

In re:

FURR'S SUPERMARKETS, INC.,  
A Delaware Corporation,

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

Case No. 11-01-10779 SA  
Chapter 11

Debtor.

**MEMORANDUM IN SUPPORT OF  
THE DIVISION'S SPECIAL APPEARANCE AND OBJECTION TO DEBTOR'S  
MOTION FOR ORDER DETERMINING THAT THE DIRECTOR OF THE NEW  
MEXICO ALCOHOL AND GAMING DIVISION MAY NOT CONDITION  
APPROVAL OF THE TRANSFER OF DEBTOR'S LIQUOR LICENSES UPON  
PAYMENT IN FULL TO LIQUOR WHOLESALERS**

The New Mexico Alcohol and Gaming Division (the Division), by and through the Attorney General and Assistant Attorney General Daniel Rubin, hereby files the following memorandum in support of its special appearance and objection, and states as follows:

**I. The proposed transfer violates the Eleventh Amendment.**

The Eleventh Amendment to the United States Constitution allows neither the United States Bankruptcy Court nor the United States District Court for the District of New Mexico to exercise jurisdiction over a suit or claim against a state. 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.

The Amendment reflects the principle that federal courts cannot constitutionally exercise jurisdiction over suits against non-consenting states. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122 (1996). "The ultimate guarantee of the

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Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court.” Bd. of Trustees of the University of Alabama v. Patricia Garrett, 121 S. Ct. 955, 962 (2000) (citing Kimel v. Florida Board of Regents, 528 U. S. 62, 73, 120 S.Ct. 631 (2000)).

The only exception to this rule is that “Congress may abrogate the States’ Eleventh Amendment immunity when it both unequivocally intends to do so and “act pursuant to a valid grant of constitutional authority.”” Garrett at 962 (quoting Kimel, 528 U.S. at 73, 120 S.Ct. 631). The U. S. Supreme Court has recently reaffirmed that Congress may not, “of course,” base its abrogation of the States’ Eleventh Amendment immunity upon the powers enumerated in Article I of the Constitution. Garrett at 962 (citing Kimel, 528 U. S. at 79; Seminole Tribe, 517 U.S. at 72, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board., 527 U.S. 666, 672, 119 S.Ct. 2219 (1999); Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 636 (1999); Alden v. Maine, 527 U.S. 706, 730-33 (1999). Congress may validly abrogate the States’ Eleventh Amendment immunity, if at all, only pursuant to a valid exercise of its Section 5 powers under the Fourteenth Amendment.

“In order to determine whether Congress has abrogated the States’ sovereign immunity, we ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress has acted pursuant to a valid exercise of power.” Seminole Tribe, 517 U.S. 44, 55, 116 S. Ct. 1114 (1996) (citation, alteration, and internal quotation marks omitted); College Savings Bank, 527 U.S. at 673, 119 S.Ct. at 2223. With respect to the Bankruptcy Code, the answer to the first question clearly is yes. See 11 U.S.C. § 106. Just as clearly, however, the answer to

the second question with respect to the Code is no. The majority of courts that have considered whether Congress acted pursuant to a valid exercise of power in abrogating state sovereign immunity in passage of the Bankruptcy Code have found that the Code was enacted pursuant to Congress' powers under Article I of the Constitution, not the Fourteenth Amendment, and that, as a result, Section 106 does not validly abrogate states' Eleventh Amendment immunity. See, e.g., In re Sacred Heart Hospital of Norristown, 133 F.3d 237, 244 (3<sup>rd</sup> Cir. 1998) (no evidence that Bankruptcy Code was enacted pursuant to Fourteenth Amendment, so Congress had no authority to abrogate states' sovereign immunity under Code); Department of Transportation and Development v. PNL Asset Management Company (In the Matter of the Estate of Fernandez), 123 F.3d 241, 245 (5<sup>th</sup> Cir. 1997) (same); Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C.), 119 F.3d 1140, 1146 - 47 (4<sup>th</sup> Cir. 1997) (Congress relied on its powers under Article I of the United States Constitution to enact Section 106, as it has since 1800, 68 years before Fourteenth Amendment enacted); Scarborough, v. State of Michigan Collection Division (In re Scarborough), 229 B.R. 145, 149 - 50 (Bankr. W.D. Mich. 1999 ("majority of federal courts . . . have concluded that Congress' attempt to abrogate the state's [sic] sovereign immunity in the Bankruptcy Code is invalid").

