

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 7-01-10779 SA

Chapter 7

Debtor.

**ORDER APPROVING AGREEMENT REGARDING SALE OF LIQUOR
LICENSES, AND ESTABLISHING PROCEDURES FOR THE SALE OF LIQUOR
LICENSES FREE AND CLEAR OF LIENS AND PAYMENT OF LIQUOR
WHOLESALEERS AND CERTAIN TAXES**

This matter came before the Court on the Motion To Approve Agreement Regarding Sale of Liquor Licenses, and Establishing Procedures for the Sale of Liquor Licenses Free and Clear of Liens and Payment of Liquor Wholesalers and Certain Taxes (Docket No. 1547), filed February 7, 2002 (the "Motion"). The Court FINDS:

A. On February 7, 2002, the Court filed an order (Docket No. 1545) shortening the period to object to the Motion to eight (8) days plus three days if the notice is served by mail.

B. On February 8, 2002, the Debtor gave notice (the "Notice") of the Motion to all persons on the limited mailing matrix maintained for this chapter 11 case, as shown by the Notice filed March 15, 2002 (Docket No. 1609), which contains a proof of service.

C. The Notice specified a deadline of eight days, plus three days based on service of the Notice by mail, for a total of eleven days, in which to file objections to the Motion.

D. The Notice was sufficient and appropriate in the particular circumstances.

E. The objection deadline expired on February 19, 2002. The only objections to the Motion were filed by Desert Eagle Distributing Company of New Mexico L.L.C. This Order resolves those objections.

F. No further notice of the Motion or of this order is necessary in the particular circumstances, prior to entry of this order.

G. The Court has jurisdiction with respect to this Motion and to grant the relief set forth below 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.

H. The Trustee has complied with the requirements of Bankruptcy Code § 363 with respect to the relief requested in the Motion.

I. Entry of this order is appropriate.

IT IS THEREFORE ORDERED, as follows:

1. As used in this Order:

AGD means the Alcohol Gaming Department of the State of New Mexico.

Escrow Account means an escrow account established by the person serving as escrow agent with respect to the sale of a License.

Escrow Agent means the person serving as escrow agent with respect to the sale of a License pursuant to the terms of the agreement for purchase and sale of the License.

Fleming Sale means the sale of assets by the Debtor to Fleming Companies Inc. or its third party purchaser designees as authorized by an order entered in this bankruptcy case on July 3, 2001.

Interests is defined in paragraph 12.

Lenders means Heller Financial, Inc., as agent for Fleet Capital Corporation, Bank of America N.A., Heller Financial, Inc. and Metropolitan Life Insurance Company; and Metropolitan Life Insurance Company acting for its own account.

Licenses means the following New Mexico Liquor Licenses:

Retailer Licenses

<u>License #</u>	<u>Location</u>
4023	Albuquerque
4029	Los Lunas
4047	Farmington
4051	Albuquerque

Dispenser Licenses

<u>License #</u>	<u>Location</u>
187	Albuquerque
231	Albuquerque
617	Albuquerque
768	Albuquerque
818	Albuquerque
405	Belen
939	Espanola
254	Las Cruces
364	Roswell

Net Sale Proceeds means sale proceeds less the amount of proceeds used to pay claims of Wholesalers and gross receipts taxes with respect to License nos. 131, 581, 882, 996, and 4069 and the Licenses, to pay amounts then still owed to TRD with respect to the liquor licenses sold as part of the Fleming Sale, and to pay the Trustee's attorneys fees and expenses associated with the sale and lease, the renewal of temporary suspensions of Licenses, and the annual renewal of Licenses.

Order means this Order.

Proposed Contract is defined in paragraph 3(a).

Proposed Sale is defined in paragraph 3(a).

Specimen Contracts is defined in paragraph 3(c).

TRD means Taxation & Revenue Department of the State of New Mexico.

Trustee means Yvette G. Gonzales in her capacity as chapter 7 trustee in this bankruptcy case.

Wholesaler Clearance means a wholesaler clearance, in the form specified by AGD, or otherwise acceptable to AGD, relating to the Licenses.

Wholesalers means Desert Eagle Distributing Company of New Mexico L.L.C., Joe G.

Maloof & Co., National Distributing Company Inc., New Mexico Beverage Company, Inc. Southern Wine & Spirits of New Mexico, Inc., RRAM, and Premier Distributing Company, Inc.

2. The following agreement between the Trustee and Lenders is approved:

(a) The Trustee will use reasonable efforts to sell the Licenses, without retaining a broker.

(b) The Trustee shall be entitled 3% for the Trustee of the amount of Net Sale Proceeds of License nos. 131, 581, 882, 996, and 4069 and of the Licenses, and the estate shall be entitled to 10% of the amount that is the difference between the Net Sale Proceeds and the 3% payable to the Trustee. For example, if the Net Sale Proceeds were \$10,000, the 3% payable to the Trustee would be \$300 and the 10% payable to the estate would be \$970. The amounts allocated to the Trustee will be paid to the estate and are available to pay compensation to the 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 Trustee.

