

FEB 08 2002

CLERK OF COURT
United States Bankruptcy Court
Albuquerque, New Mexico

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

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

Debtor.

**MOTION TO APPROVE SETTLEMENT AGREEMENT BETWEEN THE CHAPTER 7
TRUSTEE AND THE SECURED LENDERS**

Yvette G. Gonzales, the Chapter 7 Trustee of the above-captioned bankruptcy case (the "Trustee"), moves the Court for an order approving the agreement between the Trustee and the estate's secured lenders Heller Financial, Inc., as agent, and Metropolitan Life Insurance Company (together, the "Lenders"), and in support hereof states:

1. 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.

2. Case History. On February 8, 2001, the Debtor filed a voluntary petition in this Court under Chapter 11 of the Bankruptcy Code. Before its sale of assets to Fleming Companies, Inc. ("Fleming"), the Debtor operated supermarkets in New Mexico and western Texas. On July 3, 2001, the Court entered an order approving the sale of a substantial portion of the Debtor's assets to Fleming. The sale to Fleming closed on August 31, 2001. On December 19, 2001, this Court entered an order converting the chapter 11 case to a chapter 7 case.

3. The Settlement. On February 8, 2002, the Trustee and the Lenders reached an agreement settling all claims and issues between the estate and the Lenders. The settlement terms are set forth in the Outline of Terms of Settlement, attached hereto as Exhibit A (the "Settlement Terms").

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4. Conditions Precedent. Pursuant to the Settlement Terms, the settlement will not binding upon the Trustee or Lenders unless and until a settlement agreement is executed by the Trustee and Lenders upon mutually agreeable terms and conditions, and approved by the Court after notice and a hearing. If the settlement agreement is not approved in full, then except as set forth in paragraph 17 of the Settlement Terms, no party would be bound. The Settlement Terms require that a settlement agreement be executed and made available to parties in interest requesting copies at least three business days before a preliminary hearing on this Motion.

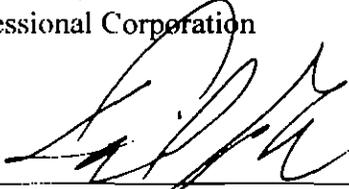
5. Major Settlement Terms. The Settlement Terms are necessarily somewhat complex, given the nature of the claims between the Trustee and the Lenders. All parties are strongly encouraged to review the Settlement Terms in their entirety. The major points settled under the Settlement Terms include:

- a. Settlement of all estate claims against lenders;
- b. Settlement of professional fee carve-out issues;
- c. Agreement regarding liquidation of the remaining estate's tangible assets and dividing the proceeds;
- d. Agreement regarding allocation of the Fleming preference settlement;
- e. Agreement regarding reimbursement of collection costs;
- f. Agreement regarding payment of Trustee fees; and
- g. Agreement regarding termination of the pension plan and the 401(k) plan.

6. The Settlement is Fair and Equitable. The settlement is fair and equitable, and in the best interests of and beneficial to the estate and the creditors, given the uncertainty, risks and expense of the litigation, and the benefits to be gained by the compromise.

WHEREFORE, the Trustee requests that the Court approve the Settlement Terms and the settlement agreement reflecting those terms, and for all other just and proper relief.

JACOBVITZ, THUMA & WALKER
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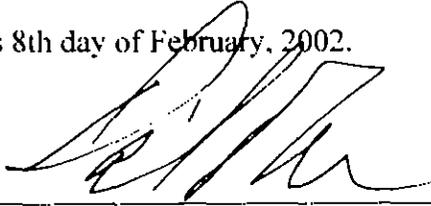
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this 8th day of February, 2002.

A handwritten signature in black ink, appearing to read 'D. Thuma', written over a horizontal line.

