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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,
13 Debtor and Debtor in Possession.

Case No.: 2:18-bk-11744 NB

Chapter 11

**OMNIBUS REPLY BY OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS TO OPPOSITIONS FILED BY
SIENA LENDING GROUP, LLC SET FOR
HEARING ON NOVEMBER 6, 2018**

Hearing Date: November 6, 2018

Time: 2:00 p.m.

Court: United States Bankruptcy Court
255 East Temple Street
Courtroom 1545
Los Angeles, CA

Judge: Honorable Neil Bason

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20 The Official Committee of Unsecured Creditors (the "Committee") of B&B Liquidating,
21 LLC, the above-captioned debtor (the "Debtor"), files this omnibus reply to the below various
22 oppositions filed by Siena Lending Group ("Siena") in connection with motions set for hearing
23 before this Court on November 6, 2018 in the above-captioned case and in support of the *Joint*
24 *Motion of the Debtor and The Official Committee of Unsecured Creditors to Dismiss Chapter 11*
25 *Case* [Docket No. 227] (the "Motion to Dismiss"):

- 26 (i) *Opposition of Secured Lender Siena Lending Group, LLC to Joint Motion of the*
27 *Debtor and the Official Committee of Unsecured Creditors to Dismiss Chapter 11*
28 *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

1 *Convert Chapter 11 Case to a Case Under Chapter 7 Declaration of Leo D. Plotkin*
2 *in Support Thereof* [Docket No. 241];

3 (ii) *Opposition of Secured Lender Siena Lending Group, LLC to Creditor Simon Property*
4 *Group, Inc.’s Motion to Compel Immediate Payment of Administrative Rent;*
5 *Declarations of Michael Zielinski and Leo D. Plotkin in Support Thereof Filed by*
6 *Creditor Siena Lending Group, LLC* [Docket No. 237];

7 (iii) *Opposition of Secured Lender Siena Lending Group, LLC to Motion of Starwood*
8 *Retail Partners LLC and The Forbes Company for an Order (1) Allowing as an*
9 *Administrative Expense Post-Petition Rent and Lease Charges Under 11 U.S.C. §§*
10 *365(d)(3) and 503(b) and (2) Compelling Immediate Payment; Declarations of*
11 *Michael Zielinski and Leo D. Plotkin in Support Thereof* filed by Creditor Siena
12 Lending Group, LLC [Docket No. 239].

13 **PRELIMINARY STATEMENT**

14 Siena has enjoyed the full benefits of having this case remain in chapter 11¹ – where its
15 collateral has been liquidated under the Court’s supervision – yet now seeks to avoid not only the
16 agreed-upon and unambiguous terms of its agreement with the Committee, but also to avoid the
17 standard responsibilities required for the privilege of this Court-supervised liquidation. In a
18 transparent attempt to save costs at the expense of administrative creditors and unsecured creditors,
19 Siena has chosen to take a series of positions of that this Court should not countenance.

20 First, Siena disingenuously attempts to manufacture ambiguity into the plain terms of the
21 global settlement between the Committee and Siena on sharing of litigation proceeds. The DIP
22 Stipulation [Docket No. 141] is clear that the 25% litigation proceeds sharing arrangement applies to
23 proceeds from “any commercial tort claims” that Siena may receive, whether on account of claims
24 against Great American or any other third party, and whether on account of direct claims that Siena
25 holds or on account of estate claims. While perhaps this dispute is not presently ripe for this Court
26 to adjudicate as such litigation proceeds do not and may never exist, the Committee, this Court, and
27 parties in interest are entitled to notice, at a minimum, from Siena of the receipt of proceeds from
28 any commercial tort claims relating to this case. As the Debtor points out in its Reply, this Court
retains jurisdiction to interpret the terms of the Final DIP Order, which approved the DIP

¹ This is despite the fact that the Debtor renamed itself B&B *Liquidating* and was admittedly “dead on arrival” as a going concern as of the Petition Date.

