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Siena Lending Group, LLC
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8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 LOS ANGELES DIVISION

11 In re:

12 B&B LIQUIDATING, LLC,
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14 Debtor and Debtor in Possession.
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Case No. 2:18-bk-11744- NB

Chapter 11

**OPPOSITION OF SECURED
LENDER SIENA LENDING GROUP,
LLC TO JOINT MOTION OF THE
DEBTOR AND THE OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS TO DISMISS
CHAPTER 11 CASE SUBJECT TO A
RESERVATION OF RIGHTS TO
ENFORCE PREVIOUSLY AGREED-
UPON CARVE OUT FOR
UNSECURED CREDITORS OR, IN
THE ALTERNATIVE, SUSPEND
ALL PROCEEDINGS OR CONVERT
CHAPTER 11 CASE TO A CASE
UNDER CHAPTER 7**

**DECLARATION OF LEO D.
PLOTKIN IN SUPPORT THEREOF**

Date: November 6, 2018

Time: 2:00 p.m.

Ctrm: 1545

1 **I. INTRODUCTION**

2 Debtor and the Official Committee of Unsecured Creditors (the “Committee”) jointly
3 move to dismiss this Chapter 11 case or alternatively to suspend proceedings or convert to a
4 Chapter 7. Secured lender Siena Lending Group, LLC (“Siena”) agrees that dismissal of this
5 Chapter 11 case is warranted, but objects to the requested reservation of alleged rights to enforce
6 the financing stipulation or the requested order requiring Siena to immediately pay further
7 administrative expenses.

8 Debtor and the Committee mistakenly assume that Siena may receive additional proceeds
9 of the disposition of its collateral that it would be obligated to share with the unsecured creditors.
10 That is not the case. Siena is only required to share payments it receives from Debtor in the event
11 the secured debt is reduced to \$1.5 million. Debtor and the Committee state that currently the
12 debt is in the approximate amount of \$3.77 million (the actual debt is substantially higher); given
13 that the vast majority of Debtor’s assets, and Siena’s collateral, has been sold, under no scenario
14 will the sharing provision be triggered. Even if Siena is able to reduce the secured debt to the
15 threshold level through third-party litigation, no further payments would be forthcoming from
16 Debtor that would be subject to the sharing provision.

17 Nor will the provision for sharing proceeds of the prosecution of commercial tort claims
18 come into play. Although Debtor granted Siena a security interest in commercial tort claims,
19 Siena is not pursuing any claim held by Debtor. Instead, Siena filed a contract-based suit against
20 Great American Group Advisory & Valuation Services, LLC (“GA”) for negligent performance
21 of appraisals that induced Siena to finance Debtor prior to its bankruptcy. The unsecured
22 creditors represented by the Committee, which opted not to accept Siena’s invitation to jointly
23 prosecute Siena’s claims against GA, are not entitled to share in Siena’s recovery because Siena
24 is not prosecuting a commercial tort claim held by Debtor. Rather, Siena asserts its own
25 independent claim against GA arising from the performance of pre-petition services, which in
26 any event is based upon the contractual relationship between Siena and GA. That suit is not a
27 commercial tort claim subject to the sharing provision.

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1 Finally, the request to compel immediate payment of administrative expenses is
2 unsupported by sufficient evidence or authority. Accordingly, this Chapter 11 case should be
3 dismissed with no reservations or conditions.

4 **II. DEBTOR AND THE COMMITTEE MISCONSTRUE THE CARVE-OUT**
5 **PROVISIONS OF THE FINANCING STIPULATION**

6 Debtor and the Committee request reservation of the right to enforce the financing
7 stipulation, which contemplated two scenarios, neither of which will come to pass, under which
8 Siena would share the proceeds of its collateral disposition. Those potential scenarios are
9 contained in paragraph 28 of the financing stipulation, which provides in relevant part:

10 Notwithstanding anything to the contrary herein and in complete
11 resolution of the Committee's informal objections to entry of an Order
12 approving this Stipulation on a final basis which is binding on the
13 Committee, the Debtor, Siena, and the Committee agree as follows:

14 a. Siena agrees that after its secured debt is reduced to \$1.5 million,
15 then 10% of *any further payment by the Debtor to Siena* on account of
16 the Current Sum Due or the Pre-Petition Fees shall be held in trust for the
17 benefit of claims of creditors other than Siena in this case and such
18 amounts shall constitute part of the Carve-Out set forth in paragraph 21
19 above. Such amounts shall not be distributed absent further Order of this
20 Court.

