

STATE OF NORTH CAROLINA
RANDOLPH COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23-CVS-1786

BANK OF AMERICA, N.A.,

Plaintiff,

v.

KLAUSSNER FURNITURE
INDUSTRIES, INC.; CANDOR
CREEK INVESTMENTS, LLC;
KLAUSSNER INTERNATIONAL,
LLC; KLAUSSNER CORPORATE
SERVICES, INC.; COMMUNITY
DENTAL NETWORK, LLC;
PRESTIGE FABRICATORS, INC.;
KLAUSSNER FURNITURE OF
CALIFORNIA, INC.; and EAGLE
INTERMEDIATE HOLDINGS, INC.,

Defendants.

**CONSENT MOTION FOR ORDER
AUTHORIZING INITIAL
DISTRIBUTION OF FUNDS**

Preliminary Statement

Focus Management Group USA, Inc. (“**Focus**”) and Michael Grau, as Focus’s Agent (collectively, “**Receiver**”),¹ as general receiver for Klaussner Furniture Industries, Inc., Candor Creek Investments, LLC, Klaussner International, LLC, Klaussner Corporate Services, Inc., Community Dental Network, LLC, Prestige Fabricators, Inc., Klaussner Furniture of California, Inc., and Eagle Intermediate Holdings, Inc. (collectively, “**Defendants**”), by and through undersigned counsel,

¹ The Receiver is the general receiver over Defendants, including all tangible and intangible assets of Defendants (the “**Receivership Estate**”) pursuant to that certain Order Appointing General Receiver entered in the above-captioned proceeding on September 1, 2023 (ECF No. 23).

along with Bank of America, N.A. (“**BANA**”), by and through its undersigned counsel, hereby jointly submit this motion (the “**Consent Motion**”) and move the Court for entry of an order authorizing an interim distribution of \$5,000,000.00 to BANA pursuant to the terms described below.

Background Information

At least \$24,732,199.00 in obligations, plus accrued interest and expenses (the “**Loans**”), and a Letter of Credit in the amount of \$1,105,000.00 are presently outstanding under the Amended and Restated Loan and Security Agreement between BANA and Defendants dated as of October 5, 2020 (as amended, restated, amended and restated, or otherwise modified as of the date hereof, the “**Loan Agreement**,” and together with all instruments and documents executed at any time in connection therewith, the “**Loan Documents**”). Order Appointing General Receiver (“**Receivership Order**”) ¶ 12 (ECF No. 23), citing Am. Loan Agreement 45–46 (ECF No. 4.1) [“**Loan Agt**”]. Interest continues to accrue on all principal obligations at the Default Rate in the Loan Agreement. Receivership Order ¶ 12 (ECF No. 23), citing Loan Agt. 10 (ECF No. 4.1).

In section 5.11.1 of the Loan Agreement, each Defendant agreed that it was responsible for the payment and performance of the obligations under the Loan Agreement. Specifically, each Defendant agreed as follows:

[I]t is jointly and severally liable for, and absolutely and unconditionally guarantees to Agent and Lenders the prompt payment and performance of, all Obligations, except its Excluded Swap Obligations. Each [Defendant] agrees that its guaranty obligations hereunder constitute a continuing guaranty of payment and not of collection, that such obligations shall not be discharged until Full

Payment of the Obligations, and that such obligations are absolute and unconditional.

Receivership Order ¶ 13 (ECF No. 23), citing Loan Agt. 73 (ECF No. 4.1).

Additionally, each Defendant granted BANA “a continuing security interest in and Lien upon” the following property to secure the payment and performance of its obligations under the Loan Agreement (collectively, the “**Collateral**”):

(a) all Accounts; (b) all Chattel Paper, including electronic chattel paper; (c) all Commercial Tort Claims, including those shown on Schedule 9.1.16; (d) all Deposit Accounts; (e) all Documents; (f) all General Intangibles, including Intellectual Property; (g) all Goods, including Inventory, Equipment and fixtures; (h) all Instruments; (i) all Investment Property; (j) all Letter-of-Credit Rights; (k) all Supporting Obligations; (l) all monies, whether or not in the possession or under the control of Agent, a Lender, or a bailee or Affiliate of Agent or a Lender, including any Cash Collateral; (m) all accessions to, substitutions for, and all replacements, products, and cash and non-cash proceeds of the foregoing, including proceeds of and unearned premiums with respect to insurance policies, and claims against any Person for loss, damage or destruction of any Collateral; (n) all books and records (including customer lists, files, correspondence, tapes, computer programs, print-outs and computer records) pertaining to the foregoing; and (o) all other Property of such Obligor.