(c) The Lenders will reimburse the Trustee for all reasonable attorneys fees and expenses incurred by the Trustee with respect to the renewals, extension of temporary suspensions, marketing, negotiation, and sale and lease of the Licenses. To the extent any amounts become due and owing to the Trustee as set forth in this subparagraph (c), such amounts shall be deemed a voluntary §506(c) surcharge, and shall be paid out of the Net Sale Proceeds of License nos. 131, 581, 882, 996, and 4069 and the Licenses.

(d) Proceeds from the sale of License nos. 131, 581, 882, 996 and 4069 and the Licenses will be distributed as follows:

(i) First, to pay claims of liquor wholesalers and gross receipts taxes with respect to the License sold;

(ii) Second, to pay amounts then still owed to the TRD with respect to the liquor licenses sold as part of the Fleming transaction;

(iii) Third, to pay the Trustee's attorneys fees associated with the sale and lease, the renewal of temporary suspensions, and the annual renewal of License nos. 131, 581, 882, 996 and 4069 and the Licenses;

(iv) Fourth, 3% of the amount remaining after the above payments are made to the Trustee; and

(v) Fifth, 10% of the balance remaining after payment of items *(d)(i)-(iv) above to the estate, and 90% thereof to the Lenders.

3. Procedures for Sales of Licenses. The Trustee is authorized, without further order of the Court, to sell the Licenses in accordance with the following procedures:

(a) As soon as practicable after the Trustee's negotiation of an agreement for a sale of a License, the Trustee would submit to the Lenders, through their counsel, a copy of the proposed contract for the purchase and sale of the License in question (the "Proposed Contract"). The Lenders would be permitted ten (10) business days from receipt of the Proposed Contract to review it. If the Lenders (x) affirmatively assent to the sale of the License pursuant to the terms and conditions of the Proposed Contract (the "Proposed Sale") or (y) fail to notify the Trustee in writing of any objection to the Proposed Sale within ten (10) business days from receipt, or (z) timely object(s) to the Proposed Sale but withdraws for any reason its or their objection to such sale, the Trustee would be authorized to consummate the

Proposed Sale without notice and a hearing or entry of a further order of the Court. If the Lenders timely object to the Proposed Sale and do not withdraw its or their objection, the Trustee would not proceed with the Proposed Sale unless the terms are modified in a way that results in the Lenders withdrawing its or their objection.

(b) All of the terms set forth in this Order shall apply to the sale of any License pursuant to this Order under a Proposed Contract. However, the Trustee shall have the right to submit an order confirming her authority to consummate any Proposed Sale, if the order is approved by the Lenders, Wholesalers and TRD, without notice to any other party in interest, or on notice only to the Lenders, Wholesalers, TRD and UST if any of them object.

(c) Notwithstanding subparagraphs (a) and (b) of this paragraph 3, if a Proposed Contract does not contain the same escrow and other terms and conditions protecting Wholesalers and TRD as are included in the specimen contracts attached as Exhibit A (a contract of sale) or Exhibit B (a contract for a lease and sale) to the Settlement Motion (Exhibits A and B together are called the “Specimen Contracts”), or if the Trustee requests that any provisions in this Order do not apply to the Proposed Contract, then the Trustee shall give notice of the Proposed Contract to the Wholesalers and TRD together with notice of any requested modifications to such Order as it relates thereto, and the references in subparagraphs (a) and (b) to the Lenders also shall be deemed to refer to the Wholesalers and TRD.

4. Within thirty (30) days after consummation of each sale, the Trustee will file a report of sale pursuant to Bankruptcy Rule 6004(f), and transmit a copy of the report to the UST and Lenders.

5. The Trustee is authorized under 11 U.S.C. § 363(b) to execute all agreements

for the purchase and sale, or for the purchase and sale and lease, of Licenses approved by the Order; and to consummate all transactions contemplated by any agreements relating to such sales; and to take any action and execute and deliver any additional instrument or documents that may be reasonably necessary, desirable, or appropriate to implement such transactions, to effect the sales and leases of the Licenses, to cause the closings of such sales and leases to occur, and to perform the Trustee's obligations under the agreements.

6. Upon request by the Escrow Agent (as defined in the Specimen Contracts), the Wholesalers will deposit with Escrow Agent a separate Wholesaler Clearance for each of the Licenses. The Wholesaler Clearance will provide that it is valid only if AGD approves the transfer of the License in question to the purchaser within eight (8) business days after the issuance date specified on the Clearance. The Wholesaler Clearances provided to the Escrow Agent will not specify the issuance dates. The Escrow Agent will be instructed to deliver a Wholesaler Clearance to a purchaser only after the purchaser has deposited the entire purchase price with the Escrow Agent, and to specify an issuance date on the Wholesaler Clearance that is the date the Escrow Agent delivers the Wholesaler Clearance to the purchaser. The Escrow Agent is directed to transfer from the purchase price held in escrow to each Wholesaler, within three (3) business days after the later of (i) when Escrow Agent is advised that such License transfer has occurred or (ii) the Wholesaler has advised Escrow agent of the payoff amount with respect to that License, the amount specified on Exhibit C to the Settlement Motion with respect to the License being transferred plus the additional amount of attorneys fees and interest accrual to the date of payment owed by the Trustee to each Wholesaler as specified by each Wholesaler or its counsel to the Escrow Agent in writing. Escrow Agent may

conclusively rely upon the amounts specified by each Wholesaler or its counsel to the Escrow Agent in writing amounts as the amounts of such attorney's fees and interest accrual to be disbursed. The transfer of funds by the Escrow Agent to the Wholesalers will be made by wire transfer to any Wholesaler who requests the same and provides wiring instructions.

