

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.

**ORDER APPROVING AGREEMENT
BETWEEN THE TRUSTEE AND LENDERS**

This matter came before the Court on the Motion to Approve Settlement Between the Trustee and Lenders, filed February 8, 2002 and docketed as #1553 (the "Settlement Motion"), to the extent the Settlement Motion seeks approval of the agreement set forth in paragraph 21 of the proposed Stipulation and Consent Order Approving Compromise and Settlement Between the Trustee on Behalf of the Estate, Heller Financial, Inc., Bank of America, N.A., Fleet Capital Corporation and Metropolitan Life Insurance Company (the "Proposed Stipulation and Order"). The Proposed Stipulation and Order is attached as Exhibit A to the Trustee's Second Submission Of Settlement Agreement Between the Trustee and Secured Lenders, filed March 18, 2002.

The Court FINDS:

A. On February 8, 2001, Furr's Supermarkets, Inc. (the Debtor") filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code.

B. On December 19, 2001, the Debtor's case was converted to a chapter 7 case, and Yvette J. Gonzales (the "Trustee") was appointed Chapter 7 trustee.

C. The Trustee filed the Settlement Motion seeking, in part, approval of the

agreement set forth below (the "Agreement")

D Notice of the Settlement Motion was given to the persons on the limited mailing list maintained by the Clerk of the Bankruptcy Court in connection with this case, specifying a period of twenty days from the mailing of the notice, plus three days because the notice was served by mail, in which to object. The objection period expired on March 6, 2002. The notice of the Settlement Motion (Docket No. 1557) constituted adequate and sufficient notice to all parties and entities entitled thereto and was appropriate under the circumstances of this case.

E. A preliminary hearing on the Settlement Motion, and objections thereto, was held on March 7, 2002. Although various parties objected to the Settlement Motion, no objections were filed to approval of the Agreement except by the United States Trustee. That objection is resolved by this Order. The parties appearing at the preliminary hearing made no objection to the Court approving the Agreement by an order approved by the Trustee, United States Trustee, Metropolitan Life Insurance Company, and Heller Financial, Inc., acting as agent for Fleet Capital Corporation, Bank of America, N.A., and itself.

F. The Agreement is 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 chapter 7 bankruptcy estate.

NOW, THEREFORE, IT IS HEREBY ORDERED, as follows:

1. The Court hereby approves the Agreement between the Trustee and Lenders set forth below, which shall be fully effective upon entry of this Order.

2. The following terms as used in the Agreement shall have the following meanings:

“Avoidance Actions” means avoidance claims and any and all proceeds therefrom under Bankruptcy Code sections 544, 545, 547, 548, 550 and/or 553, whether received before or after the commencement of litigation.

“Collection Costs” means all direct costs incurred by the Estate on or after December 19, 2001 selling or liquidating the Distribution Center Lease and Liquor Licenses, including attorneys fees, all tax liabilities of the Estate of any nature resulting from such sales (except for reductions in the Estate’s net operating loss carryforwards), and all direct costs incurred by the Estate in connection with the Pinnacle/Heller Leasing Litigation, including attorneys fees, and specifically including without limitation all of the foregoing costs incurred by the Trustee with respect to (i) carrying costs and other amounts incurred or expended to preserve and protect the Distribution Center Lease and Liquor Licenses, such as payment of rent, utilities, insurance, liquor license renewal fees or taxes, and attorneys fees and expenses incurred to seek and obtain an extension of time to assume or reject the lease, and any related appeals; and (ii) any brokers’ fees to the extent the Lenders give their written consent to incurring them. The following conditions shall apply to all Collection Costs, whether incurred before or after Court approval of the Agreement. The Lenders shall be consulted in advance with regard to expenses for litigation in excess of \$5,000 incurred on and after April 1, 2002 in any case or other discrete matter or transaction for which such expenses are a Collection Cost. All professional fees shall be subject to Court approval for reasonableness and necessity. The Trustee shall furnish the Lenders a monthly report showing the status of outstanding fees billed and expenses broken down by Distribution Center Lease, Liquor Licenses and Pinnacle/Heller Leasing Litigation within thirty days after the end of the reporting period (except the first such report will be due April 30, 2002 for outstanding fees billed and expenses incurred prior to April 1, 2002). The Trustee shall be available to consult with the Lenders regarding the amount of outstanding fees. The Trustee shall not retain the services of counsel other than JTW and Linda Aikin with respect to the preservation or sale of the Distribution Center Lease and Liquor Licenses or the Pinnacle/Heller Leasing Litigation 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. The Lenders shall not have a lien against any Estate assets, or an administrative claim, on account of the payment of Collection Costs.

