

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 APPROVING PARTIAL  
RELEASE OF ESCROW AMOUNT UNDER ASSET PURCHASE  
AGREEMENT BETWEEN FLEMING COMPANIES, INC., HELLER  
FINANCIAL, INC., BANK OF AMERICA, N.A., FLEET CAPITAL  
CORPORATION AND METROPOLITAN LIFE INSURANCE COMPANY**

This Stipulation and Consent Order (the "**Stipulation and Consent Order**") is entered into between and among Fleming Companies, Inc. ("**Fleming**") and Erica, Inc. d/b/a Food Basket ("**Erica**") 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 Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection, and (3) Granting Other Relief dated March 14, 2001 (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;

WHEREAS, 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**");

WHEREAS, on July 3, 2001, the Court entered an order approving the sale of a substantial portion of the Debtor's assets to Fleming or its assignees or designees in accordance with the terms and conditions of the Asset Purchase Agreement between the Company and Fleming dated June 25, 2001 (the "**Purchase Agreement**"), which sale of assets closed on August 31, 2001;

WHEREAS, the Purchase Agreement provides for, among other things, the escrow by the Debtor of two million dollars (\$2,000,000) of the Cash Consideration<sup>1/</sup> associated with the sale for one year following the Closing Date (the "**Escrow Amount**"), with said Escrow Amount to be applied, if at all, in accordance with the indemnification provisions of the Purchase Agreement;

WHEREAS, on December 19, 2001, the Debtor's case was converted to a case under chapter 7 of the Bankruptcy Code, and Yvette J. Gonzales was thereafter appointed as trustee of the chapter 7 estate in the above-referenced bankruptcy case (the "**Trustee**");

WHEREAS, on July 25, 2002, the Court entered an order (the "**Global Settlement Order**") approving a global compromise and settlement between the Trustee and the Lenders which provided for, among other things, the complete general assignment to the Lenders of all right, title and interest of the Estate in and to the Escrow Amount;

WHEREAS, on July 26, 2002, Erica, by and through its counsel, Bracewell & Patterson, L.L.P., provided notice to the Debtors, the Trustee and the Lenders of its assertion of a Claim for indemnification against the Debtors and the Trustee, and the Escrow Amount, in the amount alleged to be in excess of \$62,000;

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<sup>1/</sup> All capitalized terms shall have the meanings ascribed to such terms in the Purchase Agreement.

WHEREAS, on August 2, 2002, the Lenders, as successors-in-interest to the Debtors with regard to the Escrow Amount, provided notice to Erica in accordance with the terms of the Purchase Agreement that they contest the Claim of Erica in its entirety and reserve all rights and remedies with respect thereto;

WHEREAS, on August 27, 2002, Fleming, by and through its counsel, McAfee & Taft A Professional Corporation, provided notice to the Debtors, the Trustee and the Lenders of its assertion of Claims for indemnification against the Debtors and the Trustee, and the Escrow Amount, in an undetermined amount alleged to be in excess of \$200,000;

WHEREAS, on September 23, 2002, the Lenders, as successors-in-interest to the Debtors with regard to the Escrow Amount, provided notice to Fleming in accordance with the terms of the Purchase Agreement that they contest the Claims of Fleming in their entirety and reserve all rights and remedies with respect thereto;

WHEREAS, the parties hereto have conducted extensive arm's-length negotiations and have determined to enter into an agreement authorizing the partial release of the Escrow Amount to the Lenders in accordance with the terms and conditions herein (all such terms and provisions, the "**Agreement**");

WHEREAS, the Purchase Agreement provides the Court with exclusive jurisdiction to resolve all disputes regarding the indemnification procedures set forth in the Purchase Agreement and the respective rights of the parties to the Escrow Amount;

WHEREAS, the Lenders have filed a motion dated November 7, 2002 (the "**Motion**"), seeking the Court's approval of this Agreement;

WHEREAS, 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;

WHEREAS, this Court finds that this Agreement 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 all 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 Agreement is approved and **“so ordered”** in its entirety.

