Orders shall be reduced by \$2 million. This reduction reflects the settlement of the allocation issue asserted by the Trustee and others, to wit: that a portion of the Fleming sale proceeds was allocable to the release of a potential preference action allegedly held by the Estate against Fleming, and that the Lenders should not have received that portion of the sale proceeds because at that time they did not hold a security interest in proceeds of Avoidance Actions.

5. Allowed Claims and Liens. The Lenders (i) shall have allowed secured claims as set forth in the Final DIP Order and the Post Fleming Financing Orders (as expressly modified hereby), and by their respective Proofs of Claim filed in this case, which in the case of MetLife is in an aggregate amount of not less than \$37,286,043.42<sup>1</sup>, and in the case of the Bank Lenders is in an aggregate principal amount of not less than \$48,107,674.94, and (ii) shall be deemed to have first, prior and perfected liens on all assets of the Estate (except for the liens on Avoidance Actions which liens are limited pursuant to the Post Fleming Financing Orders as expressly modified herein) to secure the DIP Indebtedness (as defined in the Final DIP Order) and the Lenders' respective allowed pre-petition claims, as applicable, as set forth above; provided, however, that the Lenders agree that notwithstanding such liens, funds recovered by the Trustee or the Estate on account of the amounts allocated to the Trustee and the Estate under this Settlement and amounts payable pursuant to the Carve-Outs (as defined below), as permitted herein, may be paid from the Lenders' collateral unless expressly provided otherwise herein; and further provided, however, that the amounts of the Lenders' respective secured claims is limited

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<sup>1</sup> The amount of MetLife's secured claim set forth in paragraph 5 is in addition to and without prejudice to MetLife's separate proof of claim filed in respect of its unsecured claims against the Debtor.

by Bankruptcy Code §506(a). The Court hereby orders that all claims, security interests and liens of the Lenders and each of them shall not be subject to any avoidance, surcharge, subordination, defenses, counterclaims, rights of set-off, challenge or infirmity of any kind whatsoever, and that the amounts already paid to the Lenders in this case shall not be subject to any disgorgement to the Estate for any reason or under any theory whatsoever.

6. Trustee Collection of Assets.

a. *Collection of Assets.* The Trustee shall sell assets and collect claims pledged to the Lenders, including without limitation those assets set forth in paragraphs 9 to 16 below. In exchange, the Estate shall receive the percentages of the Net Amount(s) set forth in paragraphs 9 to 16 below, and be reimbursed for all Collection Costs (defined below). The amounts allocated herein to the Trustee for payment of Trustee fees shall be paid to the Trustee to the extent such Trustee fees are allowed by the Court, and if and to the extent such amounts exceed the Court allowed compensation to the Trustee, the difference will be divided 50% to the Lenders and 50% to the Estate. The amounts allocated to the Estate herein shall be paid to the Trustee and shall be available for distribution to administrative and unsecured creditors of the Estate generally after payment of allowed Trustee compensation. The Lenders guarantee that the amount of proceeds allocated to the Estate with respect to the assets identified in paragraphs 10 to 16 below shall be at least \$550,000 (which is in addition to the 3% allocated to the Trustee). The Trustee shall not sell any asset in which the Lenders are entitled to a portion of the proceeds without the prior written consent of the Lenders. Except for Avoidance Actions, the Trustee shall not settle any matter in which the Lenders are entitled to a portion of the proceeds without the written consent of the Lenders. Until the DIP Agent's liens on behalf of the Lenders against Avoidance Actions and proceeds thereof, as reduced in accordance with paragraph 4 hereof, is

fully satisfied, any settlement of Avoidance Actions shall require the written consent of the Lenders and approval of the Bankruptcy Court, provided that if the Lenders do not consent to any proposed settlement, the Trustee may seek to obtain Court approval of the settlement in any event, based on whether the settlement is fair and reasonable under the circumstances without giving any deference to the business judgment of either the Trustee or the Lenders.

b. *Collection Costs.* As used herein, "Collection Costs" means all direct costs incurred by the Estate collecting a claim or selling or liquidating an asset and all tax liabilities of the Estate of any nature resulting from such collections and sales (except for reductions in the Estate's net operating loss carryforwards), including without limitation all (i) carrying costs and other amounts expended to preserve and protect the asset or claim, such as payment of rent, utilities, insurance, or taxes; (ii) any brokers' fees to the extent the Lenders give their written consent to incurring them; (iii) any attorney fees, accountant fees, expert witness fees, and fees incurred for litigation support, if incurred on or after February 4, 2002; (vi) all of the foregoing costs incurred by the Trustee on or after December 19, 2001 with respect to (a) preserving the Distribution Center Lease, including but not limited to seeking and obtaining an extension of time to assume or reject the lease, and any related appeals; (b) litigating with Pinnacle Logistics, Inc. and Countrywide Logistics, Inc. in adversary proceeding no. 01-01099 and the appeal thereof; and/or (c) litigating and/or settling with Heller Leasing, Inc. in adversary proceeding no. 01-01160. The following conditions shall apply to all Collection Costs, whether incurred before or after execution or approval of this Settlement. The Lenders shall be consulted in advance with regard to expenses for litigation in excess of \$5,000 in any case or other discrete matter or transaction. All professional fees shall be subject to Court approval for reasonableness and necessity. The Trustee shall furnish the Lenders a monthly report showing the status of