The Director of the Division is a duly appointed officer of the State of New Mexico, acting by and through the New Mexico Regulation and Licensing Department of the State of New Mexico. NMSA 1978, Section 60-3A-7. The Division is an agency of the State of New Mexico, and as such is immune from suit in federal court pursuant to both the United States Constitution and the Eleventh Amendment to the Constitution of the United States of America.

In the absence of a valid Congressional abrogation of the Eleventh Amendment immunity from suit, the Director is subject to the jurisdiction of this Court only if the Director has consented to this Court's jurisdiction. The Director has not done so. The Director's objection specifically provides that nothing in the objection was to be deemed a consent to jurisdiction by the State of New Mexico nor was there any waiver of sovereign immunity by the State of New Mexico. The Director has expressly not consented to be sued by plaintiff, either in a New Mexico statute, in the New Mexico Constitution, or by any other means.

Debtor asserts that the State has already waived its Eleventh Amendment immunity in this case (*Debtor's Memo in Support, at 18-20*). Generally, the Eleventh Amendment cannot be waived by the attorney general of the state entering an appearance and litigating in the case "absent some extraordinarily effective waiver." Ford Motor Co. In Richins v. Industrial Construction, Inc., 502 F.2d 1051, 1056 (10th Cir. 1974).

The Debtor relies upon the filing of a proof of claim by the New Mexico Taxation and Revenue Department. This mere ministerial act, unaccompanied by some explicit waiver of Eleventh Amendment Immunity, does not amount to an "extraordinarily effective waiver" as required by law.

In sum, the Eleventh Amendment provides the Division with immunity from the relief contemplated by Debtor's motion. The motion should be denied.

**II. The proposed transfer violates the Twenty-First Amendment because the Division is not satisfied that satisfactory arrangements have been made between the Debtor and the Wholesalers**

Section 2 of the Twenty-First Amendment of the United States Constitution provides:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

As observed in *In re J.F.D. Enterprises*, 183 B.R. 342,352 (D. Mass 1995), this Amendment “grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”

NMSA 1978, Section 60-6B-3 provides as follows:

“The transfer...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.”

This Section charges the Division Director with the discretion to determine, in any particular case, whether “satisfactory arrangements have been made.”

Here, the Debtor’s motion, if granted, would allow the purchaser, Fleming Companies, Inc., as a transferee of a liquor license, to import liquor into the state for retail purposes. It thus implicates the rights enjoyed by the State of New Mexico under the Twenty-First Amendment.

The Debtor’s motion, if granted, would allow the Debtor, as a debtor in possession, to transfer its license to the purchasers without the wholesalers’ liens being paid. Nor does Debtor propose to pay. Rather, as stated in footnote 5 to Debtor’s Memorandum in Support, Debtor proposes to condition any transfer to the Purchaser of these licenses upon placing in escrow a sufficient portion of the sale proceeds to satisfy payment of the Wholesalers’ liens, pending the outcome of Adversary No. 01-01073S.

In the opinion of the Division, this escrow agreement does not constitute “satisfactory arrangements” between the wholesalers and the Debtor. Instead, it suffers

the Wholesalers to the vagaries of the pending adversarial proceeding, and allows for the possibility that the licenses will be transferred to other creditors deemed to hold priority, without payment of the liens. As indicated by the parties at the scheduling conference before this Court on July 20, 2001, the adversarial proceeding has yet to determine either the amount of the claims on each license, or a fair appraisal for each license. Until such valuations and appraisals are completed, and creditors' priorities adjudicated, the Director is not in a position to assess whether the proposed sale would constitute "satisfactory arrangements."

In sum, the relief requested by Debtor contemplates the import of liquor by the transferees in violation of Section 60-6B-3, which contemplates that a transferee could not commence selling (and necessarily, importing) liquor without all wholesalers' liens being paid or otherwise satisfied. As such, it would contravene the rights enjoyed by the State of New Mexico under the Twenty-First Amendment.

Debtor cites *In re J.F.D. Enterprises* for the proposition that the Twenty-First Amendment does not bar the relief sought in Debtor's motion (*Memorandum in Support at 21-23*). However, the Division respectfully asserts that *In re J.F.D. Enterprises* is unpersuasive.

The issue in *In re J.F.D. Enterprises* was whether a debtor's liquor license could be transferred without requiring that the buyer's name be substituted for the debtor's on a delinquency list maintained by the Massachusetts Alcohol Beverage Control Commission. Such a state law is roughly comparable to Section 60-6B-3, which requires any wholesaler's liens to be either paid or otherwise satisfactorily resolved prior to the transfer of any liquor license.

