UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

In re:	)	Chapter 11
	)	
FURR'S SUPERMARKETS, INC.	)	No. 11-01-10779-SA
	)	
Debtor.	)	

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 LICENSES UPON PAYMENT IN FULL TO LIQUOR WHOLESALERS

Metropolitan Life Insurance Company ("MetLife"), by and through its counsel of record, Jonathan B. Alter of Bingham Dana, LLP and Jennie Deden Behles of J.D. Behles & Associates, a Commercial Law Firm, P.C., do hereby reply to the Responses to the 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 (the "Motion"). MetLife supports the Debtor's Motion and the arguments set forth therein, and respectfully requests that the Motion be granted for those reasons articulated by the Debtor and those grounds set forth in this Memorandum.

I. Facts Relevant to the Reply

At the inception of this case, MetLife, along with certain other post-petition lenders (collectively, the "DIP Lenders" or "Senior Lenders")[1], agreed to provide post-petition financing to Furr's Supermarkets, Inc. (the "Debtor") pursuant to the Interim

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[1] The other DIP Lenders or Senior Lenders are Heller Financial, Inc., Bank of America, N.A. and Fleet Capital Corporation.

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Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection, and (3) Granting Other Relief, entered by this Court on February 9, 2001 (the "Interim Order").

As the record in this case amply demonstrates, the hearing on the providing of interim post-petition financing was noticed to all creditors and parties in interest, including those persons parties to this contested proceeding. The Interim Order allowed for a multi-million dollar advance for the purposes of keeping the Debtor in operating condition so that its business could be sold as a going concern rather than liquidated for the benefit of all parties in interest.

Paragraph 19 of the Interim Order, entitled Waivers and Validation and Pre-Petition Senior Indebtedness and Lien", provides as follows:

> Subject to paragraph 20 of this Order, "Debtor, on behalf of itself and its estate, hereby waives any and all defenses (including without limitation, offsets and counterclaims of any nature and kind) as to the validity, perfection, priority, enforceability and non-avoidability (under Section 510, 544, 545, 547, 548, 550, 552 or 553 of the Bankruptcy Code or otherwise) of the Pre-Petition Senior Indebtedness and the security interest and liens on the Pre-Petition Senior Indebtedness and the security interests in the liens on the Pre-Petition Senior Collateral in favor of the 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 (which liens and security interest have the priority described herein). The agreements set forth in this paragraph shall be deemed effective upon the date this Order is entered, subject only to creditors' rights to object on the terms and conditions set forth in Paragraph 20 below.

Paragraph 20 of the Interim Order, entitlted "Objections by Creditors and Final Hearing Issues", provides as follows:

> 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 MetLife'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.

Once again, on March 2, 2001, after appropriate notice and hearing, a Second Interim Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection, and (3) Granting Other Relief, entered by this Court on February 9, 2001 (the "**Second Interim Order**") was entered by this Court which contained virtually identical Paragraphs 19 and 20, with the exception that the Second Interim Order specified March 30, 2001 as the date by which objections shall be filed.

Finally, after yet additional notice and hearing, on March 14, 2001, a Final Order (1) Authorizing Debtor to Obtain Secured Financing (2) Granting Adequate Protection and (3) Granting Other Relief, entered by this Court on February 9, 2001 (the "**Final Order**") was entered by this Court. The Final Order contained the same Paragraphs 19 and 20, but the objection date had been changed to April 30, 2001 for creditors and May 23, 2001 for the Committee. The Senior Lenders, including MetLife, advanced millions of dollars based on the language of these financing orders and the rights granted thereby, and in particular Paragraphs 19 and 20.

Of the parties involved in this contested proceeding, only two (2) timely objections to the claims of the Senior Lenders were filed in accordance with the terms of the Final Order: Premier Distributing Company ("Premier") filed its objection on April 26, 2001, and a conditional objection was filed by New Mexico Beverage Company, Inc., Southern Wine and Spirits of New Mexico, Inc., and National Distributing Company, Inc., on April 30, 2001. Neither Desert Eagle Distributing Company of New Mexico,

LLC ("Desert Eagle") or Joe G. Maloof & Company ("Maloof") ever filed a timely objection.

