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

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

DESERT EAGLE'S OBJECTION
TO
METROPOLITAN LIFE INSURANCE COMPANY'S REPLY TO RESPONSES TO DEBTOR'S MEMORANDUM IN SUPPORT OF DEBTOR'S MOTION FOR ORDER DETERMINING THE DIRECTOR OF 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

Desert Eagle Distributing Company of New Mexico, L.L.C. objects to the Reply brief submitted by MetLife in connection with the contested matter involving the transfer of the Debtor's liquor licenses. The Court specifically limited reply briefs to matters responsive to the issues raised in the response briefs filed by the Liquor Wholesalers. MetLife's reply goes beyond those issues in the following respects:

1. MetLife contends that Desert Eagle and Malouf have waived their claims. MetLife relies on the DIP Financing Orders in this case to argue waiver. The Debtor made no such contention in its opening brief. The response briefs of the Liquor Wholesalers make no mention of such matters. The waiver arguments contained in pages 2-3 and 5-8 (§ II) of MetLife's reply fall far outside the boundaries of reply permitted by the Court. MetLife is attempting to unfairly "sand-bag" Desert Eagle and Malouf by making its argument at a point in the briefing schedule when Desert

Eagle no longer had an opportunity to respond. **Pages 2 and 3, and § II of MetLife's reply should be stricken from the record.** In the alternative, Desert Eagle should be allowed to respond.

2. MetLife makes further waiver arguments at § IV of its reply which were not raised in the responses. MetLife argues that the constitutional issues raised by the Liquor Wholesalers have been waived by the filing of an adversary proceeding. In reality, there is no conflict and no waiver. The relief requested by Premier and the other liquor wholesalers in the adversary proceeding is independent of the relief sought by the Debtor in the contested matter. In the adversary proceeding, the Liquor Wholesalers seek a determination of the validity, extent, and priority of their statutory liens. In the contested matter, the Liquor Wholesalers argue that the Court may not interfere with the Director's enforcement of provisions of the New Mexico Liquor Control Act which impose conditions precedent upon the transfer of liquor licenses.

3. In § III of its reply, MetLife again confuses two separate and distinct issues. The Liquor Wholesalers lien rights are separate and independent of the conditions precedent to the transfer of liquor licenses.

4. In relation to MetLife's waiver arguments, Desert Eagle would respectfully ask the Court to consider its "Brief in Support of Desert Eagle Distributing's Motion for Leave to File Complaint-in-Intervention", a copy which is attached hereto and incorporated herein by reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served on Debtor's counsel and MetLife's counsel, by facsimile on the 26th day of August, 2001 and in person on August 27, 2001.

_____
ROBERT R. FEUILLE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

IN RE:	)	
	)	
FURR'S SUPERMARKETS, INC.	)	Case No. 11-01-10779-SA
a Delaware Corporation,	)	
	)	
Debtor.	)	
	)	
	)	
PREMIER DISTRIBUTING	)	
COMPANY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 01-1073-SA
	)	
FURR'S SUPERMARKETS, INC.	)	
HELLER FINANCIAL, INC.,	)	
BANK OF AMERICA, N.A.,	)	
FLEET CAPITAL CORPORATION,	)	
and METROPOLITAN LIFE	)	
INSURANCE COMPANY	)	
	)	
Defendants.	)	

DESERT EAGLE'S
BRIEF IN SUPPORT OF
DESERT EAGLE DISTRIBUTING'S MOTION FOR LEAVE TO FILE COMPLAINT-IN-INTERVENTION

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

Desert Eagle Distributing Company of New Mexico, L.L.C. ("Desert Eagle"), as movant, submits this brief in reply to the allegations of waiver asserted by Met Life and Heller in opposing Desert Eagle's motion for leave to intervene. Desert Eagle has not waived its right to intervene, nor has Desert Eagle waived its lien rights or priorities, nor has Desert Eagle waived its right to seek a

determination of its lien rights and priorities *vis-a-vis* the DIP Lender/ Defendants[1], for the following reasons:

1. Desert Eagle could commence its own adversary proceeding. If Premier Distributing (the originating plaintiff) had never instigated this adversary proceeding, Desert Eagle would still have a right under the Federal Rules of Bankruptcy Procedure to initiate and prosecute its own adversary proceeding for determination of the validity, extent, and priority of its liens *vis-a-vis* Heller, MetLife, and the other defendants. Desert Eagle has the right to instigate its own adversary proceeding independent of this proceeding in any event. The purpose of intervening in this proceeding is simply to place common issues of fact and law before the Court in a single proceeding, in the interests of judicial economy and for the convenience of the Court and the parties.

2. Waiver Arguments go to the Merits. If Desert Eagle were to instigate its own adversary proceeding, the waiver issue raised by Heller and MetLife would be raised as a defensive issue against Desert Eagle's claims of priority and would be addressed on the merits, most likely in the context of a motion for summary judgment. The same should hold true in this context. The waiver issue raised by Heller and MetLife should be addressed on the merits, *after* the Court decides

plaintiffs-in-intervention and that Desert Eagle and Malouf reply to Heller's and MetLife's waiver claims in the context of Heller's motion for summary judgment.

3. Heller and MetLife own Waiver bars their Waiver Argument in Relation to the Motion for Leave to Intervene. Heller and MetLife have waived the waiver issue, at least in relation to Desert Eagle's motion for leave to intervene. After Heller and MetLife filed their objections to Desert Eagle's motion for leave, Heller, for itself, "as agent for" Bank of America and Fleet Capital, and "on behalf of" MetLife, served Interrogatories on Desert Eagle (and on Malouf, also) in this adversary proceeding, and later served Amended Interrogatories on them. By burdening Desert Eagle (and Malouf) with obligations to respond to their written discovery in this proceeding, the DIP Lenders have waived their objections to Desert Eagle's request for leave to intervene.

4. No Waiver Based on the DIP Financing Orders. Heller and MetLife rely on two particular paragraphs of the Interim DIP Financing Order and the Final DIP Financing Order, Paragraphs 19 and 20, as the basis for their waiver argument. [See MetLife's reply brief in the contested matter regarding transfer of liquor licenses, pp. 2-3, 5-8.] Under the facts of this case, Paragraphs 19 and 20 could not cause or result in a waiver by Desert Eagle, for the following reasons:

a. Heller and MetLife approved/agreed to the Orders. The DIP Financing Orders were drafted, approved, and/or agreed to by the DIP Lenders, and the DIP Lenders must, therefore, live with any shortcomings in the drafting.

b. Paragraph 19 contains waivers by the Debtor, not Creditors. Paragraph 19 sets forth certain waivers by the "Debtor, on behalf of itself and its estate". The Debtor had no authority

to waive any of Desert Eagle's rights or interests, and the Debtor did not purport to do so in the Orders. Paragraph 19 does not support the DIP Lenders' waiver argument.

c. Paragraph 20: The Orders are neither Final nor Binding. Paragraph 20 describes the circumstances under which the Orders would become final and binding upon "the Debtor and all creditors and other parties in interest". Paragraph 20 specifically provides,

> All of the provisions of this Order shall be final and binding on Debtor and all creditors and other parties in interest and their successors and assigns upon entry of this Order except as provided in this paragraph. All creditors and any Committee shall have until forty-five days after the date that the U.S. Trustee appoints a Committee within which to file and to serve upon counsel for Lenders objections or complaint (each a "Claim Objection") respecting the provisions of Paragraph 19 above or any other provisions herein that are predicated upon the validity, extent, priority, avoidability or enforceability of the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt, Senior Lenders' pre-petition liens on and security interest in the Pre-Petition Senior Collateral and Met Life's Pre-Petition ML Collateral. *If **no** Claim Objection is filed with this Court and served upon counsel of record for Lenders and Debtors, within the time period set forth above, all provisions of this Order shall become final and binding on all parties in interest.*

