UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

IN RE:	)	
	)	
FURR'S SUPERMARKETS, INC.	)	Case No. 11-01-10779-SA
a Delaware Corporation,	)	
	)	
Debtor.	)	
	)	

DESERT EAGLE'S OBJECTION TO
DEBTOR'S
AMENDED MOTION FOR (i) APPROVAL OF WIND-DOWN BUDGET, (ii) APPROVAL OF CASH COLLATERAL STIPULATION, (iii) AUTHORITY TO APPLY FUNDS AND OPERATE IN ACCORDANCE WITH THE WIND-DOWN BUDGET WITHOUT FURTHER COURT ORDER, (iv) APPROVAL OF EMPLOYEE RETENTION PLAN, (v) AN ORDER DIRECTING DISBURSEMENT OF FLEMING SALE PROCEEDS AND OTHER DEBTOR PROPERTY, (vi) APPROVING THE SETTLEMENT OF ALL ESTATE CLAIMS AGAINST THE SECURED LENDERS, AND (vii) ALLOWING CLAIMS OF SECURED LENDERS

TO THE HONORABLE JAMES C. STARZYNSKI, CHIEF UNITED STATES BANKRUPTCY JUDGE:

DESERT EAGLE DISTRIBUTING COMPANY OF NEW MEXICO, L.L.C. ("Desert Eagle"), as a secured creditor in this case, objects to the Debtor's "Amended Motion for (i) Approval of Wind-Down Budget, (ii) Approval of Cash Collateral Stipulation, (iii) Authority to Apply Funds and Operate in Accordance With the Wind-Down Budget Without Further Court Order, (iv) Approval of Employee Retention Plan, (v) An Order Directing Disbursement of Fleming Sale Proceeds and Other Debtor Property, (vi) Approving the Settlement of All Estate Claims Against the Secured Lenders, and (vii) Allowing Claims of Secured Lenders" ("the Motion"), filed in this case on or about August 10, 2001. As grounds, Desert Eagle show would the Court as follows:

1. The disclosures in the Motion are inadequate and hence the notice provided to creditors and interested parties by the Motion is inadequate and insufficient to constitute due and adequate notice of the relief sought by the Debtor.

a. Paragraphs 2 through 4 of the Motion refer generally to "professionals" whose fees will be paid from the proposed wind-down budget. However, the professionals who will be paid are not identified either by name or by client, nor is any information provided from which to assess the reasonableness or necessity of the fees to be paid. Nor is there an express condition of submission and approval of the applications by professionals. Nor is there any basis upon which to assess the reasonableness of the amount budgeted to professional fees in the wind-down budget.

b. The wind-down budget contains an allocation for post-petition trade credit, without disclosure or identification of the trade creditor which the Debtor anticipates paying from the wind-down budget the amounts to be paid, or the reason the trade credit included in the wind-down budget is not being paid or has not been paid from proceeds of post-petition DIP financing. See ¶ 4 of the Motion

c. There is no disclosure of the estimated value of the "unencumbered estate funds" or "funds encumbered only by the Replacement Lien" referenced in paragraph 6(b) of the Motion.

d. There is no disclosure of the cash collateral stipulations which the Debtor would consider to fall within meaning of the phrase "other customary provisions of cash collateral stipulations, consistent with the particular facts and circumstances of this case", used by the Debtor in paragraph 6(f) of the Motion. The Debtor seeks approval of undisclosed cash collateral stipulations and provisions, which may or may not affect or impair the rights of other creditors or parties in interest.

e. The Debtor represents that the Initial Sales Proceeds less the DIP loan balance, less lease cures, less equipment lease cures "would equal at least" $67.3 million. There is no disclosure of the DIP loan balance, the real-property-lease-cure cost, or the equipment-lease-cure cost for which the Debtor seeks approval. See ¶ 6(h) of the Motion.

f. In relation to Section 3 of the Motion, there is no disclosure of which employees fall within the budget for employee salaries, there is no disclosure of the amounts to be paid to each employee or position, and there is no basis

upon which to determine whether the proposed salaries or payments are reasonable.

