

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

FILED
12:00 MIDNIGHT
JUN 20 2001
DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

In re:

FURRS SUPERMARKETS, INC

Debtor.

Case No. 11-01-10779 SA

**OBJECTION OF NEW MEXICO BEVERAGE COMPANY,
SOUTHERN WINE & SPIRITS AND NATIONAL DISTRIBUTING
COMPANY TO MOTION FOR ORDER APPROVING SALE
OF SOME OR ALL OF DEBTOR'S OPERATING ASSETS
AND GRANTING RELATED RELIEF**

New Mexico Beverage Company, Inc., Southern Wine & Spirits of New Mexico, Inc. and National Distributing Company, Inc., ("the Wholesalers") by and through counsel of record, Hisey & Cadigan, P.C. (Michael J. Cadigan) hereby object to the Debtor's Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief ("the Motion").

I. THE PROPOSED TERMS OF SALE VIOLATES THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Wholesalers hold valid, perfected liens on Debtor's liquor licenses pursuant to NMSA §60-6B-3, arising out of pre-petition shipments of beverages which were not paid for or not paid for in full. Pursuant to NMSA §60-6B-3, the licenses may not be transferred until the state Alcohol and Gaming Division of the Regulation and Licensing Department receives certification that all wholesalers have been paid in full.

The Motion proposes to sell Debtor's liquor license, among other things, and proposes to hold any New Mexico state agency that fails to permit the transfer of the licenses in violation of the Automatic Stay. Motion at ¶iii. The Motion also implicitly seeks an order prohibiting the state Alcohol and Gaming division from enforcing NMSA §60-6B-3, which prohibits the transfer

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of a license before wholesaler debts are paid. Such an order would violate the Eleventh Amendment to the United States Constitution. This Court lacks jurisdiction to order the Director of Alcohol and Gaming to take or not take action. Therefore, Wholesalers object to this part of the relief sought by Debtor and submits that the sale of all or some of Debtor's assets should be contingent upon payment in full, or arrangements therefor, to the Wholesalers of all amounts owed against all of Debtors' liquor licenses.

The Eleventh Amendment, provides, "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Courts have recognized that the Eleventh Amendment prohibits a Bankruptcy Court from making any order against a political arm of a state unless the state has waived its immunity. Section 106(a) of the bankruptcy Code, which purports broadly to abrogate the states' Eleventh Amendment immunity, has been held to violate the Eleventh Amendment. Sacred heart Hospital of Norristown v. Pennsylvania, 133 F.3d 237 (3d Cir. 1998); Dept. of Transportation & Development v. PNL Asset Management Co., 123 F.3d 241 (5th Cir. 1997); In re Creative Goldsmiths of Washington, D.C., 119 F.3d 1140 (4th Cir. 1998), cert. denied, 523 U.S. 1075 (1998). The Tenth Circuit has held that Section 106(b), which states that filing a proof of claim relating to the particular property operates as a waiver of Eleventh Amendment immunity is constitutional. Wyoming Department of Transportation v. Straight, 143 F.3d 1387 (10th Cir. 1998). However, there is no indication in the record that the Alcohol and Gaming Division has filed a proof of claim in this matter or otherwise waived its Eleventh Amendment immunity. See, e.g. In re Mark Innes, 184 F.3d 1275 (10th Cir. 1999).

Because the Alcohol and Gaming division has not waived its Eleventh Amendment immunity, this Court is without jurisdiction to order the transfer of the licenses without provision being made for payment of the Wholesalers in full.