Nearly simultaneously with the filing of Premier's objection, Premier initiated an adversary proceeding (bearing the adversary proceeding number 01- 1073 SA) entitled, Complaint to Determine the Validity, Priority or Extent of Lien, naming as parties the Senior Lenders, including MetLife and its agent for purposes of the post-petition financing, Heller Financial, Inc. ("Heller"). In Premier's Complaint, Premier "objects to the claimed first lien by the Lender Group to the extent that lien asserts a first lien, claims a first super priority lien on all or any of the Debtor's liquor licenses or to the extent the Lender Group or anyone of them has failed to properly file and perfect liens on any of the Debtor's assets, specifically including Debtor's Liquor Licenses " (Complaint, p. 9). Premier then asserts first lien status on the liquor licenses and what it believes to be its super priority for payment upon transfer under the Liquor Control Act, citing to many of the same cases referred to in its Response.

New Mexico Beverage Company, Inc., Southern Wine and Spirits of New Mexico, Inc. and National Distributing Company, Inc (collectively, the "Intervenors") filed a motion to intervene in the adversary proceeding, which motion was granted. The Intervenors' Complaint in Intervention requests similar relief as to the relief sought by Premier. Only recently have Desert Eagle and Maloof filed their own motions to intervene, and MetLife (and the other Senior Lenders) have objected to the intervention on the basis that the request is untimely under the orders of this Court relating to post-petition financing.

On or about the time the Debtor filed its motion for sale of substantially all of its assets, these very same liquor distributors, parties to this contested proceeding, raised these alleged superiority rights in objection to the sale. The Senior Lenders vehemently objected. At the sale hearing, the Court determined that these issues raised by the liquor

distributors should be deferred until Closing (as defined in the sale motion and order), as they were, in effect, objections to distribution, and not objections to the sale itself.

In their objection to the proposed sale, the liquor distributors raised numerous Constitutional issues that were not directly raised in their adversary complaints, but certainly served to a greater or lesser extent as the underpinnings of these proceedings.

II. Those Parties Not Filing a Timely Objection Pursuant to Paragraphs 19 and 20 of the Interim Order, Second Interim Order and Final Order Authorizing Debtor to (1) Obtain Secured Financing, (2) Granting Adequate Protection; and (3) Granting Other Relief, Are Not Entitled to Assert Any Super Priority Status in this Contested Proceeding or Otherwise, Because They Have Waived That Right.

As a preliminary point, MetLife asserts that Desert Eagle and Maloof have waived any right to participate in these contested proceeding by failing to comply with orders of this Court. It is not unusual that parties waive rights in litigation, even Constitutional rights. This waiver was the necessary result of the unexplained (and unexplainable) failure to file a timely objection to the claims of the Senior Lenders

An analogous situation is addressed in In re Calore Express Co., Inc., U.S. of America Appellant v. Fleet National Bank, 2000 U.S. Dist Lexis 19950, 86 Aftr.2d (RIA) 5639, (D.C Mass. 2000). Here, the United States had requested stay relief to allow it to set off tax liability incurred by the debtor against monies owed the debtor and loaned to Fleet or a related company. The motion was opposed by both the debtor and its lender and the request was rejected on the basis that the U.S. had waived its right to assert both its pre and post-petition setoff claims Interestingly, the background giving rise to this appeal was that of a borrowing motion, which had been granted early on in the case, to allow the debtor to borrow up to 80% of its outstanding qualified accounts receivable with a cap of $3 million. In return, the debtor granted the bank a senior lien, a super priority claim and a security interest in all post-petition assets. The motion was properly noticed to all creditors and parties in interest. No objection was filed by the Internal

Revenue Service. The Court in Calore made a determination that by failing to object in a timely fashion to the financing order, the government had waived its right to assert its setoff claims by failing to object to the numerous requests for orders authorizing the debtor to borrow from the bank against its accounts receivable including those due from the United States on a secured and super priority basis. The government's only defense was that it simply did not realize that failing to object would be a waiver of its rights. This waiver was affirmed on appeal.