“Court” means the United States Bankruptcy Court for the District of New Mexico.

“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 bankruptcy estate created under Bankruptcy Code §541 upon the commencement of the Bankruptcy Case.

“Fleming Transaction” means the sale of assets by the Debtor to Fleming Companies, Inc. approved by an ordered entered in the Bankruptcy Case on July 3, 2001.

“Lenders” means Metropolitan Life Insurance Company, Fleet Capital Corporation, Bank of America, N.A., and Heller Financial, Inc., in its individual capacity, together with their respective successors, assigns, and transferees.

“Liquor Licenses” means all New Mexico liquor licenses that are property of the Estate as of March 1, 2002, including but not limited to liquor licenses under contracts for sale entered into prior to conversion of the Bankruptcy Case to a case under chapter 7.

“Net Amount” means the amount received by the Trustee on behalf of the Lenders and the Estate for a particular asset (prior to deduction of any applicable 3% Trustee fee), less all applicable Collection Costs.

Pinnacle/Heller Leasing Litigation means litigation with Pinnacle Logistics, Inc. and Countrywide Logistics, Inc. in adversary proceeding no. 01-01099 and the appeal thereof; and/or litigating and/or settling with Heller Leasing, Inc. in adversary proceeding no. 01-01160.

“Settlement” means the settlement of which the Trustee seeks approval by the Settlement Motion (defined in the introductory paragraph of this Order).

“TRD” means the Taxation and Revenue Department of the State of New Mexico.

“Trustee” means Yvette J. Gonzales, the Chapter 7 trustee in this Chapter 7 bankruptcy case.

3. The Trustee immediately shall market the Distribution Center Lease, and shall receive 3% of the Net Amount of sale proceeds, and the balance shall be paid to the Lenders. 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 shall pay all attorneys fees incurred by the Trustee in connection with the Distribution Center Lease; provided, however, that the Lenders shall pay all Court-required carrying costs that are

allowable as administrative claims against the Estate and indemnify the Trustee against all

~~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 Lenders shall so notify the Trustee and Fleming Companies, Inc. in writing at least three (3) business days prior to the date that the Lenders will no longer pay the carrying costs incurred after such date. The Trustee may then, at her option, immediately move to reject the Distribution Center Lease. All Collection Costs relating to the Distribution Center Lease, including reimbursement of the Lenders for Collection Costs advanced by them, shall be paid from the first proceeds arising from the sale of the Distribution Center Lease.]~~

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 Lenders shall so notify the Trustee and Fleming Companies, Inc. in writing at least three (3) business days prior to the date that the Lenders will no longer pay the carrying costs incurred after such date. The Trustee may then, at her option, immediately move to reject the Distribution Center Lease. All Collection Costs relating to the Distribution Center Lease, including reimbursement of the Lenders for Collection Costs advanced by them, shall be paid from the first proceeds arising from the sale of the Distribution Center Lease.]

4. The Trustee immediately shall market the Liquor Licenses, and shall collect and apply the sales proceeds as follows:

(a) First, to pay claims of liquor wholesalers with respect to the Liquor Licenses sold, with all parties contending they have not waived and specifically reserving any rights, claims or defenses that may exist in connection therewith as set forth in the Order Regarding Payment of Liquor Wholesalers and Transfers of Liquor Licenses, entered August 31, 2001 with respect to payments to liquor wholesalers in connection with the Fleming Transaction, which language in such order is incorporated herein by reference.