21 b. *If any portion of the Current Sum Due or the Pre-Petition Fees is*
22 *paid from the proceeds of any commercial tort claims*, then 25% of such
23 amount shall be paid to creditors other than Siena in this case and such
24 amounts shall also constitute part of the Carve-Out set forth in paragraph
25 21 above. Such amounts, if any, shall not be distributed absent further
26 Order of this Court. [Emphasis added.]

27 Amended Financing Stipulation [Docket 141 at p. 15].
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1 Neither subsection of paragraph 28 has or will come into play. As Debtor and the
2 Committee note, the proceeds of the liquidation sales fell far short of the projections of the
3 liquidation consultants, leaving Siena with a balance allegedly due from Debtor of approximately
4 \$3.77 million (the actual debt is substantially higher). [Motion at 8:11-22; 10:17-21.] Under no
5 realistic set of circumstances will there be sufficient proceeds generated from the little remaining
6 collateral to reduce the secured debt below the \$1.5 million threshold that would trigger the
7 obligation to share proceeds with unsecured creditors under paragraph 28(a). Even if Siena is
8 able to reduce the secured debt to the threshold level through third-party litigation, no further
9 payments would be forthcoming from Debtor that would be subject to the sharing provision, as
10 that provision requires sharing only of “further payments by the Debtor to Siena”, of which there
11 will be none.

12 Nor is there any reasonable possibility that any portion of the secured debt would be paid
13 from the proceeds of any commercial tort claim. One of the components of Siena’s collateral was
14 Debtor’s commercial tort claims; the financing stipulation contemplated that Siena might pursue
15 such claims, in which case Siena would share the proceeds with the unsecured creditors under
16 paragraph 28(b). However, neither Debtor nor Siena is pursuing any such claims.

17 In their Motion to Dismiss, Debtor and the Committee misperceive both the nature of
18 Siena’s claims and the party against which the claims are asserted. Contrary to their statements in
19 such motion, Siena is not suing either Great American Group, LLC (“Great American”) or Tiger
20 Capital Group, LLC (collectively with Great American, the “Liquidation Consultants”). Rather,
21 Siena has filed its claim against GA only, which is not a Liquidation Consultant. Further, and
22 again contrary to the statements in the motion, the claims are based upon GA’s breach of its
23 contracts with Siena to competently perform two appraisals pre-petition upon which Siena relied
24 in making a pre-petition loan to Debtor, not on the Liquidation Consultants’ performance of
25 services during this bankruptcy case. [Declaration of Leo D. Plotkin (“Plotkin Dec.”), ¶ 2.] These
26 claims belong to Siena alone, and do not constitute commercial tort claims of Debtor subject to
27 paragraph 28(b) of the financing stipulation.
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1 In short, no commercial tort claims are being pursued that could generate recovery under
2 paragraphs 28(b) of the stipulation. Debtor and the Committee erroneously assume that Siena
3 nonetheless is required to share the proceeds of its litigation of pre-petition claims with the
4 unsecured creditors. While Siena had proposed to the Committee that the parties jointly
5 prosecute such claims in return for a share of the recovery, the Committee elected not to do so.
6 [Plotkin Dec., ¶ 3.] Accordingly, paragraph 28(b) would become operative only if Siena pursued
7 Debtor's commercial tort claims. As noted, the claims Siena is pursuing are contractual claims
8 asserted in its own right, and arise from a pre-petition contract with and conduct of GA, not a
9 Liquidation Consultant.

10 Simply put, the carve-out provisions of paragraph 28 have become moot. There is no
11 reason to condition dismissal of this bankruptcy case upon a reservation of rights in favor of the
12 unsecured creditors to enforce such provision. This bankruptcy case should be dismissed
13 outright.

14 **III. SIENA SHOULD NOT BE COMPELLED TO MAKE IMMEDIATE PAYMENT**
15 **OF ADMINISTRATIVE EXPENSES**


16 Debtor and the Committee also ask the Court to order Siena to pay the balance of the
17 carve-out for professional fees and administrative expenses. Except for a minor amount allegedly
18 owed to Donlin Recano & Company, which apparently may increase, the nature and amount of
19 such expenses are not specified. Further, Debtor has not established that any amount to its
20 counsel currently is due and owing. In its latest fee statement filed on September 19, 2018,
21 Debtor's counsel represented that amounts received under the carve-out exceeded the post-
22 petition fees and costs incurred through the end of the reporting period. [Docket 224.] Further,
23 the amount of the Donlin Recano claim has not been determined, and Debtor has failed to
24 provide any detail concerning other alleged administrative expenses or any authority that Siena
25 must bear the burden of payment. No basis exists to compel Siena to pay any further sums at this
26 time.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Siena respectfully requests that the Court grant the motion of
3 Debtor and the Committee to dismiss this Chapter 11 case without reservation, including the
4 reservation of any right to enforce paragraph 28 of the financing stipulation or any provision
5 requiring Siena to immediately pay any further administrative expenses.