1 Stipulation, even after dismissal of the case and the reservation of rights set forth in the Motion to
2 Dismiss is merely a confirmation of what rights are enforceable in any event following dismissal.

3 Second, after committing to this Court and landlords that Siena would pay administrative
4 claims, not just once at the first day hearing, but again a second time in connection with the response
5 to the relief from stay motion, Siena has made landlords “jump through hoops” to be paid pursuant
6 to their lease terms by requiring them to file motions to compel administrative claims. Even after
7 these landlords duly filed such motions, provided Siena with claim reconciliations, and incurred
8 additional attorneys’ fees in so doing, Siena now seeks to avoid payment of post-petition rent claims
9 by hiding behind section 506(c). But, as discussed below, this Court *has already* ordered that Siena
10 cannot use section 506(c) as a defense to paying administrative claims and that Siena must pay any
11 amounts that the Court determines that Siena should pay.

12 The Committee will not repeat the arguments that the Debtor makes in its reply supporting
13 the dismissal of the case on the terms set forth in the Motion to Dismiss and for the reasons set forth
14 therein and herein, the Motion to Dismiss should be granted with appropriate reservations of
15 jurisdiction over the GA litigation (should that matter remain in Bankruptcy Court), the DIP
16 Stipulation/Final DIP Order, and an order requiring Siena to pay administrative claims.

17 **I.**

18 **REPLY**

19 **A. The DIP Stipulation is Unambiguous and Clear.**

20 The DIP Stipulation, as approved by the Court in the Final DIP Order, is an agreement
21 between the Debtor and Siena. Under the DIP Stipulation, Siena agreed that:

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

27 DIP Stipulation at ¶ 28(b) (emphasis added).
28

1 Siena argues that it does not have to pay any sums to the Committee for the benefit of
2 unsecured creditors under this provision with respect to its pending complaint against Great
3 American because the claims belong to Siena, and not to the estate. Even if there is a determination
4 by the Court that Siena’s claims are not estate claims, which there has not been, nowhere in the DIP
5 Stipulation is there a requirement that the sharing arrangement only apply to estate claims. To the
6 contrary, the plain language of the DIP Stipulation says “any commercial tort claims”. “Under
7 California contract law, ‘if the language [of a contract] is clear and explicit, and does not involve an
8 absurdity’ the language must govern the contract’s interpretation.” *Comedy Club*, 553 F.3d at 1285
9 (alteration in original) (quoting Cal. Civ. Code § 1638); *Biller v. Toyota Motor Corp.*, 668 F.3d 655,
10 662 (9th Cir. 2012) (quoting Cal. Civ. Code § 1639); *Gruen Watch Co. v. Artists All, Inc.*, 191 F.2d
11 700, 703 (9th Cir. 1951) (“It is the law of California, absent any ambiguity, that the provisions of a
12 contract as written will govern.”) (citations omitted). The phrase “any commercial tort claims” is
13 not qualified by estate claims or direct claims.

14 As Siena itself admits in the Declaration of Leo D. Plotkin (“Plotkin Decl.”) to the
15 Opposition to the Motion to Dismiss, Siena approached the Committee about “the prospect of the
16 Committee’s joint prosecution of Siena’s claims against GA”. See Plotkin Decl. ¶ 3. There would
17 have been no reason for Siena to approach the Committee but for the agreement of Siena to share
18 commercial tort claims proceeds with the Committee. The fact that Siena approached the
19 Committee to be joint plaintiffs in the GA litigation is corroborating evidence of the parties’
20 agreement and the plain language of the DIP Stipulation. The discussions between Siena’s counsel
21 and the Committee’s counsel support this fact. At no point did Siena’s counsel ever articulate the
22 position that it has now advanced in the Opposition to the Motion to Dismiss, which is that Siena
23 only intended to share the litigation proceeds only under certain circumstances. See Declaration of
24 Jeffrey W. Dulberg (“Dulberg Decl.”), attached hereto at ¶ 3. While the Committee ultimately chose
25 not to participate as a plaintiff in Siena’s pending GA complaint that certainly does not change this
26 Court’s prior Order approving the DIP Stipulation and Siena cannot now try to alter the deal.

