

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
OFFICE OF THE CLERK
03 DEC 17 PM 4:00

In re:
FURR'S SUPERMARKETS, INC.,
Debtor.

Case No. 7-01-10779-SAB
Chapter 7

**MOTION TO APPROVE SETTLEMENT OF
ADVERSARY PROCEEDING 02-1210 S**

Yvette Gonzales, the Chapter 7 Trustee (the "Trustee"), by counsel, moves the Court for an order approving the settlement of all claims the estate has against Santa Fe Tortilla Company ("Santa Fe Tortilla"), as set forth in the adversary proceeding No. 02-1210-S, captioned *Yvette J. Gonzales, Trustee v. Santa Fe Tortilla Company* (the "Adversary Proceeding"), pursuant to F.R.Bankr.P.9019, and in support hercof states:

1. **Commencement and Conversion of Case.** On February 8, 2001, (the "Petition Date"), the Debtor filed a Voluntary Petition in this Court under Chapter 11 of the Bankruptcy Code. On December 19, 2001, this Court entered an Order converting the Chapter 11 case to a case under Chapter 7.
2. **Appointment of Chapter 7 Trustee.** On December 19, 2001, the United States Trustee appointed Yvette Gonzales as the Trustee for the Debtor's bankruptcy estate, in which capacity she continues to serve.
3. **Jurisdiction and Venue.** The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§1408 and 1409.
4. **The Adversary Proceeding.** In the Adversary Proceeding, the Trustee sought to recover Ninety Thousand Two Hundred Thirty Three Dollars and 65/100 (\$90,233.65) from Santa Fe Tortilla, plus all other amounts, if any, recoverable pursuant to 11 U.S.C. §547. After

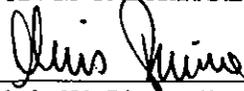
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investigation and analysis of Santa Fe Tortilla's new value defense, which includes an analysis of goods and/or services delivered to the Debtor within the preference period, the Trustee now believes that the total claim against Santa Fe Tortilla is \$18,293.26.

5. **The Settlement.** Santa Fe Tortilla has offered to pay the Trustee Thirteen Thousand Seven Hundred Nineteen Dollars and 00/100 (\$13,719.00), with \$1,143.25 to be paid immediately upon the entry of an Order approving the settlement, and the remainder of \$12,575.75 to be paid in equal monthly installments of \$1,143.25 on the first day of each month thereafter until fully paid, in full satisfaction of any and all claims, including without limitation claims asserted in the Adversary Proceeding (the "Settlement"). The full terms of the Settlement are set forth in the attached Settlement Agreement. The Settlement is fair and equitable, and in the best interests of and beneficial to the Debtor's estate and the creditors.

WHEREFORE, the Trustee requests that the Court enter an Order approving the Settlement and for such other relief as may be just.

DAVIS & PIERCE, P.C.



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(505) 243-6129

I hereby certify that a true and correct copy of the foregoing was mailed on December 17th, 2003, to:

Clifford C. Gramer, Jr., Esq.
3733 Eubank NE
Albuquerque, NM 87111-3536

David T. Thuma, Esq.
Jacobvitz, Thuma & Walker
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Post Office Box 608
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Chris W. Pierce, Esq.

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SETTLEMENT AGREEMENT AND MUTUAL RELEASE

The parties to this Settlement Agreement and Mutual Release (hereinafter, "Agreement") are Yvette J. Gonzales, Chapter 7 Trustee in In re: Furr's Supermarkets, Inc., No. 7-01-10779 SA (the "Adversary Proceeding"), in the United States Bankruptcy Court for the District of New Mexico, for herself and on behalf of the Furr's Supermarkets, Inc. bankruptcy estate, and its or each of their current or former general partners, limited partners, officers, directors, stockholders, employees, attorneys, agents, servants, successors and assigns, spouses, heirs, executors, administrators, attorneys, and any and all other related persons, entities, associations or corporations, whether or not herein named or referred to (collectively, hereinafter, "Trustee" or "Plaintiff"), and Santa Fe Tortilla Company, and its current or former general partners, limited partners, officers, directors, stockholders, employees, attorney, agents, servants, successors and assigns, spouses, heirs, executors, administrators, attorneys, and any and all other related persons, entities, associations or corporations, whether or not herein named or referred to (collectively, hereinafter, "Santa Fe Tortilla," or "Defendant").

WHEREAS on or about September 11, 2002, the Plaintiff filed her First Amended Complaint to Avoid Preferential Transfers against the Defendant in the case captioned *Yvette J. Gonzales, Trustee v. Santa Fe Tortilla Company*, in the United States Bankruptcy Court for the District of New Mexico, Adv. Pro. No. 02-1210 S (the "Avoidance Action").

WHEREAS the Plaintiff and the Defendant desire to settle the Lawsuit and have agreed to execute this Agreement for such purpose and to extinguish the claims and obligations set forth below;

NOW THEREFORE, it is agreed between the Plaintiff and the Defendant as follows:

1. Payment. Santa Fe Tortilla agrees to pay Trustee the sum of \$13,719.00 in full and

final settlement of the Avoidance Action. Payments shall be due and payable on the following dates:

<u>Amount</u>	<u>Date</u>
\$1,143.25	Date of Entry of Order Approving Settlement
\$1,143.25	The First (1 st) day of each consecutive month thereafter until paid in full.

Interest shall not accrue on the payments to be made under this Agreement (except in the event of default, as set out below). Payments may be made without penalty in advance of their due dates. Payments shall be made to the Trustee at Yvette J. Gonzales, Chapter 7 Trustee, Post Office Box 1037, Placitas, NM 87043-1037.

