

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

**FILED**

12:00 MIDNIGHT

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

AUG 16 2001

Case No. 11-01-10779 SA  
Chapter 11

Debtor. **MAIL BOX**  
United States Bankruptcy Court  
Albuquerque, New Mexico

**DEBTOR'S REPLY TO RESPONSES TO DEBTOR'S 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 ("MOTION") AND TO DEBTOR'S MEMORANDUM IN SUPPORT OF THE MOTION**

Furr's Supermarkets, Inc. ("Debtor"), by counsel, replies to (i) the Objection and Memorandum filed by the New Mexico Alcohol and Gaming Division on August 2, 2001, (ii) the Brief filed by Premier Distributing Company, Inc., National Distributing Company, Inc., New Mexico Beverage Company, Inc., and Southern Wine & Spirits, Inc., served August 9, 2001, (iii) the Response filed by Desert Eagle Distributing Company of New Mexico, L.L.C. served August 9, 2001, and (iv) the Response filed by Joe G. Maloof and Company (together, the Objection and various Memoranda are referred to as the "Responses" and the responding parties are referred to as the "Objectors").<sup>1</sup> This Reply is filed in further support of Debtor's *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* (the "Motion") along with Debtor's Memorandum filed July 26,

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<sup>1</sup> Curiously, the Division states in ¶7 of its Objection that it "further concurs with the Wholesaler's response" to the Motion. The Wholesalers' Responses were not served until seven days later.

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2001 in Support of the Motion. Capitalized terms that are not defined have the same meanings as given in Debtor's Memorandum.

### Introduction

Should a state law allow certain trade creditors to be paid before all other secured, administrative, and priority claimants in a federal bankruptcy case?<sup>2</sup> Does the answer to this question change simply because the trade creditor's claim arose from past alcohol sales?

The present matter does not concern the secured or unsecured status of the Wholesalers' claims or the priority of their liens. That is the subject of a separate adversary proceeding. The present matter also does not present the issue of whether, as a result of the Twenty-First Amendment, the whole of New Mexico's Liquor Control Act would prevail over conflicting portions of the Bankruptcy Code. The present matter simply turns on whether one subpart of New Mexico's Liquor Control Act may lawfully grant the Wholesalers a payment priority that no other creditor in this bankruptcy case enjoys. Debtor asserts that it does not.

The Debtor has argued three grounds for the relief it seeks. First, the Section 60-6B-3 restriction on the sale or transfer of a liquor license, as applied to pre-petition claims, is preempted by the priority and distribution provisions of the Bankruptcy Code.<sup>3</sup> Second, enforcement of Section 60-6B-3 violates the automatic stay. Third, enforcement

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<sup>2</sup> Prior to 1938, the Bankruptcy Act recognized state laws that favored particular classes of creditors upon a debtor's insolvency, thus "undermining the meaningfulness of the federal priority scheme." 2 Norton Bankr. L. & Prac. 2d §42:12 (*citing* Sec. 64(7) Bankruptcy Act (pre-1938); and H.R. 12889, 74<sup>th</sup> Cong., 2d Sess. 201 (1936)). Congress addressed this issue comprehensively in the 1938 Chandler Act when it amended the 1898 Bankruptcy Act and abolished the recognition of state-created priorities. *Id.*

<sup>3</sup> As discussed below, all referenced herein to §60-6B-3 are deemed to be references to the

of Section 60-6B-3 violates the Code's anti-discrimination provision in 11 U.S.C. §525(a), and is preempted by such provision.

**A. Preliminary Matters**

1. Debtor Seeks Narrow Relief.

In its Objection, the Division misstates the relief sought by Debtor in the Motion.<sup>4</sup> The relief debtor seeks is narrow: 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.” Motion, ¶7 (emphasis added). Debtor has not asked this Court to find that the Bankruptcy Code relieves it from any other provisions of the Liquor Control Act (“LCA”). The Division’s alarm should be disregarded.