II. DEBTOR'S REQUEST FOR AN ORDER THAT THE ALCOHOL AND GAMING DIVISION APPROVE TRANSFER OF THE LICENSES INFRINGES ON THE TWENTY-FIRST AMENDMENT RIGHTS OF THE STATE OF NEW MEXICO

Debtor's request that this Court order the Alcohol and Gaming Division to approve transfer of the licenses without payment to the Wholesalers also infringes on the State's plenary right to regulate the sale of alcoholic beverages guaranteed in the Twenty-First Amendment to the United States Constitution. That amendment, which repealed prohibition, made it clear that the states, not the federal government, have nearly exclusive authority to regulate the sale and distribution of alcohol. States have broad latitude under this amendment to control manner in which liquor is dispensed. Grendel's Den, Inc. v. Goodwin, 662 F.2d 88 (1st Cir. 1981), on rehearing 662 F.2d 102, probable jurisdiction noted 102 S.Ct. 996, 454 U.S. 1140, 71 L.Ed.2d 291, affirmed 103 S.Ct. 505, 459 U.S. 116, 74 L.Ed.2d 297.

Because of the Twenty-First Amendment, the authority of a state to regulate use sale and import of alcoholic beverages preempts federal Bankruptcy law where the two conflict. North Dakota v. United States, 495 U.S. 423, 110 S.Ct. 1986, 1992 (1990)(plurality)(Scalia..J. concurring); Indianapolis Brewing Co. v. Liquor Control Comm'n. 305 U.S. 391, 394, 59 S.Ct. 254, 255 (1939). The Twenty-First Amendment was enacted after the Commerce and Bankruptcy clauses to the Constitution. Therefore, one must presume that Congress and the states that ratified the amendment intended the Twenty-First Amendment to modify the Commerce and Bankruptcy clauses to the extent they are inconsistent.

In In re Heileman Brewing Company, 128 B.R. 876 (1991), the Court held that Oregon's authority to regulate alcohol sales under the Twenty-First Amendment preempted the Bankruptcy Code, 11 U.S.C. §365, as it related to assumption or rejection of executory contracts. The Oregon liquor control act provides (like New Mexico's) that an agreement between a beer manufacturer and a distributor can not be terminated absent good cause. The trustee argued that §365 of the Bankruptcy code allowed the brewery to terminate a distributor agreement despite the Oregon law. The Court disagreed. "The Twenty-First Amendment raises Oregon's direct interest in alcohol regulation within its borders to a greater plateau than the competing bankruptcy interest. OFPA [the Oregon liquor control act] satisfies an articulated public policy and is actively supervised by Oregon's liquor board. Article I [the Commerce and Bankruptcy clauses] in this matter must yield to the later enacted Twenty-First Amendment." Id. at 885.

Similarly, any power under the Bankruptcy Code to order the Alcohol and Gaming Division to transfer licenses must yield to New Mexico's authority under the Twenty-First Amendment and its own liquor code to regulate the sale and transfer of liquor licenses.

III. THE FAILURE OF THE ALCOHOL AND GAMING DIVISION TO TRANSFER THE LICENSES WILL NOT VIOLATE THE AUTOMATIC STAY.

Debtor's request that the failure of the Alcohol and Gaming Division to approve transfer of the liquor licenses be deemed a violation of the automatic stay is also inconsistent with the Bankruptcy Code. It is the policy of the Bankruptcy Code to give deference to a state's regulatory powers. 11 U.S.C. §362(b)(4) provides that it is not a violation of the automatic stay for a state to take enforcement actions against a debtor in furtherance of the state's police powers. The Alcohol and Gaming Division has been delegated the responsibility of exercising

New Mexico's police powers with respect to the sale and distribution of alcohol. The New Mexico Liquor Control Act, NMSA §60-3A-2, provides:

- A. It is the policy of the Liquor Control Act that the sale, service and public consumption of alcoholic beverages in the state shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in the state; and it is the responsibility of the director to investigate the qualifications of all applicants for licenses under that act, to investigate the conditions existing in the community in which the premises for which any license is sought are located before the license is issued, to the end that licenses shall not be issued to persons or for locations when the issuance is prohibited by law or contrary to the public health, safety or morals.

The New Mexico Liquor Control Act is exercise of police power of the state, for the welfare, health, peace, temperance and safety of its people. Baca v. Grisolano, 57 N.M. 176, 256 P.2d 792 (1953). NMSA §60-6B-3, the wholesalers' lien law, is an integral part of New Mexico's comprehensive regulatory scheme for sale, use and distribution of liquor and is a valid exercise of the state's police power. Therefore, under Section 362(f), the failure of the Alcohol and Gaming Division to transfer the license would not be a violation of the Automatic Stay.