David T. Thuma

Outline of Terms of Settlement

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

“Collection Costs” means the cost of selling or taking action to collect on a claim, including carrying costs and other amounts expended to preserve and protect the asset or claim or liquidate an asset, any brokers’ fees to the extent given written consent of the Lenders, attorney fees, accountant fees, expert witness fees, and fees incurred for litigation support on or after February 4, 2002. 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. All fees will be subject to Court approval for reasonableness and necessity. The Lenders will be furnished a monthly report showing the status of outstanding fees and expenses broken down by claim or asset. The Trustee will consult with the Lenders regarding the amount of outstanding fees. The Trustee will not retain the services of counsel other than Jacobvitz, Thuma & Walker P.C. 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 Davis & Pierce P.C. (“D&P”) charges at hourly rates comparable to the hourly rates charged by Jacobvitz, Thuma & Walker P.C., the Lenders give their advance consent to the Trustee’s retention of D&P to prosecute avoidance action claims and to collect prepaid inventory deposits and accounts receivable; except the Lenders reserve their right to object to the Trustee’s retention of D&P for any purpose, including prosecution of avoidance action claims and collection of prepaid inventory deposits and accounts receivable on the ground that D&P is not disinterested or holds or represents an interest adverse to the estate. 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.

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

“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” means the chapter 7 estate in the Bankruptcy Case.

“Final DIP Order” means debtor in possession financing order entered by the Court on March 14, 2001.

“Lenders” means Heller Financial, Inc., Bank of America, N.A, Fleet Capital Corporation, and Metropolitan Life Insurance Company

“Net Amount” means the amount received net of Collection Costs that meet the conditions set forth above.

“Trustee” means Yvette J. Gonzales, the Chapter 7 Trustee, in her capacity as representative of the Estate.

“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 with 10 business days after a request. (A request by a Lender for further information will start the time limit over.) Unless otherwise instructed by the Lenders, such consent shall be from both a representative of Heller Financial, Inc., as Agent, and a representative of Metropolitan Life Insurance Company. Consent given by counsel shall suffice.

2. Lenders’ Lien on Avoidance Actions. The Lenders’ lien against avoidance action recoveries is reduced by \$2 million (reflecting the settlement of the allocation issue on the Fleming preference action and any Estate surcharge claims). The dispute regarding the amount of the proceeds of the Fleming sale related to the alleged preference action of the DIP against Fleming is resolved by such allocation of \$2 million for that preference.

3. Trustee Collection of Assets. It is stipulated and agreed between the Trustee on behalf of the Estate on one hand and the Lenders on the other hand that the Lenders have first, prior and perfected liens on all assets of the Estate to secure their pre-petition indebtedness and the DIP Indebtedness (except for the lien on avoidance actions which is limited to the post-Fleming closing advances, as reduced in accordance with paragraph 2; funds recovered by the Trustee or Estate on account of the amounts allocated to the Trustee and Estate under this settlement; and funds received on account of the Carve-Outs). The Trustee will sell assets and collect claims pledged to the Lenders. In exchange, the Estate will receive the percentages of the net proceeds set forth in paragraphs 6 to 14 below. The amounts allocated to the Trustee will be paid to the Estate and are available to pay compensation to the chapter 7 trustee to the extent allowed by the Bankruptcy Court, and will be available to the Estate generally if and to the extent such amounts exceed the Court allowed compensation for the chapter 7 trustee. The Lenders will guarantee that the amount of proceeds allocable to the Estate will be at least \$500,000 (which is in addition to the 3% allocated to the Trustee). The Trustee will 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 will 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 Lenders’ lien against the avoidance actions as reduced in accordance with paragraph 2 is fully satisfied, any settlement of avoidance actions will require the written consent of the Lenders, or approval of the Bankruptcy Court based on whether the settlement is fair and reasonable under the circumstances without giving any deference to the business judgments of either the Trustee or Lenders.

4. Release of Lender Administrative Claims. The Lenders will release or waive all super priority and administrative claims except for the administrative claim for the post-Fleming closing advances secured by all assets, including avoidance actions. If the Trustee does not recover sufficient funds from avoidance actions to repay that obligation, the Lenders shall retain their superpriority administrative claims prior 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; provided, however that: (i) that such superpriority administrative claims shall not limit or otherwise affect payment of Collection Costs or the funding of the Carve-Outs under the 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 such claim at the present time is \$4,297,109, but that amount will be reduced by \$2 million if this settlement is approved by the application of paragraph 2 hereof.