2. Wholesaler’s Claimed Liens Are Not Before The Court on this Motion.

Debtor made clear in the Motion and Memorandum that the claimed liens by the Wholesalers are not at issue in the Motion.<sup>5</sup> Yet in the Responses the Director and the Wholesalers argue about the priority and validity of the Wholesaler’s claimed liens and, in many instances, misstate the relief sought in the Motion and misconstrue the two patently distinct concepts in Section 60-6B-3.<sup>6</sup> Debtor here reiterates that the subject of

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<sup>4</sup> See Division’s Objection, ¶¶8 and 9.

<sup>5</sup> See Debtor’s Memorandum, p. 2 (the Wholesalers’ claimed liens are “not addressed in the Motion or this Memorandum”); Memorandum fn. 4 (Wholesaler lien provisions of the LCA are not at issue in the Motion or in this Memorandum”); Motion ¶ 5 (lien “matter is at issue in Adversary No. 01-01073S”).

<sup>6</sup> See Division’s Memorandum pp. 5-7; Premier Response, pp. 30-33.

the Motion is a determination that 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, notwithstanding §60-6B-3.<sup>7</sup> Finally, with respect to the lien claims, Debtor has taken further steps to protect the interests of the Wholesalers should their lien claims be validated.<sup>8</sup> The Court should disregard the various arguments in the Responses that the claimed liens are jeopardized due to Debtor's Motion. Those arguments are not germane.

### **B. The Responses**

The Division (and presumably the Director) and the Wholesalers assert that the Eleventh Amendment deprives the Court of jurisdiction over this matter and, if this Court does have jurisdiction, that N.M. Stat. Ann. § 60-6B-3 prevails over the Bankruptcy Code by virtue of the Twenty-First Amendment. Some Objectors also assert that the Debtor's proposed transfer of its liquor licenses violates 28 U.S.C. § 959, which provides that a debtor's ongoing operations must comply with relevant non-bankruptcy law.

### **C. Reply to Responses**

The Objectors assert two constitutional grounds for denying the Debtor's Motion. Both, however, are rooted in an over-broad reading of the relevant constitutional protections. The Objectors' argument that the Debtor's proposed transfer of its liquor licenses violates 28 U.S.C. § 959 is equally without merit.

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<sup>7</sup> As Debtor stated in the Memorandum, fn. 4, "all references to Section 60-6B-3 herein are deemed not to be references to the lien provision of Section 60-6B-3."

<sup>8</sup> Debtor filed a motion on August 10, 2001 (the "Wind-Down Motion") that includes a request to retain a portion of the sale proceeds as adequate protection for alleged lien claims of liquor wholesalers. See Debtor's Amended Motion for (i) Approval of Wind-Down Budget, et seq. filed August 10, 2001.

1. The Eleventh Amendment Does Not Bar the Relief Sought by Debtor

Each of the Responses contains an extensive discussion of the prerequisites for finding that Congress has properly abrogated a state's immunity under the Eleventh Amendment, and each argues that Code § 106 is unconstitutional.<sup>9</sup> This debate may be interesting, but is inapplicable to this matter.<sup>10</sup> The relief sought by Debtor fits squarely within the applicable doctrine of *Ex parte Young*. Even if *Ex Parte Young* were not applicable, the State has waived sovereign immunity in this case.

(a) The *Ex Parte Young* Doctrine Applies to this Matter.