IV. THE ALCOHOL AND GAMING DIVISION OF THE REGULATION AND LICENSING DEPARTMENT IS A NECESSARY PARTY THAT CANNOT BE JOINED

The Motion seeks an order that the Alcohol and Gaming Division transfer the licenses notwithstanding non-payment of the Wholesalers. This Court cannot order the Division to take action because it is not a party to this Bankruptcy proceeding. In re Smith, 142 B.R. 348. (Bkrcty.W.D.Mo.1992)(State was necessary party to Chapter 13 debtor's suit for order directing college of cosmetology, a creditor, to release debtor's credit hours and to certify that she had paid her contractual fees in order that she be able to sit for the license exam given by the State Board of Cosmetology; state was entitled to opportunity to fully litigate issue as to its ability to enforce payment of tuition requirement under its statute). See also: Fed.R. Bankruptcy 2019.

V. THE PROPOSED SALE SHOULD BE CONTINGENT ON CREATION OF AN ESCROW ACCOUNT TO HOLD PROCEEDS OF LIQUOR LICENSE SALES OR AN AMOUNT ATTRIBUTABLE TO THE VALUE OF THE LICENSES

If the sale is approved, and a replacement lien granted on the proceeds, the proceeds of the sale of the liquor licenses, or the proceeds of a bulk sale in an amount equal to the value of the licenses, not less than \$250,000.00 each, should be placed in escrow pending resolution of competing claims to the proceeds. If such an escrow is not created, wholesalers object to the sale.

VI. THE SALE SHOULD BE CONTINGENT UPON RECEIPT OF BIDS AT OR NEAR THE MARKET VALUE OF THE LIQUOR LICENSES

If the sale price of the licenses or all of Debtor's assets is not sufficient to satisfy the Wholesalers' liens, the Wholesalers object to the sale. See, e.g. In re Becker Industries Corp., 63 B.R. 474 (Bkrcty. S.D.N.Y. 1986); 11 U.S.C. §363(f)(3)(requiring that proceeds of sale be sufficient to satisfy liens, unless secured creditors consent).

VII. A SALE TO INSIDERS OF DEBTOR THAT DOES NOT RESULT IN MARKET VALUE REALIZATION FOR THE LICENSES SHOULD BE REJECTED

Wholesalers object to the extent the sale is to an insider of Furr's, or a company employing an insider in an executive role, e.g. Fleming Companies, and the sale price is inadequate to satisfy the Wholesalers' liens. See In re Butcher, 47 B.R. 813 (Bkrcty. D. Tenn. 1985). Wholesalers are concerned that the short time between the notice of the sale and the date of the sale, approximately 25 days, will be insufficient to give any potential buyer other than former Furr's CEO Thomas Dahlen's new employer, Fleming Companies, sufficient time to evaluate the Debtor's assets and make an educated offer. It was reported in the press on June 18 that only one other grocery retailer, Raley's had done any extensive examination of the assets.

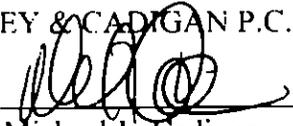
To the extent the short notice results in a sale to an insider at a depressed price, or results in any sale at a depressed price, the Wholesalers object.

Finally, Debtor seeks a determination that the sale will have been in good faith. That determination cannot possibly be made until after the sale or auction. Wholesalers reserve their objection to the good faith of the sale until after the sale is concluded.

VIII. THE SALE SHOULD HAVE A MINIMUM BID FOR THE LIQUOR LICENSES

Wholesalers object to the sale because there is no minimum bid for the liquor licenses. The licenses have a well defined market value and no bid should be accepted that is substantially below that amount. See, e.g. In re Gabel, 61 B.R. 661 (Bkrtey W.D. La. 1985).

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I hereby certify that I caused a copy
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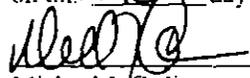
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on this 20th day of June 2001



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