g. In relation to Section 4 of the Motion, there is no disclosure of the basis for the amount which the Debtor proposes to hold in each category of reserves from the Fleming sales proceeds. In particular, there is no disclosure of the amounts included in the proposed $4,174,000.00 reserve for the liquor wholesalers or the basis of such inclusion. There is no disclosure of whether the reserves include interest or attorney's fees to which the liquor wholesalers would be entitled as oversecured creditors. There is no basis upon which to assess the adequacy of the proposed reserves.

h. There is no disclosure of the amount of Fleming sale proceeds to be paid to Secured Lenders. There is no disclosure of the amount of proceeds from the sale of other assets that will be paid to Secured Lenders. There is no disclosure of the amounts the Debtor proposes to make available to the Unsecured Creditors Committee. See ¶ 18 of the Motion.

i. There is no disclosure of the balance due to the DIP Lenders on the DIP loan. See ¶ 18(a) of the Motion.

j. There is no disclosure of the balances due to Heller, Bank of America, and/or Fleet Capital (or other Secured Lenders) on pre-petition bank financing. See ¶ 18(b) of the Motion.

k. There is no disclosure of the circumstances under which the total amount due to Solomon, Golleher, and/or Mays may not be known at closing or of the maximum amount which may be owing to them. See ¶ 18(b) of the Motion.

l. In relation to the releases referenced at paragraph 20 of the Motion, there is no disclosure of the potential value of the release to the Secured Lenders, nor is there any assessment of whether any claims are believed to exist in any of the categories being released or of the viability of any claims being released. There is no disclosure of any facts relating to any released claims.

m. There is no disclosure of the estimated value of assets which will not be sold to Fleming.

n. There is no liquidation analysis.

p. There is no disclosure or inadequate of the consequences of approval of the motion to the various classes of secured, administrative, unsecured creditors.

2. The Motion effectively seeks to establish an expedited default claim allowance and distribution solely applicable for the Secured Lenders with inadequate notice and inadequate opportunity to respond, and which is in derogation of the rights and claims of parties with competing and/or prior secured claims against collateral claimed by the Secured Lenders. See ¶¶ 18 and 22 of the Motion. The Motion proposes automatic approval of the Secured Lenders' claims upon a claims procedure designed to apply solely to the Secured Lenders which is at variance with the claim submission and approval procedures set out in Chapter 5 of the Bankruptcy Code, without any justification for such preferential treatment.

3. The Debtor seeks to elevate the Secured Lenders' liens and security interests over those of Desert Eagle and others without due process of law and in a manner and procedure which is not authorized by the Bankruptcy Code; adversary proceedings are the proper context in which to determine and adjudicate the extent, validity, and priority of liens among competing creditors. Desert Eagle and other liquor wholesalers, and the Secured Lenders, all claim first-priority liens upon the Debtor's liquor licenses. Approval of the Motion would apparently result in subordination of Desert Eagle's liens and lien priority, as well as those of all but a select few liquor wholesalers, to the liens of the Secured Lenders. Nor does the Motion explain how its treatment of the Secured Lenders will impact the reserves and claims to the reserves. In this respect, it even appears that the results will be to subvert and undermine the rights and the rights of Desert Eagle and other liquor wholesalers without due process of law and contrary to the equal protection rights of other creditors, solely for the benefit of the Secured Lenders at the expense of Desert Eagle and other liquor wholesalers, and other creditors. (The DIP Lenders have been raising waiver arguments in an attempt to elevate their liens over those of some of the liquor wholesalers, including Desert Eagle.