Debtor's Motion seeks to prevent a state official from interfering with the sale of Debtor's assets and enforcing an illegal priority, in contravention of the Bankruptcy Code. When, as here, the plaintiff seeks only prospective relief, "the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a

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<sup>9</sup> Ordinarily the Eleventh Amendment is not implicated where, as here, Debtor has not filed a suit nor sought a monetary recovery against the state. *Chandler v. Oklahoma ex rel. Oklahoma Tax Comm'n* (In re Chandler), 251 B.R. 872, 876 (10th Cir. BAP 2000); Debtor's Memorandum, pp. 17-18. However, on August 1, 2001, the Debtor and the Division filed a stipulation that provides, in part, that the Division and the Debtor may raise any arguments with respect to the Eleventh Amendment to the same extent they could if this matter were an adversary proceeding; that the Division's participation in this Contested Matter shall not constitute a waiver of sovereign immunity; and that the Division will comply with the Court's decision on the Motion, without the Debtor having to file an adversary proceeding or obtain an injunction, and "without the necessity of the Court ordering the Division to so comply." It is interesting, albeit no longer material, that Desert Eagle argues that this matter is a "suit against the state," Desert Eagle Response, pp. 12-13, while Premier argues that not only is there no suit, there is no case at all, and that any ruling would be "advisory." Premier Response, pp. 33-34. Neither position is well founded or accurate.

<sup>10</sup> The Division, for example, misplaces its reliance on *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001) (Eleventh Amendment bars state employees' lawsuits against States to recover money damages for violations of the Americans with Disabilities Act). Division Response, pp. 2-3. *Garrett* is inapplicable to the present case; it has nothing to do with bankruptcy law or even with actions implicating state authority without any claim for damages against the state. The case is limited to an analysis of Congress's power under the Fourteenth Amendment to authorize federal claims for damages by citizens against the states, and a criticism of Congress's fact-finding in support of the ADA. 121 S.Ct. at 967-968. In *Garrett*, the court notes, of course in the context of the ADA, that even though an individual cannot sue the state for damages under the ADA, the ADA's standards can be enforced against the states by "individuals in actions for injunctive relief under *Ex parte Young*." 121 S.Ct. at 968, fn. 9.

declaratory judgment or injunctive relief."<sup>11</sup> This principle – rooted in the Supreme Court's *Ex Parte Young* jurisprudence – "strikes a delicate balance by ensuring on the one hand that states enjoy the sovereign immunity preserved for them by the Eleventh Amendment while, on the other hand, 'giving recognition to the need to prevent violations of federal law.'"<sup>12</sup>

Further, the Supreme Court's reinforcement of sovereign immunity, beginning with the decision in *Seminole Tribe v. Florida*,<sup>13</sup> does not limit *Ex Parte Young*, as one Wholesaler suggests, to violations of the Fourteenth Amendment or state law.<sup>14</sup> This Wholesaler argues that after *Seminole*, "federal statutes enacted only pursuant to Article I of the Constitution may not be used as a basis for a suit against a state."<sup>15</sup>

But the Tenth and Sixth Circuits<sup>16</sup> recently applied *Ex Parte Young* to state action that interfered with the Telecommunications Act of 1996, the Fifth Circuit<sup>17</sup> recently found that a suit for violation of the Resource Conservation and Recovery Act was

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<sup>11</sup> *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982) (applying *Ex Parte Young*, 209 U.S. 123 (1908)); see also *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1188 (10th Cir. 1998) ("[W]hen a party seeks only prospective equitable relief - as opposed to any form of money damages or other legal relief - then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States.").

<sup>12</sup> *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997)), cert denied, 121 S. Ct. 1485 (2001).

<sup>13</sup> 517 U.S. 44 (1996).

<sup>14</sup> See generally Kenneth N. Klee, et al., *State Defiance of Bankruptcy Law*, 52 VAND. L. REV. 1527 (1999). It is interesting that in *Seminole*, the Supreme Court identifies the *Ex parte Young* doctrine as one of "several avenues" to ensure state compliance with federal law, specifically including bankruptcy law. 116 S.Ct. 1114, fn. 14 and 16.

<sup>15</sup> Premier Response, p. 11.

<sup>16</sup> *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000).