Receivership Order ¶ 14 (ECF No. 23), Loan Agt. 78 (ECF No. 4.1) (emphasis removed from original).

It is undisputed that BANA has a first-priority lien on substantially all the Receivership Estate’s assets. The Receiver, who is tasked with managing the assets and liabilities of the Receivership Estate, has conducted lien searches that do not reflect any additional first-priority liens.² *See, e.g.*, Exhibits B and C to Receiver’s

² In the Court’s Notice of Status Conference [ECF No. 90] entered November 17, 2023, it requested that Receiver’s counsel provide it with evidence “setting forth the basis for their statement that ‘BANA holds the only properly perfected security interest in the Non-Inventory Assets[.]’” In compliance therewith, Receiver’s counsel provided the Court with a copy of the Uniform Commercial Code search results that

Supplement to Brief in Support of Motion to Expedite (ECF Nos. 93.2 and 93.3). Moreover, the Receiver has not received notice of any other first-priority liens since the Court entered the Receivership Order over three months ago, on September 1, 2023. And finally, no party has asserted, or suggested to the Receiver any reason to assert, that there is any defect or exclusion in BANA's first-priority liens.

Liens that have been asserted in this case by any party other than BANA do not extend to the proceeds of the Prestige Assets.³ While the Receiver recently settled a claim with the IRS,⁴ as of the date hereof, the IRS has not taken the steps to perfect a lien related to that claim, as reflected in the lien searches attached hereto as Exhibit A. Further, even if the IRS had filed a notice of lien, the North

it conducted on September 18, 2023 (more than two weeks after the commencement of this receivership and the imposition of the "stay") demonstrating that BANA held a first priority security interest in Defendant's assets. *See* Ex. B, UCC Lien Search [ECF No. 93.2]. As previously noted, creditors other than BANA have filed UCC-1 financing statements on the Defendants assets, but those liens relate to specific assets and did not attach to all assets, as BANA's lien did. *See* Supplement to Brief in Support of Motion to Expedite ¶ 6 [ECF No. 93].

³ On October 31, 2023, Green Worldwide Shipping LLC ("**Green**") filed a Notice of Lien Claim [ECF No. 67] asserting a lien on certain goods pursuant to 46 U.S.C. § 31342 and federal maritime common law identified in the notice (the "**Green Worldwide Shipping Lien Claim**"). On November 21, 2023, ASF Global, LLC ("**ASF**," and together with Green, the "**Statutory Lien Claimants**") filed a Notice of Secured Claim [ECF No. 96] asserting a lien on certain goods pursuant to 46 U.S.C. § 31342 and federal maritime common law identified in the notice (the "**ASF Global Lien Claim**," and together with the Green Worldwide Shipping Lien Claim, the "**Statutory Lien Claims**"). As of the date of this Consent Motion, the goods identified in the Statutory Lien Claims have not been sold and thus, to the extent that the Statutory Lien Claimants are able to assert a valid lien on any or all of the goods identified in the Statutory Lien Claims, such lien would not have attached to any funds held by the Receiver that would be subject to distribution pursuant to this Consent Motion.

⁴ *See* Order on Motion to Approve Settlement with Internal Revenue Service [ECF No. 105].

Carolina Supreme Court has recognized that federal tax claims are subordinate to prior specific liens. *See Nat'l Sur. Corp. v. Sharpe*, 236 N.C. 35, 45, 72 S.E.2d 109, 120 (1952) (holding that, although the federal government has a right of priority in payment out of the property in the hands of the receiver, this right does not have priority over “a prior specific lien embracing specific property of the debtor”); *see also United States v. State*, 227 S.C. 187, 194, 87 S.E.2d 577, 580 (1955) (holding that the federal government’s right of priority in payment out of the property in the hands of the receiver would not supersede a lien which was specific and perfected at the time the receiver was appointed). Thus it has not been disputed in this case, and relevant law supports that BANA has a first priority, perfected security interest in the cash the Receiver seeks to distribute via this Consent Motion.

