

**United States Bankruptcy Court  
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:

FURRS SUPERMARKETS, INC.,  
Debtor.

No. 11-01-10779 SA

HELLER FINANCIAL, INC., et al.,  
Plaintiffs,

v.

JOE G. MALOOF & CO.,  
Defendant.

Adv. No. 03-1149

HELLER FINANCIAL, INC., et al.,  
Plaintiffs,

v.

PREMIER DISTRIBUTING CO.,  
Defendant.

Adv. No. 03-1150

HELLER FINANCIAL, INC., et al.,  
Plaintiffs,

v.

Desert Eagle Distributing Co., et al.,  
Defendant.

Adv. No. 03-1151

HELLER FINANCIAL, INC., et al.,  
Plaintiffs,

v.

National Distributing Co.,  
Defendant.

Adv. No. 03-1152

HELLER FINANCIAL, INC., et al.,  
Plaintiffs,

v.

Southern Wine & Spirits,  
Defendant.

Adv. No. 03-1153

HELLER FINANCIAL, INC., et al.,  
Plaintiffs,

v.

The New Mexico Beverage Co.,  
Defendant.

Adv. No. 03-1154

**MEMORANDUM OPINION ON MOTIONS TO ABSTAIN**

This matter is before the Court in these Adversary Proceedings on Joe G. Maloof & Company's ("Malooof") Motion to Abstain (Adv. 03-1149 (doc. 9)), Premier Distributing Company's ("Premier") Motion to Abstain (Adv. 03-1150 (doc. 9)), Desert Eagle Distributing Company's ("Desert Eagle") First Amended Motion for Permissive Abstention (Adv. 03-1151 (doc. 16)), National Distributing Company's ("National") Motion to Dismiss which incorporates a motion to abstain (Adv. 03-1152 (doc. 12)), Southern Wine & Spirits' ("Southern") Motion to Dismiss which incorporates a motion to abstain (Adv. 03-1153 (Doc. 10)) and New Mexico Beverage Company's ("NMBC") Motion to Dismiss which incorporates a motion to abstain (Adv. 03-1154 (Doc. 9)). The Court finds that the motions are well taken and should be granted in part.

#### The Complaints

Plaintiffs are secured lenders of the Debtor and the Chapter 7 Trustee. Defendants are liquor wholesalers that claimed liens on the Debtor's liquor licenses by virtue of New Mexico statutes that prohibit the transfer of a liquor license until liquor wholesalers' liens are paid.<sup>1</sup> Plaintiffs seek to

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<sup>1</sup> The New Mexico statute in question, Section 60-6B-3 NMSA 1978 (1998 Repl.) provides:

The transfer, assignment, sale or lease of any license shall not be approved until the director is satisfied that all wholesalers who are creditors of

recover from Defendants various sums of money. Pursuant to a settlement agreement entered in the main bankruptcy case the Trustee will receive 2.5% of the proceeds of the liquor wholesaler lien litigation. (Case 7-01-10779 SA, doc. 1766, pages 20-21)

The six adversaries are identical, except for the dollar amounts claimed and, in two cases, preferential transfer claims and, in one case, an additional claim for relief. The first 34 paragraphs of the complaints give a history of the financial and collateral transactions between Plaintiffs and the Debtor, cite to various provisions of the New Mexico statutes, discuss the Furrs-Fleming sale transaction that disposed of most of the Debtor's assets, and argue that the liquor wholesalers wrongfully demanded more money than they were entitled to in connection with transfers of the liquor licenses. Count 1 is for "restitution" and is a claim for amounts that unjustly enriched the Defendants. It seeks disgorgement and subordination of the claims to those of Plaintiffs. Count 2 is

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the licensee have been paid or that satisfactory arrangements have been made between the licensee and the wholesaler for the payment of such debts. Such debts shall constitute a lien on the license, and the lien shall be deemed to have arisen on the date when the debt was originally incurred.

a claim for "unjust enrichment, quantum meruit and assumpsit"<sup>2</sup> and is a claim for amounts paid on Defendant's junior liens that were inferior to Plaintiff's liens or void under state law. Count 3 is for "conversion" in which Plaintiffs claim that the Defendants are in wrongful possession of proceeds of the sale of liquor licenses. Count 4 is for "equitable subordination and disgorgement" in which Plaintiffs claim that they were damaged as a result of the inequitable conduct<sup>3</sup> of the Defendants and therefore seek subordination under 11 U.S.C. § 510(c). Count 5, only against Joe G. Maloof & Co. and National Distributing Company, are preferential transfer claims by the Trustee. The complaint against Desert Eagle also includes a "further disgorgement claim."

Premier's position

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<sup>2</sup>These three causes of action are essentially one. Ontiveros Insulation Co. v. Sanchez, 129 N.M. 200, 203, 3 P.3d 695, 698 (Ct. App. 2000) ("New Mexico has long recognized actions for unjust enrichment, that is, in quantum meruit or assumpsit. To prevail on such a claim, one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust.") (Citations omitted.)

<sup>3</sup>The inequitable conduct is the same as that alleged for Counts 1, 2 and 3. Therefore, the outcome of Count 4 depends on whether a court, in fact, finds that the conduct alleged in the first 3 counts amounts to inequitable conduct on the part of the defendants.

Premier argues that the Court should abstain or dismiss because this case will consume judicial resources without materially advancing administration of the estate and that the outcome of the litigation cannot benefit the estate because the estate is limited to only 2.5% of the proceeds.

Premier claims that state law dominates the case, and that all the issues are non-core. Premier claims this case is like Gardner v. United States (In re Gardner), 913 F.2d 1515 (10<sup>th</sup> Cir. 1990), in which the Tenth Circuit concluded that the bankruptcy court lacked jurisdiction over a dispute between the debtor's ex-wife and the government over liens on property that had left the estate. Premier also cites In re Jodan's Pro Hardware, 49 B.R. 976 (Bankr. E.D. Wisc. 1985), in which the court abstained from a 2-creditor dispute when (a) the impact of the dispute on the estate was minimal, (b) the lien priorities were matters of state law, and (c) the secured creditors' lien dispute was an issue not yet decided by the state court. Premier also cites Elscint, Inc. v. First Wisconsin Fin. Corp. (In re Xonics, Inc.), 813 F.2d 127, 132 (7<sup>th</sup> Cir. 1987), where the Seventh Circuit in a similar situation stated "When the disposition of the abandoned assets cannot possibly affect other creditors, there is no reason for the bankruptcy court's jurisdiction to linger."

Premier argues that the trustee is only a token party. Therefore, her presence should not convert a non-core matter to a core matter.

Premier claims that the matters raised in this adversary are not core proceedings. They do not materially affect the estate because the trustee will not recover sufficient funds to pay unsecured creditors. They also do not involve allowance or disallowance of claims. They do not properly raise lien issues that the Court should hear because the lien priority dispute is only between the creditors, not between the estate and a creditor, and because the subject property is no longer property of the estate. They do not affect liquidation of assets and they do not adjust the debtor-creditor relationship.

Premier also argues that there is no independent basis for federal jurisdiction. There are significant issues of state law that support abstention. Premier urges Burford abstention (Burford v. Sun Oil Co., 319 U.S. 315 (1943)), under which a federal court should yield to the state courts to encourage a coherent and unified policy on a matter of substantial concern to the public.

Alternatively, Premier asks for dismissal of the case outright for lack of subject matter jurisdiction. Finally,

Premier argues that the trustee lacks standing to bring this adversary proceeding.

Desert Eagle's position

Desert Eagle argues that Plaintiffs' causes of action are based on state law and are neither core nor "related to" proceedings. First, mere joinder of the Trustee as a plaintiff does not convert the actions into core proceedings.

Furthermore, any recovery for the estate would be immaterial in amount and would immaterially affect the estate, which will not pay dividends to unsecured creditors. Plaintiffs' causes of action are only private state-created rights that cannot be finally adjudicated by the bankruptcy court. Next, only the net proceeds of the sale of the liquor licenses would go to the estate; the only interest owned by the Debtor upon sale is "net" of the payments to liquor wholesalers who must be paid in full by law before the licenses can be transferred.

Plaintiffs' causes of action are not claims objections; Plaintiffs have not alleged that Defendant's debts are not owed. Furthermore, the causes of action cannot determine validity, extent, or priority of liens because the lien dispute is a private dispute between secured creditors, and also because the property at issue has left the bankruptcy estate. The property was sold free and clear of liens. Under Elscint,



Inc. v. First Wisconsin Fin. Corp. (In re Xonics, Inc.), 813 F.2d 127 (7<sup>th</sup> Cir. 1987) jurisdiction does not follow property out of the estate. Bankruptcy courts are without jurisdiction to resolve private disputes between creditors. Finally, the causes of action do not adjust the debtor-creditor relationship because the real purpose of the adversary is simply to recover money for the Plaintiffs.

Desert Eagle also argues that the causes of action are not even "related to" the bankruptcy because they do not affect the "rights, liabilities, options, or freedom of action" of the Debtor or the Trustee, or impact on the estate.

Desert Eagle also cites In re Jordan's Pro Hardware as support for abstention.

Desert Eagle argues that the causes of action in this case could not be brought in federal court absent this bankruptcy. Furthermore, the complaint raises multiple issues of first impression under New Mexico law dealing with the relationship of the liquor license laws to lien laws.

Because the proceeding is not core or "related to", Desert Eagle argues that the case should be dismissed under Fed. R. Civ. P. 12(b)(1).

Maloof's position

Maloof adopts and incorporates the arguments and authorities raised by Desert Eagle.

National's, Southern's and NMBC's positions

These Defendants urge abstention because there can only be a nominal recovery for the trustee, none of which is likely to flow to unsecured creditors, and which will have little or no effect on the administration of the estate. Except for the equitable subordination claim, all of Plaintiff's causes of action arise under state law. This state law is somewhat unsettled. The doctrine of comity requires that the bankruptcy court defer to the state court for a determination of these state law issues.

There is no basis for federal jurisdiction. The only federal question is the issue of equitable subordination. The proceeding is primarily a dispute between the wholesalers and the secured lenders. The essential substance of the claims are restitution. The preference claim asserted against National can be severed, as can be the equitable subordination claim.

The adversary is a burden on the Court's docket. The real parties in interest are non-debtors.

National, Southern and NMBC cite a number of cases which they say support abstention in this case: Earle Indus., Inc. v. Circuit Eng'g, Inc. (In re Earle Indus., Inc.), 72 B.R. 131

(Bankr. E.D. Pa. 1987), Gober v. Terra + Corp. (In re Gober), 100 F.3d 1195 (5<sup>th</sup> Cir. 1996), Haugen v. Butler Machinery, Inc. (In re Haugen), 120 B.R. 124 (D. N.D. 1990), Richmond Tank Car Co. v. CTC Investments (In re Richmond Tank Car Co.), 119 B.R. 124 (S.D. Tex. 1989), In re Oliver's Stores, Inc., 107 B.R. 40 (D. N.J. 1989) and First Nat'l Bank of Westminster v. Rarick (In re Rarick), 132 B.R. 47 (D. Colo. 1991). They also urge Burford abstention.

#### Plaintiffs' positions

Plaintiffs frame the issue as whether the Lenders, who had a priority lien position in the Debtor's liquor licenses, have a remedy when the liquor wholesalers are able to obtain the proceeds of collateral to which they were not entitled. Plaintiffs claim that the liquor wholesalers did not have enforceable liens on the liquor licenses because of a violation of state law regarding sales of liquor on credit; they also claim that one wholesaler added attorneys fees to which it was not entitled. Plaintiffs and the Trustee ask the Court to determine the respective interests of the parties in the proceeds that resulted from the Court-supervised liquidation of assets and payments made "under protest and compulsion." Plaintiffs argue that these adversary proceedings were anticipated by the Court in the "Director opinion" (Case 7-01-

10779 (doc. 990)), in which the Court stated that later actions by the Lenders to recover payments would not be moot, and noted that the actions should be brought as adversary proceedings. Plaintiffs argue that these are core proceedings and that abstention would not be appropriate.

Plaintiffs argue that these adversaries are "core" proceedings for several reasons. First, the determination of how much each wholesaler should have been paid on their alleged liens concern the administration of the estate; proceeds should be disgorged and used to pay other creditors, namely the Lenders holding senior liens. See Stumpf v. Creel & Atwood, P.C. (In re Lockwood Corp.), 216 B.R. 628, 632 (Bankr. D. Neb. 1997); In re Nichols, 1994 WL 932214, at \*1 (Bankr. N.D. Iowa 1994). Furthermore, the estate is entitled to 2.5% of amounts recovered, and this will bring additional money to the estate, affecting its administration. Therefore, it is core under 28 U.S.C. 157(b)(2)(A).

Next, Plaintiffs urge that this is a core proceeding because it implicates the claims allowance process and asks for equitable subordination of claims under 11 U.S.C. § 510(c). Equitable subordination proceedings are core. Therefore, it is core under 28 U.S.C. § 157(b)(2)(B), or § 157(b)(2)(A) and (O).

Plaintiffs also argue that this cause of action requires a determination of the validity, extent and priority of the liens asserted by the Lenders and wholesalers. Therefore, it is core under 28 U.S.C. § 157(b)(2)(K).

In re Gardner and In re Xonics, Inc. are both distinguishable because in those cases there was an issue only between creditors on rights to property that had left the estate. In this case, Plaintiffs are seeking a return of funds to the estate for redistribution, thereby directly affecting the estate.

Alternatively, Plaintiffs argue that even if this case is not core, the Court has jurisdiction over it because the "proceeding could conceivably have [an] effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3<sup>rd</sup> Cir. 1984). Finally, Plaintiffs argue that the Court expressly noted that the Lenders asserted their right to seek disgorgement in a separate action, and that the Court reserved jurisdiction to enforce and interpret its own Orders.

### **Discussion**

The determination of whether to abstain is a core proceeding in which the bankruptcy court can enter final orders. 28 U.S.C. § 157(b)(2)(A). Beneficial Nat'l Bank USA

v. Best Receptions Systems, Inc. (In re Best Reception Systems, Inc.), 220 B.R. 932, 941 (Bankr. E.D. Tenn. 1998).

Abstention in the bankruptcy context is governed by 28 U.S.C. § 1334(c), which provides:

(C)(1) Nothing in this section prevents a district court in the interests of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

There are no related pending actions in state court, so the mandatory abstention provisions of § 1334(c)(2) do not apply. See Earle Indus., Inc. v. Circuit Eng'g, Inc. (In re Earle Indus., Inc.), 72 B.R. 131, 133 (Bankr. E.D. Pa. 1987). The issue is whether the Court should abstain under the permissive abstention provisions of § 1334(c)(1).

Federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 716 (1996). "This duty is not, however, absolute." Id.

Abstention is a narrow exception to the generally broad duty of federal courts to exercise jurisdiction. See Ankenbrandt v. Richards, 504 U.S. 689, 705, 112 S.Ct. 2206, 2215, 119 L.Ed.2d 468 (1992). There is little, if any, discretion to abstain in a case which does not meet the requirements of a particular abstention principle. See Bethpage Lutheran Serv., Inc. v. Weicker, 965 F.2d 1239, 1245 (2<sup>nd</sup> Cir. 1992).

Planned Parenthood of Dutchess-Ulster, Inc. V. Steinhaus, 60 F.3d 122, 126 (2<sup>nd</sup> Cir. 1995). Discretion may be somewhat greater in the bankruptcy context. See 11 U.S.C. § 1334(c)(1); Republic Reader's Serv. Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader's Serv., Inc.), 81 B.R. 422, 425 (Bankr. S.D. Tex. 1987)("The 1984 amendments to the abstention provisions contained in section 1334(c) thus reflect a clear expansion of the abstention doctrine within the realm of bankruptcy.")

When mandatory abstention is not required, permissive abstention may be appropriate based on various factors. In re Republic Reader's Serv., Inc., 81 B.R. at 428. Relevant factors considered by that court were:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main

bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden on [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Id. at 429. See also In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 6 F.3d 1184, 1189 (7<sup>th</sup> Cir.

1993)(Applying same 12 factors.); Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.), 935 F.2d 1071, 1075 (9<sup>th</sup> Cir. 1991)(Applying same 12 factors.)

The Court will examine these twelve factors.

1. Efficient administration of the estate.

It is impossible to determine whether retention of these cases would result in a more efficient administration of the estate. On one hand, one advantage of the bankruptcy system is to collect all matters respecting the Debtor in one forum. On the other hand, however, is the fact (as discussed below) that several of the causes of action alleged are non-core proceedings over which Defendants do not consent to entry of final judgments by the Bankruptcy Court. This would necessitate the filing of proposed findings and conclusions by the Bankruptcy Court and an automatic additional level of



review by the District Court, which is often a lengthy process given the enormous caseload of the United States District Court for the District of New Mexico as a border court.<sup>4</sup>

2. State law versus bankruptcy law.

Other than the equitable subordination claims and preferential transfer claims, these adversary proceedings are based entirely on state law. Furthermore, most of the state law issues in question have not yet been decided by the state courts.