<sup>17</sup> *Cox v. City of Dallas*, 2001 U.S. App. LEXIS 14337 (5th Cir. Tex. June 26, 2001).

properly brought under *Ex Parte Young*, and the Fourth Circuit upheld the use of *Ex Parte Young* to challenge a Maryland liquor regulation under the Sherman Antitrust Act.<sup>18</sup> All these statutes were undoubtedly enacted under the Commerce Clause, an Article I congressional power. More importantly, the Ninth Circuit has expressly upheld the use of *Ex Parte Young* to enforce the discharge provisions of the Bankruptcy Code.<sup>19</sup> Numerous bankruptcy courts have also used *Ex Parte Young* to enforce the provisions of the Bankruptcy Code against the states.<sup>20</sup>

Nor is this a case where the State enjoys a "special sovereignty interests" in the regulation of alcohol that, under the Supreme Court's decision in *Idaho v. Coeur d' Alene Tribe*,<sup>21</sup> might overcome application of *Ex Parte Young*. The Fourth Circuit has held that the Twenty-First Amendment confers no "special sovereignty interests" that would trigger the concerns of *Coeur d' Alene Tribe*.<sup>22</sup> This holding is supported by the limited scope of clause two of the Twenty-First Amendment, which is not comparable to the local interests at issue in *Coeur d' Alene Tribe*, which would have been an ordinary real property case but for the fact that one party was a Native American tribe.

(b) The State has Waived Sovereign Immunity in this Case.

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<sup>18</sup> *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 212 (4th Cir. 2001) (suit against state liquor officials under Sherman Act, enacted under Commerce Clause of Article I, was authorized under *Ex parte Young*).

<sup>19</sup> *Goldberg v. Ellet (In re Ellett)*, 254 F.3d 1135 (9<sup>th</sup> Cir 2001) (Eleventh Amendment did not bar debtor's action against state tax official for injunction preventing tax collection).

<sup>20</sup> See, e.g., *Lenke v. Tischler (In re Lenke)*, 249 B.R. 1 (Bankr. D. Ariz. 2000); *Wilson v. Cumis Ins. Society, Inc. (In re Wilson)*, 246 B.R. 600 (Bankr. E.D. Ark. 2000); *Hillard Dev. Copr. v. Weinstein (In re Richmond Health Care)*, 243 B.R. 899 (Bankr. S.D. Fla. 2000); *Alston v. State Board of Medical Examiners (In re Alston)*, 236 B.R. 214 (Bankr. D.S.C. 1999).

<sup>21</sup> 521 U.S. 261, 281 (1997).

<sup>22</sup> *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 204 (4th Cir. 2001) (noting that several overriding federal interests survived the passage of the Twenty-first Amendment).

The State of New Mexico has waived sovereign immunity by filing proofs of claims in this case and, moreover, by actively participating in the case, including the sale proceeding of which this matter is a part.<sup>23</sup> The Tenth Circuit's holdings *In re Straight* are applicable to this matter.<sup>24</sup> The court held that the state is one entity for purposes of claims of sovereign immunity and waivers thereof.<sup>25</sup> It would be fundamentally unfair and inequitable if the State were found to be outside the jurisdiction of the Court after it chose to litigate with the Debtor, to assert objections in the case, to argue and negotiate its rights, and to arrive at compromises with the Debtor, resulting in orders entered by the Court.<sup>26</sup> The Tenth Circuit held that Code §106(b) is constitutional and not impacted by *Seminole*.<sup>27</sup> Finally, the court ruled that the requirement under Code § 106(b) that the claims arise out of the "same transaction or occurrence" is met if they both arise from operation of the "debtor's business."<sup>28</sup>

Desert Eagle argues that the Tenth Circuit was able to come to its decision in *Straight* because the unpaid unemployment taxes and worker's compensation premiums

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<sup>23</sup> The State Department of Taxation and Revenue filed a proof of claim and an amended proof of claim in April, 2001. It participated in substantive negotiations with the Debtor resulting in at least two stipulated orders, one regarding renewal of liquor licenses (#313) and the other relating to assessment of gross receipts taxes (#323). As described in Debtor's Memorandum, pp. 18-20, the State objected to the Sale Motion, negotiated terms of the Sale Order and ultimately approved it.