Calore is directly on point with what has occurred here Secured lenders would never finance a debtor in the hopes of obtaining going concern value for a debtor's assets for their benefit and the benefit of the estate if they could rely on orders properly entered and noticed to protect their lien position. The entire Chapter 11 system is predicated on such borrowing, especially made by pre-petition lenders.

In the case of In re Wedgewood Realty Group, Ltd., Wedgewood Investment Fund, Appellant v. Wedgewood Realty Group Ltd., 878 F 2d 693 (3rd Cir 1989), the Third Circuit addressed the issue of waiver of rights at some length. The Wedgewood case also involved proceedings which required notice under Rule 4001 or "Notice and a Hearing." This particular case involved the challenge of a denial of a motion to modify the automatic stay to permit the foreclosure of the debtors' property The Court reversed the denial holding that the stay terminated by operation of law because the Bankruptcy Court failed to render a decision or continue the stay within the requisite 30 day period. In Wedgwood, the Court said that the appellant did not waive its right to a timeliness objection by its submissions or by consenting to the debtors' response because this behavior was not inconsistent with the time constraints, and the court could have allowed such response within the statutory period. In explaining the issue of waiver after a 4001 notice, the Court wrote:

> Unlike the cases in which waiver was found, creditors' actions did not necessarily require a delay beyond the time constraints set forth in § 362(E) and bankruptcy rule 4001(A)(2) because the post-hearing submissions related to an issue other than the request for relief from the stay, the submissions did not require any delay in the issuance of an order continuing the stay. Even if the court could have not issued its order prior to the debtors' response, the court could have required a response well within the time limits. Because it chose not to do so, it was the bankruptcy court's actions which engendered the delay. Moreover, WIF could have reasonably assumed that if the court were to permit the debtor to respond beyond the 30-day period, it would inform WIF of its actions or enter an order continuing the stay pending submission of the debtors' response. WIF was, therefore, unnoticed that its actions would prevent the issuance of a timely order, nor should it have known that such delay would necessarily occur.

The Wedgewood court stated that an implied waiver is generally of a right, is generally not found unless the creditor has taken some action which is inherently inconsistent with the adherence to the time constraints of the applicable section of the Bankruptcy Code and the notice rules under Bankruptcy Rule 4001 Borg Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308, (11th Cir. 1982) (implied waiver where creditor not only failed to object to the absence of preliminary hearing but also attended the final hearing beyond 30-day period without objection); In re McNeeley, 51 Bankr. 816, 821 (Bankr. D Utah 1985) (implied waiver where creditor failed to schedule final hearing within 30-day period); In re Small, 38 Bankr 143, 147 (Bankr. D. Md. 1984) (implied waiver of 30-day requirement where creditor filed discovery request to which responses were due beyond the 30-day period); and In re Willmet Partners, 34 Bankr. 958, 961 (Bankr N.D. Ill. 1983) (implied waiver where creditor agreed to continuance of preliminary hearing beyond the 30-day period). The Wedgewood court said that if each of these cases was analyzed, what was clear was that the creditors' own actions which were clearly inconsistent with an intention on their part to insist on their rights under the applicable code section and Bankruptcy Rule 4001, impliedly waived their rights. Wedgewood, supra.

That is precisely what happened here. Desert and Maloof failed to take timely action required and that failure is inconsistent with Bankruptcy Rule 4001 and § 364 of the Code in regard to obtaining credit.

Desert and Maloof, as is evident from their invoices, did not extend any post-petition credit to the Debtor; and they now wish to take advantage of that credit extended by the Senior Lenders after they have lulled them into advancing or continuing to advance funds by failing to object Such conduct should not be condoned by this Court. The waiver is clear, and should be enforced.

