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Hearing Date: January 2, 2003. **FILED**  
Objection Deadline: January 3, 2003  
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U.S. BANKRUPTCY COURT  
ALBUQUERQUE, NM

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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In re: : Chapter 7  
FURR'S SUPERMARKETS, INC. : Case No. 01-11-10779-SA  
Debtor. :

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**MOTION TO HAVE THE ADMINISTRATIVE CLAIM OF FLOHO  
PARTNERS DEEMED TO HAVE BEEN FILED WITHIN THE  
ADMINISTRATIVE CLAIMS BAR DATE PURSUANT TO SECTION 105(a)  
OF THE BANKRUPTCY CODE AND RULE 9006(b)  
OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

TO: THE HONORABLE JAMES S. STARZYNSKI  
UNITED STATES BANKRUPTCY JUDGE:

FLOHO Partners ("FLOHO" or "Movant"), by and through its counsel Kronish Lieb Weiner and Hellman LLP, in support of its motion (the "Motion") seeking entry of an order pursuant to Section 105(a) of Chapter 11, Title 11 of the United States Code (the "Bankruptcy Code") and Rule 9006(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the administrative claim of FLOHO to be deemed to have been filed within the Chapter 11 administrative claims bar date period in this bankruptcy case (the "Furr's Supermarkets Bankruptcy Case"), respectfully represents the following:

## **PRELIMINARY STATEMENT**

FLOHO, the landlord of various premises occupied by Furr's Supermarkets, Inc. (the "Debtor"), by no fault of its own, failed to have its administrative proof of claim (the "Administrative Claim") for administrative damages incurred during the course of the Debtor's Chapter 11 Case, received by the Clerk of the Bankruptcy Court (the "Clerk") by the Bar Date. Due to a negligent error in delivery made by Federal Express, the Administrative Claim was received by the Clerk of the Bankruptcy Court one business day after the Notice Deadline to File Administrative Claims (the "Administrative Claim Bar Date").

FLOHO now seeks an order from this Court deeming the Administrative Claim to have been received within the Administrative Claim Bar Date. As discussed further below, FLOHO's filing of its Administrative Claim one business day after the Administrative Claim Bar Date was beyond FLOHO's control and the recognition of the Administrative Claim as timely will not prejudice the Debtor or delay the Debtor's Case.

## **FACTS**

1. On February 8, 2001, the Debtor filed its Petition for Relief pursuant to Chapter 11 of the Bankruptcy Code and continued to operate its business and manage its properties as Debtor and Debtor in Possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

2. FLOHO was the owner and landlord of premises located in El Paso, Texas (store #927), Carlsbad, New Mexico (store # 949) and Albuquerque, New Mexico (store # 866) and entered into non-residential real property leases with the Debtor for said premises prior to the Debtor's filing for Chapter 11 protection.

3. During the Debtor's Chapter 11 case the Debtor became indebted to FLOHO for unpaid rent for the months of September 2001, October 2001, and November 2001, along with

various tax and other miscellaneous obligations as an administrative expense in the total sum of \$312,400.10, as detailed in the FLOHO administrative proof of claim (the "FLOHO Administrative Claim") a copy of which is annexed hereto as **Exhibit "A."**

4. The Administrative Claim Bar Date was November 23, 2001, which was the Friday following the Thanksgiving holiday.

5. FLOHO through its counsel Kronish Lieb Weiner & Hellman LLP forwarded the FLOHO Administrative Claim on November 21, 2001 by Federal Express, next business day delivery, to the Clerk of the Bankruptcy Court pursuant to Federal Express USA Airbill dated November 21, 2001, a copy of which is annexed hereto as **Exhibit "B."**

6. However, sometime later, upon checking the claims docket, it became known that the FLOHO Administrative Claim was not delivered to the Clerk of the Bankruptcy Court on Friday, November 23, 2001. Instead, it was delivered on Monday, November 26, 2001, due to the negligence and oversight of Federal Express as evidenced by a copy of the letter from the Federal Express Customer Relations Department, written by Joan Kintzle, a copy of which is annexed hereto as **Exhibit "C."**

7. On or about December 19, 2001, the Debtor's Chapter 11 case was converted to a Chapter 7 case and thereafter Yvette J. Gonzales was appointed Chapter 7 Trustee (the "Trustee").