<sup>24</sup> *In re Straight*, 143 F.3d 1387 (10<sup>th</sup> Cir. 1998), *cert den.*, 525 U.S. 982, 119 S.Ct. 446 (1998). See Debtor's Memorandum, pp. 18-20.

<sup>25</sup> *Id.*, 143 F.3d at 1392

<sup>26</sup> In this context, it is disconcerting (if not outrageous) that the State and the Wholesalers take the position that the Court has no jurisdiction of the very narrow relief sought by Debtor. The Wholesalers' arguments go far beyond code §106(a); according to them the Bankruptcy Court has no jurisdiction over any entity of the State at anytime. Premier goes so far as to question the constitutionality of the Bankruptcy Code (Premier Response, pp. 13-14) and of the Bankruptcy Court (Premier Response, fn. 5).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

giving rise to the proofs of claims are necessarily “within the definition” of the “unpaid payroll liability” that triggered the state’s decertification of the debtor, and in turn, debtor’s action against the State.<sup>29</sup> The Tenth Circuit’s decision was much more logical and practical than *Desert Eagle* suggests. The bases for the proofs of claims and the basis for the debtor’s motion against the state (for violating Code §§ 362 and 525) all arose from the same thing - operation of the debtor’s business.<sup>30</sup> The same is true in Debtor’s case.

The Debtor’s Motion, the State’s claims, and the Wholesaler’s liens are closely intertwined, more so than were the matters in *Straight*. *Desert Eagle* argues that in Debtor’s case the tax obligations giving rise to New Mexico’s proofs of claims, the Debtor’s “claims against the Director” and the wholesaler’s claims against the Debtor “bear no relationship to each other.”<sup>31</sup> (The Debtor is in fact not asserting a claim against the Director at this time.) The Director and Division are involved in this proceeding for no reason other than the outstanding debts owed to the Wholesalers; the tax claims arose at least partly from prepetition sales of goods, including the liquor for which the Wholesalers’ debts are owed.<sup>32</sup> *Straight* is controlling on these issues.<sup>33</sup>

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<sup>29</sup> Desert Eagle Response, p. 15.

<sup>30</sup> 13 F.3d at 1391-1392.

<sup>31</sup> Desert Eagle Response, p. 14.

<sup>32</sup> While this seems beyond question, Debtor is prepared to present whatever evidence is necessary to show that Debtor purchased and resold liquor prepetition and that the taxes owed include gross receipts taxes on liquor sales.

<sup>33</sup> Premier discusses at length the Tenth Circuit B.A.P. decision *Straight III* for the inapplicable proposition that §106(a) is unconstitutional. *Straight v. Wyoming DOT (In re Straight)*, 248 B.R. 403 (10<sup>th</sup> Cir. B.A.P. 2000). Premier Response, pp. 3-5. Premier ignores the fact that §106(a) has nothing to do with this proceeding. Premier even criticizes Debtor’s “argument” under §106(a), when in fact Debtor did not even mention the section. Premier’s discussion of *Straight III* omits a crucial fact: that §106(b) was

The Division asserts that the State's "mere ministerial act" of filing a proof of claim in this case can never be deemed a waiver of sovereign immunity.<sup>34</sup> The Debtor has never relied *solely* upon the State's filing of a proof of claim or section 106 to support its waiver argument, and the Debtor's brief in support of the Motion instead argues that the State has waived sovereign immunity in this case by its voluntary participation in the case, which includes both the filing of a proof of claim and active participation in the sale process.

Outside of bankruptcy, it is clear that "a state waives its immunity if it voluntarily invokes the jurisdiction of a federal court."<sup>35</sup> This rule also applies to bankruptcy cases.<sup>36</sup> Accordingly, the Court may properly find a waiver of sovereign immunity by one arm of the State of New Mexico, which extends to the Division.