III. The Liquor Wholesalers Should Not be Allowed Two Attempts to "Wrest" from the Senior Lenders During Protracted Litigation, the Money Flowing from the Sale of These Liquor Licenses

In its brief, Premier, joined by the Intervenors, states in addressing the closing of the Fleming sale

> The heart of the dispute is only whether the wholesalers will get the money to which they are statutorily entitled at Closing, or whether the major Secured Lenders will have another chance to wrest it from the wholesalers during protracted litigation pursuant to which the Secured Lenders will seek to overturn established case law protecting the rights of wholesalers.

(Premier Brief, p. 18) This is an incredible statement simply because the other litigation referenced is the adversary proceeding filed by Premier and the Intervenors which seek precisely the same relief as requested herein, a determination of the validity, priority and extent of the wholesale distributors' liens on the basis of the New Mexico statutes The only parties who are asking for two bites at the apple in this case are in fact the liquor distributors.

It is to be noted that the liquor distributors have not offered, as is customary in bankruptcy cases, to have proceeds equal to the value of the licenses deposited with the

Court or into an escrow account pending a determination of their claims in the adversary proceeding. Their uncompromising position is that they want their money and they want it now. Is it unclear, at best, what effect this result would have on the adversary proceeding they have filed Does any payment upon closing render it moot? Or, as a practical matter, does this result deny the Senior Lenders of any relief they might gain in the adversary proceeding. The answer to one or the other of these questions is likely. "Yes." The wholesale distributors cannot proceed in such a fashion that is clearly prejudicial to the interests of the Senior Lenders.

IV. The Liquor Wholesalers Have Waived Their Right to Raise Constitutional Arguments

Moreover, the liquor wholesalers have waived their rights to raise Constitutional arguments to allow their taking of all the funds on closing free of the lenders claims. These rights were waived by the liquor distributors by their filing a suit and submitting to the jurisdiction of this Court for the determination of the very same issues the validity and priority and extent of the wholesalers' liens or claims in relation to that of the Senior Lenders.

In the case of In re Yeutseuen Chen, 227 B.R. 614 (D.N.J. 1998), the State had filed an adversary complaint in the Bankruptcy Court claiming that the debtor owed money for unemployment compensation that he fraudulently received while employed. The State had previously received a judgment under a state statute finding that the debtor had made certain false statements. The debt had been discharged in the bankruptcy The Court held that the standard of intent under the New Jersey statute was different than it was under the Bankruptcy Code and discharged the debt. The State protested this decision on, among other bases, the Constitutional grounds that they had sovereign immunity which could not be waived. The court found that the Constitutional argument

had, in fact, been waived by virtue of the filing of the adversary complaint, as well as asserting a claim in the case. It seems that is precisely the situation that we have here.

Constitutional rights are frequently waived both in criminal and civil cases and numerous examples of this type of waiver exists even in bankruptcy cases There are several cases on this point which address the waiver of Seventh Amendment rights to jury trial which follow along the line of In re Data Compass Corp. 95 Bankr. 575 (E.D.N.Y. 1988). There is simply no difference here, and in fact, by attempting to prime or preempt their own relief to obtain these funds more quickly, it is clear that we have the same parties asking this Court for the same relief arising out of the same factual situation generally addressed by a joinder requiring claims. (See F.B.R. 7018) Premier's brief makes it clear that their claims in the contested proceeding and in the adversary proceeding are in *pari materia*

When Premier and the other Intervenors persist in raising in their memoranda, as in their Complaints, arguments under the New Mexico Liquor Control Act, they tacitly recognize the waiver argument in stepping in and arguing on behalf of the State that sovereign immunity has not been validly abrogated nor has it been waived. They claim that they may argue on behalf of the State and individually benefit from this statute, yet do not want to be barred by the waiver argument by the filing of their own complaint on the same or similar issues in the adversary proceedings. They simply can't have it both ways.