27 The Committee acknowledges that the dispute may not be ripe for adjudication as there are
28 no litigation proceeds over which to currently argue about. The Committee merely seeks to preserve

1 the right, should litigation proceeds arise, to reopen the case and have the proceeds be disbursed
2 through the Court. The Committee, therefore, requests that the Court fashion relief that preserves
3 the Committee's rights on the issue, which would consist of (i) Siena providing notice to the
4 Committee and this Court of any litigation proceeds received on account of any commercial tort
5 claims; and (ii) that the DIP Stipulation and Final DIP Order would survive dismissal and the
6 parties' rights thereunder be preserved with this Court to retain jurisdiction over such matter.

7 **B. Post-Petition Rent Must be Paid.**

8 In connection with Siena's relief from stay motion, various landlords raised objection that
9 they had not been paid post-petition rent. Siena assured parties that so long as relief from stay was
10 granted, it would work with the landlords to resolve disputed rent claims:

11 That said, the Court should be aware that Siena is in the process of reconciling the
12 claimed expenses and will pay undisputed amounts (and Siena believes there may
13 be some undisputed amounts). To the extent any amounts are disputed, Siena will
14 attempt to resolve such disputes and will abide by the Court's determination of
15 any unresolved disputes.

16 *Movant Siena Lending Group, LLC's Reply Memorandum of Points and Authorities in Support of*
17 *Motion for Relief from Automatic Stay*, at p. 5 (lines 12 – 16) [Docket No. 217].

18 Accordingly, this Court granted relief from stay, ruling that Siena could not use section
19 506(c) as a defense to paying such claims:

20 Landlords shall have the right to initiate a contested motion in lieu of an adversary
21 proceeding to obtain a determination of Siena's obligation to pay disputed
22 portions of landlords' claims. **Siena shall not raise as a defense to such motion**
23 **that the landlords' remedy is limited to surcharging Siena's collateral**, and
24 shall pay any amounts that the Court determines Siena is required to pay the
25 landlords within seven days of the entry of a final order on such contested motion
26 or as otherwise may be agreed by the parties in writing. With respect to
27 determination of disputed portions of the landlord claims, Debtor shall have no
28 obligation to support or oppose payment of any such claim. Debtor shall,

1 however, to the extent requested, provide such information as may be requested
2 by the parties.

3 *Order Granting Motion for Relief from the Automatic Stay under 11 U.S.C. § 362 (Personal*
4 *Property)*, at ¶ 16.3 [Docket No. 220] (emphasis added). Yet, notwithstanding the Court’s ruling
5 above, Siena argues that the landlords have not met their burden in satisfying the section 506(c)
6 surcharge requirements.

7 If the Court is inclined to consider Siena’s argument on section 506(c), the Committee
8 submits that where Siena promised to pay post-petition rent claims, it cannot now hide behind
9 section 506(c) or provisions of the leases that it does not like. Courts have held that when an
10 administrative claimant incurs costs due to the secured lender’s action, then that constitutes implied
11 consent by the secured lender for the surcharge of its collateral. *In re Tollenaar Holsteins*, 538 B.R.
12 830, 838 (Bankr. E.D. Cal. 2015). In this case, Siena either expressly or impliedly consented to the
13 post-petition rent claims incurred by landlords when it (i) promised to pay landlords rent directly (as
14 opposed to through the Debtor) not only at the first day hearing (*see* First Day Hearing Tr. at pp. 37-
15 38 [Docket No. 67]), but also in its reply to the relief from stay motion as noted above, and (ii)
16 subsequently reaped the benefits of its collateral being liquidated at the landlords’ locations. Siena
17 cannot now attempt to re-write the terms of the leases that are not economically beneficial for Siena.
18 The leases say what they say. The landlords should be provided their post-petition rent claims
19 pursuant to the plain mathematical formulas set forth under their leases.