5. All Claims Against Lenders Settled. Except as otherwise provided below, the Trustee will release all Estate claims against the Lenders, including all claims arising under Code §506(c) and all claims asserted in Adversary Proceeding No. 01-01096 S. All claims that any proceeds of the Fleming sale or any other funds previously paid to the Lenders must be disgorged is settled and resolved with the Lenders retaining such funds, subject only to the terms hereof.

6. Professional Carve-Outs.

(a) The "carve out" for professionals retained by the Debtor in Possession and Unsecured Creditors 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) \$1,650,000 for allowed fees for services rendered between the February 8, 2001 and August 31, 2001 (the "Pre-Closing Carve-Out"), (ii) the actual amount of allowed and unpaid fees arising from services rendered after August 31, 2001, through the date of conversion of the case to Chapter 7, not to exceed \$1.5 million (the "Post-Closing Carve-Out"), which the Trustee estimates to be approximately \$400,000, including \$150,000 for Peter J. Solomon Company, which will be considered part of the Post-Closing Carve-Out, and in no event shall be over \$500,000; provided, however, that this \$500,000 cap shall not apply to professionals fees 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 under the Final DIP Order, and (iii) the Lenders will honor and guarantee the existing carve-out in favor of Jacobvitz, Thuma & Walker, P.C (the "JTW Carve-Out") to the extent that firm has not been paid by the Estate and is not paid as an administrative claim or by the other Carve-Outs. The Pre-Closing Carve-Out amount will not be reduced by any payments made to professionals prior to conversion of the chapter 11 case to chapter 7. The Lenders reserve the right to claim that compensation sought for prosecuting and defending fee applications that seek compensation for services rendered and expenses incurred prior to September 1, 2001 are under the Pre-Closing Carve-Out. 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 Debtor in Possession 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. All claims of professionals against the Lenders for any carve-out under the Final DIP Order or any other Order or agreement will be fully settled. Professionals will not be able to make collateral attacks against the Lenders.

(b) No payments shall be made from any of the Carve-Outs to professionals for fees or expenses incurred in the course of actions taken against the Lenders, to the extent provided in the Section 3 of the Final DIP Order. Any professional seeking payment under any of the Carve-Outs 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, the Trustee shall either have 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' share 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 will pay the Trustee the amount necessary to fully fund the Carve-Outs.

(d) The Lenders shall 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. However, because 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, such subrogation rights of the Lenders will result in payment to the Lenders only if the Carve-Out amounts that are funded exceed the amount of the Court approved compensation eligible for payment from the Carve-Outs. The Lenders have only subordinated to the professionals, and to the extent of assets otherwise available to satisfy claims of the Lenders, Lenders shall receive such payments.

7. Avoidance Actions. The Trustee will undertake to collect from third parties the Trustee believes received avoidable preferential transfers, including commencement of adversary proceedings to avoid preferential transfers, as determined by Trustee in her reasonable business judgment. Funds recovered shall be disbursed as follows:

(a) Until the Lenders' lien against the avoidance actions is satisfied, first to Collection Costs; second, 3% of the remaining amount to the Trustee; and third, 2/3 of the balance to the Lenders and 1/3 of the balance to the Estate;

(b) After the Lenders' lien against the avoidance actions is satisfied,

all amounts recovered will be paid to the Trustee.

8. 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 will pay all attorneys fees incurred by the Trustee in connection with the Distribution Center; provided, however, that the Lenders shall pay 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 Trustee may, at her option, abandon the warehouse and/or reject the ground lease. All Collection Costs shall be paid from the first proceeds arising from the sale of the Distribution Center. The Trustee will receive 3% of the Net Amount of sale proceeds, and the balance will be paid to the Lenders.