#### **JURISDICTION AND STATUTORY PREDICATES**

8. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334 and the Administrative Order referring all cases under Title 11 to bankruptcy court judges of the District Court for the District of New Mexico, filed March 19, 1992 (Burciaga, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant

to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief requested herein is Section 105(a) of the Bankruptcy Code and Rule 9006(b) of the Bankruptcy Rules.

### **REQUESTED RELIEF AND REASONS THEREFOR**

9. By this Motion, FLOHO seeks an order from this Court deeming the Administrative Claim to have been received within the Administrative Claim Bar Date, by application of the equitable powers of this Court pursuant to Section 105(a) of the Bankruptcy Code or by reason of excusable neglect pursuant to Rule 9006(b) of the Bankruptcy Rules.

10. Section 105 of the Bankruptcy Code authorizes the Court to enter any order in aid of the exercise of its jurisdiction. See 11 U.S.C. § 105(a); *United States v. Richards* (*In re Richards*), 994 F.2d 763, 765 (10<sup>th</sup> Cir. 1993). Section 105(a) states in pertinent part, “[t]he court may issue *any* order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a) (emphasis supplied); *Lansing Diversified Properties-II v. First Nat’l Bank and Trust Co. of Tulsa* (*In re Western Real Estate Fund, Inc.*), 922 F.2d 592, 598 (10<sup>th</sup> Cir. 1990) (bankruptcy court has broad equitable powers); *In re Croton River Club, Inc.*, 52 F.3d 41, 45 (2d Cir. 1995) (“[b]ankruptcy courts have long had broad equity power to manage the affairs of debtors... a power now codified in [s]ection 105”). Thus, the Court possesses broad authority to grant the relief requested in the Debtors’ Motion.

11. Additionally, pursuant to Rule 9006(b)(1), the bankruptcy court has authority to allow an act which is required to be done at or within a specified period to be done after the expiration of such period where the failure to act was the result of excusable neglect. FED. R. BANKR. P. 9006(b)(1).

12. The determination as to whether neglect is “excusable” is an equitable determination, which takes into account all relevant circumstances surrounding the failure to

timely file the claim. See Pioneer Investment Services v. Brunswick Associates Limited Partnership et al., 113 S. Ct. 1489, 1498 (1993) (holding that in determining whether neglect is excusable the court should take into account “all relevant circumstances surrounding the party’s omission.”)

13. The Court, in Pioneer, suggested a number of factors which should be considered in making the “excusable neglect” determination, which include; (i) the reason for the delay, including whether it was within the reasonable control of the movant; (ii) the danger of prejudice to the debtor; (iii) the length of the delay and the potential impact on judicial proceedings; and (iv) whether the movant acted in good faith. See In re Ltd. Gaming of America, Inc., 213 B.R. 369, 377 (Bankr. N.D. Okla. 1997) (rejecting excusable neglect claim where proof of claim was filed 13 months after claims bar date); In re Petroleum Production Mgmt., Inc. 240 B.R. 407, 413 (Bankr. D. Kan. 1999) (rejecting excusable neglect claim where creditor’s parent corporation’s litigation unit received timely notice, and where creditor filed proof of claim 5½ months after bar date); Ain v. Myers (In re Ain), 193 B.R. 41, 46 (D. Colo. 1996) (reversing bankruptcy court decision and remanding for proper consideration of the Pioneer factors to allow late proof of claim filed 73 days late).

14. FLOHO believes that, in accord with the above-mentioned factors, the special circumstances surrounding filing its Administrative Claim one business day after the Administrative Claim Bar Date, as described below, justify this Court deeming the Administrative Claim to have been filed within the Administrative Claim Bar Date.

**THE DELAY WAS BEYOND  
FLOHO’S REASONABLE CONTROL**

15. The reason for the receipt of FLOHO’s Administrative Claim one business day after the Administrative Claim Bar Date was entirely beyond FLOHO’s reasonable control. On

November 21, 2001, two days before the Administrative Claims Bar Date, FLOHO sent its Administrative Claim via Federal Express for delivery the next business day. See Exhibit "B." Despite the fact that the Bankruptcy Court for the District of New Mexico was open on Friday, November 23, 2001, Federal Express negligently believed that the court was closed due to the Thanksgiving holiday. See Exhibit "C." Therefore, in spite of the package's arrival in Albuquerque on Friday, November 23, 2001, and the explicit instructions that it be delivered by 10:30 a.m. that day, the package was not delivered until the following Monday, November 26, 2001. See id.

