

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§	Chapter 11
	§	
NEIMAN MARCUS GROUP LTD LLC, <i>et al.</i> ,	§	Case No. 20-32519 (DRJ)
	§	
Debtors. ¹	§	(Jointly Administered)
	§	

**STATEMENT AND RESERVATION OF RIGHTS BY DEUTSCHE BANK AG
NEW YORK BRANCH REGARDING FINAL APPROVAL OF DIP FINANCING
AND USE OF CASH COLLATERAL
[Relates to Docket No. 104]**

Deutsche Bank AG New York Branch, as administrative agent (in such capacity, the “ABL Agent”)² for the lenders (the “ABL Lenders”) under that certain asset-based lending credit agreement (as amended, restated, supplemented, or otherwise modified from time to time, the “ABL Credit Agreement”), dated as of October 25, 2013, among the ABL Agent, Neiman Marcus Group LTD LLC (the “Borrower”) and certain of the other above-captioned debtors and debtors-in-possession (collectively, the “Debtors”), by and through its undersigned counsel, hereby submits this statement and reservation of rights regarding final approval of the Debtors’ *Emergency Motion for Entry of Interim and Final Orders (i) Authorizing the Debtors to (a) Obtain Postpetition Financing and (b) Utilize Cash Collateral, (ii) Granting Adequate Protection to*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each debtor’s federal tax identification number, are: Neiman Marcus Group LTD LLC (9435); Bergdorf Goodman Inc. (5530); Bergdorf Graphics, Inc. (9271); BG Productions, Inc. (3650); Mariposa Borrower, Inc. (9015); Mariposa Intermediate Holdings, LLC (5829); NEMA Beverage Corporation (3412); NEMA Beverage Holding Corporation (9264); NEMA Beverage Parent Corporation (9262); NM Bermuda, LLC (2943); NM Financial Services, Inc. (2446); NM Nevada Trust (3700); NMG California Salon LLC (9242); NMG Florida Salon LLC (9269); NMG Global Mobility, Inc. (0664); NMG Notes Propco LLC (1102); NMG Salon Holdings LLC (5236); NMG Salons LLC (1570); NMG Term Loan Propco LLC (0786); NMG Texas Salon LLC (0318); NMGP, LLC (1558); The Neiman Marcus Group LLC (9509); The NMG Subsidiary LLC (6074); and Worth Avenue Leasing Company (5996). The location of the debtors’ service address is: One Marcus Square, 1618 Main Street, Dallas, Texas 75201.

² Capitalized terms used but not defined herein have the meanings ascribed to them in the DIP Motion or the Interim DIP Order (each as defined below), as applicable.

Prepetition Secured Parties, (iii) Modifying the Automatic Stay, (iv) Scheduling a Final Hearing and (v) Granting Related Relief [Docket No. 104] (the “DIP Motion”), and respectfully states as follows:

STATEMENT AND RESERVATION OF RIGHTS

1. While the ABL Agent does not object to final approval of the DIP Motion, it submits this statement to inform the Court of concerns it has regarding the current status of the court-ordered protections of the ABL Lenders’ secured interests, and to reserve the right to return to the Court on an emergency basis or otherwise, if necessary, to protect the ABL Lenders’ collateral.

2. As set forth more fully in the interim DIP Order [Docket No. 254] (the “Interim DIP Order”), prior to the Petition Date, the ABL Credit Agreement provided the Debtors with access to aggregate revolving loan commitments of \$900,000,000.³ Interim DIP Order ¶ E(e)(i). As of the Petition Date, approximately \$760,000,000 of loans and letters of credit were outstanding under the ABL Credit Agreement, plus interest, fees, expenses and other amounts. *Id.* ¶ E(e)(iii). To secure these obligations, the ABL Agent (for itself and the other ABL Lenders) was granted a security interest in, and liens on, substantially all of the Debtors’ assets, including a first priority security interest in, among other things, the Debtors’ inventory, accounts, cash and cash equivalents (the “ABL Priority Collateral”). *See id.* ¶¶ E(e), (j) and (k).