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

10. Land and Equipment and Miscellaneous Assets. The Trustee will undertake to sell land and equipment and miscellaneous assets not otherwise categorized herein that is property of the estate, as determined by Trustee in her reasonable business judgment. Sale proceeds from each piece of property sold shall be disbursed as follows: first, for Collection Costs; second to cover the Trustee's attorneys fees associated with the sale of the subject property; third, 3% of the Net Amount to the Trustee for trustee fees and fourth, 10% of the balance to the Estate and 90% of the balance to the Lenders.

11. Liquor Licenses. Trustee will undertake to sell the liquor licenses that are property of the estate, in her reasonable business judgment. 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 licenses sold, reserving all rights that such payments are made under compulsion and under protest, as stated in the Order Regarding Payment of Liquor Wholesalers and Transfers of Liquor Licenses, filed August 31, 2001, and reserving all other rights set forth in 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 to the Taxation & Revenue

Department of the State of New Mexico ("TRD") with respect to the liquor licenses sold

as part of the Fleming transaction;

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

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

(f) Sixth, 10% of the balance to the Estate and 90% the balance to the Lenders. If any payments must be made to TRD to renew a license, the Lenders will pay such amount, and it will be treated as a Collection Cost. The Net Amount is the amount received after deducting amounts paid for gross receives taxes, liquor wholesaler claims and attorneys fees incurred in connection with renewal of temporary suspensions, renewal of licenses and the sale of the licenses.

12. Pension Plan Surplus. Any surplus remaining after with wind-down of the pension plan shall be paid 3% to the Trustee, and the balance to the Lenders.

13. \$2 million Closing Escrow. The Lender's will receive all funds distributed from the \$2 million closing escrow established in connection with the closing of the Fleming transaction. The Trustee shall have no obligation to undertake any action at the expense of the estate in connection with the closing escrow. The Trustee will assign all right, title and interest in and to the Closing Escrow to the Lenders and the Court will acknowledge the standing of the Lenders to pursue the claim.

14. Claims against Liquor Wholesalers. The Lenders in their discretion may commence or continue to prosecute claims against liquor wholesalers based on liens claimed by the Lenders against liquor licenses. The Estate will 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 will agree 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 will pay any Collection Costs incurred by the Estate in such litigation. The Trustee will cooperate in good faith with the Lenders in the prosecution of the claims.

15. Reimbursement of Collection Cost. 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 reimbursed for such payments from such proceeds. If there are insufficient funds from the proceeds of a sale or collection of assets to pay the Collection Costs to be paid from such proceeds (such as if an adversary proceeding is unsuccessful), such unpaid Collection Costs shall be paid off the top from the next proceeds of a sale or collection of assets.

16. Court Approval of Settlement. The settlement is not binding upon the parties unless and until a settlement agreement upon agreed terms and conditions (i) executed by each of the parties, and (ii) approved by the Court after notice and a hearing. If the settlement is not approved in full, then except as set forth in paragraph 17 below, no party thereto is bound thereby. The settlement agreement shall be prepared and executed by the parties and made available to parties in interest requesting copies at least three (3) business days before the date set for the preliminary hearing on approval of this settlement.

17. Surcharge/Advancing of Funds. The Trustee and the Lenders will agree to an order allowing the Trustee to take the following actions immediately:

(a) The Trustee immediately shall market the Distribution Center Lease, and will receive the amounts set forth in paragraph 8 above, whether or not the settlement agreement is executed or approved;

(b) The Trustee immediately shall market the liquor licenses, and will receive the amounts set forth in paragraph 11 above, whether or not the settlement agreement is executed or approved; and

(c) To the extent any amounts become due and owing to the Trustee as set forth in this paragraph 17, such amounts shall be deemed a voluntary §506(c) surcharge to the extent of the Collection Costs and the 3% for the Trustee, and shall be paid out of any sales proceeds, whether or not the settlement is ultimately approved.

(d) The Lenders, at the request of the Trustee, will 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, and the assertion of avoidance action claims, 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. This advance will be secured by all assets of the estate, including avoidance actions, if this settlement is not approved.

18. The settlement does not constitute an admission of any fact by either the Lenders or Trustee. If a dispute arises under the settlement, it shall be resolved by the Bankruptcy Court.