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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
FLURR'S SUPERMARKETS, INC.,
a Delaware corporation,

Case No. 7-01-10779 SA
Chapter 11

Debtor.

**JOINT MOTION TO APPROVE SETTLEMENT OF ADVERSARY
PROCEEDING**

Yvette G. Gonzales, Chapter 7 Trustee of Debtor's bankruptcy estate and successor plaintiff herein (the "Trustee"), by counsel, and Heller Financial Leasing, Inc., ("Heller") by counsel, jointly move the Court for an order approving the settlement of all claims between them in the above captioned adversary proceeding (the "Adversary Proceeding") pursuant to F. R. Bankr. P. 9019.

In support of this Motion, the Trustee and Heller state:

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 Interim Trustee for the Debtor's bankruptcy estate. There having been no other trustee elected, Yvette Gonzales is and continues to be the trustee in the case.

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.

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4. The Heller Equipment Lease. Debtor is the lessee and Heller is lessor under an equipment lease, including an 8-page Master Equipment Lease Agreement, two closing schedules, a document entitled "Equipment Lease No. One," two certificates of acceptance, equipment lists, documents evidencing assignment to Heller, and public filing and recording documents (the "Heller Lease"). Pursuant to the Heller Lease, Debtor leased certain equipment and other personal property (together, the "Equipment") including certain equipment located and used at Debtor's stores numbers 953 and 954 (the "Store Equipment"), other equipment located and used at the Debtor's warehouse (the "Distribution Center") at 9820 Railroad Drive and 9601 Railroad Drive in El Paso, Texas (the "Distribution Center Equipment"). Heller is the assignee of GECC, the original lessor under the Heller Lease. By previous agreement between the Debtor and Heller, certain floor cleaning equipment was severed from the Equipment and the Heller Lease.

5. The Adversary Proceeding. In the Adversary Proceeding, Debtor alleged in part that the Heller Lease is a secured transaction. Heller timely responded to the Complaint and denied Debtor's claims. Debtor and Heller filed cross motions for summary judgment, which the Court denied by its Memorandum Opinion filed on February 1, 2002. Trustee and Heller have agreed to a settlement of all claims in the Adversary Proceeding (the "Settlement"), approval of which is sought in this Motion.

6. The Settlement. The terms of the Settlement are as follows:

A. *The Store Equipment shall be severed from the Heller Lease and shall no longer be part of the Equipment leased thereunder. All right, title and interest in the Store Equipment of the Debtor, the Debtor's estate and the Trustee shall be transferred to Heller following entry of an order approving the Settlement, in full satisfaction of*

Heller's claim against the Debtor or Debtor's estate arising from the lease of the Store Equipment under the Heller Lease. The Trustee agrees to use reasonable efforts to complete the pending agreement to sell the Store Equipment for former Store number 954, the proceeds of which shall be made payable to Heller or shall be promptly transferred to Heller. Heller shall have the right to assume responsibility for completing the sale of the Store Equipment for former Store number 954 at any time after approval of the Settlement. The order approving the Settlement shall grant Heller relief from the automatic stay with respect to the Store Equipment to permit Heller to exercise its rights and remedies under non-bankruptcy law to take possession of and liquidate the Store Equipment.

B. The Heller Lease and the Trustee's obligations under the Heller Lease shall be revised as follows:

(1) The Heller Lease and the Equipment leased thereby is limited to the Distribution Center Equipment and shall no longer include the Store Equipment or the floor cleaning equipment.

(2) The Heller Lease shall be treated as, and be declared to be, an unexpired lease of personal property pursuant to 11 U.S.C. 365 and the applicable Uniform Commercial Code, and not a security interest, except as specifically provided in the Settlement.

(3) The Periodic Rent or Periodic Rental (as defined in the Heller Lease and referred to herein as the "Rent") under the Heller Lease shall be \$38,205.98 per month beginning on March 1, 2002 and thereafter on the first day of each month for a total of 38 months, after which the Lease will expire. The Rent payments that come due after

the filing of this Motion but before approval of the Settlement shall be paid within ten (10) days following entry of an order approving the Settlement.

C. The Adversary Proceeding shall be dismissed with prejudice.

D. The Heller Lease is neither assumed nor rejected hereby. Notwithstanding the provisions of Code §365, the Trustee shall not have any deadline to assume, assign or reject the Heller Lease, absent further order of the Court, provided that the payments required in section B (3) above are timely made.

E. If the Heller Lease is assumed and assigned, the amount necessary to be paid to cure the default under the Heller Lease shall be no greater than the product of the number of months of rent in arrears multiplied by \$38,205.98.

F. When the Heller Lease expires, whether or not it has been assumed or rejected prior to expiration, the Trustee or lease assignee, as the case may be, shall have the option to purchase the Equipment for payment to Heller in the total amount of \$197,753.50.

G. The Settlement is a compromise of disputed claims and defenses raised in the Adversary Proceeding by Debtor and Heller. The terms of the Settlement are not and shall not be deemed to be an admission and shall not be used against any party hereto except to enforce the terms hereof. By entering into this Settlement, neither the Trustee nor Heller admits any wrongdoing or liability with respect to any claims or defenses that were or that could have been raised in the Adversary Proceeding.

H. The terms of the Settlement shall become effective following entry of an order approving the Settlement and shall be binding on and enforceable by and

between Heller and the Trustee, their successors and assigns. The Heller Lease is modified by the terms of the Settlement to the extent inconsistent therewith.

I. The Trustee shall serve notice of the Settlement and of this Motion on the limited matrix pursuant to F. R. Bankr. P. 9019.

7. The Settlement is fair and equitable, and in the best interests of and beneficial to the Debtor's estate and the creditors, given the uncertainty, risks and expense of litigation, and the benefits to be gained by the compromise.

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

JACOBVITZ, THUMA & WALKER
a Professional Corporation

By: Thomas D. Walker
Thomas D. Walker
500 Marquette NW, Suite 650
Albuquerque, NM 87102
(505) 766-9272
(505) 766-9287 (fax)
Attorneys for the Trustee

MODRALL SPERLING ROEHL HARRIS & SISK,
P.A.

By: Approved by telephone TDW ^{3/4/02}
Paul M. Fish
500 4th St., N.W., #1000
Albuquerque, New Mexico 87103-2168
(505) 848-1800
(505) 848-1882 (fax)
Attorneys for Heller Financial, Inc.