

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

In re:

NEIMAN MARCUS GROUP LTD LLC, *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 20-32519 (DRJ)
)
) (Jointly Administered)
)

**DEBTORS' OBJECTION TO MACEOO, LLC'S MOTION TO COMPEL
RECLAMATION OF COLLATERAL AND IN THE ALTERNATIVE AN ALLOWANCE
OF AN ADMINISTRATIVE EXPENSE**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") file this objection (this "Objection") to *Maceoo, LLC's Motion to Compel Reclamation of Collateral and in the Alternative an Allowance of an Administrative Expense* [Docket No. 1439] (the "Reclamation Motion"), filed by Maceoo, LLC ("Maceoo"). In support of the Objection, the Debtors respectfully state as follows:

Preliminary Statement

1. Maceoo's Reclamation Motion should be denied. Maceoo's right, if any, to reclamation pursuant to section 546(c)(1) of the Bankruptcy Code is subordinate to pre-existing liens by secured creditors whose claims far exceed the value of merchandise Maceoo seeks to reclaim. Furthermore, Maceoo has failed to establish that the Debtors were insolvent at the time

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 Debtors' service address is: One Marcus Square, 1618 Main Street, Dallas, Texas 75201.

the merchandise was delivered to them, a prerequisite to reclamation under section 546 of the Bankruptcy Code. Maceoo is also ineligible for administrative expense priority because Maceoo delivered merchandise to the Debtors more than 20 days prior to the commencement of these chapter 11 cases. Accordingly, Maceoo is an unsecured creditor seeking to collect on a prepetition claim ahead of other unsecured creditors.

Background

I. Maceoo's Demands.

2. On May 12, 2020, Maceoo, via a letter emailed to the Debtors' counsel (the "Initial Demand Letter"), demanded reclamation of certain goods identified by invoice number, PO #, and cost on Exhibit A to the Initial Demand Letter (the "Encumbered Inventory").

3. On May 14, 2020, Maceoo served upon the Debtors' counsel and filed on the docket the *Notice of Demand for Reclamation by Maceoo, LLC* [Docket No. 416] (the "Supplemental Demand Letter," and together with the Initial Demand Letter, the "Demand Letters"), which demanded the reclamation of the Encumbered Inventory.

4. On May 26, 2020, the Debtors responded to the Demand Letters via a letter to Maceoo's counsel stating that the Debtors did not intend to honor the reclamation demand because Maceoo's right of reclamation was subordinate to liens held by the Debtors' prepetition and postpetition lenders in substantially all of the Debtors' assets, including the Encumbered Inventory.

5. On June 16, 2020, in response to the Debtors' refusal to lift the automatic stay to allow Maceoo to recover the Encumbered Inventory from the Debtors' estates, Maceoo filed a motion asserting that cause existed to lift the stay to allow Maceoo to reclaim the Encumbered Inventory. The motion to lift the automatic stay was withdrawn after a hearing on the motion (the "Maceoo Lift Stay Hearing") held July 15, 2020.

6. On August 4, 2020, Maceoo filed the Reclamation Motion asserting that cause existed to allow Maceoo to reclaim the Encumbered Inventory or, in the alternative, to be granted administrative expense priority.

II. The Debtors' Secured Debt.

A. The Debtors' Prepetition Financing.

7. On May 7, 2020 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. As of the Petition Date, the Debtors had funded-debt obligations of approximately \$5.5 billion. As further described in the *Declaration of Mark Weinstein, Chief Restructuring Officer of Neiman Marcus Group LTD LLC, in Support of the Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 86] (the "First Day Declaration")², the Debtors' funded debt obligations, as of the Petition Date, included a \$900.0 million senior secured asset-based revolving credit facility dated as of October 25, 2013 (the "Asset-Based Revolving Credit Facility"), of which \$749.0 million has been drawn. The obligations under the Asset-Based Revolving Credit Facility are secured by substantially all of the assets of Debtor Mariposa Intermediate Holdings LLC ("Holdings"), the ABL Borrowers, and the ABL Subsidiary Guarantors (collectively, the "ABL Priority Collateral"), including a first-priority security interest in inventory and the proceeds of inventory.

8. Additionally, the Debtors' funded debt obligations as of the Petition Date include the \$2,253.1 million Term Loan Facility dated as of October 23, 2013, \$561.7 million in aggregate principal amount of Second Lien Notes under an indenture dated June 7, 2019, and \$1,228.3 million in aggregate principal amount of Third Lien Notes under an indenture dated June 7, 2019. All obligations under the Term Loan Facility and the guarantees of those obligations are

² Capitalized terms used but not immediately defined in this motion shall have the meanings assigned to them elsewhere in this motion or in the First Day Declaration, as applicable.

secured by substantially all of the assets of Holdings, the Term Loan Borrowers, and the TL Subsidiary Guarantors, including, *inter alia*, a second-priority security interest in the ABL Priority Collateral. The Second Lien Notes and related guarantees are secured by collateral that includes, *inter alia*, a third-priority security interest in the ABL Priority Collateral. Lastly, the Third Lien Notes are secured by collateral that includes, *inter alia*, a fourth-priority security interest in the ABL Priority Collateral.