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

3. Fleming and Erica releases and waives any and all claims to and interest in the Escrow Amount including any interest accrued or accruing thereon except for the amount of two hundred and fifty thousand dollars (\$250,000) (the **“Post Agreement Escrow Amount”**). The Post Agreement Escrow Amount shall be held by the Trustee or the Estate in escrow in accordance with the terms of the Purchase Agreement, subject to further order of this Court. The parties hereto each reserve all rights and remedies that they may have under the Purchase Agreement with regard to the Post Agreement Escrow Amount. Nothing herein shall constitute a waiver of any such rights and remedies.

4. The parties hereto agree and the Court hereby orders that all escrowed funds currently held in the Court Registry of the United States Bankruptcy Court for the District of New Mexico (the "Court Registry") constituting the Escrow Amount in excess of the Post Agreement Escrow Amount of \$250,000, including any interest accrued and accruing thereon, shall be paid immediately 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 funds shall be deposited into the segregated account designated by the Trustee to fund the Carve-Outs defined in and provided for in the Global Settlement Order, which payments to the Trustee shall be in partial satisfaction of the Lenders' obligations thereunder with respect to the Carve-Outs, or as otherwise directed by the Lenders.<sup>2/</sup> In no event will Fleming or Erica have any liability for or with respect to any escrowed funds released pursuant to this Stipulation and Consent Order.

5. On May 30, 2002, the Escrow Amount of two million dollars (\$2,000,000) together with certain other funds in the amount of five hundred thousand dollars (\$500,000) was deposited in the Court Registry pursuant to an Order Directing the Transfer of Funds into the Court Registry. The Clerk of the United States Bankruptcy Court for the District of New Mexico (the "Clerk") is hereby directed to transfer to the Trustee (i) \$1,750,000 of such two and a half million dollars (\$2,500,000) deposited in the Court Registry and (ii) the interest earned on two million dollars (\$2,000,000) of the two and a half million dollars (\$2,500,000) deposited in the Court Registry, less the fees accrued to the date of transfer to be paid to the Clerk for

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<sup>2/</sup> The Lenders agree that the funds deposited into the Trustee's segregated account to partially fund the Carve-Outs required under the Global Settlement Order, or as otherwise directed by the Lenders to be paid to or for the account of the Lenders, shall be subject to characterization and allocation in accordance with the Intercreditor Agreement (as defined in the Final DIP Order) and the Co-Lender Agreement dated as of March 14, 2001.

administering the two million dollars (\$2,000,000), which fees the Clerk is authorized to distribute to the party entitled to such fees.

6. This Agreement is not binding upon the parties unless and until this Stipulation and Consent Order is executed by counsel for each of the parties, and approved by the Court after notice and a hearing. If this Settlement is not so executed and approved in full, then no party thereto is bound thereby.

7. Nothing 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. Except as specifically set forth herein, nothing herein shall be deemed to constitute a waiver by any party hereto of the right to insist upon strict compliance with the terms and provisions of the Purchase Agreement. Nothing 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 and/or the Purchase Agreement. 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.

8. 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 and to resolve all remaining disputes concerning the Post Agreement Escrow Amount.

9. 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.

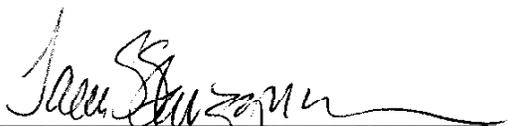
10. The parties hereto agree and the Court hereby orders that the Settlement approved by this Stipulation and Consent Order shall be effective immediately upon entry and shall not be affected and/or stayed by any of the provisions of the Federal Rules of Bankruptcy Procedure, or any other applicable statutes or rules.

11. Any applicable rule of construction that requires a document to be construed most strictly against the party who prepared it is not applicable to this Stipulation and Consent Order because each party hereto participated in the drafting hereof.

12. 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.

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.

IT IS SO ORDERED.

  
THE HONORABLE JAMES S. STARZYNSKI  
UNITED STATES BANKRUPTCY JUDGE

Approved:

Dated: November \_\_, 2002

MODRALL SPERLING ROEHL HARRIS & SISK, P.A.

By: Approved by e-mail 11-13-02

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~~"SO ORDERED" this \_\_\_\_\_ day of \_\_\_\_\_ 2002~~

~~UNITED STATES BANKRUPTCY JUDGE~~

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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:

By: \_\_\_\_\_

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NOV 20 2002

Mary B. Anderson

~~"SO ORDERED" this \_\_\_\_\_ day of \_\_\_\_\_, 2002~~

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE