

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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

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

**DESERT EAGLE DISTRIBUTING COMPANY'S
RESPONSE TO THE UNSECURED CREDITORS COMMITTEE'S
OBJECTION TO FINAL ORDER (1) AUTHORIZING DEBTOR TO OBTAIN
SECURED FINANCING, (2) GRANTING ADEQUATE PROTECTION AND
(3) GRANTING OTHER RELIEF; AND MOTION TO AVOID LIENS; AND
OBJECTION TO LIENS OF LENDERS AND
LIQUOR LICENSE SECURED CLAIMANTS**

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

Desert Eagle Distributing Company of New Mexico, L.L.C. ("Desert Eagle") submits this response to the "Official Committee of Unsecured Creditors of Furr's Supermarket Inc.'s Objection to Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief; Motion to Avoid Liens; and Objection to Claims of Lenders and Liquor License Secured Claimants" filed on behalf of the Unsecured Creditor's Committee (the "UCC").

1. The UCC moves to avoid the liens of the "Liquor License Secured Claimants". Desert Eagle is one of the Liquor License Secured Claimants.

2. The UCC's avoidance motion is asserted under the authority of 11 U.S.C. § 544. Lien avoidance under § 544 is not properly the subject of a motion, but instead must be pursued in an adversary proceeding. 5 COLLIER ON BANKRUPTCY ¶ 544.02 at 544-6 (15th Ed. Rev'd 2001).

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3. The “strong arm” powers of 11 U.S.C. § 544 are invested in the trustee, not the UCC.

4. The UCC fails to specify which of the § 544 avoiding powers the UCC believes to be applicable in relation to the liens of the Liquor License Secured Claimants. The UCC further fails to provide any authority for the proposition that (a) the 11 U.S.C. § 544 “strong arm” powers grant the trustee “a superior and senior and first lien position on the Liquor Licenses”, or (b) the UCC’s request that the Court find that the “Liquor License Secured Claimants are junior secured claimants with regard to the Debtor-In-Possession’s interest in the Liquor Licenses, and that the Debtor holds a perfected first priority lien on the Liquor Licenses”.

5. The Liquor License Secured Claimants (including Desert Eagle) hold valid, duly-perfected, super-priority liens upon the Debtor’s liquor licenses by virtue of § 60-6B-3 NMSA 1978, recognized as automatically-perfected super-priority liens by *In re D & M, Inc.*, 114 B.R. 274, 276 (Bkrcty. D.N.M. 1990). Such liens are perfected at the time that the debt is incurred. *Id.*, at 276. Such liens are not avoidable under any provision of 11 U.S.C. § 544.

6. 11 U.S.C. § 544 allows the trustee/DIP to avoid liens which are unperfected as of the petition date [§ 544(a)(1)], places the trustee/DIP in the position of a creditor who has exhausted all legal remedies as of the petition date and is therefore entitled to immediately pursue equitable remedies in the enforcement and collection of debts, including the equitable remedy of marshalling of assets [§ 544(a)(2)], and allows the trustee/DIP to avoid any lien or transfer avoidable by a hypothetical bonafide purchaser of *real property* of the Debtor as of the petition date [§ 544(a)(3)]. 5 COLLIER ON BANKRUPTCY ¶¶ 544.02, 544.05, 544.06, 544.07, 544.08. 11 U.S.C. § 544 also gives the Trustee the power to avoid transfers that would be fraudulent or preferential under state law [§

544(b)]. 5 COLLIER ON BANKRUPTCY ¶ 544.09. None of the foregoing provisions would apply to allow the Debtor to avoid the liquor license liens at issue.

7. Liquor license liens of the type granted by the New Mexico liquor wholesalers lien statute are recognized as perfected liens in the bankruptcy context. *In re D & M, Inc.*, 114 B.R. at 276; *cf. In re Anchorage International Inn, Inc.*, 718 F.2d. 1446 (9th Cir. (Alaska) 1983). Therefore, the liquor license liens at issue are not subject to the "strong arm" powers of 11 U.S.C. § 544.

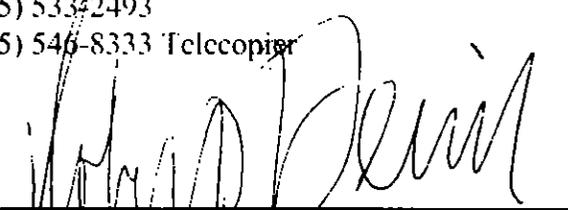
FOR THESE REASONS. Desert Eagle respectfully prays that the UCC's motion and the relief requested by the UCC in relation to the Liquor License Secured Claimants be, in all respects, denied. Desert Eagle also prays for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

SCOTT. HULSE. MARSHALL. FEUILLE.

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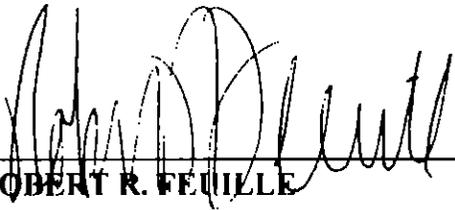
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was delivered to the matrix by mail on this **15** day of June, 2001.



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