outstanding fees billed and expenses broken down by claim or asset within thirty days after the end of the reporting period. The Trustee shall be available to consult with the Lenders regarding the amount of outstanding fees. The Trustee shall not retain the services of counsel other than JTW and Linda Aikin or any accountant or expert witness other than Sage Accounting in any matter in which the Lenders are entitled to a portion of the recovery without the prior written consent of the Lenders, which consent shall not be unreasonably withheld or denied. The Lenders give their advance consent to the Trustee's retention of any brokers already retained by the Trustee. On the condition that D&P charges hourly rates comparable to the hourly rates charged by JTW, the Lenders give their advance consent to the Trustee's retention of D&P to prosecute Avoidance Actions and to collect prepaid inventory deposits and accounts receivable. The above limitation on the Trustee's retention of professionals does not apply to professionals retained to perform services in connection with the pension plan who are paid from plan assets. The Lenders shall not have a lien against any Estate assets, or an administrative claim, on account of the payment of Collection Costs.

7. Release By Lenders of Administrative Claims. The Lenders release and waive all superpriority and administrative claims except for the superpriority claim for the post-Fleming closing advances (the "Post-Closing Funding Claim") secured by all assets, including Avoidance Actions, ordered by the Post Fleming Financing Orders (as expressly limited and reduced pursuant to paragraph 4 hereof). If the Trustee does not recover sufficient funds from Avoidance Actions to repay that obligation, the DIP Agent on behalf of the Lenders shall retain its superpriority administrative claims senior in priority to the administrative claims of all parties other than holders of chapter 7 administrative claims, and shall be entitled to recover such shortfall from amounts allocated hereunder to the Estate or other assets of the Estate after all

chapter 7 administrative expenses are paid in full; provided, however, that: (i) such superpriority administrative claims shall not limit or otherwise affect payment of Collection Costs or the funding of the Carve-Outs (as defined in paragraph 8 hereof) under this Settlement and shall not be payable from the 3% of proceeds allocable to the Trustee, and (ii) the Lenders shall not be entitled to seek disgorgement of any funds from any third parties on account of such superpriority and administrative claims. The amount owed on the Post-Closing Funding Claim at the present time is \$4,297,109 (plus interest), but that amount shall be reduced by \$2 million by the application of paragraph 4 hereof upon the effectiveness of this Stipulation and Consent Order and interest shall be deemed to have accrued on the unpaid principal balance of the Post-Closing Funding Claim less the \$2 million.

8. Professional Carve-Outs. The parties hereto agree and the Court hereby orders that:

(a) The “carve out” for professionals retained by the Debtor in Possession and Committee set forth in Sections 2(b) and 3 of the Final DIP Order shall be deemed fully funded and fully and finally resolved by this Settlement on the following terms and conditions: (i) on the terms and conditions set forth in paragraphs 8(b), (c) and (d), subject to subsection (w) below, the Lenders shall pay \$1,650,000 for allowed fees and expenses arising from fees and expenses incurred between February 8, 2001 and August 31, 2001 (the “Pre-Closing Carve-Out”); (ii) on the terms and conditions set forth in paragraphs 8(b), (c) and (d) and subject to subsections (x) and (y) below, the Lenders shall pay the actual amount of allowed and unpaid fees and reimbursement of expenses arising from fees and expenses incurred after August 31, 2001, through the date of conversion of the case to chapter 7, which the Trustee estimates to be approximately \$250,000 excluding the \$150,000 owed to Peter J. Solomon Company,

described in subsection (w) below, not to exceed \$350,000 (the "Post-Closing Carve-Out"), provided, however, (w) if the \$150,000 owed to Peter J. Solomon Company pursuant to the order entered on the Docket as no. 1309 is determined to be part of the Pre-Closing Carve-Out, the \$1,650,000 specified in subsection (i) shall be increased to \$1,800,000; (x) if such \$150,000 owed to Peter J. Solomon Company is determined to be part of the Post-Closing Carve-Out, the \$350,000 specified in subsection (ii) shall be increased to \$500,000; (y) the \$350,000 or \$500,000 cap specified in subsection (ii) shall not apply to professionals' fees and reimbursement of expenses incurred after conversion of the chapter 11 case to chapter 7 to prosecute and defend fee applications, if and to the extent such fees are payable from the Post-Closing Carve-Out; and (z) the Lenders shall honor and guarantee the existing carve-out in favor of Jacobvitz, Thuma & Walker, P.C set forth in paragraph 9 of that certain First Order Arising Out of Emergency Hearing Supplementing Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief, To Permit Short-Term Financing And Use Of Cash Collateral, docketed as number 1102 (the "JTW Carve-Out") to the extent JTW has not been paid by the Estate on the date the carve-out is funded. The Pre-Closing Carve-Out amount shall not be reduced by any payments made to professionals prior to conversion of the chapter 11 case to chapter 7. Fifty percent (50%) of any amounts paid to professionals prior to conversion of the chapter 11 case to chapter 7 that are disgorged by any professional after such conversion based on the Court having determined that such professional received more than the amount of compensation allowed it by the Court, shall be paid to the Trustee for payment of professional fees and expenses incurred prior to September 1, 2001, and shall not be deducted from or applied as a credit against the \$1,650,000 Pre-Closing Carve-Out amount. The other fifty percent (50%) of any such disgorged funds shall be paid to the Lenders