[Interim DIP Financing Order, ¶ 20, emphasis added.] The provisions of the Final DIP Financing Order are substantially the same, except that the time period expressed for Claim Objections is April 30, 2001 for "all creditors" and May 23, 2001 for "the Committee". However, the final sentence of paragraph 20 of the Final DIP Financing Order contains substantially the same wording:

> "If ***no*** Claim Objection is filed with the Court and served upon counsel of record for Lenders and Debtor within the time period set forth above, all provisions of this Order shall become final and binding on all parties in interest."

[Final DIP Financing Order, ¶ 20, emphasis added.]

Not one, but several, Claim Objections were filed within the prescribed time, including those of Premier Distributing (Docket 138, 401), General Electric and G.E. Lighting

(Docket 81), New Mexico Beverage Company, Southern Wine and Spirits of New Mexico and National Distributing Company (Docket 154, 404), the United States Trustee's Office (Docket 155), Star Line Printing Company (Docket 192), G.E. Capital Business Asset Funding Corporation (Docket 200), various taxing authorities (Docket 139, 140, 165), and the Unsecured Creditors Committee (Docket 146, 503). Some were later withdrawn. Some were not. Those of the liquor wholesalers, the U.S. Trustee and the UCC are still outstanding. Under the express terms of all the DIP Financing Orders, none of the Orders has become either "final" or "binding" on anyone.

The DIP Financing Orders all specifically provide that they will become final and binding *if* "no" Claim Objection is filed with this Court within a certain time. The Orders themselves establish a condition precedent which must be fulfilled in order for the Orders to become "final and binding", i.e., *if* "no Claim Objections are filed", *then* the Orders become "final and binding". Since at least one Claim Objection was timely filed with the Court, the condition precedent upon which the Orders depended to become "final and binding" was never satisfied, and the Orders have not become final and binding. *Matter of Grand Valley Sport & Marine, Inc.*, 143 B.R. 840, 854 (Bankr. W.D. Mich. 1992)[addressing virtually the same wording]:

> "The GECC Notice Order unequivocally states that '[i]f no objection is timely filed and served . . . [the GECC Notice Order] will be considered a final order . . . .' . . . *Conversely, if a timely objection is filed and upheld, the GECC Notice Order cannot become a final order. This language is unmistakable.* Even an average laymen untrained in the law could understand this."

Id. at p. 854, n. 23 (emphasis added). Since the Order is not yet final or binding, it remains subject to objection and contest. *Id.* (Please note once again, the DIP Lenders drafted or agreed to the Orders.)

Desert Eagle did submit a joinder to the Claim Objections filed by Premier and the other liquor wholesalers, and did so on May 18, 2001, about five days before the Unsecured Creditors Committee filed its objection. Thus, Desert Eagle's Joinder was filed before either Order became "final" or "binding", and before the last deadline for Claim Objections. Heller and Met Life are attempting to "bind" Desert Eagle to the terms of Orders Heller and MetLife proposed which, by the plain terms of the Orders, have not yet become "final" or "binding". Having drafted and/or approved the Orders, Heller and Met Life must live with their terms.

Furthermore, the Orders manifestly do not impose a penalty or waiver upon a non-objecting creditor. The Orders could have been drafted to specify that creditors would, as a consequence of failing to object, be deemed to have waived certain rights or be foreclosed from asserting such rights. The Orders do not contain such language. The drafters could have also have provided that all provisions of the Orders would become final and binding upon any non-objecting creditors or parties in interest. The Orders do not so specify. Having failed to notify the creditors that a waiver would occur by failing to object, the DIP Lenders cannot now contend that Desert Eagle has waived its rights.[2] (Please note once again, the Orders did not have to create an ambiguity in regard to their effect on non-objecting parties.)

d. Desert Eagle's Lien Priority Claims do not fall within either Category of Objection described in Paragraph 20. Paragraph 20 of the DIP Financing Orders establishes two (2) categories of objection to be made within the specified time. Under the terms of the Orders, no other

[2]As MetLife has so ably asserted, waivers arise where a party is clearly acting in a manner inconsistent with prior conduct. [MetLife's Reply brief in contested matter, p. 7.] If the Orders had given fair notice of waiver, then perhaps Heller and MetLife could validly argue that a waiver occurred. The Orders do not do so, and Desert Eagle's assertion of lien priority is not "clearly inconsistent" with its failure to object to the Orders for that reason . . . and for the reasons set forth in detail below.

objections are required to be lodged within the Paragraph 20 time limits. The first category is objection subject to the time limits is "objections or complaints . . . respecting the provisions of Paragraph 19 above." As indicated above, Paragraph 19 sets forth the Debtor's waivers. The Debtor could not and did not purport to waive Desert Eagle's rights and/or interests. Paragraph 19 is irrelevant to the assertion of lien priority by Desert Eagle in this proceeding.

The second category of objection is found is described in the Orders as follows:

> "[O]bjections or complaints . . . respecting . . . any other provisions ***herein*** that are ***predicated upon*** the validity, extent, priority, avoidability or enforceability ***of*** the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt, Senior Lenders' pre-petition liens on and security interest in the Pre-Petition Senior Collateral and Met Life's Pre-Petition ML Collateral." (Emphasis added.)

First, in the context of Paragraph 20, the descriptive word, "herein", creates an ambiguous reference. It directs the reader to provisions found "herein". Does "herein" refer to provisions of the Paragraph in which the reader is then engaged, Paragraph 20? Or, does it refer to provisions found in the Order generally?[3]

Assuming for the sake of argument that "herein" directs the reader to the terms of the Order generally, the second category of objection described in Paragraph 20 is limited to "objections or complaints . . . respecting . . . any other provisions . . . that are ***predicated upon*** the

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[3]Construing "herein" to refer only to Paragraph 20 would comport with the language which precedes the descriptive, i.e., "objections or complaints . . . respecting the provisions of Paragraph 19 above or any other provisions herein . . .." Given the preceding descriptive which takes the reader outside Paragraph 20 to the provisions of Paragraph 19, it is reasonable to read the descriptive at issue ("herein") as returning the reader to the provisions of paragraph in which reader is then engaged, Paragraph 20. The alternative is that "herein" turns the reader not to the provisions of Paragraph 20 but to the provisions of the Order. The alternative is a plausible reading of Paragraph 20. However, the drafters had no trouble in the preceding sentence referring to "this Order". Why wouldn't the drafters simply use the phrase "this Order" if that is what they meant by "herein"?

validity, extent, priority, avoidability or enforceability *of* the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt, Senior Lenders' pre-petition liens on and security interest in the Pre-Petition Senior Collateral and Met Life's Pre-Petition ML Collateral." Simply put, Desert Eagle asserts and maintains its lien priority regardless of the validity, extent, priority, avoidability or enforceability any other pre-petition debt and pre-petition liens. *In re D & M, Inc.*, 114 B.R. 274, 276 (Bankr. D.N.M. 1990). Desert Eagle is not complaining about provisions of the DIP Financing Orders which are "predicated upon" the validity, extent, priority, avoidability or enforceability of the Lenders' pre-petition debt and pre-petition liens. The liens granted to the DIP Lenders are post-petition liens, found at Paragraph 6 of the Orders, which do not depend for their effect upon the validity, extent, priority, avoidability or enforceability of the Lenders pre-petition debt and pre-petition liens. Instead, the post-petition liens depend for their effect upon the provisions of the Bankruptcy Code upon which they are predicated. The second category of objection described Paragraph 20 is irrelevant.

Desert Eagle's assertions and complaints do not fall within either category of objection described in Paragraph 20 of the Orders.

e. The Orders do not Grant Priming Liens. Paragraph 6 of the Orders grants post-petition liens to the DIP Lenders. The grant of lien to the DIP Lenders in Paragraph 6 is expressly predicated upon 11 U.S.C. §§ 364(c)(2) and 364(c)(3). [See DIP Financing Orders, ¶ 6(a): "The DIP Indebtedness . . . shall be secured by, and Lenders are hereby granted, pursuant to Section 364(c)(2) and 364(c)(3) of the Bankruptcy Code, ..."] The terms of §§ 364(c)(2) and 364(c)(3) are set out in the Debtor's motion requesting authority for post-petition financing, at page 12:

> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court,

> after notice and a hearing, may authorize the obtaining of credit or the incurring of debt —
>
> (1) . . .;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c). Section 364(c)(2) does not apply to the Debtor's liquor licenses at issue in this adversary proceeding, because the liquor licenses were subject to the statutory liens of the liquor wholesalers (including Desert Eagle) on the petition date. Section 364(c)(3) would only authorize the Court to grant to the DIP Lenders a junior lien on the Debtor's liquor licenses, for the same reason, i.e., on the petition date the liquor licenses were subject to the statutory, first-priorty liens of the liquor wholesalers (including Desert Eagle). Thus, the Orders do not grant liens to the DIP Lenders which prime the liquor wholesalers liens. (If the Orders did grant priming liens, then they do so only ambiguously, since the authority upon which the Orders rely — § 364(c)(2) and (c)(3) — does not authorize a grant of priming liens on the Debtor's liquor licenses. Any ambiguity should be resolved against those who participated in the drafting and/or approval of the Orders.)

f. The Orders cannot Grant Priming Liens in the Liquor Licenses. Assuming for the sake of argument, that Paragraph 6(a) of the Orders does purport to grant to the DIP Lenders priming liens in the Debtor's liquor licenses, the grant is outside the authority of the Court under § 364, and does not require objection from Desert Eagle. A lien created under the authority of § 364(c) and (d)(1) of the Code, which does not grant adequate protection to the creditor whose lien is being primed does not effectively grant a priming lien. *In re T.M. Sweeney & Sons LTL Services, Inc.*, 131 B.R. 984 (Bankr. N.D. Ill. 1991). This is true whether or not the creditor-being-primed objected. *Id.*

"As the above-excerpted provisions of § 364 indicate, where a trustee or debtor in possession cannot otherwise obtain unsecured post-petition credit, such credit may be obtained under certain carefully proscribed conditions. Where there is a preexisting lien on property which the trustee or Debtor in possession seeks to encumber in order to obtain post-petition credit, such encumbrance must remain 'junior' to the preexisting lien. 11 U.S.C. § 364(c)(3). Similarly, if the Debtor in possession seeks to 'prime' an existing lien, such preexisting lienholder must have adequate protection. 11 U.S.C. § 364(d)(1)(B).

". . . '[B]efore a senior lien can be granted, the Debtor must demonstrate that there is adequate protection for the secured party whose lien is being primed.' *In re Au Natural Restaurant, Inc.*, 63 B.R. 575, 581 (Bankr. S.D.N.Y. 1986).

"Nowhere in the KSI Order is there any finding or demonstration of adequate protection of JMB's interest, and no evidence of such protection was offered when that order was requested by agreement and entered. Under § 364(d)(2), the Debtor in possession has the burden of demonstrating such adequate protection. It didn't. As a result, KSI is not entitled to a lien senior to the JMB Lien on any of the Assets under § 364(c)(3).

* * *

"[illegible] JMB could reasonably have assumed from the notice

and order that if KSI were to be granted a lien under § 364(d)(1) it [KSI] would have to demonstrate that prior lienholders were adequately protected, but if it could not make such a showing, KSI would be granted a lien under § 364(c). . . .."

Id. at 989-90, 991. Here, to the extent that the Orders purport to grant priming liens in the Debtor's liquor licenses, Desert Eagle was entitled to adequate protection. *Id.* It was the Debtor's burden to have demonstrated that Desert Eagle's lien interests would be adequately protected. *Id.* The Orders make no finding of adequate protection. In fact, the Orders do not even purport to grant priming liens under the authority of § 364(d)(1). Absent a showing of adequate protection by the Debtor, the Orders did not grant to the DIP Lenders priming liens in the Debtor's liquor licenses, whether or not

Desert Eagle objected. *Id.* Consequently, Desert Eagle cannot fairly be said to have waived the lien priority which it asserts in this adversary proceeding.

g. With Adequate Protection, Desert Eagle may yet have priority. In the event that this Court finds that Desert Eagle was adequately protected, then Desert Eagle is still entitled to and maintains a right to a superpriority administrative claim to the extent that the adequate protection proves inadequate. 11 U.S.C. § 507(b); *In re Willingham Investments, Inc.*, 203 B.R. 75, 80 (Bankr. M.D. Tenn. 1996). Such a lien would prime any administrative expenses for professional fees, for which priority is elevated above that of the DIP Lenders in Paragraph 3 of the DIP Financing Orders. Thus, under the Orders and § 507(b), Desert Eagle's priority over the DIP Lenders is preserved to the extent that any adequate protection granted to Desert Eagle proves inadequate.

h. The Orders Explicitly Preserve Desert Eagle's Priority. The DIP Financing Order simply do not grant to the DIP Lenders liens which prime Desert Eagle's liquor license liens. To the contrary, Desert Eagle's liquor license liens are expressly *excepted* from any priority granted to the DIP Lenders in the Order. [See DIP Financing Orders ¶ 6(a).] The DIP Financing Orders provide,

> "(a) Security Interests. The DIP Indebtedness . . . shall be secured by , and Lenders are hereby granted, pursuant to Section 364(c)(2) and 364(c)(3) of the Bankruptcy Code, a first lien, ***subject only to Prior Claims (as defined below),*** . . .. As used herein, the term ***"Prior Claims"*** shall mean ***any*** non-avoidable, valid, enforceable and perfected liens on and security interests in the assets of Debtor, as pre-petition debtor[,] which existed on the Petition Date, but only to the extent such liens and security interest are superior in priority, after giving effect to any existing subordination or intercreditor arrangements, to Pre-Petition Senior Lenders' and MetLife's respective pre-petition liens on and security interests in the

> assets of Debtor, as pre-petition debtor, [subject to certain non-applicable exceptions]."

[DIP Financing Orders ¶ 6(a) (emphasis added).] Desert Eagle contends that its claims are indeed "Prior Claims" as defined in the Orders — i.e., liens which are "non-avoidable, valid, enforceable and perfected liens on . . . the assets of Debtor, as pre-petition debtor[,] which existed on the Petition Date. . . . [and which are] are superior in priority". Such liens, as "Prior Claims", are expressly excepted from the priority accorded the DIP Lenders' liens under the Orders. Heller and MetLife here seek to prevent Desert Eagle from demonstrating that its claims constitute "Prior Claims", the priority of which is undisturbed by the DIP Financing Orders. If indeed Desert Eagle's liens fall within the definition of "Prior Claims" under the Orders, then Desert Eagle would have no reason to object to the Orders and cannot be fairly said to have waived its claims in this adversary proceeding or its right to be heard.

5. Even if Primed, Desert Eagle Would Only Fall Behind the DIP Financing, not behind the Lenders' pre-petition debts or liens. If the DIP Financing Orders do grant priming liens to the DIP Lenders, the priming liens secure only the DIP Indebtedness, i.e., the $33 million DIP line of credit. According to the Debtor's wind-down motion, at least $67 million will remain after paying the DIP line of credit. Under Paragraph 6 of the Orders, the Lenders' pre-petition debts and pre-petition liens are not advanced in lien priority. As can be seen from Paragraph 6(a), the Lenders' pre-petition liens are excepted from the definition of "Prior Claims" and are nowhere else advanced in priority (except to the extent of post-petition diminution in the collateral base due to post-petition operations). Under such circumstances, if the DIP Lenders' post-petition liens do prime Desert Eagle's liens, then Desert Eagle's liens would fall immediately behind the DIP Lenders' post-petition liens and the DIP Indebtedness, and would remain ahead of the Lenders' pre-petitions liens and pre-