The court in *In re J.F.D. Enterprises* relied in part upon the U.S. Supreme Court's reasoning in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110, 100 S.Ct. 937, 946 (1980), where it reasoned that the Twenty-First Amendment has not "somehow operated to repeal the Commerce Clause." 183 B.R. at 352. Yet no federal law promulgated under the Commerce Clause was implicated in that case, or in this case. Nor can it be reasonably said that requiring wholesalers' liens to be paid as a condition precedent to a sale in a bankruptcy proceeding would constitute an unreasonable burden on interstate commerce. Thus, the Division respectfully asserts that the *In re J.F.D. Enterprises* decision's reliance on the Commerce Clause is misplaced.

The *In re J.F.D. Enterprises* decision also cursorily relies upon the Bankruptcy Clause at U.S. Const. Art. I, §8, cl. 4, similarly noting that the Twenty-First Amendment "has not repealed the Bankruptcy Clause." 183 B.R. at 354. Yet "repeal" is not the proper analysis; one Constitutional provision should be read as a specific exception to a general rule, if possible. Indeed, that decision contemplates such an analysis, reasoning that only a regulation of the "time, place and manner" of the sale of liquor would be upheld as falling within the scope of the Twenty-First Amendment. Presumably, such regulation would be interpreted as a specific exception to the Bankruptcy clause.

The *In re J.F.D. Enterprises* decision states that its delinquency list "is about credit, not about import" of alcohol. *Id.* As it applies in that case, and in this case, such reasoning ignores the plain language of the Amendment. Again, the Debtor's motion, if granted, would allow the purchaser, Fleming Companies, Inc., as a transferee of a liquor license, to import liquor into the state for retail purposes. Such import would violate

Section 60-6B-3, which contemplates that a transferee could not commence selling (and necessarily, importing) liquor without the wholesalers' liens being resolved.

For the forgoing reasons, Debtor's motion seeks relief that would contravene the rights enjoyed by the State of New Mexico under the Twenty-First Amendment. The Court should deny the motion.

**III. The proposed transfer violates 28 U.S.C. 959(b) because the Division is not satisfied that satisfactory arrangements have been made between Debtor and the Wholesalers**

Section 959(b) of Title 11 provides, in relevant part:

"[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

Pursuant to this section "it is not the province of the bankruptcy court to undertake the role of local agencies; bankruptcy court is only empowered to preserve assets of a bankrupt estate and cannot authorize noncompliance with local law." *Matter of Briarcliff*, 15 B.R. 864, 867 (D.C.N.J. 1981) (citing *In re Dolly Madison Industries*, 504 F.2d 499, 504 (3<sup>rd</sup> Cir. 1974)). This statute prohibits the use of bankruptcy to circumvent applicable state consumer protection laws. *In re White Crane Trading Co., Inc.*, 170 B.R. 694, 705 (E.D. Cal. 1994).

Similarly, a debtor in possession must manage and operate his business in accordance with state law. *Matter of Investors Development Co.*, 7, B.R. 772, 775 (D.N.J. 1980). The term "manage and operate" applies to activities where the business is

held for the purpose of continuing operations. *Matter of Borne Chemical Co., Inc.*, 54 B.R. 126, 135 (D.N.J. 1984) (distinguishing actions relating to a cessation of operations).

As discussed in **II**, above, because the proposed sale would transfer the licenses without satisfactory arrangements for the payment of the wholesalers' liens, such sale would violate Section 60-6B-3. The purchaser presumably intends to receive the license for the purpose of continuing operations. As such, such transfer would require the Debtor to manage and operate the license in violation of the requirements of the valid laws of the State of New Mexico, and should not be approved. 28 U.S.C. §959(b).

The clear intent of Section 60-6B-3 should not be subverted, nor a different result reached, because the transfer of a liquor license occurs within the context of a bankruptcy proceeding. The clear intent of the Liquor Control Act generally is one of consumer protection: "[i]t is the policy of the Liquor Control Act...to protect the public health, safety and morals of every community in the state." NMSA 1978, Section 60-3A-2. Debtor seeks to subvert this public purpose by moving for an order approving the sale "notwithstanding §60-6B-3 or any other provision of the Liquor Control Act of the State of New Mexico." (*Motion, at 1*).

The Debtor's motion should therefore be denied.

#### **IV. Conclusion.**

WHEREFORE, for the forgoing reasons, the Division respectfully asks that the Court deny Debtor's motion, and grant such other and further relief as the Court deems just.

Respectfully submitted,

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Attorney General of New Mexico

A handwritten signature in black ink, appearing to read "Daniel Rubin", written over a horizontal line.

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