3. The ABL Credit Agreement, like all asset-based loans, is structured so that the amount available for borrowing is regularly calibrated to the value of the specific set of collateral securing the loan. Here, the definition of “Borrowing Base” in the ABL Credit Agreement is critical, because (as the Court knows) it sets forth the formula by which to determine the Debtors’

³ The ABL Credit Agreement also provided for a \$100 million first-in-last-out term loan (“FILLO”) not addressed here.

maximum borrowing capacity. As the ABL Credit Agreement is a first-lien secured facility, the Borrowing Base formula is a direct function of the value of certain eligible collateral on which the ABL Lenders have first recourse (*i.e.*, the ABL Priority Collateral). ABL Credit Agreement ¶ 1.01.

4. The ABL Credit Agreement provides the ABL Lenders with several important protections, two of which are particularly relevant here. First, the Debtors effectively can borrow only up to 90% of the Borrowing Base in the ABL Credit Agreement (the “Liquidity Condition”) because, if the excess availability under the ABL Credit Agreement (defined as the difference between the outstanding loan amount and the current Borrowing Base) falls below 10% of the Borrowing Base,⁴ and if the shortfall is not cured within five days, then the ABL Agent is entitled to exercise cash dominion over the Debtors and perform a daily sweep of the Debtors’ cash accounts until excess availability exceeds the greater of 10% of the Borrowing Base and \$50 million for a period of 20 consecutive days. ABL Credit Agreement § 8.01(4). Second, when material changes in circumstance decrease the value of the ABL Lenders’ specified collateral, the ABL Credit Agreement allows the ABL Agent to take certain discretionary reserves that further reduce the Borrowing Base. *Id.* § 1.01. As discussed more fully below, this right was triggered by the current crisis in the retail sector caused by COVID-19, resulting in the ABL Agent taking a reasonable, prepetition reserve of 5% against the Debtors’ net eligible inventory (the “Prepetition Reserve”). Thus, prior to the Petition Date, the Debtors could maintain borrowings of no more than approximately 85% of the Borrowing Base.

5. After weeks of intensive negotiations leading up to the Petition Date, the ABL Agent and the Debtors reached a consensus, as memorialized in the Interim DIP Order. Among

⁴ To be precise, under Section 1.01 of the ABL Credit Agreement, the Liquidity Condition occurs when excess availability falls below the greater of \$50 million and 10% of the “Line Cap,” which is defined as the lesser of (1) the aggregate Available Revolving Facility Commitments at such time and (2) the Borrowing Base then in effect.

other things, this agreement permitted the Debtors to use the ABL Lenders' cash collateral in exchange for what the ABL Agent believed to be adequate protection at that time. Specifically, in the interest of compromise, the ABL Agent accepted (i) a 7% reserve to the Borrowing Base (*see* Interim DIP Order ¶¶ 9(g)(iv-v))⁵ and (ii) a segregated cash collateral account of \$50 million, which was earmarked as a cash backstop and guaranteed source of liquidity to restore compliance with the ABL Borrowing Base during the course of the chapter 11 cases (*id.* ¶ 9(g)(v)). In exchange for these protections, the ABL Agent agreed to relinquish (i) the 10% Liquidity Condition under the ABL Credit Agreement; (ii) the 5% Prepetition Reserve it had imposed as a result of the acute COVID-19 crisis and the store closures that followed in its wake; (iii) the right to impose discretionary reserves during the chapter 11 cases (*id.* ¶ 9(g)(iv)); and (iv) the right to re-appraise the collateral under Section 5.07(3) of the ABL Credit Agreement during the five months following the Petition Date (*id.*). Additionally, the ABL Agent agreed to forego any postpetition approval rights over the Debtors' DIP budgets and other covenants restricting the Debtors' use of the ABL Priority Collateral.