20 **II.**

21 **CONCLUSION**

22 For the reasons set forth herein, the Committee respectfully requests that the Court enter
23 orders (i) requiring Siena to pay post-petition administrative rent claims owed to landlords according
24 to the lease terms; (ii) ruling that Siena must provide notice of receipt of any commercial tort
25 litigation proceeds, whether from the GA litigation, or otherwise, to the Committee and that the
26 effect of the DIP Stipulation is binding on Siena after conversion or dismissal of the case.

1 Dated: October 30, 2018

PACHULSKI STANG ZIEHL & JONES LLP

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By /s/ Jeffrey W. Dulberg

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Jeffrey W. Dulberg

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Shirley S. Cho

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Counsel for the Official Committee of
Unsecured Creditors

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PACHULSKI STANG ZIEHL & JONES LLP
ATTORNEYS AT LAW
LOS ANGELES, CALIFORNIA

DECLARATION OF JEFFREY W. DULBERG

I, Jeffrey W. Dulberg, declare:

1. I am over the age of 18 years of age. I am an attorney at law duly licensed to practice and in good standing before this Court, the Ninth Circuit Court of Appeal, and all courts of the State of California. I am a partner at Pachulski, Stang Ziehl & Jones, LLP, which is counsel for the Official Committee of Unsecured Creditors (the “Committee”) in this case. The facts set forth in this Declaration are personally known by me and if called to testify, I could and would competently testify to the matters set forth below. This Declaration is made in support of the Motion to Dismiss the case filed jointly by the Debtor and the Committee. Terms not defined herein are as set forth in the Motion to Dismiss or in the above Reply.

2. I was involved in the Committee’s negotiations with Siena regarding the terms of the global settlement agreement between the Committee and Siena that is now embodied in the DIP Stipulation at paragraph 28 of Docket Number 141. The DIP Stipulation was finalized and filed on April 26, 2018. At the time of entering into the DIP Stipulation, the Committee was unaware of the existence of any potential claims against any third parties. Therefore, paragraph 28(b) of the DIP Stipulation was drafted broadly on purpose and sets forth a general catchall sharing arrangement for “any commercial tort claims.”

3. The Committee was first made aware of potential claims against GA at a lunch meeting with Siena’s counsel, Leo D. Plotkin, on June 4, 2018. At that meeting, counsel disclosed the potential claims against GA and solicited the Committee’s assistance in view of the litigation proceeds sharing arrangement under the DIP Stipulation. Over the next month, the Committee and Siena continued to engage in dialogue regarding the potential litigation. At no point in time did Siena’s counsel ever articulate that the proceeds of any litigation would not be shared with the Committee if the Committee did not join in the litigation. The argument set forth in Siena’s Opposition to the Motion to Dismiss is the first time that Siena has stated that it will not share litigation proceeds with the Committee, contrary to the parties’ agreement.

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

3 Executed this 30th day of October, 2018 in Los Angeles, California.

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5 /s/ Jeffrey W. Dulberg
Jeffrey W. Dulberg

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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:
10100 Santa Monica Blvd., 13th Floor, Los Angeles, CA 90067

A true and correct copy of the foregoing document entitled (*specify*): **OMNIBUS REPLY BY OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO OPPOSITIONS FILED BY SIENA LENDING GROUP, LLC SET FOR HEARING ON NOVEMBER 6, 2018** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) 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 (*date*) **October 30, 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:

Service information continued on

attached page

2. **SERVED BY UNITED STATES MAIL**:

On _____, 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.

Service information continued on

attached page

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*) **October 30, 2018**, 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.

The Honorable Neil W. Bason
United States Bankruptcy Court
Central District of California
255 E. Temple Street, Suite 1552 / Ctrm. 1545
Los Angeles, CA 90012

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.

October 30, 2018
Date

Patricia Jeffries
Printed Name

/s/ Patricia Jeffries
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

In re: B&B Liquidating, LLC

Case 2:18-bk-11744-NB

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

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.