3. Difficulty or unsettled nature of state law.

The state law at issue is unsettled. There are no state court opinions on the legal questions raised by Plaintiffs' suits. Specifically, the interpretation of the lien priority language in the liquor license transfer statute when there are insufficient proceeds to pay all liens, the interplay of the

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<sup>4</sup> Since 1946 the federal judiciary has applied "weights" to filings in the U.S. district courts to account for the different amounts of time judges require to resolve various types of criminal and civil actions. The total "weighted filings" is the measure of the workload comprised of all the civil and criminal matters for each district. United States courts statistics are available at <http://www.uscourts.gov/fcmstat/index.html> (last visited Oct. 11, 2004). They show that the District of New Mexico had a weighted filing per judgeship of 733 cases in FYE 9/30/03, and 802 in FYE 9/30/02, compared to a national average of 523 cases in FYE 9/30/03, and 528 in FYE 9/30/02. Of these totals, each New Mexico judge averaged 340 criminal felony cases in FYE 9/30/03 and 357 in FYE 9/30/02, compared to the national averages of 87 in FYE 9/30/03 and 84 in FYE 9/30/02.

thirty-day credit law with the allowability of a liquor wholesaler lien, the necessity of the Director of the Alcohol Beverage Commission or the liquor license purchasers as indispensable parties in these proceedings, the allowability of attorneys fees as a cost recoverable by a liquor wholesaler upon a sale of a liquor license, are all unanswered questions under state law.

4. Presence of related proceeding in nonbankruptcy court.

There are no related proceedings in nonbankruptcy court.

5. Jursidiction other than 28 U.S.C. § 1334.

There is no jurisdiction other than under 28 U.S.C. § 1334.

6. Degree of relatedness to bankruptcy case.

But for the estate's 2.5% interest, these adversary proceedings are not related to the bankruptcy case and the secured lenders have no further claims against the estate, including from the settlement agreement reached with the trustee (doc 1766). While the issues may have been related before a distribution of the proceeds, after the proceeds were distributed the issues are only between creditors. See Gardner, 913 F.2d at 1518 (when property leaves the estate the bankruptcy court's jurisdiction lapses). The Court also notes that, unlike in the Court's earlier Memorandum Opinion on

standing of the Trustee to bring preference actions,<sup>5</sup> in these cases the original causes of action (with the exception of the preference claims) belong to the secured lenders who have assigned 2.5% of the proceeds to the estate. In the preference actions the Trustee was the owner of the preference actions and had assigned a portion of her causes of action to the secured lenders. It appears that the current agreement to give 2.5% to the estate is an attempt to create a relationship with the estate that was not originally there. The Court makes no finding, to the extent such a further finding is necessary, that transfer of a 2.5% interest in a cause of action to a trustee is sufficient to create Bankruptcy Court jurisdiction over the entire action. The 2.5% figure itself may well be enough to sustain personal jurisdiction for the Trustee to bring such an action, although its small size may counsel abstention. But that figure alone also does not address the Trustee's interest in seeing that the Lenders, as creditors of the estate, are paid on their claims. The Court makes no ruling on whether this small conger of considerations weighs for or against abstention.

7. Core versus noncore proceeding.

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<sup>5</sup> Gonzales v. Nabisco Division of Karft Foods, Inc. (In re Furr), 294 B.R. 763 (Bankr. N.M. 2003).

This Court has previously ruled that when a complaint potentially has both core and non-core counts the proper procedure is to analyze each count separately to determine its core status. Alliance Health Of Santa Teresa, Inc. v. New Mexico Human Services Department (In re Alliance Health of Santa Teresa, Inc.), Adv. No. 99-1140, doc. 49, slip op. at 10-11 (Bankr. D. N.M. Feb. 13, 2002)(discussing Halper v. Halper, 164 F.3d 830, 839 (3<sup>rd</sup> Cir. 1999) and Hudgins v. Shaw (In re Systems Engineering & Energy Management Assoc., Inc.), 252 B.R. 635, 643 n. 3 & 4 (Bankr. E.D. Va. 2000)). In these cases there are basically five counts. Counts 1, 2 and 3 are state law claims dealing with the validity and priority of liens established by the state's liquor control laws. The claims do not arise in or under the bankruptcy laws, and could proceed even in the absence of this bankruptcy. Counts 1, 2 and 3 are non-core. Counts 4 and 5, equitable subordination and preference recovery, are created by the bankruptcy code and therefore arise under Title 11 and are core proceedings. The "further disgorgement claim" against Desert Eagle is similar to Counts 1, 2 and 3 and is also a non-core claim.