The waiver argument depends on the terms of the DIP financing order in this case. To the extent that the DIP financing order purports to subordinate Desert Eagle's super-priority liquor-license liens, the DIP financing order does so in violation of the express provisions of §364(d). *In re T.M. Sweeney & Sons LTL Services, Inc.*, 131 B.R. 984 (Bkrtcy. N.D. Ill. 1991). An order granting a priming lien under §364(d) must include adequate protection for the lienholder whose lien is being "primed". *Id.* If it does not, the order will not effectively grant a priming lien even if the "primed" lienholder failed to object. *Id.*)

4. The provisions of paragraph 22 of the Motion would result in elevation of the Secured Lenders liens over those super-priority liens of Desert Eagle and other liquor wholesalers who delivered merchandise to the Debtor on credit, which the Debtor used in the operation of its business to the benefit of the Debtor and the Secured Lenders. Desert Eagle has moved to intervene in a pending adversary proceeding (Adversary Proceeding No. 01-1073-SA, styled *Premier Distributing Company v. Furr's Supermarkets, Inc., et al.*), in which the Plaintiff, who is also a liquor wholesaler, seeks a determination and adjudication of the extent, validity, and priority of its liquor license liens upon the Debtor's liquor licenses *vis-a-vis* those claimed by the Secured Lenders. Three other liquor wholesalers sought and were granted leave to intervene in the said adversary proceeding for the purpose of adjudicating the validity, extent, and priority of their liquor license liens *vis-a-vis* those claimed by the Secured Lenders. Desert Eagle has moved to intervene in that same adversary proceeding for the purpose of adjudicating the validity, extent and priority of its liquor license liens *vis-a-vis* those claimed by the Secured Lenders. Similarly, Joe G. Maloof & Company has also moved to intervene. At least some of the Secured Lenders have objected to the motions to intervene filed by Desert Eagle and Joe G. Maloof. The intervention motions are set for hearing on August

27, 2001. Even if the Court denies the motions for leave to intervene, Desert Eagle and Joe G. Maloof still have the right under the Federal Rules of Bankruptcy Procedure to initiate and prosecute an independent adversary proceeding for the purpose of adjudicating the validity, extent and priority of their liquor license liens *vis-a-vis* those claimed by the Secured Lenders. Nonetheless, the Debtor seeks an adjudication of priority in favor of the Secured Lenders notwithstanding the pending adversary proceeding and intervention motions, in what appears to be an attempt to "sandbag" Desert Eagle and Joe G. Maloof into an unknowing or unintentional waiver of their lien and lien priority. Desert Eagle and other liquor wholesalers are entitled to have such matters adjudicated in the context of an adversary proceeding with attendant procedural safeguards and processes, including the opportunity for a complete investigation and full discovery of relevant facts, fair and adequate opportunity to brief the issues, and a full and fair opportunity to present its evidence and arguments to the Court. Nevertheless, the Debtor attempts to deprive Desert Eagle and other liquor wholesalers of the procedural safeguards and rights established and protected by the Federal Rules of Bankruptcy Procedure. The validity, extent, and priority of the Secured Lenders' liens should remain open to challenge in the manner provided by the Federal Rules of Bankruptcy Procedure.

5. Desert Eagle has valid reclamation claims for product delivered to and held by the Debtor on the petition date. The Debtor sought "first-day" orders which would bar reclamation claimants from taking possession of their product and grant to reclamation claimants administrative claims in lieu of their reclamation rights. Such claims are first-priority claims under 11 U.S.C. §§ 546(c), 503(b), and 507(a). Now, after obtaining "first-day" orders relegating reclamation claims to administrative claims, the Debtor seeks to distribute estate monies without paying valid reclamation claims. The Debtor makes no allocation or allowance whatsoever for payment of valid

reclamation claims. Thus, it appears that the Debtor now seeks to alter § 507 priorities among administrative claimants to the detriment of reclamation claimants, such as Desert Eagle, in favor other administrative claimants who occupy no higher priority position than the reclamation claimants and some of whom may occupy lesser priority positions, in derogation of the rights and protections afforded the reclamation claimants by the due process clause and the equal protection clause of the United States Constitution, and the statutory priorities and procedures set forth in 11 U.S.C. §§ 503 and 507.