as part of their collateral. The Lenders shall not be entitled to any funds disgorged by any professional based on the Court having determined that such professional received more than its pro rata share of payments to professionals and/or other parties in interest. The Lenders reserve the right to claim that (i) compensation and reimbursement of expenses sought for prosecuting and defending fee applications that seek compensation for services rendered and expenses incurred prior to September 1, 2001 fall within the Pre-Closing Carve-Out, and/or (ii) such fees and expenses are not compensable under the provisions of the Final DIP Order governing carve-outs. All other parties in interest, including all professionals, reserve the right to claim otherwise. The Pre-Closing Carve-Out, Post-Closing Carve-Out, and JTW Carve-Out (collectively the “Carve-Outs”) are intended to protect professionals employed by the DIP or the Committee against any shortfall after they receive their pro rata share of funds available to pay holders of administrative claims generally. Accordingly, professionals shall be entitled to receive their respective pro rata share of funds available to pay administrative claims generally, without regard to any amounts professionals receive on account of a Carve-Out. The Court hereby orders that all claims of professionals against the Lenders for any Carve-Out or other carve-out under the Final DIP Order or any other order or agreement relating to this bankruptcy case, or otherwise for payment of fees and expenses relating to this bankruptcy case are hereby fully settled, and professionals are forever barred from asserting any collateral attacks against the Lenders for unpaid fees and expenses.

(b) No payments shall be made from any of the Carve-Outs or from any of the Lenders’ collateral to professionals for fees or expenses incurred in the course of actions taken against the Lenders, to the extent provided in Section 3 of the Final DIP Order. Any professional seeking payment under any of the Carve-Outs or from any of the Lenders’

collateral shall obtain the consent of the Trustee and Lenders, or approval from the Court, that the amounts sought were not incurred in such an action or effort. Prior to any distribution to a professional of any funds under the Carve-Outs or from any of the Lenders' collateral, the Trustee shall either have obtained the prior written consent from the Lenders or a court order authorizing such payment.

(c) The Carve-Outs shall be funded from the proceeds of sale of the Distribution Center Lease to the extent of the Lenders' collective share (excluding monies paid as reimbursement to the Lenders of Collection Costs advanced by the Lenders in respect of the Distribution Center Lease) of the Net Proceeds payable to the Lenders. If by December 15, 2002 proceeds have not been realized and paid to the Trustee from the sale of the Distribution Center Lease sufficient to fully fund the Carve-Outs, then on or before December 15, 2002 the Lenders shall pay the Trustee the amount necessary to fully fund the Carve-Outs, regardless of the occurrence or nonoccurrence of any other event, including, without limitation, whether or not (i) any payments have been made on professional fee claims from funds available in the Estate, (ii) any issues of the type referred to in paragraph 8(b) have been resolved, and/or (iii) any issues remain about the allowance of any professional fees, including any appeals from orders of this Court.

(d) The Lenders shall not be subrogated to the allowed administrative claim, including the administrative expense priority thereof, of such professional to the extent of payments under the Carve-Outs. The Lenders have only subordinated to the professionals to the extent of the Carve-Outs, and to the extent assets are otherwise available to satisfy claims of the Lenders, the Lenders shall receive such payments as provided in this Order.

9. Avoidance Actions. The Trustee shall undertake in her reasonable business judgment to prosecute and to collect from third parties in respect of Avoidance Actions, including commencement of adversary proceedings. The parties hereto agree and the Court hereby orders that funds recovered in respect of Avoidance Actions, whether before or after the commencement of litigation, shall be disbursed as follows:

(a) Until the Lenders' liens against the Avoidance Actions are satisfied, first, to Collection Costs; second, 3% of the remaining amount to the Trustee; and third, 2/3 of the balance to the DIP Agent on behalf of the Lenders under the DIP Facility and 1/3 of the balance to the Estate;

(b) After the DIP Agent's liens against Avoidance Actions are satisfied, all amounts recovered shall be paid to the Trustee.

