

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

JUL 10 PM 3:10

UNITED STATES BANKRUPTCY COURT  
ALBUQUERQUE, NM

In re:

FURR'S SUPERMARKETS, INC.,  
a Delaware corporation,

Case No. 11-01-10779 SA  
Chapter 11

Debtor.

**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**

Furr's Supermarkets, Inc. ("Debtor"), by counsel, moves the Court for an order determining that, notwithstanding §60-6B-3, NMSA 1978, or any other provision of the Liquor Control Act of the State of New Mexico, the Director (the "Director") of the New Mexico Alcohol and Gaming Division (the "Division") of the Regulation and Licensing Department of the State of New Mexico (the "Department") may not condition his approval of the transfer of the Liquor Licenses (defined below) to Purchaser (defined below) or its designees, upon payment in full to the Liquor Wholesalers (also defined below). The Debtor further requests that the order direct the Director not to so condition approval of the transfer of the Liquor Licenses.

In support of and as grounds for this Motion, Debtor states

1. On June 1, 2001, Debtor filed a motion (the "Sale Motion") seeking approval of the sale substantially all of its assets to Fleming Companies, Inc. ("Purchaser"). On July 3, 2001, the Court entered an Order (i) Approving Asset Purchase Agreement with Fleming Companies, Inc., (ii) Authorizing the Sale of All or Substantially All of the Debtor's Operating Assets and the Transactions Contemplated by Asset Purchase Agreement, and (iii) Granting Related Relief (the "Sale Order"). The Sale Order approved the sale of certain

737

assets of the estate to Purchaser, pursuant to the terms of an Asset Purchase Agreement, dated June 25, 2001, between the Debtor and Purchaser (the "APA").

2. Debtor owns licenses that permit Debtor to engage in the retail sale of alcoholic beverages in New Mexico (the "Liquor Licenses"). Pursuant to the APA, Debtor is obligated to transfer to Purchaser or its designees the Liquor Licenses associated with stores to be transferred to Purchaser or its designees.

3. Desert Eagle Distributing Company, The New Mexico Beverage Company, Southern Wine & Spirits, National Distributing Company, Premier Distributing Co. and Joe G. Maloof & Co. (collectively, along with any other liquor wholesalers, the "Liquor Wholesalers") filed objections to the Sale Motion. Paragraph 10 of the Sale Motion reserves certain grounds for those objections for determination following the entry of the Sale Order. This Motion seeks a determination of those grounds for the objections.

4. Section 60-6B-3, NMSA 1978 of the Liquor Control Act of the State of New Mexico, provides:

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.

5. The Liquor Wholesalers claim a first priority lien against the Liquor Licenses. That matter is at issue in Adversary No. 01-01073S, pending before this Court. Under the Sale Order, any lien the Liquor Wholesalers may have against the Liquor Licenses will attach to the proceeds of sale to the same extent, and in the same order of priority, that such liens (if any) attach to the Liquor Licenses that are transferred.

6. The Liquor Wholesalers also claim that under the Liquor Control Act of the State of New Mexico, including §60-6B-3, NMSA 1978, regardless of whether the Liquor Wholesalers have liens against the Liquor Licenses, and regardless of the priority of any such liens, the Debtor may not transfer the Liquor Licenses to Purchaser or its designees, without payment in full to the Liquor Wholesalers.

7. The Debtor asks the Court (i) to determine that, notwithstanding §60-6B-3, NMSA 1978, or any other provision of the Liquor Control Act of the State of New Mexico, the Director may not condition his approval of the transfer of the Liquor Licenses to Purchaser or its designees upon payment in full to the Liquor Wholesalers; and (ii) to issue an order directing the Director not to so condition approval of the transfer of the Liquor Licenses.

8. In support of the relief sought by this Motion, Debtor states, and asks the Court to determine:

(a) The Bankruptcy Code pre-empts §60-6B-3, NMSA 1978, or any other provision of the Liquor Control Act of the State of New Mexico, insofar as such statute precludes or restricts the Director from approving the transfer of the Liquor Licenses to Purchaser or its designees without payment in full to the Liquor Wholesalers.

(b) If the Director were to condition his approval of the transfer of the Liquor Licenses to Purchaser or its designees upon payment in full to the Liquor Wholesalers, the Director (and the Department and Division) would violate Bankruptcy Code §362(a). The Debtor is not asking the Court to determine in this contested matter whether the Director would be subject to damages individually for a willful violation of the automatic stay, if the Director were to condition his approval of the transfer of the Liquor

Licenses to Purchaser or its designees upon payment in full to the Liquor Wholesalers, but reserves the right to assert such a claim for damages in a separate proceeding.