2. The Twenty-First Amendment Does Not Protect this Statute.

In support of the applicability of the Twenty-First Amendment, the Division argues that the Debtor's motion, if granted, implicates the rights enjoyed by the State under the Twenty-First Amendment, because it would allow the Purchaser, as transferee

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inapplicable to the debtor's damages lawsuit because the lawsuit was not property of the estate, a necessary element of §106(b). *Straight III*, 248 B.R. at 411-412.

<sup>34</sup> *But see Gardner v. New Jersey*, 329 U.S. 565 (1947) (State waives its sovereign immunity by filing a proof of claim in a bankruptcy proceeding).

<sup>35</sup> *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 935 (10th Cir. 2000); *see also Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (removing case from state court to federal court waives Eleventh Amendment immunity); *Hill v. Blind Indus. and Servs.*, 179 F.3d 7854, 756 (9<sup>th</sup> Cir. 1999) (participation in pretrial proceedings in federal court waives sovereign immunity).

<sup>36</sup> *In re Corporacion de Servicios Medico Hospitalarios de Fajardo*, 123 B.R. 4 (Bankr. D.P.R. 1991).

of a liquor license, to import liquor into the state for retail purposes.<sup>37</sup> This is incorrect. Debtor's Motion asks the Court to determine that "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."<sup>38</sup>

The Division's argument is that any policy that is tied to a liquor license is beyond the reach of the Bankruptcy Code, and this Court. This interpretation of the Twenty-First Amendment is plainly over-broad; the Twenty-First Amendment does not grant any state legislature the unlimited power to create exemptions to Congress' power under the Bankruptcy Clause.

As the Debtor noted in its Memorandum, when a state statute involving alcohol conflicts with a federal statute, the question is whether the state's interests are so "closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail notwithstanding that its requirements directly conflict with express federal policies."<sup>39</sup> As a leading commentator has noted, "any broader interpretation of the twenty-first amendment would revive the spectre of balkanized commerce which haunted the framers."<sup>40</sup>

The Division and the Wholesalers recite the high-minded legislative statements of purpose: consumer protection, public health, morals, safety, etc. Yet none of the

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<sup>37</sup> Division Memorandum, p. 5 and again on p. 7. The Division may be confused about the issue at hand. Pages 5 and 6 of its memorandum refer repeatedly to transfer of the licenses without payment of the "wholesalers' liens," which is not at issue here.

<sup>38</sup> Motion, ¶7.

<sup>39</sup> *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994).

<sup>40</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 478 (2d ed. 1988) (discussing the interaction of the Amendment with the Commerce Clause).

Responses credibly attempt to tie §60-6B-3 to any such goals. Even the Division offers no policy justification for the present statute that relates to the purposes of the Twenty-first Amendment, save for the statute's purely coincidental connection to liquor. Surely this is not enough to override the Bankruptcy Code. It cannot be said, that if this section 60-6B-3 were deleted from the LCA, the act would suffer from its primary purposes or its charge under the Twenty-first Amendment.<sup>41</sup>

The Wholesalers attempt to relate § 60-6B-3 to a core purpose of the Twenty-first Amendment by concluding that the statute is an integral part of New Mexico's Liquor Control Act.<sup>42</sup> But this argument again suggests that a state could adopt any sort of device to favor a class of creditors, so long as the enactment was included within the State's liquor statutes.<sup>43</sup> Further, the argument does not address the relationship of § 60-6B-3 to the core purposes of the Twenty-First Amendment. Mere association with other valid exercises of the State's core Twenty-First Amendment powers does not save a provision that is otherwise outside of the core. Nor do any of the Responses attempt to defend §60-6B-3 independent from its coincidental relationship with the LCA. Most of

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<sup>41</sup> The Wholesalers are not compelled to extend credit by either the LCA or the Twenty-first Amendment. The Wholesalers do so voluntarily, as do other businesses. In the bankruptcy context a state preference in favor of liquor wholesalers over other creditors is simply not justified by the purposes of the LCA and should not be protected by Twenty-First Amendment.