10. Distribution Center Lease. Lenders may, at their option, pay all carrying costs, including, but not limited to, costs for rent of the facility, equipment rent, utilities, taxes and security, and shall pay all attorneys fees incurred by the Trustee in connection with the Distribution Center Lease; provided, however, that the Lenders shall pay all Court-required carrying costs that are allowable as administrative claims against the Estate and indemnify the Trustee against all carrying costs that are allowable as administrative claims against the Estate. Such payments may be made from funds that the Trustee otherwise would remit to the Lenders, as directed by the Lenders. If the Lenders choose not to pay such carrying costs, the Lenders shall so notify the Trustee and Fleming Companies, Inc. in writing at least three (3) business days prior to the date that the Lenders will no longer pay the carrying costs incurred after such date. The Trustee may then, at her option, immediately move to reject the Distribution Center Lease and/or equipment lease, as appropriate. All Collection Costs relating to the Distribution

Center Lease, including reimbursement of the Lenders for Collection Costs advanced by them, shall be paid from the first proceeds arising from the sale of the Distribution Center Lease. The Trustee shall receive 3% of the Net Amount of sale proceeds, and the balance shall be paid to the Lenders, subject to paragraph 8(c) hereof.

11. Prepaid inventory deposits, accounts receivable, utility deposits. The parties hereto agree that the Trustee shall undertake to collect from third parties pre- or post-petition prepaid inventory deposits, accounts receivable, and utility deposits (if any), including commencement of adversary proceedings, all as determined by the Trustee in her reasonable business judgment, and that funds from each amount recovered shall be disbursed as follows: first, for Collection Costs; second, 3% of the Net Amount to the Trustee; and third, 10% of the balance to the Estate and 90% of the balance to the Lenders.

12. Land and Equipment and Miscellaneous Assets. The parties hereto agree and the Court hereby orders that the Trustee shall undertake to sell land and equipment and miscellaneous assets not otherwise categorized herein that are property of the Estate, as determined by the Trustee in her reasonable business judgment, and that sale proceeds from each piece of property sold shall be disbursed as follows: first, for Collection Costs; second, 3% of the Net Amount to the Trustee for trustee fees; and third, 10% of the balance to the Estate and 90% of the balance to the Lenders.

13. Liquor Licenses. The parties hereto agree and the Court hereby orders that the Trustee shall undertake to sell the liquor licenses that are property of the Estate, in her reasonable business judgment, and that sale proceeds from each license, including licenses under contract prior to conversion of the case from chapter 11 to chapter 7, shall be disbursed as follows:

(a) First, to pay claims of liquor wholesalers with respect to the license sold, with all parties contending they have not waived, and specifically reserving any rights, claims, or defenses that may exist in connection therewith as set forth in the Order Regarding Payment of Liquor Wholesalers and Transfers of Liquor Licenses, entered August 31, 2001, and reserving all other rights set forth in the first paragraph numbered 4 in such order as to any payments to liquor wholesalers.

(b) Second, to pay gross receipts taxes with respect to the license sold;

(c) Third, to pay amounts owed, if any, to the TRD with respect to the liquor licenses sold as part of the Fleming transaction;

(d) Fourth, to pay other Collection Costs, including Trustee's attorneys fees associated with the sale, the renewal of temporary suspensions of licenses, if any, and the annual renewal of licenses;

(e) Fifth, 3% of the Net Amount to the Trustee; and

(f) Sixth, 10% of the balance to the Estate and 90% of the balance to the Lenders. If any payments must be made to TRD to renew a license, the Lenders shall pay such amount and later be repaid such advance as part of the Collection Costs to be paid from sale proceeds and collections. For purposes of this paragraph 13, the Net Amount is the amount received after deducting amounts paid for gross receipt taxes, liquor wholesaler claims, TRD fees, Collection Costs and costs incurred in connection with the renewal of temporary suspensions, renewal of licenses and the sale of the licenses.

This order does not supercede or modify the Order Approving Agreement Regarding Sale of Liquor Licenses, and Establishing Procedures for the Sale of Liquor Licenses Free and Clear of Liens and Payment of Liquor Wholesalers and Certain Taxes filed in the Bankruptcy Case on

April 5, 2002, or any other orders that may in the future be entered relating to the sale of liquor licenses.

14. Pension Plan Surplus. The parties hereto agree and the Court hereby orders that any surplus remaining after wind-down of any or all of the Debtor's pension or 401(k) plans shall be paid 3% to the Trustee, and the balance to the Lenders.

15. \$2 million Closing Escrow. The parties hereto agree and the Court hereby orders that (i) the Lenders shall receive all funds distributed from the \$2 million closing escrow established in connection with the closing of the Fleming transaction (the "Closing Escrow"; (ii) the Trustee shall have no obligation to undertake any action at the expense of the Estate in connection with recovering amounts in respect of the Closing Escrow; (iii) the Trustee hereby assigns all right, title and interest of the Estate in and to the Closing Escrow to the Lenders; (iv) this Stipulation and Consent Order shall be considered and constitute for all purposes a full and complete general assignment, conveyance and transfer of the Closing Escrow to the Lenders and/or a bill of sale transferring the Estate's title and interest therein; (v) the Trustee is authorized, directed and empowered to execute, perform under, consummate and implement any required assignment instruments or documents or other documents that may be reasonably desirable, required or requested by the Lenders for the purpose of assigning transferring, granting, conveying or conferring title to, or reducing possession of, the Closing Escrow to the Lenders; and (vi) the Court hereby acknowledges the standing of the Lenders to pursue recovery of the Closing Escrow.