petition debt. Desert Eagle would, therefore, be first in line to participate in the $67 million remaining after payment of the DIP line of credit. Consequently, Desert Eagle should still have an opportunity (in this adversary proceeding or another) to demonstrate that its liens are valid and duly-perfected liens which are prior to the Lenders' pre-petition liens and pre-petition debt, and failure to object to the DIP Financing Orders would be irrelevant to that determination.

6. Cross-collateralization orders are ineffective. Heller and MetLife might argue that the DIP Financing Orders not only provide priming liens but also provide cross-collateralization. First, the Orders, plainly do not purport do so (except possibly to the extent of post-petition diminution in the Lenders' collateral base). Second, DIP financing orders cannot validly provide cross-collateralization and are ineffective to the extent that they do so. *In the Matter of Saybrook Manufacturing Company, Inc.*, 963 F.2d 1490 (11th Cir. 1992); *In re Willingham Investments, Inc.*, 203 B.R. 75 (Bankr. M.D. Tenn 1996). Cross-collaterization is not authorized under § 364 and is beyond the inherent equitable powers of the bankruptcy courts because it is directly contrary to the fundamental priority scheme of the Bankruptcy Code. *In the Matter of Saybrook Manufacturing Company, Inc.*, 963 F.2d at 1494-95.

Similarly, if Heller and MetLife argue that the Orders provide a sort of "cross-prioritization" which elevates the priority of their pre-petition liens over those of Desert Eagle, such a result would also run afoul of *Saybrook Manufacturing*. 3 COLLIER ON BANKRUPTCY ¶ 364.04[2][c], at 364-14, 364-15 (15th ed.).

Also, to the degree that the Orders attempt to elevate the priority of the DIP Lenders' pre-petition liens in the event of post-petition diminution of their collateral base, the Orders do not give the DIP Lenders' lien priority over Desert Eagle; Desert Eagle's collateral would not form part

of the Lenders' collateral base. Therefore, the Orders do not grant the DIP Lenders' priority over Desert Eagle in any event.

7. Conclusion. Heller and MetLife are attempting to use DIP Financing Orders as a determination of the validity, extent, and priority of liens. The proper procedural vehicle for such a determination is an adversary proceeding. The Orders plainly do not determine the validity, extent or priority of Desert Eagle's liens *vis-a-vis* Heller, MetLife or the other defendants. In fact, the Orders preserve the priority of any pre-petition liens — such as Desert Eagle's — which were prior to the Lenders' pre-petition liens on the petition date. And the Orders maintain the priority of such pre-petition liens over the DIP Lenders' post-petition liens (as they must, having not provided the adequate protection required for priming liens). Heller and MetLife cannot rely on the terms of the Orders to bar Desert Eagle from a judicial determination of the validity, extent, and priority of its liens.

Respectfully submitted,

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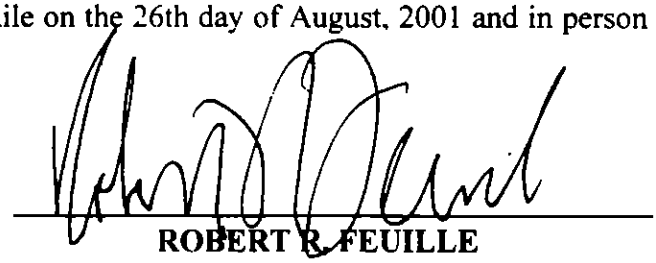
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served on the Debtor's counsel and on counsel for Heller, MetLife, and Malouf, by facsimile on the 26th day of August, 2001 and in person on August 27, 2001.



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