

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT  
ALBUQUERQUE, N.M.

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779 SA  
Chapter 11

Debtor.

**DEBTOR'S SUBMISSION OF TRANSCRIPT  
FOR HEARING ON PRESENTMENT  
OF ORDER APPROVING SALE OF ASSETS**

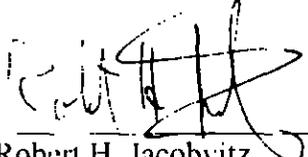
Furr's Supermarkets, Inc., by counsel, hereby submits a Partial Transcript of Proceeding, Oral Findings of Fact and Conclusions of Law as Permitted by Rule 7052, which is attached hereto as Exhibit "A." The attached transcript is a partial transcript of the hearing held June 29, 2001.

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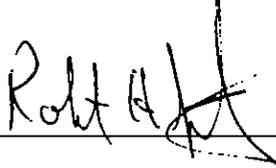
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this 3<sup>rd</sup> day of July, 2001.

  
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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In Re:

FURR'S SUPERMARKETS, INC.,  
Debtor.

No.: 11-01-10779 SA

PARTIAL TRANSCRIPT OF PROCEEDINGS  
ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AS PERMITTED BY RULE 7052

BE IT REMEMBERED that the above-entitled matter  
came on for hearing before the HONORABLE JAMES  
STARZYNSKI, United States Bankruptcy Judge, at the hour  
of 9:00 a.m., on June 29, 2001, at the Federal Building  
and Courthouse, 421 Gold, SW, Albuquerque, New Mexico.

APPEARANCES

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1                   THE COURT: Anybody who needs to leave,  
2 whether your car is in the garage or not, is welcome to  
3 do so.

4                   It seems to me -- well, first of all, let  
5 me start off, this is a matter in which this Court has  
6 jurisdiction pursuant to 28 USC, Sections 1334 and 157.  
7 This is a core proceeding pursuant to Section 157(b), and  
8 these are oral findings of fact and conclusions of law on  
9 the record as permitted by Rule 7052, which is to say,  
10 the Court reserves the right to supplement in the event  
11 that it writes an opinion.

12                   The Court has reviewed the motion. It has  
13 reviewed the asset purchase agreement, albeit briefly,  
14 and the related documents. It's reviewed the objections  
15 in connection with all of this. It's reviewed or is  
16 familiar with most of the case law that has been cited by  
17 the various parties. The Court is also familiar with the  
18 cases that have proceeded throughout this, throughout  
19 this proceeding so far beginning on February the 8th,  
20 and all of those things go into the decision that the  
21 Court is about to make.

22 Bottom line, I think it is appropriate to  
23 approve the sale of the assets to Fleming. That is to  
24 say, I approve the asset purchase agreement and approve  
25 or grant the relief requested essentially in the motion

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1 seeking approval of the sale. I think that the issue of  
2 successor liability essentially can be argued, but in the  
3 context of -- essentially that it is reserved, so that,  
4 in effect, the State of New Mexico has some sort of claim  
5 against the proceeds, which is what I think I understood  
6 what Mr. Harris from Taxation and Revenue was saying.

7 I do not think that this is the  
8 appropriate order to deal specifically with rejection of  
9 lease notices, with the issue of liquor licenses  
10 requiring to be paid right now, and with the issue of  
11 allocation, with respect to how the proceeds are to be  
12 allocated, at least that won't go in this particular  
13 order, so that it will not affect the contract in any  
14 way.

15 And I also want to say, I think the people  
16 that need to, that are permitted to sign off on the order  
17 are, essentially, the counsel for the debtor, for the  
18 unsecured creditors' committee, Heller, Met Life, and  
19 also -- let's see -- Mr. Fine, Ms. Gottlieb, Mr. Feuille,

20 Mr. Scott and the other two folks. I'm sorry, ma'am, you  
21 represent Joe Maloof?

22 MS. MIDDLEBROOKS: Yes.

23 THE COURT: You get to sign off on it, and  
24 Mr. Miranda, and there was one other person -- Mr.  
25 Cadigan.

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1 MR. FISH: And Mr. Harris.