16. Claims Against Liquor Wholesalers. The Trustee and Lenders agree that the Lenders in their discretion may commence or continue to prosecute claims against liquor wholesalers seeking, among other things, return of payments made to them since the Petition

Date by the DIP or the Estate based upon, inter alia, the Lenders' claims that their liens are senior to the liens of liquor wholesalers. Should the Lenders and/or Trustee proceed with such actions, and should either of them prevail, the Estate shall receive 2.5% of any amounts recovered, plus any attorney fees and expenses incurred by the Estate in connection with the litigation. The Estate shall have no obligation to undertake any action at the expense of the Estate in connection with such claims other than cooperation with Lenders in such an action. The Estate agrees to be a party in such proceeding, although the parties recognize that the bulk of the legal work in such action will be performed by the Lenders. The Lenders shall pay any Collection Costs incurred by the Estate in such litigation. The Trustee agrees to cooperate in good faith with the Lenders in the prosecution of the claims against the liquor wholesalers. Any provision in this Order to the contrary notwithstanding, nothing in this Order shall be construed or interpreted as (a) requiring or mandating the Lenders to commence or continue to prosecute claims against the liquor wholesalers; or (b) a finding or adjudication by the Court that the Lenders have or do not have valid claims of any kind, or a factual or legal basis to assert any claims, against the liquor wholesalers.

17. Payment of \$50,000 to the Estate. At any time after entry of this Stipulation and Consent Order, the Trustee may transfer \$50,000.00 to the Estate's bank account, free and clear of any liens or claims of the Lenders, which funds shall be taken by the Trustee from funds that are now or in the future held by the Trustee that otherwise would be payable to the Lenders. This amount shall be credited to the Lenders in connection with the \$550,000.00 guarantee set forth in paragraph 6(a) above. The Trustee may collect any Trustee fees in connection with such payment, in accordance with the terms of the Stipulation and Consent Order.

18. Payment of \$50,000.00 to TRD or its Designee(s). The Trustee shall pay from funds held by the Trustee that otherwise would be payable to the Lenders: (i) \$5,039.32 to Emery Company, Inc., and (ii) \$44,960.68 to TRD, within ten days after this Stipulation and Consent Order is entered, which amount shall be applied to TRD's Chapter 11 administrative claim. No further order of the Court shall be required before the Trustee may make such payments. The Trustee may collect a 3% Trustee fee in connection with such payment from funds held by the Trustee that otherwise would be payable to the Lenders. TRD's (i) Motion to Clarify or to the Extent Necessary Modify the Final Financing Order Entered March 14, 2001 to Provide That the Chapter 7 Trustee May Surcharge, Pursuant to §506(c), the Secured Creditors With Respect to Costs and Expense Incurred During the Chapter 11 Case, filed February 20, 2002 and docketed as # 1575, and any amendments thereto, and (ii) Second Amended Motion to Compel Payment of Postpetition Taxes Out of Aggregate Proceeds Pursuant to First Closing Order, filed June 17, 2002 and docketed as #1706, are hereby denied in all respects, and all issues raised by such motions are compromised and settled by this Stipulation and Consent Order. TRD hereby consents to all of the terms of this Stipulation and Consent Order, and shall not seek and hereby waives the right to seek any relief sought in the motions or similar to that sought in such motions or that could have been sought in such motions (including without limitation the assertion of any claim that the Lenders or their collateral are liable, in whole or in part, for unpaid taxes or other amounts owed by the Debtor or the Estate to TRD), from the Lenders, their collateral, or the Estate, after entry of this Stipulation and Consent Order.

19. Receipt of Funds By Lenders. The parties hereto agree and the Court hereby orders unless otherwise agreed by the Lenders, (a) all funds currently held by the Trustee or the Estate in excess of \$125,000 shall be paid immediately to the Lenders, other than the

remaining balance of funds advanced for the benefit of the Trustee prior to conversion of the case to chapter 7, including the \$50,000 of unrestricted funds advanced for the benefit of the Trustee, funds advanced to pay third parties to perform certain services and U.S. Trustee quarterly fees, and the funds held for the Closing Escrow and (b) all funds received by the Trustee in connection with the liquidation of assets that are to be paid to the Lenders pursuant to this Settlement shall be paid to the Lenders on or before the date the Trustee's monthly status report is due pursuant to paragraph 6(b) in which such funds are to be reported, except that any receipt of funds in the amount of \$50,000 or more that is to be paid to the Lenders pursuant to this Settlement shall be paid to the Lenders within five (5) business days of such receipt by the Trustee (this requirement does not apply to receipts of lesser amounts that aggregate more than \$50,000); provided, however, that the Trustee may hold back from any payments (i) an amount representing her reasonable estimate of Collection Costs that may be paid from such funds if the amount of such Collection Costs is not readily ascertainable and (ii) an amount representing her reasonable estimate of any tax liability resulting from any sale of assets or collection of claims. Except with respect to monies to be paid to the DIP Agent pursuant to paragraph 9 hereof, payments to the Lenders hereunder shall be made to the Lenders in their capacities as pre-petition creditors. The Court further orders that in all cases where this Stipulation and Consent Order requires payments to the Lenders, such payments shall be made to MetLife, except as otherwise agreed in writing among the Lenders<sup>2</sup>

