

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

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

IN RE:

FURR'S SUPERMARKETS, INC.,)
a Delaware Corporation)
Tax I.D. No. 75-2364418 (Federal))
02-159595-0 (New Mexico))
Debtors,)
_____)

No. 11-01-10779-SA

**OBJECTION BY PREMIER DISTRIBUTING CO.
TO PROPOSED SALE OF SOME OR ALL OF DEBTOR'S ASSETS**

Premier Distributing Company, Inc. objects to the motion by the Debtor to sell some or all of its assets, and as grounds, states:

1. Premier claims a first lien on the liquor licenses described on Exhibit A to its previously filed Objection to the Claims of the Secured Lenders, filed April 26, 2001, or any other licenses owned by Defendant (collectively the "Licenses"), based at least in part on the following facts:

A. Premier is a wholesale provider of alcoholic beverages to Debtor. Debtor's right to lawfully resell alcoholic beverages at retail is entirely dependent upon Debtor's compliance with New Mexico laws regarding liquor sales, including the Liquor Control Act. NMSA 1978, § 60-3A-1, et seq. (1998). "The state has broad police power to regulate the liquor business and the legislature may impose on the liquor industry more stringent regulations than on other type of businesses." First Interstate Bank of Lea County

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v. Taxation and Revenue Dept., 108 N.M. 756, 779 P.2d 133 (Ct. App. 1989), citing Chronis v. State ex rel. Rodriguez, 100 N.M. 342, 670 P.2d 953 (1983).

B. Pursuant to the Liquor Control Act, Debtor must maintain licenses permitting it to engage in the retail sale of alcoholic beverages (the "Liquor Licenses"), and must comply with all regulatory and statutory requirements in connection with the maintenance of the Liquor Licenses.

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.

B. It is the intent of the Liquor Control Act that each person to whom a license is issued shall be fully liable and accountable for the use of the license, including but not limited to liability for all violations of the Liquor Control Act and for all taxes charged against the license.

NMSA 1978, § 6-3A-2 (1998).

C. The New Mexico Liquor Control Act further provides a wholesaler liquor distributor with a lien on the liquor licenses of any liquor licensee for outstanding debts of the licensee to the distributor and prohibits the transfer of such a license.

The transfer, assignment, sale or lease of any license shall not be approved until the director is satisfied that all wholesalers who are creditors of the licensee have been paid or that satisfactory arrangements have been made between the licensee and the wholesaler for the payment of such debts. Such

debts shall constitute a lien on the license, and the lien shall be deemed to have arisen on the date when the debt was originally incurred. (Emphasis added.)

NMSA 1978, § 60-6B-3 (1998).

D. The New Mexico Supreme Court, upon certification from the United States District Court for the District of New Mexico, upon request of the United States Bankruptcy Court, has held that the liens of liquor wholesalers have superpriority, even above state tax liens. In In re What D'Ya Call It, Inc., 105 N.M. 164, 730 P.2d 467 (1986) the court wrote, “[a] lien pursuant to Section 60-6B-3(E) has a superpriority status over other lienholders[.]” 105 N.M. at 165, 730 P.2d at 468.

E. The United States Bankruptcy Court for the District of New Mexico has recognized that the liens of liquor wholesalers have superpriority status over even the properly perfected liens of lenders.

F. Pursuant to NMSA 1978, § 60-6B-3 (1998), Premier has a properly perfected superpriority lien on the Liquor Licenses because it is a wholesale liquor creditor of the Debtor's. On the date of the Petition, the Debtor was indebted to Premier for approximately \$812,598.00 arising from delivery by Premier of alcoholic beverages which Debtor subsequently sold at retail without paying Premier, all of which is secured by a first and prior lien on the Debtor's owned or leased Liquor Licenses.

2. The applicable law in the District of New Mexico prohibits a sale of all or substantially all of the debtors assets absent a plan of reorganization, as debtors cannot determine how the liquidation of the assets will affect treatment of their claim, or their prospects of repayment. An essential feature of the bankruptcy process, the full disclosure

by the debtor of the value of its assets, its debts, and its proposed treatment of claims, and the subsequent negotiation between the debtor and its secured and unsecured creditors, is destroyed by allowing a sale in this context.

3. The proposed sale does not specify the amounts to be paid for each of the different

who have preserved their rights to assert a lien on the Licenses will be unable to determine that in fact all or most of the Licenses will sell for an amount greater than their liens. Moreover, marshaling of assets is an equitable remedy which might be available, but such remedy cannot be applied appropriately unless the value of the Licenses is determined fairly through

7. Delay in paying the claims of Premier serves no purpose, may subject the fund to improper administrative charges, and is not justified. The sale can occur just as easily with the fund due to Premier paid at the time of closing.

8. With respect to the claims of Premier, applicable nonbankruptcy law does not permit the sale of such property free and clear of Premier's lien. Premier has not consented to the sale. The Licenses will likely not sell for an aggregate price greater than all of the claimed liens on the Licenses. There is no bona fide dispute as to Premier's debt. Although the Licenses could be transferred subsequent to payment in full of Premier, Premier could not be compelled to accept a future (and conditional) money satisfaction of its interest in any legal or equitable proceeding which complies with and follows applicable state law. For these reasons, the requirements of 11 U.S.C. 363(f) are not met.

9. The proposed sale is so indefinite and subject to unknown variations that there is no way for the Debtor to establish or the Court to conclude that a "sound business justification" exists for the sale. Moreover, under *In re Allison*, 39 B.R. 300 (Bankr. D. N.M. 1984) the Court must determine *prior* to authorizing the sale the following facts:

- a. Whether there are facts authorizing an emergency, which the Debtor did not assert in its motion;
- b. Whether the trustee has solicited other purchasers; and
- c. Whether the sale is in the best interests of the estate when the consideration and all other relevant factors are taken into account.
- d. Whether reasonable and adequate notice was given to all interested parties;

e. Whether the proposed sale is economically reasonable, considering the value of the assets, and the terms proposed;

f. Whether the objectors to the sale could defeat a plan of reorganization which involved a similar sale.

10. The Debtor has made no effort to demonstrate or allege facts sufficient to support any findings with respect to these requirements, most specifically 9a, 9e, and 9f, and the Court cannot make such findings as the proposed sale is presently structured, in part because no determination can be made as to the value of any assets.

11. The debtor has neither alleged nor made a showing that the sale could be confirmed over the objections of Premier under 11 U.S.C. 1129.

12. Moreover, sale of all or substantially all of the debtor's assets outside of a confirmed plan of reorganization will deprive Premier and other creditors of all of the protections of 11 U.S.C. 1129, including at least the following protections:

a. The right, before being divested of its lien, to a court determination that the entire plan was proposed in good faith, and that both the plan and the plan's proponent comply with all applicable law, and that the plan does not depend on any mean forbidden by law, which would include strict compliance with all state statutes regarding transfers of liquor licenses.

b. The right to know the identity of all individuals who might be insiders to successors to the debtor, which could include purchasers of all or substantially all of the debtor's assets.

c. The right to review and approve, or have a court determine the sufficiency of, a disclosure statement.

d. The right to the protections of 11 U.S.C. 1129(a)(7), (a)(8) and (a)10.

e. The right to know what all of the administrative claims are, and to be certain that they will not be paid from assets subject to the liens of Premier.

f. The right to the protections of the absolute priority rule.

WHEREFORE, Premier requests that the Court deny the motion, or that if the motion is approved, that it only be approved subject to payment of Premier's debt in full, prior to transfer of the licenses.

SUTIN, THAYER & BROWNE
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By 

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on this 21 day of June, 2001.

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By 