2 THE COURT: And Mr. Harrison -- Mr.  
3 Harris; right. Okay. Here's my thoughts in connection  
4 with this, which are basically my findings of fact and  
5 conclusions of law. And this is a bit of a history of  
6 this case based on the evidence presented at the numerous  
7 hearings that have taken place in this case, and which I  
8 take into account in making this decision.

9 I'm also, in the process, going to talk  
10 about some bankruptcy procedure and law, which is  
11 necessary to understand what's going on because not  
12 everyone here is a bankruptcy lawyer, which is probably  
13 good for people who don't routinely work in the  
14 bankruptcy arena, including a number of lawyers. This  
15 bankruptcy business can seem fairly strange, but it's  
16 just like everything else, once you understand how it's  
17 happening, like how a car engine works, then everything

18 makes sense. Until you understand, this probably seems  
19 pretty mysterious or unfair, in some ways.

20 This is a debtor who two or three years  
21 ago, at least, began to experience some serious problems,  
22 and they brought in Mr. Dahlen from a big chain in  
23 California to help them solve those problems. His  
24 philosophy, essentially, was to expand out of the  
25 problems or out of the trouble to Furr's. They worked on

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1 opening big new stores and renovating old ones, et  
2 cetera, and that philosophy ended up not working.

3 By the fall of last year, 2000, Furr's was  
4 running out of cash, plainly even before that. So they  
5 sought more cash, or Furr's sought more cash from its  
6 owners and lenders, but that didn't happen until late  
7 December of about 2000. That's when the money finally  
8 came in.

9 In the meantime, Furr's made the decision  
10 to live off its inventory, so that's where -- most  
11 grocery chains expect to have about 90 percent of  
12 replacement inventory available, maybe as low as 85  
13 percent. Furr's, instead, ended up with an inventory  
14 that, shortly before filing, was down to about 45 percent  
15 and, as a result, there were big gaps in shelves and, as

16 a result overall, for that reason in part, Furr's ended  
17 up losing about 25 percent of its customer base, which is  
18 a huge loss.

19 Basically this company was in a death  
20 spiral. If there was any substantial value for the  
21 unsecured creditors beyond what it would take to pay off  
22 the secured loans in full, that probably disappeared  
23 about this time, even if it was still there at this time,  
24 so that by the time Furr's got its loan in late December  
25 of 2000, it was not enough to put Furr's or to pull

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1 Furr's out of its downward trend. It kept operating at a  
2 loss through January of 2001, but, as everybody knows,  
3 checks were bouncing at the very end.

4 And then Furr's asked its primary counsel,  
5 Skadden, Arps, Slate, Meagher & Flom, to help it file a  
6 Chapter 11 petition. That petition was filed on February  
7 the 8th. Let me talk a little bit about the bankruptcy  
8 process. The purpose of filing a Chapter 11 is to either  
9 reorganize the company and keep going or to engage in an  
10 orderly liquidation so that assets get sold for the best  
11 value.

12 Furr's did not know which it wanted to do  
13 when it got into this case initially, but when new

14 management came in, and that was, essentially, Mr.  
15 Golleher and Mr. Mays, on March 28, Furr's realized  
16 fairly shortly thereafter there was only one way to go  
17 that had a reasonable chance of success, and that was to  
18 sell, to sell as many stores as possible.

19                   Let me talk also a little bit about first  
20 day orders, which is something that occurs in big Chapter  
21 11 cases, and small ones, I suppose, too. First of all,  
22 there was an arrangement for a sudden infusion of cash,  
23 which the debtor desperately needed. That was 29 --  
24 well, the effect has been somewhere in the neighborhood  
25 of about 29- to \$30 million was advanced to Furr's.

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1                   That allowed Furr's to make good on all of  
2 these various checks that were bounced, including the  
3 employee checks and checks to the suppliers. It allowed  
4 Furr's to continue to restock. It allowed Furr's to  
5 continue making purchases to keep the shelving full and  
6 to make purchases from suppliers.

7                   This debtor had essentially already bled  
8 to death as of February the 8th. Without this infusion  
9 of cash, the only choice would have been to close the  
10 stores immediately, put everybody out of work and turn it  
11 over to a Chapter 7 Trustee who would probably let the

12 various lenders and landlords take everything because he  
13 or she would not have been interested in running the  
14 stores, which, in any event, would have required special  
15 permission and order from the Court.

16                   Essentially what has happened is the  
17 debtor since used the money it received from the lenders  
18 to keep operating and try to generate a sale and sell  
19 some assets that would yield the most value. Also, an  
20 order was entered to keep the employees being paid and  
21 keep in place their various benefits, such as health  
22 insurance.

23                   Now, I will tell you, from my experience  
24 as a lawyer and as a bankruptcy judge, that that's not  
25 very common in Chapter 11 cases in New Mexico. Indeed,

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1 as Mr. Davis is aware from the Enertech case in New  
2 Mexico years ago, there were folks showed up that  
3 morning, after having worked two weeks, expecting to get  
4 their paychecks that afternoon and were told the debtor  
5 filed Chapter 11, and there weren't going to be any  
6 paychecks for their families -- I'm sorry, excuse me --  
7 but if they wanted to keep working for the company, on  
8 the gamble that they would get paid in the future, they  
9 could do that. I don't think that's the way to treat

10 employees.

11 And fortunately, because of the experience  
12 and expertise that Skadden brought this case, that didn't  
13 happen. And because of the DIP lending facility, the  
14 money that was borrowed once the case was filed, those  
15 employees were able to retain their jobs and continue  
16 working. That was 49 hundred folks right there.

17 The debtor also sought to employ Messrs.  
18 Golleher and Mays, and those two gentleman had a lot of  
19 experience in dealing with grocery chains in trouble.  
20 They changed, basically, the philosophy of the debtor  
21 from this three-year, normal expansion business plan, to  
22 stop -- to do an emergency stopping, as best they could,  
23 at the hemorrhaging of cash that was occurring in  
24 connection with this debtor. They managed to get the  
25 losses down to about half a million dollars a week; it

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1 was a whole lot worse before that. Their strategy, it  
2 seems obvious in retrospect, maybe because it was all  
3 hindsight.

4 The debtor also sought and obtained an  
5 order to pay Mr. Dahlen \$30,000 for his continuing to be  
6 available to provide advice to the debtor and to not  
7 recruit management folk from the debtor. That was a hard

8 decision to make, but the reality is that sometimes, in  
9 order to benefit somebody, you have to move out from  
10 where you are, rather than argue about what should have  
11 been and what people did or didn't do and water under the  
12 bridge. Let me also note, incidentally, that the amount  
13 paid to Mr. Dahlen was \$30,000 -- not \$130,000 as was  
14 previously reported by some folks.

15                   And, in that respect, let me tell you  
16 that, if you want to know what's going on in this case,  
17 one of the best ways to do it is simply read the  
18 decisions of this Court and the various motions and so  
19 forth that are filed, all of which are on the web page,  
20 the Furr's web page. You don't need an account number.  
21 You don't need a special password. It's free of charge.  
22 As long as you have a computer, you can find out what's  
23 going on in this case, and you can do it even if you  
24 can't get to sleep at 2:00 in the morning.

25                   Another comment concerning Mr. Dahlen,

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1 which has been a matter of considerable and intense  
2 interest to a variety of creditors in this matter, and  
3 understandably so, the evidence is, he has -- really has  
4 nothing to do with the sale, nothing. Of course, as the  
5 sale goes through, as I assume it will, he may have

6 something to do with those assets as they are  
7 administered by Fleming, since that purports to be his  
8 expertise, but there is no evidence at all that he  
9 engaged -- that he engineered a sale of Furr's to Fleming  
10 with the idea that he would be at Fleming at the time  
11 when those assets came over. And nothing that I have  
12 heard or read at any hearing throughout this whole case  
13 even remotely supports that assertion.

14                   Maybe at some point he realized Furr's was  
15 not going to continue in business and he decided to leave  
16 and went to Fleming. Even if that is the case, there is  
17 no evidence of collusion or bad faith or any misbehavior  
18 on the part of Fleming or the debtor. And there is no  
19 evidence such that this is, above all, any reason not to  
20 do this deal. It will be hard for some people to accept  
21 Mr. Dahlen, following what happened, that he may well  
22 have come out okay overall after he left Furr's, when  
23 they are left holding the bag and he is better off than  
24 the unsecured creditors. Unfortunately, that's just  
25 reality and, in any event, it is not a reason, again, not

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1 to do this deal.

2                   Furr's realized the best thing to do is to  
3 sell, so they solicited interest -- expressions of

4 interest, and negotiated, and then they got the asset  
5 sale agreement with Fleming, and then they did the  
6 auction.

7 Now, there are different kinds of  
8 auctions, and we know there is the stereotypical one,  
9 where somebody stands in front of everyone and says,  
10 "Going once, going twice, going three times." There's  
11 also what are called silent auctions, which usually occur  
12 at charity events when people walk around, look at art,  
13 sipping white wine, that sort of thing. And then there's  
14 this sort of auction that occurred here, where the debtor  
15 wanted to be able to sit down and conduct negotiations  
16 with a variety of people in order to increase the value  
17 that was brought into the estate.

18 When you sit down and negotiate with  
19 people on a business basis, you don't do it out in  
20 public. I have to confess, I'm reminded of, years ago, a  
21 famous lawyer, Melvin Belli, who had an office in San  
22 Francisco, and he had a big picture window at street  
23 level in his office. And I remember, years ago, one day  
24 another lawyer and I were walking down the street, and we  
25 stopped in front of that picture window. Sure enough,

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1 inside was Mr. Belli, talking with some clients. And

2 that's how he did things, right in front of everybody.

3 Well, the debtor is not Melvin Belli. When  
4 you do business deals, you want to do them quietly in  
5 order to discharge anybody from getting involved in the  
6 process. You don't want a picture window. You want to  
7 be able to get the best deal possible, and that's what  
8 this auction process was all about.

9 Ultimately, a final deal that was binding  
10 on everybody was reached at this auction, and that's what  
11 the purpose of today's hearing is, for the Court to  
12 approve the deal after everybody had a chance to argue  
13 about it, which they have done.

14 And there may not be much money coming out  
15 of that particular deal for unsecured creditors -- part  
16 of that depends if the UCC is successful in carving out  
17 some of the money pursuant to its avoidance claims that I  
18 explained at the beginning of this hearing, and that Mr.  
19 Davis explained as well -- but that value was not lost  
20 during this bankruptcy procedure, by and large, but it  
21 was lost sometime before the bankruptcy, and probably  
22 significantly before this bankruptcy was filed, at least  
23 when Furr's lost 25 percent of its customer base. But  
24 the fact that there will likely not be much for unsecured  
25 creditors out of this sale is not a reason to not approve

1 it.

2 All the various secured creditors, first  
3 of all, will benefit by having this sale take place, even  
4 the ones that oppose it, and that's a reason to do the  
5 sale. A number of unsecured creditors who are lessees or  
6 lessors and who have other relationships with the debtor  
7 will benefit from this, and that's a reason to do the  
8 deal.

9 In addition to that, the general unsecured  
10 creditors may benefit, to some extent, if Mr. Davis is  
11 successful in carving out a chunk of this cash for the  
12 unsecured creditors. And, on top of that, various  
13 parties, like Desert Feather, and so forth, to the extent  
14 that they continue to have a store that is not dark and  
15 that is buying inventory available to sell, will, in  
16 fact, benefit from this.

17 On top of that, frankly, the employees  
18 will continue to benefit from this to the extent that  
19 they continue to have their jobs. It is absolutely true  
20 that Fleming has not guaranteed to continue to employ  
21 everybody or, for that matter, to honor any union  
22 contracts, but frankly, if the alternative to this,  
23 which is decidedly possible, it seems to me, is that the

24 stores, a number of them may go dark, then this  
25 eliminates jobs and they won't be there for the

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1 employees. So there is a benefit, in a real way, to the  
2 employees as well.

3 In short, in connection with this  
4 particular sale, despite Mr. Dietz not being able to  
5 enumerate the benefits, it seems to me clear that  
6 virtually everybody benefits from this sale.

7 There were a variety of objections that  
8 were raised. I'm going to address those very briefly,  
9 and I'm not going to attribute them to the particular  
10 parties that argued them because I don't think I need to  
11 do that. One is that there were no appraisals made.  
12 Well, frankly, the appraisal business is incredibly  
13 expensive and time consuming, and I believe, the  
14 testimony that was given and offered, if you are going to  
15 sell this whole business on an enterprise basis, on a  
16 going-concern basis, that you don't need all of those  
17 various appraisals because you are not selling each item,  
18 item by item.

19 With respect to Peter J. Solomon Company's  
20 fees, Peter J. Solomon and Chanin and, frankly, nobody  
21 else involved in this is intending to be an eleemosynary

22 institution; that is to say, people don't do things for  
23 free. So frankly, if folks are going to make some money  
24 out of this because they have put together a good sale,  
25 that is exactly the way that our whole system operates,

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1 and the bankruptcy code is no different. In fact, we try  
2 to incentivise to do a good job. So sure, PJSC does have  
3 a vested interest in this, and lots other folks have a  
4 vested interest in this, frankly, including, it seems to  
5 me, the creditors.

6           The liquidation analysis, I think that the  
7 basic argument that was made by Mr. Mays is,  
8 essentially, and the argument that was -- testimony --  
9 excuse me -- by Mr. Mays and by Mr. Dietz essentially was  
10 there was no specific liquidation analysis done, and  
11 that's true.

12           But it seems to me just common sense that,  
13 first of all, if you're talking about dark stores, they  
14 are going to sell for a whole lot less than stores that  
15 are full of customers, or hopefully full of customers and  
16 are at least fully stocked. That's just a matter of  
17 common sense. It also seems to me that to require  
18 that -- it also seems to me there was testimony,  
19 essentially, from Mr. Mays which constituted a

20 liquidation analysis.

21                   While I am on the subject, let me address  
22 the issue of liquidation analysis. Judge McFeeley's  
23 decision in the Allison matter, which was decided in  
24 1984, is, of course, his typically ingenious analysis and  
25 solution to a problem. It is a very nicely-done

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1 decision.

2                   I would point out it was decided in 1984  
3 when there was still a lot of argument raging about  
4 whether or not it was appropriate to sell assets outside  
5 of a plan or whether you needed to have an extreme  
6 emergency. It seems to me that with the debtor  
7 continuing to go head downward, as it is right now, there  
8 is enough of an emergency to justify this situation. In  
9 any event, that's the first thing; there are certainly  
10 compelling circumstances to allow the sale.

11                   The second thing, however, is that, with  
12 respect to the issue of having to figure out whether the  
13 debtor would be able to confirm a plan with these  
14 provisions, I am not really sure that that is a  
15 requirement anymore. And as persuasive and elegantly  
16 written as I found the Allison decision to be, I am not  
17 going to freight this debtor and this estate with the

18 requirement of essentially proving up a plan as a  
19 condition to making a sale. I just don't think that is  
20 necessary. And I think that I'm not even sure that  
21 Allison would be written the same way now in 2001 as was  
22 written in 1984. So while I respectfully admire the  
23 Allison opinion, I don't think that it's applicable in  
24 these particular circumstances.

25 With respect to the argument about the

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1 monthly lease payments, I am comfortable, based on what  
2 has been presented so far, that there is a small enough  
3 risk that the debtor and the secured creditors will work  
4 out an arrangement to make sure that this sale gets to  
5 the closing stage, and that seems to me more than enough  
6 motivation to get that done.

7 Finally, with respect to the taxing  
8 authorities, I do think that whatever happens, even if  
9 this whole thing were to crash and burn, particularly the  
10 Texas tax authorities with respect to their ad valorem  
11 tax rights, they are going to come out golden, regardless  
12 of what happens. So I am not too worried about their  
13 concerns.

14 Let me just add another thing with respect  
15 to the issue of flip sales -- I've already suggested

16 this -- I don't think that that constitutes collusion in  
17 any way. On top of that, it seems to me the evidence  
18 indicates that, even though flip sales might work both  
19 ways, that is to say that to perhaps discourage some  
20 people from coming in and bidding and perhaps to  
21 encourage a higher bidder, otherwise, I think the  
22 evidence that I have suggests that the possibility of  
23 flip sales has resulted, in fact, in Fleming being able  
24 to make a much higher bid that will benefit this estate  
25 much more.

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1 It also is important to me, frankly, to  
2 hear that the unsecured creditors' committee is in favor  
3 of this transaction. They represent -- they are the  
4 institutional representative of the unsecured creditors,  
5 and their support for this is extraordinarily important.

6 It seems to me, also, bottom line, that  
7 when we look at all of this, there is no question that  
8 the debtor and Fleming engaged in this in good faith.  
9 There is, in fact, good faith. This is a good contract,  
10 and this is a good buyer that's got good money to put up,  
11 and it seems to me that it benefits the estate as a  
12 result.

13 Let me make a final comment as well with

14 respect to what has been said -- bottom line, Chapter 11  
15 itself, the very -- the simple procedure itself doesn't  
16 generate money. If a business is failing, it must be  
17 resurrected in order to make money, but if it can't be  
18 resurrected, there may not be a payment to the creditor.  
19 This right now is the best deal for the debtor, the  
20 secured creditor, the landlords, the unsecured creditors,  
21 and employees, even though, clearly, this deal alone is  
22 not enough to, enough to pay everybody in full. And for  
23 that reason, I think it's appropriate to approve, to  
24 approve this sale.

25 So with that, I would expect that an order

19

1 be negotiated and submitted as quickly as possible. Do  
2 we need to deal with anything else before we head out of  
3 here?

4 MR. THUMA: Your Honor, I think I got the  
5 complete list of people that would like to sign off on  
6 the order, and we will circulate that. In the interest  
7 of time, you think you might have a little time early  
8 next week to have a status conference, if we are not able  
9 to reach an agreement?

10 THE COURT: Yes. The situation is, when  
11 folks have fights over discovery, and when they have

12 fights over the form of an order, you can get in real  
13 fast and we'll deal with that because I don't want  
14 anything slowing you down because people are quibbling  
15 over the specific language of an order, and I think we  
16 can pretty much clear up the issue.

17 MR. THUMA: Thank you.

18 THE COURT: Anything else?

19 (No response.)

20 THE COURT: Okay. We will be in recess.

21 (Hearing recessed at 5:17 p.m.)

22  
23  
24  
25

1 STATE OF NEW MEXICO )  
 ) ss  
2 COUNTY OF BERNALILLO )

3

4 REPORTER'S CERTIFICATE

5

6 I, Irene Delgado, New Mexico CCR 253, DO HEREBY  
7 CERTIFY that I did administer the oath to the witnesses  
8 prior to the taking of their testimony; that I did  
9 thereafter report in stenographic shorthand the questions

10 and answers set forth herein, and the foregoing is a true  
11 and correct transcript of the proceeding had.

12 I FURTHER CERTIFY that I am neither employed by  
13 nor related to any of the parties or attorneys in this  
14 case, and that I have no interest in the final  
15 disposition of this case in any court.

16

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18

19

IRENE DELGADO NMCCR 253  
License Expires: 12-31-01

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