20. Reimbursement of Collection Costs. If the Trustee pays any Collections Costs to be paid out of the proceeds of a sale or collection of assets, the Trustee shall be

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<sup>2</sup> MetLife and the Bank Lenders agree that MetLife's receipt of funds under this Settlement shall be subject to the Intercreditor Agreement (as defined in the Final DIP Order) and the Co-Lender Agreement dated as of March 14, 2001.

reimbursed for such payments from such proceeds. If there are insufficient funds generated by the sale or collection of an asset or claim to pay the Collection Costs incurred in connection therewith (such as if an adversary proceeding is unsuccessful), such unpaid Collection Costs shall be paid as a Collection Cost from the proceeds of subsequent sales or collections of assets or claims; and if such funds are insufficient, any unpaid Collection Costs shall be paid pro rata by the Lenders and Estate, based on their respective shares (as allocated under this Settlement and Consent Stipulation) of the proceeds of the asset or claim for which the unpaid Collection Costs were incurred.

21. Mutual Releases. The following comprise essential components of the terms of this Settlement, shall be effective immediately upon entry of this Settlement and Consent Order, shall be construed as broadly and as generally as possible and as permitted by law, and are together referred to as the “Releases”:

(a) *Estate Release of the Lenders*. Except for claims arising under or expressly reserved in this Settlement and Consent Order, and claims arising from actions taken after the date of entry of this Order (together, the “Reserved Claims”), the Trustee, on behalf of the Estate and the Debtor in its capacity as a chapter 7 bankruptcy estate and successor to the DIP, and any subsidiaries, predecessors, successors, creditors’ committee, assigns, officers, directors, trustees, estates, advisors, agents, attorneys, divisions, affiliates, related companies, and all persons acting by, through or in concert with them, fully and forever release and waive any argument, assertion, cause of action and claim, and discharge each of MetLife, Fleet, BofA and Heller, their respective subsidiaries, shareholders, predecessors, successors, assigns, officers, directors, agents, employees, trustees, estates, creditors, creditors’ committees, lenders, advisors,

attorneys, divisions, affiliates, related companies, and all persons acting by, through or in concert with them (all of the foregoing, collectively, the "Released Lender Parties"), from, and acknowledge full and complete satisfaction of any and all, claims, disputes, objections, litigations, defenses, demands and causes of action of any kind whatsoever, whether in law or in equity, known or unknown, currently viable or arising hereafter, suspected or unsuspected by the Estate or the DIP, and whether or not concealed or hidden, which each of them or any of them, now or hereafter own or hold as against the Released Lender Parties, and each of them or any of them, by reason of any matter whatsoever, including, without limiting the intended generality and all-encompassing scope of this release, those which (a) arise out of, or are in any way connected with, or related to, transactions, occurrences, events, acts or omissions prior to the Petition Date, including, without limitation, in connection with any pre-petition loans or indebtedness of or transactions with the Company, the Final DIP Order or any document executed in connection therewith, or any other matter whatsoever associated with the Debtor's activities, undertakings, or businesses prior to the Petition Date, (b) arise out of, or are in any way connected with, or related to, the transactions, occurrences, events, acts or omissions which took place on or after the Petition Date or which were, might or could have been, alleged in connection with the Debtor's case, (c) are in any way related to the validity, extent, secured status and/or priority of the Released Lender Parties' (i) claims, (ii) liens, or (iii) interests, or (d) arise in connection with any other matter whatsoever, including, without limitation, all claims arising under Bankruptcy Code § 506(c) or otherwise asserting surcharge, claims relating to marshalling of assets, and all claims asserted in Adversary Proceeding No. 01-01096, or claims that any proceeds of the Fleming sale previously paid to the Lenders or any other funds must be disgorged (meaning that the Lenders may retain such funds, subject only to the terms hereof).

(b) *Lenders Release of the Trustee, the Debtor, and the Estate.* Except for the Reserved Claims, each of MetLife, Fleet, BofA and Heller and any subsidiaries, predecessors, successors, creditors' committee, assigns, officers, directors, trustees, estates, advisors, agents, attorneys, divisions, affiliates, related companies, and all persons acting by, through or in concert with them, fully and forever release and waive any argument, assertion, cause of action and claim, and discharge each of the Trustee, the Estate, the Debtor, and the DIP, their respective subsidiaries, shareholders, predecessors, successors, assigns, officers, directors, agents, employees, trustees, estates, creditors, creditors' committees, lenders, advisors, attorneys, divisions, affiliates, related companies, and all persons acting by, through or in concert with them (all of the foregoing, collectively, the "Released Estate Parties"), from, and acknowledge full and complete satisfaction of any and all, claims, disputes, objections, litigations, defenses, demands and causes of action of any kind whatsoever, whether in law or in equity, known or unknown, currently viable or arising hereafter, suspected or unsuspected by the Lenders, and whether or not concealed or hidden, which each of them or any of them, now or hereafter own or hold as against the Released Estate Parties, and each of them or any of them, by reason of any matter whatsoever, including, without limiting the intended generality and all-encompassing scope of this release, those which (a) arise out of, or are in any way connected with, or related to, transactions, occurrences, events, acts or omissions prior to the Petition Date, including, without limitation, in connection with any pre-petition loans or indebtedness of or transactions with the Company, the Final DIP Order, or any document executed in connection therewith, or any other matter whatsoever associated with the Debtor's activities, undertakings, or businesses prior to the Petition Date, or (b) arise out of, or are in any way connected with, or related to, the transactions,

occurrences, events, acts or omissions which took place on or after the Petition Date or which were, might or could have been, alleged in connection with the Debtor's case.

22. Court Approval of Settlement. The Settlement is not binding upon the parties unless and until this Stipulation and Consent Order is executed by each of the parties, and approved by the Court after notice and a hearing. If this Settlement is not approved in full, then except as set forth in paragraph 23 below, no party thereto is bound thereby.

23. Surcharge/Advancing of Funds.

(a) The Trustee and the Lenders agree that the Trustee shall take the following actions immediately:

(1) The Trustee immediately shall market the Distribution Center Lease, and shall receive the amounts set forth in paragraph 10 above, whether or not this Stipulation and Consent Order is executed or approved by the Court; and

(2) The Trustee immediately shall market the liquor licenses, and shall collect and apply the amounts set forth in paragraph 13 above, whether or not this Stipulation and Consent Order is executed or approved by the Court; and

(b) To the extent the Trustee incurs costs on or after December 19, 2001, including attorneys fees, with respect to (i) marketing and selling liquor licenses; (ii) marketing or preserving the Distribution Center Lease, including but not limited to seeking and obtaining an extension of time to assume or reject the lease, and any related appeals, (iii) litigating with Pinnacle Logistics, Inc. and Countrywide Logistics, Inc. in adversary proceeding no. 01-01099 and the appeal thereof; and/or (iv) litigating and/or settling with Heller Leasing, Inc. in adversary proceeding no. 01-01160, such amounts shall be deemed a voluntary Bankruptcy Code § 506(c) surcharge against all of the Lender's collateral, to the extent of the

Collection Costs and the 3% fee for the Trustee, and shall be paid out of the proceeds from the sale or collection of all of such collateral, whether or not this Settlement is ultimately approved.

(c) In addition to use of cash collateral as provided in paragraph 23(b), the Lenders, at the request of the Trustee, shall allow the Trustee to use up to \$125,000 of cash collateral held by the Trustee to pay Trustee professional fees and litigation support team fees (such as accountants and persons supporting the accountants), costs (such as deposition costs) and expert witness fees, in connection with the collection of prepaid deposits and accounts receivable, in connection with assertion of Avoidance Actions, and also to pay Trustee professional fees incurred in connection with seeking Court approval of this Settlement. The Lenders shall be repaid such advances as part of the Collection Costs to be paid from sale proceeds and collections.

24. Approval of Release. The Releases are approved in their entirety.

25. Representations and Warranties. The parties to this Stipulation and Consent Order represent and warrant, and agree with each other, as follows:

(a) Each party hereto has received independent legal advice from its attorneys with respect to the advisability of entering into this Stipulation and Consent Order, and of finally and completely settling the matters addressed herein.

(b) No party hereto relies upon any statement, representation, or promise of any other party in executing this Stipulation and Consent Order or in making the Settlement provided for herein, except as expressly stated in this Stipulation and Consent Order.

(c) Each party hereto has made an investigation of the facts, to the extent deemed necessary, pertaining to this Settlement and this Stipulation and Consent Order.

(d) Each party hereto has read this Stipulation and Consent Order and understands the contents hereof.

(e) Each party is aware that it may hereafter discover claims or facts in addition to, or different from, those it now knows or believes to be true. Nevertheless, it is the intention of the Lenders and Trustee, on behalf of the Debtor and its Estate, to fully, finally, and forever settle and release any and all controversies with the other, and all claims relative thereto that do not yet exist, may exist, or heretofore have existed against each other. In furtherance of such intention, the Court hereby orders that the Releases given herein shall remain in effect as a full and complete release of all matters set forth therein, notwithstanding the discovery or existence of any additional or different claims or facts relative thereto.

(f) The Trustee, on behalf of the Debtor and its Estate, and the Lenders represent and warrant that they each have the authority to enter into this Stipulation and Consent Order.