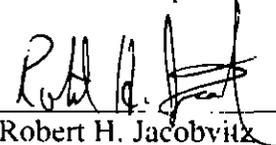
(c) If the Director were to condition his approval of the transfer of the Liquor Licenses to Purchaser or its designees upon payment in full to the Liquor Wholesalers, the Director (and the Department and Division) would violate Bankruptcy Code §525.<sup>1</sup>

WHEREFORE, the Debtor asks the Court to grant the relief set forth above, and such other relief as is appropriate.

SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
Richard Levin  
Stephen J. Lubben  
300 South Grand Avenue, Suite 3400  
Los Angeles, California 90071-3144  
(213) 687-5000

and

JACOBVITZ, THUMA & WALKER,  
a Professional Corporation

By:   
Robert H. Jacobvitz  
David T. Thuma  
500 Marquette N.W., Suite 650  
Albuquerque, N.M. 87102  
(505) 766-9272  
(505) 722-9287 (fax)

Attorneys for the Debtor and Debtor in Possession

---

<sup>1</sup> One or more of the Liquor Wholesalers asserted in their respective objections to the Sale Motion that the relief sought by this Motion is barred by the Eleventh Amendment to the United States constitution and/or the Twenty-First Amendment to the United States constitution, or that the Court does not have jurisdiction over the Director or the New Mexico Alcohol and Gaming Division. Debtor asserts that these and all other objections to the relief sought by this Motion are without merit, and should be overruled.

This will certify that a copy  
of the foregoing Motion was mailed to:

Mr. Ronald E. Andazola  
Assistant United States Trustee  
P.O. Box 608  
Albuquerque, New Mexico 87103

I. William Cohen  
Pepper Hamilton, L.L.P.  
100 Renaissance Center, 36<sup>th</sup> Floor  
Detroit, Michigan 48243-1157

William F. Davis  
Davis & Pierce, P.C.  
P.O. Box 6  
Albuquerque, New Mexico 87103-0003

David S. Heller  
Latham & Watkins  
233 South Wacker Drive  
Scars Tower, Suite 5800  
Chicago, Illinois 60606-6401

Paul M. Fish  
Modrall Sperling Roehl Harris & Sisk, P.A.  
500 4<sup>th</sup> St., N.W., #1000  
Albuquerque, New Mexico 87103-2168

Ronald J. Silverman  
Bingham Dana LLP  
399 Park Avenue  
New York, New York 10022-4689

J. D. Behles & Associates, P.C.  
Jennie Deden Behles  
P.O. Box 849  
Albuquerque, New Mexico 87103

Robert Feuille  
Scott, Hulse, Marshall, Feuille,  
Finger & Thurmond, P.C.  
201 East Main, 11<sup>th</sup> Floor Chase Tower  
El Paso, Texas 79901

Mike Cadigan  
Hisey & Cadigan  
6400 Uptown blvd. NE, Suite 570-W  
Albuquerque, New Mexico 87110

Gail Gottlieb  
Sutin, Thayer & Browne P.C.  
P.O. Box 1945  
Albuquerque, New Mexico 87103

Donald Harris  
New Mexico Taxation & Revenue Department  
P.O. Box 8485  
Albuquerque, New Mexico 87198-8485

Carlos Miranda  
Krafsur Gordon Mott. P.C.  
P.O. Box 1322  
El Paso, Texas 79947-1322

Duncan Scott  
Scott & Kienzle  
P.O. Box 587  
Albuquerque, New Mexico 87103-0587

David G. Aelvoet  
Linebarger Heard Goggan Blair  
Graham Pena & Sampson. LLP

---

711 Navarro, Suite 300  
San Antonio, Texas 78205

Jeffrey Fine  
Strasburger & Price, L.L.P  
901 Main Street  
Dallas, Texas 75202

Kim Middlebrooks  
Marchiondo, Vigil & Associates, P.C.  
315 Fifth Street  
Albuquerque, New Mexico 87102

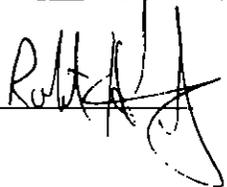
Bryan Brock  
Director, New Mexico Alcohol and Gaming Division  
Regulation and Licensing Department  
725 St. Michaels Drive  
Santa Fe, New Mexico 87505

New Mexico Alcohol and Gaming Division  
Regulation and Licensing Department  
State of New Mexico  
c/o Patricia A. Madrid  
New Mexico Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87505

Regulation and Licensing Department  
State of New Mexico  
725 St. Michaels Drive  
Santa Fe, New Mexico 87505

Hugh Dangler  
Regulation Licensing Department  
New Mexico Alcohol and Gaming Division  
725 St. Michaels Drive  
Santa Fe, New Mexico 87505

this 10<sup>th</sup> day of July, 2001.

  
\_\_\_\_\_