<sup>42</sup> Premier Response, p. 31; Desert Eagle Response, pp. 3-6. The Wholesalers' various unattributed statements of "liquor policy" or implied legislative history should be disregarded. See e.g. Premier Response, p. 17. Premier tragically miscasts the "dispute" in terms of its battle with the secured lenders; in fact, it is larger than that. It is the expeditious and equitable distribution of assets of the Debtor's estate without regard for the parochial, preferential treatment a state legislature may bestow upon a favored group.

<sup>43</sup> If a state regulatory statute conflicts with federal law, the state must evince proof that a direct interest under the Twenty-First Amendment is being advanced by the state statute. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716, 104 S.Ct. 2694, 2709 (1984) (state prohibition of out-of-state cable signals containing liquor ads was preempted by specific FCC regulations). The preempted law at issue in *Capital Cities* (regarding advertising) appears more closely connected to the Twenty-First Amendment than does the debt collection statute at issue here.

the remaining provisions of the LCA likely would withstand scrutiny under the precepts of the Twenty-First Amendment; the same cannot be said about §60-6B-3, particularly in the bankruptcy context.

The Division and Wholesalers attack Debtor's citation to *J.F.D Enterprises*, one of several cases willing to recognize statutes such as §60-6B-3 for what they are: tools to "collect payments for liquor wholesalers," squarely in conflict "with the priority scheme of the Bankruptcy Code."<sup>44</sup> *J.F.D. Enterprises* is a case factually similar to Debtor's case, that applied a law "roughly comparable" to Section 60-6B-3, according to the Division.<sup>45</sup>

3. 28 U.S.C. § 959 Doesn't Overrule the Automatic Stay or the Code's Priorities

Some Objectors argue that the Debtor is compelled to follow § 60-6B-3 by the terms of 28 U.S.C. § 959, which requires debtors to operate their business in accordance with applicable non-bankruptcy laws. But § 959 does not repeal the Supremacy Clause. Because the states "cannot rewrite bankruptcy priorities,"<sup>46</sup> § 60-6B-3 is preempted by the Bankruptcy Code and the Debtor is under no obligation to follow it.

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<sup>44</sup> 183 B.R. 342, 352 (Bankr.D.Mass.1995) (state's imposition of restrictions on buyer of liquor license violated automatic stay and was not a valid exercise of police or regulatory power).

<sup>45</sup> The Division mistakenly criticizes *J.F.D. Enterprises*. Division Response, p. 7. The case referenced by the *J.F.D.* court, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980), does implicate a federal law promulgated under the Commerce Clause, namely the Sherman Antitrust Act. "Congress exercised all the power it possessed under the commerce clause when it approve the Sherman Act." 445 U.S. at 111, 100 S.Ct. 937. That the Twenty-First Amendment hasn't somehow repealed the Commerce Clause was applied by analogy to the Bankruptcy Clause, which similarly has not been repealed. The Division's suggestion without authority, that "one constitutional provision should be read as a specific exception to a general rule" is also mistaken. To the contrary, the Court should attempt to "harmonize state and federal powers" wherever possible. *TFS, Inc. v. Schaefer*, 242 F.3d 198, 212 (4th Cir. 2001). *J.F.D.* properly held that the state violated the automatic stay and that statute at issue was not protected by the Twenty-First Amendment. 183 B.R. 351-352.

<sup>46</sup> *In re County of Orange*, 191 B.R. 1005, 1017 (Bankr. C.D. Cal. 1996).

**D. Conclusion**

For the foregoing reasons, the Court should overrule the Responses and grant the full relief requested in the Motion.