Following the sale of the assets of Prestige Fabricators, Inc. (the “**Prestige Assets**”), approved by the Court on October 2, 2023, pursuant to the Order on Motion to Sell Certain Assets of Prestige Fabricators, Inc. to VPC Group USA, Inc. (the “**Prestige Sale Order**”) (ECF No. 51), there has been no challenge to the proceeds, which netted approximately \$2,000,000 above what is requested herein. Further, the Prestige Sale Order provides that “[a]ll proceeds from the sale shall transfer and attach to all valid liens and encumbrances on the Prestige assets in order of their respective priorities under applicable law.” Because BANA held a valid first-priority lien on the Prestige Assets at the time of the sale, BANA’s first-priority lien transferred and attached to the proceeds of the sale.

BANA’s Right to a Distribution of Funds

Under N.C.G.S. § 1-507.51(a), “claims secured by liens on receivership property” that “are valid and perfected before the time of appointment” have priority over all claims in receiving distributions, including claims for “actual, necessary costs and expenses incurred by the receiver during the receivership.” As described above and noted by this Court in the Receivership Order, BANA’s claims are secured by liens on substantially all the Receivership Estate’s property, are valid, and were perfected before the Receiver’s appointment, making BANA the first-priority lienholder.

As first-priority lienholder, BANA is entitled to a distribution of funds exceeding the \$5,000,000.00 that is requested here. *See* N.C.G.S. § 1-507.53; *Flexible Funding Ltd. Liab. Co v. Graham Cnty. Land Co., L.L.C.*, No. 21 CVS 142, 2022 WL 3657094, at *4 (N.C. Super. July 26, 2022) (holding first-priority lienholder was entitled to an interim distribution of funds). Based on the anticipated receipts and disbursements reflected in the proposed budget attached as Exhibit A to the Consent Motion for Order Extending Interim Period (ECF No. 116), the funds remaining in the Receivership Estate following the proposed interim distribution are anticipated to be sufficient to fund the ongoing expenses of the Receivership Estate through the termination of the receivership, and is significantly less than the balance of proceeds of BANA’s collateral that has been liquidated to date.

The proposed interim distribution is beneficial to the Receivership Estate because it will reduce the amount of the secured claim of BANA and reduce the

continued accrual of interest pursuant to the Loan Documents. Additional interest accrual is detrimental to the Receivership Estate because it continues to increase the amount of BANA's secured claim. Thus, a reduction in ongoing interest accrual would benefit the Receivership Estate and its creditors by reducing expenses.

Principles of equity additionally dictate that the Court should grant this Motion. "Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require." *Lambeth v. Lambeth*, 249 N.C. 315, 321, 106 S.E.2d 491, 495 (1959) (citing *Skinner v. Maxwell*, 66 N.C. 45, 47 (1872)). BANA, as first-priority lienholder of substantially all the Receivership Estate's property, stands to receive substantially all the proceeds of the Receiver's work in this case — the question is not if BANA will receive the funds, but when. Despite this fact, BANA has not received any distributions to date. Since receiverships are designed to accomplish equity and BANA is entitled to an immediate distribution of funds, the Court should grant this Motion.

Timing of Funds Distribution and Service of Motion

BANA is entitled to receive the distribution of funds immediately and by separate motion, seeks to expedite consideration of this Consent Motion. In an effort to minimize the administrative burden and expense to the Receivership Estate associated with serving motions by mail, on December 5, 2023, the Receiver filed a Motion to Limit Notice [ECF No. 107], whereby the Receiver proposed to limit notice by mail and instead provide notice via email and on websites

maintained by the Court and by Epiq Corporate Restructuring, LLC, as further described in the Motion to Limit Notice. The Receiver and BANA hereby propose to serve this Consent Motion in the manner described in the Motion to Limit Notice in order to reduce expenses to the Receivership Estate associated with mailing the Consent Motion to more than 1,800 recipients.

Conclusion

Accordingly, for the foregoing reasons, the Receiver respectfully requests that the Court grant the Motion and authorize the interim distribution to BANA.

This is the 12th day of December, 2023.

K&L GATES LLP

/s/ Margaret R. Westbrook

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CERTIFICATE OF SERVICE

A copy of this document was electronically filed using the Business Court's online filing system and, therefore, will be served in accordance with Rule 3.9(a) of the Business Court Rules by issuance of a Notice of Filing sent to the parties:

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