

IN RE:)
)
FURR'S SUPERMARKETS, INC.)
a Delaware Corporation,)
)
Debtor.)
)

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

Case No. 11-01-10779-SA

**DESERT EAGLE DISTRIBUTING COMPANY'S REPLY TO
HELLER FINANCIAL'S
OBJECTION TO DESERT EAGLE JOINDER**

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

Desert Eagle Distributing Company of New Mexico, LLC ("Desert Eagle"), a creditor of Furr's Supermarkets, Inc., Debtor-in-Possession, files this response to the "Objection to Desert Eagle Joinder" filed by Heller Financial, Inc. ("Heller") on or about May 23, 2001.

1. Desert Eagle is the owner and holder of valid, duly-perfected, first-priority, statutory, super-priority liens on some of the Debtor's liquor licenses, which liens were automatically perfected pre-petition by virtue of NMSA 1978 §60-6(b)-3 (1998) [see also *In Re: What D'Ya Call It, Inc.*, 105 N.M. 164, 730 P.2d 467 (1986)].

2. On or about May 18, 2001, Desert Eagle filed its "Joinder in the Objection of Premier Distributing, and the Objection of New Mexico Beverage Company, Inc. Southern Wine & Spirits of New Mexico, Inc., and National Distributing Company, Inc. to March 14, 2001 Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection, and (3) Granting Other Relief" ("Desert Eagle's joinder") in this case.

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3. By its joinder, Desert Eagle is merely asking to be placed on equal footing with other similarly-situated lienholders, such as Premier Distributing Company, New Mexico Beverage Company, Southern Wine & Spirits on New Mexico, and National Distributing Company, all of whom have objected to the extent that the Order would impair their super-priority liquor-license liens. Desert Eagle's liens fall into the same class as those of such other wholesalers. The liquor-license liens held by Desert Eagle and the others are all statutory, super-priority liens. Desert Eagle simply seeks to be granted equal treatment with such other similarly-situated secured creditors. Equality of distribution among similarly-situated creditors is one of the central policies of bankruptcy law. *Begier v. IRS*, 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990); *In re Antweil*, 97 B.R. 65, 66-67 (Bkrcty. D.N.M. 1989)

4. Heller contends that Desert Eagle's joinder is untimely because, in Heller's opinion, Judge Black's "Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief" ("the Order") established a April 30, 2001 deadline for objection by Desert Eagle. Desert Eagle respectfully submits that Heller Financial is mistaken and that Desert Eagle's joinder is timely, for the following reasons:

(a) *The Order does not require Desert Eagle to object by April 30.*

The April 30, 2001 date to which Heller refers is found in Paragraph 20 of the Order. Paragraph 20 designates only two categories of objections that must be filed and served by April 30, 2001:

- (1) Objections or complaints "respecting the provisions of paragraph 19 above, or"
- (2) Objection 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, Pre-Petition Senior Lenders' pre-petition liens on and security interests in the Pre-Petition Senior Collateral and MetLife's pre-petition liens on and security interests in the Pre-Petition ML Collateral.

Desert Eagle's joinder does not fall into either category:

(i) Desert Eagle's joinder does not complain of Paragraph 19. Paragraph 19 of the Order provides that the Debtor waives "any and all defenses . . . as to the validity, perfection, priority, enforceability and non-avoidability . . . of the Pre-Petition Senior Indebtedness and the security interests in and liens on the Pre-Petition Senior Collateral in favor of Pre-Petition Senior Lenders and the Pre-Petition ML Senior Debt and the Security Interest and Liens on the Pre-Petition ML Collateral in favor of MetLife . . ." The Debtor may waive such defenses, *but* Desert Eagle is not bound by the Debtor's waiver and the Debtor's waiver does not operate as a waiver of Desert Eagle's lien rights, interests or priorities. Desert Eagle's joinder does not relate Paragraph 19 of the Order.

(ii) Desert Eagle's joinder does not complain of provisions of the Order "that are predicated upon the validity, extent, priority, avoidability or enforceability of the Pre-Petition Senior Indebtedness, the Pre-Petition ML Senior Debt, Pre-Petition Senior Lenders' pre-petition liens on and security interests in the Pre-Petition Senior Collateral and MetLife's pre-petition liens on and security interests in the Pre-Petition ML Collateral." Desert Eagle is, instead, joining in complaints about the provisions which would elevate the priority of post-petition financing liens on the "DIP Collateral" over Desert Eagle's statutory, super-priority liens without adequate protection to Desert Eagle.

Thus, paragraph 20 of the Order does not require Desert Eagle to file an objection by April 30, 2001 in order to preserve and assert its rights and its lien priority. Desert Eagle's joinder is timely.

(b) *The Order's grant of priming liens violates the Bankruptcy Code.*

The Order provides that the "DIP Indebtedness . . . shall be secured by, and Lenders are hereby granted, . . . , a first lien . . . , on all real and personal property and assets of Debtor, of any kind and nature whatsoever, whether now owned or hereafter acquired by Debtor and all proceeds, rents or profits thereof as more fully described in the Post-Petition Loan Documents (collectively, 'the DIP Collateral', . . .). [Order, ¶ 6(a), at p. 8.] While the Order appears to provide adequate protection to certain priority lienholders, the Order grants no such protection to Desert Eagle. Indeed, the Order makes no mention of Desert Eagle. Thus, it appears that the Order would subordinate Desert Eagle's super-priority liquor-license liens to the Lenders' DIP Indebtedness lien, *and* would do so without granting adequate protection to Desert Eagle in relation to its super-priority liens. Yet the Bankruptcy Code specifically requires that the following conditions be met in order to grant a priming lien under §364:

"The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if —

- (A) the trustee is unable to obtain such credit otherwise; and
- (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted."

11 U.S.C. § 364(d)(1) (*emphasis added*). To the extent that the Order purports to subordinate Desert Eagle's super-priority liquor-license liens to the DIP Indebtedness liens, the 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 (Bkrcty. 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 other lienholder failed to object. *Id.*

(c) *Pre-petition lien priorities must be adjudicated in an adversary proceeding.*

Heller apparently wants the Court to treat the Order as an adjudication of lien priority among competing pre-petition liens or to treat the Order as elevating the priority of the Lenders’ pre-petition liens over Desert Eagle’s statutory liquor-license liens. Neither is proper. In regard to the former, objections regarding “the validity, extent, priority, avoidability or enforceability” of the Lenders’ pre-petition liens must be determined in the context of an adversary proceeding. FED. R. BANKR. P. 7001. In regard to the latter, it is inconsistent with the Bankruptcy Code to use §364(c) and/or §364(d) to cross-collateralize pre-petition loans with post-petition §364 liens. 3 COLLIER ON BANKRUPTCY ¶ 364.04[2][c], at 364-14, 364-15 (15th ed.). And related or analogous practices, “such as waivers of prepetition causes of action against lenders or of substantive rights under the Code, would also be questionable as terms of a lending transaction under section 364.” *Id.*, at 364-15. Desert Eagle respectfully submits that “cross-priming” of liens would fall into the same category of impermissible practices in connection with §364 financing as would cross-collateralization.

(d) *The Order is not final.*

Although the Order is called a “Final Order”, it clearly is not. Even under Heller’s reading of the Order, timely objections to the Order were filed by various taxing authorities, General Electric Company, Premier Distributing Company, New Mexico Beverage Company, Southern Wine & Spirits of New Mexico, the Unsecured Creditors

Committee, and others. Such objections have not yet been heard or decided. Since the Order is not yet final, there is no reason to deny Desert Eagle's joinder.

5. The liquor-license liens are automatic, statutory liens imposed as a matter of public policy. The priority granted to such liens under New Mexico law reflects a strong public policy commitment to the protection of liquor wholesalers such as Desert Eagle and Premier; the liquor-license liens are automatic, non-consensual, and trump even state tax liens. The liquor-license liens are, then, distinct and distinguishable from the type of privately-granted consensual liens granted by the Debtor to its lenders. All super-priority, liquor-license lienholders should receive equal treatment in relation to any §364 financing authorized by the Court, and the Order should not create separate classes of liquor-license liens, some of which are adequately protected and some of which are not.

6. As a matter of equity, Heller and the other Lenders will not be prejudiced by Desert Eagle's joinder. The Lenders proceeded to fund post-petition loans to the Debtor knowing that objections could be filed after entry of the Order. The Lenders knew that the Order would not become final until all objection deadlines had passed. Recognizing Desert Eagle's joinder does not in any way prejudice the Lenders. Before April 30, 2001, various objections were lodged. Between April 30, 2001 and the date of Desert Eagle's joinder, the Lenders did not change their position in reliance upon the fact that Desert Eagle had not filed an objection.

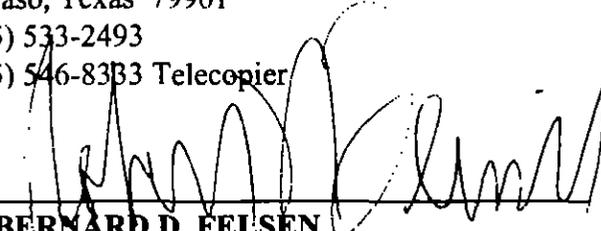
FOR THESE REASONS, Desert Eagle respectfully submits that the April 30, 2001 objection date relied upon by Heller Financial does not apply to Desert Eagle's joinder and Desert Eagle does hereby respectfully pray for recognition of Desert Eagle's joinder as timely, for recognition of Desert Eagle's super-priority lien status and, alternatively, for adequate protection of

Desert Eagle's liquor-license liens. Desert Eagle also prays for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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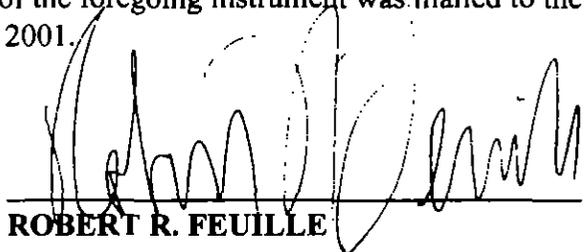
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed to the persons on the attached matrix this 5 day June, 2001.


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