7. The Lenders and Trustee have agreed, and are directed by the Court, to take no action whatsoever to impede or prevent the Escrow Agent from making such transfers of funds to the Wholesalers, including but not limited to seeking an injunction or similar relief, seeking or asserting a setoff or recoupment, or otherwise attempting in any way to delay or limit such transfers of funds. The Wholesalers will have the right to the immediate entry of an injunction by the Court, without commencing an adversary proceeding or posting any bond, if necessary to enforce the provisions of this paragraph. The Court retains jurisdiction to grant such relief. The Lenders shall cooperate fully and completely with the Escrow Agent in every respect to enable payment to the Wholesalers in the amount shown on Exhibit C to the Settlement Motion (plus per diem interest accrual through the date of payment) from the proceeds for each transaction and to ensure complete compliance with paragraph 18 in the Specimen Contracts as the transaction proceeds.

8. As of November 7, 2001, the estate owed TRD a total of \$323,860.31 (the "Pre-Closing Taxes") for gross receipts taxes arising from the sale of alcoholic beverages under liquor licenses the Debtor transferred on or about August 31, 2001 to Fleming Companies, Inc. or to third party purchasers designated by Fleming Companies, Inc. The Escrow Agent is directed to transfer to TRD from the purchase price held in escrow, within ten (10) business days after the last disbursement to a Wholesaler with respect to a License,

the sum of (i) the relevant amount specified on Exhibit C to the Settlement Motion with respect to the License being transferred (which represents all unpaid gross receipts tax arising from the sale of alcoholic beverages under each such License) and (ii) the unpaid balance (if any) of the Pre-Closing Taxes to the extent funds remain available from the purchase price for the License that is leased or transferred after payment to Wholesalers and payment of any fees to the Escrow Agent. If a Purchase Agreement is terminated, such that the License subject to such Agreement will not be transferred to the purchaser, then TRD may reimpose a hold on such License so that a new Tax Clearance is required for the transfer of the License. If the Trustee is authorized to consummate the sale of a liquor license under a Proposed Contact, pursuant to the terms of the Order, this same procedure shall apply with respect to TRD issuing a Tax Clearance, except the Tax Clearance will be issued when TRD is provided a copy of the executed contract.

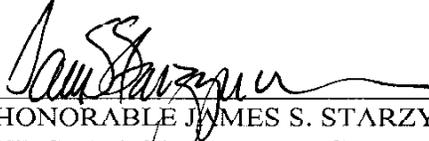
9. The Trustee is authorized to pay the Wholesalers from the proceeds of sale of License nos. 131, 581, 882, 996, and 4069 and the Licenses the amounts specified on Exhibit C to the Settlement Motion with respect to each License being transferred, plus per diem interest accrual through the date of payment, plus the amount of attorneys fee then claimed by the Wholesaler with respect to matters relating to its claims against the Trustee. The Trustee is authorized to pay to TRD from the proceeds of sale of License nos. 131, 581, 882, 996, and 4069 and the Licenses the amounts specified in paragraph 6 above, and the unpaid balance of the amount owed to TRD with respect to the licenses transferred as part of the Fleming Sale.

10. Counsel for the Trustee and counsel for the Lenders have advised counsel for the Wholesalers that the Trustee and Lenders contend that payments made to Wholesalers as

provided in the Order are being made under compulsion and under protest. All parties contend that they have not waived and specifically reserve any rights, claims or defenses that may exist in connection with this matter. Without limitation, the Trustee and Lenders contend they have not waived rights to seek disgorgement in a separate proceeding or to contest the amount and/or priority or any other aspect to the Wholesalers' claims, and the Wholesalers contend that they have not waived the right to contend that by accepting the benefits of the transfers of the License, the Lenders and Trustee have in fact waived such rights, are estopped by doctrines such as *res judicata*, or have rendered their claims moot. This Order will not be construed to affect any of the parties contentions in this regard.

11. The terms of this Order and any agreements to which the Trustee is or becomes a party that are authorized by this Order shall be binding in all respects upon, and shall inure to the benefit of, the Trustee, the estate and creditors.

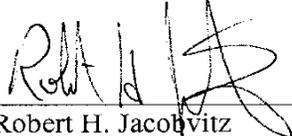
12. All sales of Licenses will be made free and clear of any lien, claim, interest or encumbrance (collectively, "Interests") of any entity in the Licenses. Any party asserting an Interest in the Licenses will be protected by having its Interest attach to the net proceeds of the sale(s), subject to any claims and defenses the Trustee may possess with respect thereto.



THE 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
of the foregoing was either electronically
transmitted, faxed, delivered or mailed to
the listed counsel and parties on:

APR 05 2002

Mary B. Anderson