6 DATED: October 23, 2018

LEO D. PLOTKIN
LEVY, SMALL & LALLAS
A Partnership Including Professional Corporations

8 By: 
9 Leo D. Plotkin
10 Attorneys for Secured Lender
11 Siena Lending Group, LLC

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DECLARATION OF LEO D. PLOTKIN

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2 I, Leo D. Plotkin, declare:

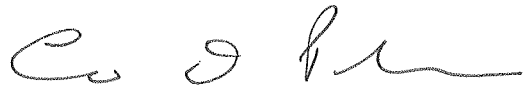
3 1. I am an attorney at law duly licensed to practice before this Court and all courts of
4 the State of California and, through my professional corporation, am a partner of Levy, Small &
5 Lallas, A Partnership Including Professional Corporations, attorneys for Secured Lender Siena
6 Lending Group, LLC (“Siena”) in this action. I have personal, first-hand knowledge of each and
7 every fact set forth in this declaration and, if called upon to testify thereto as a witness, I could
8 and would do so competently.

9 2. I am currently representing Siena in an action it filed against Great American
10 Group Advisory & Valuation Services, LLC (“GA”), which performed two appraisals upon
11 which Siena relied in making a pre-petition loan to Debtor. Neither Great American Group, LLC
12 nor Tiger Capital Group, LLC, which served as Debtor’s liquidation consultants during this
13 bankruptcy case, are parties to the suit, and Siena has not asserted any claims against them. The
14 claims against GA are based upon GA’s breach of its contracts with Siena to competently
15 perform the two appraisals of Debtor’s inventory prior to the bankruptcy. The complaint does not
16 allege claims based upon the liquidation consultants’ performance of services during this
17 bankruptcy case.

18 3. Prior to filing suit against GA, I discussed with counsel for the Official
19 Committee of Unsecured Creditors (the “Committee”) the prospect of the Committee’s joint
20 prosecution of Siena’s claims against GA in return for a share of the proceeds of any judgment or
21 settlement. After some discussion, the Committee decided not to join in the lawsuit.

22 I declare under penalty of perjury under the laws of the United States of America that the
23 foregoing is true and correct.

24 Executed this 23rd day of October, 2018 at Los Angeles, California.

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Leo D. Plotkin

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
815 Moraga Drive, Los Angeles, California 90049

A true and correct copy of the foregoing document entitled (*specify*): **OPPOSITION OF SECURED LENDER SIENA LENDING GROUP, LLC TO JOINT MOTION OF THE DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DISMISS CHAPTER 11 CASE SUBJECT TO A RESERVATION OF RIGHTS TO ENFORCE PREVIOUSLY AGREED-UPON CARVE OUT FOR UNSECURED CREDITORS OR, IN THE ALTERNATIVE, SUSPEND ALL PROCEEDINGS OR CONVERT CHAPTER 11 CASE TO A CASE UNDER CHAPTER 7; DECLARATION OF LEO D. PLOTKIN IN SUPPORT THEREOF** will be served or was served in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **10/23/2018**. I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Brian L Davidoff on behalf of Debtor B&B Liquidating, LLC - b davidoff@greenbergglusker.com,
calendar@greenbergglusker.com; jking@greenbergglusker.com

Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On **10/23/2018**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Rommel Mapa, Donlin, Recano & Company, Inc., 6201 15th Avenue, Brooklyn, NY 11219
TN Dept. of Revenue, c/o TN Atty. General's Office, BK Division, PO Box 20207, Nashville, TN 37202-0207

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

10/23/2018

Heidi Petrilli

Date

Printed Name

Signature

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):

Charla L Brown on behalf of Creditor Texas Comptroller of Public Accounts
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United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov

Elizabeth Weller on behalf of Creditor Dallas County

Elizabeth Weller on behalf of Creditor c/o Elizabeth Weller City of Frisco
dallas.bankruptcy@publicans.com