The Court disagrees with Plaintiff's arguments that the entire proceedings are core because they relate to administration of the estate and validity and priority of

liens. Under Gardner, 913 F.2d at 1518, jurisdiction lapses when property leaves the estate, as it has done in this case. So, while a determination of the lien priority and payment of proceeds for the sale would have been core proceedings earlier in the case, they are no longer even "related to" the bankruptcy. The exception to this conclusion may be the 2.5% share of the net proceeds that the Trustee is entitled to. But even taking that into account makes this proceeding at most a "related to" proceeding, but not core.

8. Feasibility of severing state law claims.

It is feasible to sever the state law claims. Counts 1, 2 and 3 and the "further disgorgement claim" are all related to the same facts and to each other and deal exclusively with state law. If successful in any future state court case, plaintiffs could return to the bankruptcy court to seek their equitable subordination remedy. The Court can easily retain the preferential transfer claims.

9. Burden on the bankruptcy court docket.

It would be a burden on the Bankruptcy Court to devote its resources to private lien disputes between creditors. Although Plaintiffs attempt to frame the cases as an attempt by the Trustee to recover incorrectly distributed property for the purpose of redistribution, the real substance of these

adversaries are an attempt by the secured creditors to recover on their liens. Counts 4 and 5 are genuine bankruptcy issues and would not be unduly burdensome to this Court.

10. Forum shopping.

The Court does not believe this proceeding represents forum shopping. In fact, in the Director opinion (case 7-01-10779 (doc. 990)) this Court suggested that it would retain jurisdiction over the parties to deal with any issues of overpayments, and suggested that the proper procedure would be to file adversary proceedings. Therefore, this Court basically invited further action in the Bankruptcy Court. However, when the Court anticipated issues regarding overpayments it visualized simple accounting issues, such as questions of duplicate bills or receipts, etc. See Director opinion, page 27 ("The Court of course retains jurisdiction over the parties, including the wholesalers, to deal promptly with the potential issue of any overpayment to the wholesalers.") It definitely did not anticipate the issues raised by the complaints in these adversary proceedings regarding unanswered state law questions of lien priority in relation to liquor license transfer law.

11. Right to jury trial.

No party has requested a jury trial.

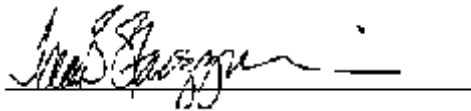
12. Presence of nondebtor parties.

The Debtor is not a party. The Trustee, representing the estate (as opposed to the Debtor as such) is more than merely a token party (hoping to receive 2.5% of any recovery by the Plaintiffs) but definitely not a major player. All of the major players involved are non-debtors. Defendants have also raised the issue that there may be other necessary parties to these lawsuits: the Director of the Alcohol Beverage Commission and purchasers of the liquor licenses. While the Director may resist being brought into these proceedings by asserting 11<sup>th</sup> Amendment immunity, that issue is easily resolved if the action goes forward in a state court. The Court is more concerned about Defendants' threat to attempt to undo the already consummated sales of the liquor licenses. Based on the Director's opinion, the wholesalers presumably received the (maximum) amount to which they were entitled in connection with each sale; any adjudication adverse to the wholesalers will presumably only result in a determination that they were entitled to less than they received. Thus it is not clear why any of the sales themselves should be challenged. Nevertheless, the Court cannot and does not adjudicate that issue in the context of this abstention ruling, but it is confident that a state court could reliably and quickly dispose

of that threat to unleash such a "dirty bomb" in any litigation.

**Conclusion**

Having weighed the various factors, the Court finds that the reasons for abstaining far outweigh the reasons for retaining jurisdiction over these adversary proceedings. Separate orders will be entered in each adversary dismissing without prejudice to refileing in any other tribunal Counts 1, 2, 3 and the "further disgorgement claim" (Count 5 in Adv. 03-1151) against Desert Eagle. The Court will not abstain from the Trustee's preferential transfer claims against Joe G. Maloof & Co. (Adv. 03-1149) and National Distributing Company (Adv. 03-1152). Counts 4 for equitable subordination will be dismissed without prejudice in all six adversaries without prejudice to being reopened if Plaintiffs obtain state court judgments that justify the relief requested in Count 4.



Honorable James S. Starzynski  
United States Bankruptcy Judge



I hereby certify that on October 15, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties. This memorandum opinion is being filed in each of the six adversaries in the caption; only one copy will be transmitted to each person listed, in the case indicated next to their name.

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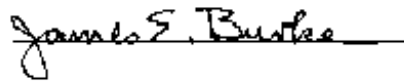
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