26. Settlement. This Stipulation and Consent Order settles potential claims that are denied and contested, and nothing contained herein shall be construed as an admission by any party hereto of any fact or liability of any kind to any other party. Each party hereto denies any liability in connection with any claim and intends hereby solely to avoid litigation and finally resolve any and all potential issues among the parties hereto. If a dispute arises under this Settlement, it shall be resolved by the Court.

27. Further Assurances. Each party hereto, without further consideration, agrees to execute and deliver such other documents and take such other actions as may be reasonably necessary to more effectively consummate the subject matter hereof. The parties each further agree that once this Settlement and Consent Order is approved they will not take,

and shall oppose, any action which would have the effect, either directly or indirectly, of prejudicing the agreements, arrangements, effects, and results contemplated by this Settlement, including, without limitation, (i) the rights of the Estate and the Lenders to receive distributions as provided for herein, and (ii) the validity, amount, secured status, priority, or other aspect, of the Lenders' claims, liens, rights or interests in and to their collateral and the other assets of the Debtor.

28. Non-Waiver. Failure to insist upon strict compliance with any term or provision of this Stipulation and Consent Order shall not be deemed to be a waiver of any rights because of a subsequent act or failure to act. Nothing contained herein shall be deemed to constitute a waiver by any party hereto to insist upon strict compliance with the terms or provisions of this Stipulation and Consent Order. Nothing contained herein shall be deemed to limit, constrain, waive, forfeit or otherwise affect the ability of any party hereto to request the Court or any court of competent jurisdiction to enforce the terms of this Stipulation and Consent Order. This Stipulation and Consent Order does not prejudice any rights of any of the Lenders as between themselves that exist under the DIP Facility, the Intercreditor Agreement (as defined in the Final DIP Order) or the Co-Lender Agreement dated as of March 14, 2001.

29. Jurisdiction. Each of the parties hereto consents to the jurisdiction of this Court for the purpose of enforcing and interpreting the terms and provisions of this Stipulation and Consent Order.

30. Successors and Assigns. The parties hereto agree and the Court hereby orders that this Stipulation and Consent Order inures to the benefit of and binds the parties hereto, and their successors and assigns, including, without limitation (a) the Debtor and its Estate, (b) the Lenders, (c) any committee of creditors or constituents appointed or otherwise

existing in the Debtor's chapter 11 case, or in this chapter 7 case, (d) any successor trustee, examiner or responsible officer who may subsequently be appointed in this chapter 7 case, and (e) all other parties in interest. The parties hereto expressly rely on the terms and conditions of this paragraph 28 in entering into this Stipulation and Consent Order.

31. Order Not Stayed. The parties hereto agree and the Court hereby orders that the Settlement approved by this Stipulation and Consent Order shall be effective immediately upon entry and shall not be affected and/or stayed by any of the provisions of Rules 4001(a)(3), 6004(g), 6006(d) and/or 7062 of the Federal Rules of Bankruptcy Procedure, or any other applicable statutes or rules.

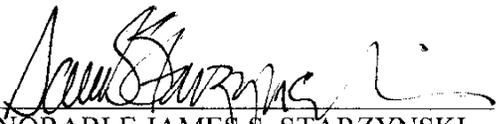
32. No Prior Assignment. The Trustee, on behalf of the Debtor and its Estate, represents and warrants that she has not assigned or transferred (other than by subrogation or any operation of law), and that to the best of her knowledge she has not transferred by subrogation or any operation of law, in whole or in part, to any other person, corporation, or other entity, in any manner, and any claim, right, demand or cause of action which the Estate may now have, or may in the future acquire, or claim to have, or may have had regarding the released claims of whatever kind or nature, against the Released Parties.

33. Captions. The captions or headings of the paragraphs and/or sections of this Stipulation and Consent Order are for convenience only and shall not control, affect, or be used as evidence regarding the meaning or constructions of any of the terms or provisions of this Stipulation and Consent Order.

34. Interpretation. Each party hereto participated in the drafting of this Stipulation and Consent Order and the terms and provisions of this Stipulation and Consent Order shall not be construed against any party hereto.

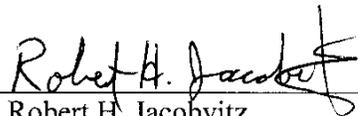
35. Execution in Counterparts. This Stipulation and Consent Order may be executed in counterparts and facsimile signatures on this Stipulation and Consent Order shall be deemed to be of the same force and effect as original signatures.

WHEREFORE, the undersigned sign this Stipulation and Consent Order for the purpose of showing their consent, agreement, and approval as to the form and substance of this Stipulation and Consent Order.

  
HONORABLE JAMES S. STARZYNSKI  
UNITED STATES BANKRUPTCY JUDGE

Agreed and submitted by:

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I hereby certify that a true and correct copy  
of the foregoing was either electronically  
transmitted, faxed, delivered or mailed to  
the listed counsel and parties on:

JUL 25 2002

Mary B. Anderson