6. The Debtor's proposal amounts to a *sub rosa* plan which circumvents all of the requirements for proposing and confirming a plan of reorganization in a Chapter 11 proceeding. While the Debtor sought approval of its sale motion based upon the exigent circumstances which the Debtor then-believed existed, current circumstances do not present the same exigencies, nor do the current exigencies (if any) justify provisions which prefer the Secured Lenders at the expense of competing lienholders, prefer some administrative claims over others, insulate the Secured Lenders lien claims from valid challenges, and foreclose normal claim and priority adjudications, procedures, and challenges. Furthermore, as the court noted in ruling on the Debtor's sale motion, the prospective beneficiaries of the sale included both the Debtor's rank-and-file employees and the creditors who had the prospect of continuing to do business with the buyer (because the proposed sale provided the only then-foreseeable prospect of allowing some or most of the Debtor's stores to remain open and operating). Here, however, approval of the Debtor's motion would benefit, either primarily or exclusively, the Secured Lenders, the Debtor's executive-and-management-level employees, and the professionals. The Debtor proposal is an attempt to obtain approval of a liquidating plan without adequate disclosure of meaningful information to the creditors and

interested parties, without adequate notice, without sufficient opportunity to object, and without an opportunity to vote or otherwise participate in the process in a meaningful way.

7. In addition, approval of the Debtor's motion apparently would release the Secured Lenders from any marshalling claims and marshalling obligations that may be imposed upon them to the benefit of competing secured creditors. The Debtor should not be allowed to insulate the Secured Lenders from marshalling arguments by means of a wind-down motion. Rather, competing creditors should be afforded the opportunities granted to them under existing bankruptcy procedures to assert marshalling claims in the context of an adversary proceeding and the Secured Lenders should be obligated to defend in such a context, if marshalling issues are raised by competing creditors.

8. The Debtor seeks an order which prefers the claims of some liquor wholesalers over the claims of others, thus altering the bankruptcy distribution scheme and violating the rights of liquor wholesalers whose claims are of the same priority as those preferred by the Debtor which are afforded to such other liquor wholesalers under the Bankruptcy Code and the due process and equal protection clauses of the United States Constitution. See ¶ 22 of the Motion.

9. The Debtor seeks *carte blanche* approval of undisclosed cash collateral stipulations in violation of the due process rights of creditors and interested parties.

10. The Debtor seeks approval of a settlement with the Secured Lenders in the context of a multifarious motion which is confusing and provides inadequate and insufficient disclosure of the terms and potential value of the settlement to the estate and the other creditors.

11. The claim notices submitted by Heller, Met Life, Certain PIK Noteholders, and First Boston Private Equity are inadequate, and the time for reviewing and responding to same is

inadequate. The supporting documents for the claims did not become available in Albuquerque until August 22, 2001, and are available only at significant expense. This creditor objects to such claims and requests a fair opportunity to review such claims and to object as this creditor may deem appropriate and on such grounds as may be presented upon review.

12. To the extent the allowance of the claims of the Secured Lenders is deemed to affect the rights of Desert Eagle in connection with its claims, including its lien claims, and/or those claims asserted or advanced in Adversary Proceeding No. 01-1073-SA or the contested matter relating to transfer of the liquor licenses, Desert Eagle objects to the claims of the Secured Lenders.

13. The amount escrowed for the claims of liquor wholesales in insufficient to pay all of the claims of liquor wholesales, plus all attorney fees and accrued interest in full. Because liquor wholesalers are oversecured, they are entitled to interest and attorney fees pursuant to 11 U.S.C. 506.

14. The full value of the liquor licenses (estimated to be approximately 9.5 million dollars) should be escrowed pending a resolution of the claims of the wholesalers claims.

15. The Motion will yield no benefit to the estate or the unsecured creditors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Objection will be served on the Debtor's counsel and on the persons identified in the attached mailing list by e-mail (Adobe format) or by facsimile and by first-class mail on the 23rd day of August, 2001.

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