16. In sum, the failure of the Administrative Claim to arrive within the Administrative Claim Bar Date was wholly out of FLOHO's control, having been an error for which Federal Express has admitted complete responsibility.

**THE DEBTOR'S ESTATE WILL NOT BE PREJUDICED NOR  
WILL THE JUDICIAL PROCEEDINGS BE DELAYED BY AN  
ORDER DEEMING THE ADMINISTRATIVE CLAIM  
TO HAVE BEEN FILED WITHIN THE ADMINISTRATIVE CLAIM BAR DATE**

17. The Debtor will not be prejudiced by the Court deeming FLOHO's Administrative Claim to have been filed by the Administrative Claim Bar Date. First, the Debtor received FLOHO's Administrative Claim only one business day after the Administrative Claim Bar Date. Moreover, the Debtor has been on notice of FLOHO's Administrative Claim since that time, the Administrative Claim having been received by the Clerk of the Bankruptcy Court on November 26, 2001. Accordingly, deeming the Administrative Claim to have been filed within the Administrative Claim Bar Date will neither prejudice the debtor nor delay these proceedings.

**FLOHO IS FILING THIS MOTION IN GOOD FAITH**

18. FLOHO worked diligently to file its Administrative Claim within the Administrative Claim Bar Date, and in fact sent its Administrative Claim via overnight carrier with sufficient time for it to be received by the Clerk of the Bankruptcy Court within the Administrative Claim Bar Date. The unilateral decision by Federal Express not to deliver the package until November 26, 2001 was beyond the ability of FLOHO to control. FLOHO cannot therefore be said to have acted willfully in failing to timely file its Administrative Claim.

**NOTICE AND PRIOR APPLICATION**

19. Notice of this Motion has been provided to: (i) Furr's Supermarkets, Inc.; (ii) the Chapter 7 Trustee; and (iii) those parties indicated on the Master Service List. FLOHO submits that the foregoing constitutes good and sufficient notice and that no further notice need be given.

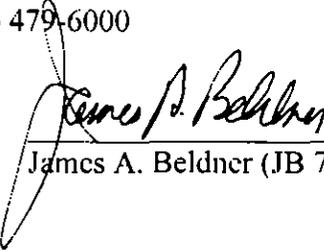
20. The relief requested herein has not been previously sought by this or any other court.

WHEREFORE the Movant respectfully requests entry of an order granting the relief requested herein and such other and further relief as is just.

Dated: New York, New York  
December 18, 2002

KRONISH LIEB WEINER & HELLMAN LLP  
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New York, New York 10036  
(212) 479-6000

By:

  
James A. Beldner (JB 7166)

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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In re: : Chapter 7  
FURR'S SUPERMARKETS, INC. : Case No. 01-11-10779-SA  
Debtor. :

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**ORDER GRANTING FLOHO PARTNERS'S MOTION TO HAVE ITS  
ADMINISTRATIVE CLAIM DEEMED TO HAVE BEEN FILED WITHIN THE  
ADMINISTRATIVE CLAIMS BAR DATE PURSUANT TO  
RULE 9006(b) OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

Upon the motion dated December \_\_, 2002 (the "Motion") of FLOHO Partners ("FLOHO") by and through its counsel Kronish Lieb Weiner & Hellman LLP, seeking entry of an order, pursuant to Section 105(a) of Chapter 11, Title 11 of the United States Code (the "Bankruptcy Code") and Rule 9006(b) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") authorizing the administrative claim of FLOHO to be deemed to have been filed within the Chapter 11 administrative claims bar date period in this case (the "Furr's Supermarkets Bankruptcy Case"); and it appearing that the Court has jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the Administrative Order referring all cases under Title 11 to bankruptcy court judges of the District Court for the District of New Mexico, filed March 19, 1992 (Burciaga, C.J.); and due notice of the Motion having been provided to Furr's Supermarkets, the Chapter 7 Trustee, and those parties indicated in the Master Service List, and it appearing that no other or further notice need be provided; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED**, that the Motion is granted; and it is further

**ORDERED**, that FLOHO's Administrative Claim, received by the Clerk of the Bankruptcy Court on November 26, 2001, shall be deemed filed as of the previously established bar date of November 23, 2001..

Dated: Albuquerque, New Mexico  
January \_\_, 2002

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Honorable James S. Starzynski  
United States Bankruptcy Judge

In re:

FURR'S SUPERMARKETS, INC.,

Debtor.

7-01-10779 SA

Attached exhibits A - C are unscannable.

See original pleading for exhibits.