B. The Debtors' Postpetition Financing.

9. On May 7, 2020, the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court") entered the *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 254] (the "Interim DIP Order"), which authorized the Debtors to incur up to \$275 million under a \$675 million new-money debtor in possession financing facility (the "DIP Facility") secured by, *inter alia*, a "valid, binding, enforceable, fully-perfected junior security interest in and lien upon" the ABL Priority Collateral. On June 16, 2020, the Bankruptcy Court entered the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 850] (the "Final DIP Order") approving the DIP Facility and the liens granted thereunder on a final basis and allowing the Debtors to incur the full \$675 million principal amount under the DIP Facility. To date, the Debtors have drawn approximately \$525 million of DIP Facility funds.

Objection

I. Maceoo Does Not Have An Enforceable Right To Reclamation.

A. The Debtors' Prepetition and Postpetition Lenders Have Superior Liens on the Encumbered Inventory.

10. Maceoo seeks to reclaim merchandise it delivered to the Debtor pursuant to 11 U.S.C. § 546(c)(1). Reclamation Mot. ¶ 6. However, Maceoo has no such right under federal or state law.

11. Section 546 of the Bankruptcy Code is crystal clear that Maceoo's reclamation right is "subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof . . ." *In re Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976) (en banc), *cert denied* (1976); *see also hhgregg, Inc.*, 949 F.3d at 1041-42 (affirming the bankruptcy court's summary judgment against a seller seeking to enforce its reclamation rights because the reclamation claim was "subordinate to the DIP financing lien" under section 546(c)).

12. Likewise, pursuant to the section 2-702 of the Texas Business & Commercial Code (the "Texas U.C.C."), the rights of a party seeking reclamation are subject to "the rights of a buyer in ordinary course or other good faith purchaser" under section 2-403. Editor's Note three of section 2-702 of the Texas U.C.C. states that "since Section 2-403(4) incorporates by reference rights given to other purchasers and to lien creditors by Articles 6, 7 and 9, such rights have the same priority." Texas U.C.C. § 2-702, Editors Notes. A perfected security interest generally has priority over an unsecured seller. *See generally*, Texas U.C.C. § 9. Maceoo's right to reclaim the Encumbered Merchandise is therefore subordinate to the perfected liens of the Debtors' secured lenders pursuant to Texas and other state law. *See In re Samuels & Co., Inc.*, 526 F.2d 1238 (holding that under the Texas U.C.C., a perfected security interest "is unquestionably superior to the interest of the seller seeking to reclaim the same goods"); *In re Reliable Drug Stores, Inc.*, 70

F.3d 948, 949 (7th Cir. 1995) (“[A] reclamation claimant stands in line after a creditor with a security interest in after-acquired inventory.”); *In re Pester Ref. Co.*, 964 F.2d 842, 846 (8th Cir. 1992) (“the [reclamation] right is subordinate or inferior to the security interests”).

13. Furthermore, if the value of the goods a seller seeks to reclaim is less than the amount of debt secured by a prior lien, the seller’s claim has no value. *See hhgregg, Inc.* at 1048 (citing *In re Dana Corp.*, 367 B.R. 409, 421 (Bankr. S.D.N.Y. 2007) (finding that sellers reclamation claims were valueless because the goods remained subject to the prior lien defense)); *Reliable Drug Stores*, 70 F.3d at 950 (explaining that a reclaiming seller’s administrative claim is worthless where a debtor’s secured lenders are undersecured). Maceoo seeks to reclaim the Encumbered Inventory sold to Neiman Marcus’ Last Call stores worth approximately \$93,955.00 (at cost). The Debtors’ present and future inventory is subject to pre-existing and superpriority security interests totaling over \$5.0 billion. Consequently, Maceoo’s reclamation claim is valueless and Maceoo has no right to reclamation under federal or state law.

B. Maceoo Has Not Established That the Debtors Were Insolvent When They Received the Goods.

14. Section 546(c) only protects a seller’s reclamation rights if the debtor was “insolvent” when it received the goods. *See, e.g., Matter of Cont’l Airlines, Inc.*, 125 B.R. 415, 417 (Bankr. D. Del. 1991). An entity is insolvent under the Bankruptcy Code if its liabilities exceed its assets at a fair valuation. 11 U.S.C. § 101(32).

15. In the Reclamation Motion, Maceoo concedes that “it is unclear... when exactly the Debtor became insolvent.” Reclamation Mot. ¶ 8. Rather, in an attempt to demonstrate insolvency at the time of the merchandise’s receipt, Maceoo cites to the First Day Declaration, a decline in market conditions brought on by the COVID-19 crisis in March 2020, and a Reuters

report dated April 19, 2020. *Id.* The foregoing fails to establish the Debtors' insolvency when the Debtors received the merchandise.