V. The New Mexico Liquor Control Act Does Not Mandate the Results Sought by the Liquor Wholesalers

The case of In re What D'Ya Call It, Inc., 105 N.M. 164, 730 P.2d 467 (1986), does not mandate the results sought by the liquor wholesalers and really does not address the issue This case dealt with the situation where a lien was taken pursuant to the wholesaler's lien section of the Liquor Control Act, and was determined to have a super

priority status over other lien holders, including a tax lien in favor of the State, unless those later liens were perfected under 7-1-38 N.M.S.A. (1978) or other general applicable law prior to the date the licensee incurred the debts owed to the wholesaler/creditors. According to this case, the priority is established by the date of the notice, and the lien accorded wholesalers is not subject to the requirements of 7-1-38 or general lien law.

In the case of In re D&M, Inc. v. United New Mexico Bank, 114 B.R. 274 (1990), the Court seemed to hold, and the liquor wholesalers have not really disputed, that each invoice forms a separate lien so that the wholesale dealer's priority does not date from the date of the first invoice, but that the wholesaler has separate liens dating from the date of each invoice At this point, we do not even know whether or not the dates of the invoices would prime the securitization of MetLife or other secured lenders' liens which, based on the evidence already adduced at hearings in this case, would date at least from December, 2000 and in some instances, much earlier.

Additionally, the Liquor Control Act addresses illegal credit sales, basically sales where credit has been extended beyond 30 days. As has been heretofore discussed during the sale hearing, the D&M decision, *supra*, is not binding on this Court. All sorts of possibilities exist to reach a decision on this matter and a correct interpretation of state law up to and including the type of certification undertaken in the What D'Ya Call it, Inc. case.

Despite the exhortations of this Court, little has been produced by the liquor wholesalers to help the Senior Lenders determine just how much of the total debt claimed by these wholesalers results from illegal credit sales. The Debtor, however, has been able to provide substantially more assistance. On August 16, 2001, Heller filed in its individual and representative capacity in the adversary proceeding a Motion for Summary Judgment which was supported by the affidavit of a debtor employee, Steve Stork What is clear from that affidavit is the date of many of these invoices are after the perfection date of the Senior Lenders' liens; and that, with the exception of Premier which has only

a very small amount of potentially illegal credit debt under the Liquor Control Act, a very large percentage of the debt of the other liquor wholesalers violates the credit provisions of the Act. (See Exhibit "A", and Exhibit 2 to the Summary Judgment Motion, subsections A and B.)

Under N.M.S.A. 60-6B-3 (1978), it is clear that the lien shall be deemed to have arisen on the date when the debt was originally incurred as to wholesalers' obligations. Hence, it would appear that a lot of this debt does not have priority over the Senior Lenders and the case of In re What D'Ya Call it, Inc., 105 N.M. 164, 730 P.2d 467 (1986), cited by Premier, makes that point all too well.

The law in New Mexico is clear that statutes are to be construed so that no part of the statute is rendered superfluous. See Regents of UNM v. Federation of Teachers, 125 N.M. 401, 411, 962 P.2d 1236 (1998) (Heller Summary Judgment Brief, pg. 8.) In order to get that result here, one must read the statutory sections together so that one concludes that though a debt incurred in violation of the credit provisions of the Act is collectible, it does not have the favored lien or payment on transfer status that a legally made sale would have. It is difficult to think that when the legislature amended this statute in 1985, it intended to actually change the rule in New Mexico Beverage Co. v. Blything, 102 N.M. 533, 697 P.2d 952 (1985), and reward wholesale sellers who violated the credit provisions of the Act.

It would appear that what has happened in this case is that when the sale opportunity to Fleming arose, the wholesale distributors saw a way to attempt to avoid the determination they themselves had sought in the adversary proceeding, and for very good reason in light of the facts apparent in the Stork Affidavit. They should not be allowed to do so.

V. MetLife also Supports the Arguments of the Debtor in this Case.

Finally, MetLife represents that it generally supports the position articulated in this contested proceeding by the Debtor and respectfully requests that the Motion of the Debtor be granted which provides that proceeds of sale sufficient to satisfy these claims be held in escrow pending a determination in the adversary proceeding.

Respectfully submitted,

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this 16th day of August, 2001.

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