

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

In re:

FURRS SUPERMARKETS, INC

Debtor.

Case No. 11-01-10779 SA

**CONDITIONAL OBJECTION OF NEW MEXICO BEVERAGE COMPANY,
SOUTHERN WINE & SPIRITS OF NEW MEXICO, INC. AND NATIONAL
DISTRIBUTING COMPANY TO DEBTOR'S INTERIM AND FINAL ORDER
AUTHORIZING DEBTOR TO INCUR POST PETITION FINANCING**

New Mexico Beverage Company, Inc., Southern Wine & Spirits of New Mexico, Inc. and National Distributing Company, Inc., by and through counsel of record, Hisey & Cadigan, P.C. (Michael J. Cadigan) hereby conditionally object to the Interim Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief entered on February 9, 2001 ("the Order") to the extent that the Order and a final order thereon would impair or restrict pre-petition "superpriority" liens on Debtor's New Mexico liquor licenses.

A. WHOLESALERS' LIENS

1. New Mexico Beverage Company, Inc., Southern Wine & Spirits of New Mexico, Inc. and National Distributing Company, Inc. (collectively "the Wholesalers") are wholesalers that sell and have sold alcoholic beverages to Debtor.
2. Debtor is the holder of a number of liquor licenses issued by the New Mexico Department of Regulation and Licensing, Alcohol and Gaming Division. These licenses entitle Debtor to sell alcoholic beverages in its stores. Each license is believed to have a market value ranging from \$100,000 to \$250,000.

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3. Pursuant to NMSA §60-6B-3, the Wholesalers have liens on each of the Debtor's licenses to secure the payment for shipments of alcoholic beverages. NMSA §60-6B-3 provides as follows: "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."
4. This statute has been interpreted by this Court to create a "superpriority lien" in favor of the wholesalers over all other liens. D & M, Inc. v. United N.M. Bank, 114 Bankr. 274 (Bankr. D.N.M. 1990).
5. Prior to the filing of the Debtor's Petition for Relief Under Chapter 11 of the Bankruptcy Code, the Wholesalers sold to the Debtor alcoholic beverages on various terms including payment upon invoice.
6. After the Petition was filed, Wholesalers began selling Debtor alcoholic beverages on a cash on delivery basis, with payment by electronic transfer.
7. Pursuant to New Mexico law, the Wholesalers have a superpriority lien on Debtor's liquor licenses to secure unpaid amounts relating to pre-petition shipments. These liens cannot be impaired by security interests granted as part of post-petition Debtor in Possession financing. See D & M, Inc. v. United N.M. Bank.

B. THE ORDER

8. On February 9, 2001, this Court entered the Order, and established deadlines for objecting to it and to a final order on post-petition financing. The Order, at page 9, provides for the imposition of a first lien on all real and personal property of the Debtor. The Order provides that "Prior Claims" will not be impaired, but excludes from the definition of "Prior Claims" pre-petition liens on various items, including "general intangibles." Thus, it appears that the Order purports to create a first lien in favor of the post-petition lenders on "general intangibles" that are secured by valid pre-petition liens.
9. It is not clear from the text of the Order whether valid pre-existing liens, arising under NMSA §60-6B-3 are affected by the Order. It is not clear whether a retail liquor license might be a "general intangible". The language is ambiguous on this point.
10. To the extent the Order affects the priority, validity or amount of the Wholesalers' liens on the Debtor's retail liquor licenses, created by NMSA §60-6B-3, Wholesalers object to the Order and to a Final Order thereon.
11. 11 U.S.C. §364(d)(1) permits the court to grant a lien with priority equal to valid pre-petition security interests only upon 1) proof that the trustee is unable to obtain financing otherwise; and 2) that the senior lien holder is given adequate protection. These preconditions have not been met in this matter, and therefore, the Wholesalers' liquor license liens cannot be impaired.

C. WHOLESALERS' OBJECTION

12. The Wholesalers are entitled to full payment with interest of its secured pre-petition invoices or adequate protection before a senior lien may be placed upon collateral securing the Wholesalers' pre-petition extensions of credit.
13. The Wholesalers has not and does not consent to the imposition of liens equal to or senior to the Wholesalers' liens in favor of the post-petition lenders upon the Debtors liquor licenses.

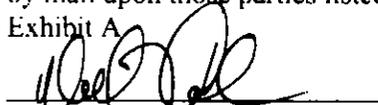
Wherefore, to the extent the Order may be read to permit imposition of senior liens on the Debtor's liquor licenses, which might impair the rights of the Wholesalers, Wholesalers object to the Order and to a Final Order thereon. In the event placement of a senior lien is not the intent of the Debtor, the post-petition lenders or the Order, Wholesalers request that the Order be amended and that the Final Order include language explicitly exempting Wholesalers' liens from the imposition of post-petition first priority liens senior to or equal to those of the Wholesalers.

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I hereby certify that I caused a copy
of the foregoing papers to be served
by mail upon those parties listed on
Exhibit A.



Michael J. Cadigan

**United States Bankruptcy Court
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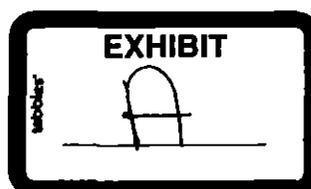
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