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

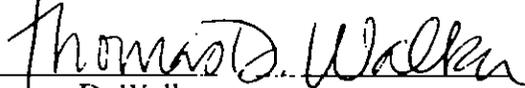
and

JACOBVITZ, THUMA & WALKER,  
a Professional Corporation

By:   
Thomas D. Walker  
Robert H. Jacobvitz  
500 Marquette N.W., Suite 650  
Albuquerque, N.M. 87102  
(505) 766-9272  
(505) 722-9287 (fax)  
Attorneys for Debtor in Possession

We hereby certify that on August 16, 2001, a copy of the foregoing Reply was sent by First Class postage prepaid United States mail, and where a fax number is shown below, was transmitted by facsimile and, where an e-mail address is shown below, by e-mail, to the following listed persons.

Jacobvitz, Thuma & Walker, P.C.

  
Thomas D. Walker

Mike Cadigan  
Hisey & Cadigan  
6400 Uptown blvd. NE, Suite 570-W  
Albuquerque, New Mexico 87110  
830-2385 Fax  
[cadigan@hc-lawyers.com](mailto:cadigan@hc-lawyers.com)

Gail Gottlieb  
Sutin, Thayer & Browne P.C.  
P.O. Box 1945  
Albuquerque, New Mexico 87103  
883-6565 Fax  
[gg@sutinfirm.com](mailto:gg@sutinfirm.com)

Robert Feuille  
Scott, Hulse, Marshall, Feuille,  
Finger & Thurmond, P.C.  
201 East Main, 11<sup>th</sup> Floor Chase Tower  
El Paso, Texas 79901  
(915) 546-8333 Fax  
[bf@scotthulse.com](mailto:bf@scotthulse.com)

Kim Middlebrooks  
Marchiondo, Vigil & Associates, P.C.  
315 Fifth Street  
Albuquerque, New Mexico 87102  
247-0758 Fax

Philip Marchiondo  
429 Santa Monica Blvd., Ste 550  
Santa Monica, CA 90401  
(310) 458-0225  
[philipmarchiondo@yahoo.com](mailto:philipmarchiondo@yahoo.com)

Daniel R. Rubin  
Office of the Attorney General  
PO Box 1508  
Santa Fe, NM 87504-1508  
(505) 827-5826  
[DRubin@ago.state.nm.us](mailto:DRubin@ago.state.nm.us)

David S. Heller  
Latham & Watkins  
233 South Wacker Drive  
Sears Tower, Suite 5800  
Chicago, Illinois 60606-6401  
(312) 993-9767 Fax  
[DAVID.HELLER@lw.com](mailto:DAVID.HELLER@lw.com) (E-mail)

Paul M. Fish  
Modrall Sperling Roehl Harris & Sisk, P.A.  
500 4<sup>th</sup> St. N.W., #1000  
Albuquerque, New Mexico 87103-2168  
848-1882 Fax  
[pml@modrall.com](mailto:pml@modrall.com) (E-mail)

Ronald J. Silverman  
Bingham Dana LLP  
399 Park Avenue  
New York, New York 10022-4689  
(212) 752-5378 Fax  
[rjsilverman@bingham.com](mailto:rjsilverman@bingham.com)

J. D. Behles & Associates, P.C.  
Jennie Deden Behles  
P.O. Box 849  
Albuquerque, New Mexico 87103  
243-7262 Fax  
[behles@jdbehles.com](mailto:behles@jdbehles.com) (E-mail)

Mr. Ronald E. Andazola  
Assistant United States Trustee  
P.O. Box 608  
Albuquerque, New Mexico 87103  
248-6558 Fax  
[ronald.andazola@usdoj.gov](mailto:ronald.andazola@usdoj.gov) (E-mail)

I. William Cohen  
Pepper Hamilton, L.L.P.  
100 Renaissance Center, 36<sup>th</sup> Floor  
Detroit, Michigan 48243-1157  
(313) 259-7926 Fax

William F. Davis  
Davis & Pierce, P.C.  
P.O. Box 6  
Albuquerque, New Mexico 87103-0003  
247-3185 Fax  
[daviswf@aol.com](mailto:daviswf@aol.com) (E-mail)