16. In the First Day Declaration, Mr. Weinsten stated that “[p]rior to February 2020, the Debtors were on track to meet all of its budget, earnings, and savings targets for the fiscal year ending in July 2020.” First Day Decl. ¶ 5. On March 18, 2020, COVID-19 forced the Debtors to voluntarily close their stores and scale back supply chain operations. *Id.* The Debtors subsequently engaged in proactive restructuring discussions with creditors and advisors to minimize the impact of the global health crisis on their financial position. First Day Decl. ¶ 7. While the First Day Declaration shows that the Debtors were cognizant of the financial considerations ahead, it does not prove that the Debtors were insolvent when they took delivery from Maceoo on April 6, 2020.

17. Maceoo cites to a news report published by Reuters, titled “Exclusive: Neiman Marcus to File for Bankruptcy as Soon as this Week” and dated April 19, 2020. Maceoo surmises that the report, combined with the First Day Declaration, tended to show that the Debtors became insolvent between February 2020 and May 2020. Reclamation Mot. ¶ 8. This conjecture is supported by loose inferences that fail to prove insolvency when the Debtors received the Encumbered Inventory. Even the Debtors' filing for bankruptcy is insufficient to establish insolvency. Courts have routinely observed that “the Bankruptcy Code has no insolvency requirement”—filing for chapter 11 relief does not serve as evidence of insolvency. *In re Idell*, No. 19-70114-TMD, 2020 WL 3445436, at *3 (Bankr. W.D. Tex. June 23, 2020); *In re SGL Carbon Corp.*, 200 F.3d 154, 163 (3d Cir. 1999) (“It is well established that a debtor need not be insolvent before filing for bankruptcy protection.”) (citations omitted).

II. Maceoo Is Not Entitled to a Constructive Administrative Expense Claim Pursuant to 11 U.S.C. § 503(b)(9) Because No Encumbered Inventory Was Delivered Within 20 Days of the Petition Date.

18. Maceoo also requests that the Court grant it a constructive administrative expense claim under section 503(b)(9) of the Bankruptcy Code. Section 503(b)(9) provides for the allowance of an administrative expense claim where goods are received by the debtor within 20 days before the date of commencement of a bankruptcy proceeding. *See* 11 U.S.C. § 503(b)(9).

19. Maceoo concedes in its Reclamation Motion that the goods were *not* delivered within 20 days before the commencement of the bankruptcy proceedings. Encumbered Inventory under two invoices—INX3310 and INX3311, both attached to the Reclamation Motion—were originally scheduled for delivery on April 25, 2020. In the ordinary course of business, on February 12, 2020, the Debtors requested that Maceoo deliver the Encumbered Inventory earlier than originally scheduled. Consequently, Maceoo delivered the Encumbered Inventory on April 6, 2020—31 days before the Debtors filed petitions for Chapter 11 relief.

20. These facts simply do not satisfy the 20-day requirement of section 503(b)(9) of the Bankruptcy Code. Section 503(b)(9) bears no mention of originally-planned delivery dates. The Debtors’ request to move up the shipment dates of the Encumbered Inventory was made in good faith and in the ordinary course of business, and there is no evidence to the contrary. *See* Maceoo Lift Stay Hearing, July 15, 2020 Hrg. Tr. 28:22-29:12 (“It was quite common to, if business was good . . . that we would ask to see if it was possible to move up goods. And on the flip side, if we have brands that aren’t performing, we sometimes push orders and delay the receipt.”). Maceoo’s request for an administrative expense claim under section 503(b)(9) of the Bankruptcy Code should be denied.

Reservation of Rights

21. Nothing contained herein or any actions taken pursuant to such relief requested is intended or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or applicable nonbankruptcy law; (b) a waiver of the Debtors' or any other party in interest's right to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any particular claim is of a type specified or defined in this motion or any order granting the relief requested by this motion or a finding that any particular claim is an administrative expense claim or other priority claim; (e) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code; (f) an admission as to the validity, priority, enforceability, or perfection of any lien on, security interest in, or other encumbrance on property of the Debtors' estates; (g) a waiver or limitation of the Debtors', or any other party in interest's, rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the relief requested in this motion are valid, and the rights of all parties in interest are expressly reserved to contest the extent, validity, or perfection or seek avoidance of all such liens. If the Bankruptcy Court grants the relief sought herein, any payment made pursuant to the Bankruptcy Court's order is not intended and should not be construed as an admission as to the validity of any particular claim or a waiver of the Debtors' or any other party in interest's rights to subsequently dispute such claim.

22. The Debtors reserve all rights to supplement or add to the legal and factual arguments raised in this Objection, on any bases whatsoever, at a future date. Additionally, the Debtors reserve all rights to seek damages for violation of the automatic stay.

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that the Court deny the Reclamation Motion.

Houston, Texas
August 25, 2020

/s/ Matthew D. Cavanaugh

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Certificate of Service

I certify that on August 25, 2020, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Matthew D. Cavanaugh

Matthew D. Cavanaugh