6. Last week, however, the Debtors disclosed that the initial DIP budget (as attached as Exhibit 3 to the Interim DIP Order, the "Initial DIP Budget")—which served as the basis for the ABL Lenders' consent to the Debtors' use of their cash collateral—contained material errors undermining key assumptions regarding the ABL Lenders' adequate protection. In particular, the Debtors' Borrowing Base Certificate of May 16, 2020 shows that ending stock ledger inventory about one week after the Petition Date was ***\$159 million less*** than the budgeted amount in the Initial DIP Budget, representing more than an 11% variance. The net eligible inventory was ***\$65***

⁵ As set forth in the Interim DIP Order, this reserve is slightly higher than 7% of the Borrowing Base because it is equal to 7% of the ABL Borrowing Base plus the lesser of the FILO Borrowing Base and \$100 million. *Id.* ¶ 9(g)(iv).

million less than the budgeted amount. Primarily as a result of the significantly lower net eligible inventory, actual net availability under the ABL Borrowing Base was *negative \$11 million* as compared to the positive \$39 million budgeted amount (a *\$50 million* “miss” from the targeted net availability in the Initial DIP Budget), resulting in over a 100% variance. These new and corrected numbers demonstrate that, just days after the Petition Date, the Debtors were already in breach of the agreed-upon Borrowing Base formula set forth in the Interim DIP Order, and the ABL Lenders were significantly less protected than under the terms for which they had bargained.

7. To cure this breach, the Debtors have proposed to “rebuild” the ABL Borrowing Base using \$12 million (of \$50 million originally set aside) from a segregated cash collateral account meant to guarantee a liquidity cushion as part of the ABL Lenders’ adequate protection. *See* Interim DIP Order ¶ 9(g)(v). While such a designation of segregated cash to cure a default under the negotiated Borrowing Base formula is a right the Debtors have under the terms of the Interim DIP Order, that contractual self-help remedy was agreed to with the understanding that the Initial DIP Budget and inventory values contained therein were accurate. That same budget indicated that such a use of the segregated cash collateral would not occur until late June 2020, at the earliest. Instead, about one week after the Petition Date, the Debtors had already designated \$12 million (or nearly 25%) of the segregated cash to restore compliance with the ABL Borrowing Base formula. Thus, the ABL Lenders’ anticipated protection of approximately \$89 million—comprising \$39 million of net availability (which is entirely gone) and \$50 million in a segregated account (which is substantially depleted)—is down to approximately \$38 million, a *57% decrease* from the bargained-for levels of protection in the Interim DIP Order.

8. This unexpected diminution of the ABL Lenders’ negotiated protections is particularly concerning to the ABL Agent in light of the ongoing COVID-19 crisis that continues

to shutter the Debtors' stores and erode the value of their inventory—the ABL Lenders' primary collateral. The most recent third-party appraisal report, issued pursuant to the terms of the ABL Credit Agreement and effective as of February 1, 2020 (the "2020 Appraisal Report"), reflects that the net orderly liquidation value ("NOLV") of the ABL Lenders' eligible inventory had already fallen by about 2% from the previous appraisal just six months prior *without* taking into account the effect of COVID-19 and the Debtors' store closures. Additionally, the 2020 Appraisal Report warned that the net recovery value of the ABL Lenders' specified collateral was likely to decline by an additional 10% beyond what was reflected in the report as a result of the need to sell inventory out-of-season. 2020 Appraisal Report at 8. In light of these warnings from an impartial, third-party expert, the ABL Agent imposed the modest 5% Prepetition Reserve discussed above—which the ABL Agent since agreed to relinquish in reliance on the Initial DIP Budget.

9. The ABL Agent is also concerned that having already lost tens of millions of dollars of their cushion, the Debtors and the DIP Lenders, rather than increase the amount of segregated cash or even pay down a portion of the ABL loan, instead expect the ABL Lenders to bear the full consequences of the substantial diminution in the segregated cash that was created to protect them against any future diminutions in value (as opposed to diminutions that already existed, but were not revealed to the ABL Lenders).

10. Nonetheless, in light of the ABL Lenders' desire to support the successful emergence of the Debtors from bankruptcy and the costs and delays a contested hearing would create, the ABL Agent does not object to final approval of the DIP Motion. Instead, the ABL Agent reserves its right, in the event the ABL Lenders' bargained-for protections are not restored through a rebuild of inventory value and a replenishment of the segregated cash collateral account to levels anticipated by the Initial DIP Budget, to seek relief from the Court on an emergency basis,

including, without limitation, relief from the automatic stay, additional adequate protection, or such other relief as may be appropriate.

Respectfully submitted this 29th day of May, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 29th day of May, 2020, he caused a copy of the forgoing pleading to be served via the Court's CM-ECF Notification System on those parties who have subscribed for notice..

/s/ Jason S. Brookner
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