(b) Second, to pay gross receipts taxes with respect to the Liquor Licenses sold;

(c) Third, to pay amounts owed, if any, to the TRD with respect to the Liquor Licenses sold as part of the Fleming Transaction;

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

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

(f) Sixth, 10% of the balance to the Estate and 90% of the balance to the Lenders. If any payments must be made to TRD to renew a license, the Lenders shall pay such amount and later be repaid such advance as part of the Collection Costs to be paid from sale proceeds and collections. For purposes of this paragraph 4, the Net Amount is the amount received after deducting amounts paid for gross receipt taxes, liquor wholesaler claims, TRD fees, Collection Costs relating to the Liquor Licenses and costs incurred in connection with the renewal of temporary suspensions, renewal of licenses and the sale of the licenses.

5. To the extent the Trustee incurs costs on or after December 19, 2001, including attorneys fees, with respect to (i) marketing and selling Liquor Licenses; (ii) marketing or preserving the Distribution Center Lease, including but not limited to seeking and obtaining an extension of time to assume or reject the lease, and any related appeals, and/or (iii) litigating and/or settling the Pinnacle/Heller Leasing Litigation, such amounts shall be deemed a voluntary Bankruptcy Code § 506(c) surcharge against all of the Lender's collateral, to the extent of the Collection Costs and the 3% fee for the Trustee, and shall be paid out of the proceeds from the sale or collection of all of such collateral.

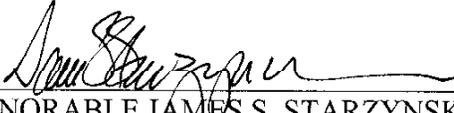
6. In addition to use of cash collateral as provided in paragraph 5 above, the Lenders, at the request of the Trustee, shall allow the Trustee to use up to \$125,000 of cash collateral held by the Trustee to pay Trustee professional fees and litigation support team fees (such as accountants and persons supporting the accountants), costs (such as deposition costs) and expert witness fees, in connection with assertion of Avoidance Actions, and also to pay Trustee professional fees incurred in connection with seeking Court approval of the Settlement Motion. The Lenders shall be repaid such advances as part of the Collection Costs to be paid from sale proceeds and collections. To secure this advance, the Court hereby grants the Lenders a security interest in all assets of the Estate, including Avoidance Actions. Notwithstanding the foregoing, nothing in this Order shall affect any liens, rights or claims of the liquor wholesalers or Lenders in relation to any liquor licenses or proceeds thereof. If the Settlement Motion is not approved, any funds borrowed under this provision with respect to the assertion of Avoidance Actions will be repaid only from Avoidance Action recoveries.

7. The \$500,000.00 held in escrow pursuant to the Court's September 21, 2001 Stipulated Order Approving Escrow of Funds and Release of Inventory will not be disbursed until further order of the Court.

8. This Court shall retain jurisdiction for the purpose of enforcing and interpreting the terms and provisions of the Agreement.

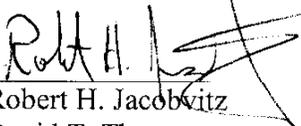
9. If the Court approves the Settlement Motion, the terms and conditions of the Settlement shall supersede the Agreement approved by this order. If the Court enters an order denying approval of the Settlement, the Trustee's right to use cash collateral as provided in paragraph 6 shall terminate at that time unless otherwise agreed in writing by

the Lenders. This Order does not affect the objection of the United States Trustee to approval of the Settlement as the Settlement relates to the sale of the Distribution Center Lease.


HONORABLE JAMES S. STARZYNSKI
UNITED STATES BANKRUPTCY JUDGE

Submitted and approved by:

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I hereby certify that a true and correct copy
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