Upon completion of the payments as set out above, the Trustee shall submit an Order Dismissing the Avoidance Action with Prejudice to the Bankruptcy Court, and the Trustee shall agree to timely execute and/or file any other documents and pleadings necessary to accomplish this dismissal.

2. Security, Default, Notice And Opportunity To Cure. In order to secure payment of the amounts provided for in this Agreement, Santa Fe Tortilla, through its attorney, shall approve a form of judgment that provides for judgment by the Trustee against Santa Fe Tortilla in the amount of \$18,293.26, together with interest thereon at the federal statutory judgment rate from the date of entry of that judgment. This form of judgment shall be held by Trustee's attorney and shall not be submitted to nor entered of record by the bankruptcy court except upon the occurrence of an uncured payment default by Santa Fe Tortilla.

If Santa Fe Tortilla fails to make any of the payments required by this Agreement by their due dates, the Trustee may make written demand upon Santa Fe Tortilla, with such notice to

specify the default and the curative action required, at Santa Fe Tortilla's address as follows:

Santa Fe Tortilla Company
Route 5, Box 359
Santa Fe, NM 87501

with a copy to Clifford C. Gramer, Jr., Esq., 3733 Eubank NE, Albuquerque, NM 87111-3536, or at such other address that Santa Fe Tortilla may designate by a notarized statement delivered to the Trustee.

Notice in writing shall be given by certified mail, return receipt requested, addressed to Santa Fe Tortilla at the effective address for Santa Fe Tortilla as provided in this Agreement, with a copy to Santa Fe Tortilla's attorney.

If Santa Fe Tortilla fails or neglects to cure any default within Fourteen (14) business days after the date Trustee's default notice is mailed, then the Trustee may submit the form of judgment held by Trustee's attorney to the bankruptcy court for entry. In such event, Trustee, upon entry of judgment, shall cause to be filed a Partial Satisfaction Of Judgment in an amount equal to the sum payments paid prior to the default by Santa Fe Tortilla. By way of example, if prior to default Santa Fe Tortilla has paid the Trustee a total of \$5,000.00, then in that event the Trustee shall file a Partial Satisfaction Of Judgment in that amount, with the result being that the amount remaining due on the judgment would be \$13,293.26 (\$18,293.26 minus \$5,000.00 paid), plus applicable statutory interest accrued on the judgment from the date of entry of the judgment.

If the final day for curing the default shall fall on a Saturday, Sunday, or Federal holiday, then the period for curing the default shall extend to the close of business on the next regular business day.

3. No Admission. It is understood and agreed that the release of Claims in this

Agreement is the compromise of doubtful and disputed Claims, and that the payment and consideration given for the release of Claims should not be construed as an admission of liability on the part of any party to this Agreement. Each party denies liability to the others and intends merely to avoid litigation by buying their peace.

4. Release of Claims. The Trustee does hereby release and forever discharge Santa Fe Tortilla, and Santa Fe Tortilla does hereby release and forever discharge the Trustee, from any and all rights, claims, demands, damages, actions, causes of action and suits, of any kind or nature whatsoever, whether known or unknown, contingent or certain, developed or undeveloped, liquidated or unliquidated, now existing or hereafter arising (collectively, "Claims"), that each, individually or collectively, has now or might have in the future have against the other. The term "Claims" includes but is not limited to, those claims asserted or which could have been asserted by the Trustee or Santa Fe Tortilla in United States Bankruptcy Court for the District of New Mexico Adversary Proceeding No. 02-1210-S, entitled, Yvette Gonzales, Trustee, Plaintiff, vs. Santa Fe Tortilla Company, Defendant, provided, however, that nothing contained herein shall operate to waive or release any claims arising in connection with this Agreement and its enforcement, including without limitation the payments set out in Paragraph 1. above, or the default provisions contained in Paragraph 2. above.

5. Trustee's Representations. The Trustee states that she is the proper party to assert the causes of action referred to above and all claims made in the Adversary Proceeding or otherwise released under this Settlement Agreement; that she has not assigned, pledged or otherwise transferred or encumbered any unasserted or asserted right, claim or cause or right of action against Santa Fe Tortilla or any claim or cause of action that is released under this

Settlement Agreement; that the person executing this Settlement Agreement for the Trustee has the authority to act on her behalf for the purpose of which she purports to act and to bind her to the terms and conditions herein, and that she is the proper party to execute this Settlement Agreement.

6. Santa Fe Tortilla's Representations. Santa Fe Tortilla states that the person executing this Settlement Agreement for it has the authority to act on its behalf for the purpose for which he/she purports to act and to bind it to the terms and conditions herein; and that it is the proper party to execute this Settlement Agreement.

7. Choice of Law. This Agreement is entered into under the laws of the State of New Mexico. Any dispute concerning this Agreement shall be brought before the United States Bankruptcy Court for the District of New Mexico. If an action is filed to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorney fees.

8. Entire Agreement. This Agreement contains the entire understanding between and among the parties and supersedes any prior understandings and agreements among them respecting the subject matter of this Agreement.

9. Parties Bound. This Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective heirs, executors, administrators, successors and assigns.

10. No Assignment. Each party to this Agreement acknowledges and represents that he, she, or it is the owner of the Claims released by this Agreement, and has not voluntarily or involuntarily assigned the Claims released by this Agreement to any other person or entity.

11. Time. Time is of the essence in the performance of the promises contained in this Agreement.

SANTA FE TORTILLA COMPANY

By: _____
Its:

ACKNOWLEDGEMENT FOR CORPORATION

STATE OF _____)
)ss.
COUNTY OF _____)

The foregoing Settlement Agreement and Mutual Release was acknowledged before me this _____ day of _____, 2003 by _____, _____ of Santa Fe Tortilla Company.

Notary Public

My Commission Expires: _____

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