

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 13-4428-A

LLOYDS BANK PLC, f/k/a Lloyds TSB Bank plc,
in its capacity as Facility Agent,

Plaintiff,

v.

SERVICE POINT USA, INC.,

Defendant, and

CITIZENS BANK OF MASSACHUSETTS,

Trustee Process Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
ORDER AUTHORIZING AND DIRECTING TURNOVER BY
SPECIAL RECEIVER OF CERTAIN COLLATERAL PROCEEDS**

Plaintiff Lloyds Bank, plc, f/k/a Lloyds TSB Bank plc, in its capacity as Facility Agent for certain secured lenders (the "Agent") as creditors of defendant Service Point USA, Inc. ("SPU") pursuant to one or more guarantees of indebtedness given by SPU, and as a secured party holding a valid, perfected, first priority security interest (the "First Lien") in all, or substantially all of the assets of SPU, hereby submits this memorandum of law in support of its *Motion for Order Authorizing and Directing Turnover by Special Receiver of Certain Collateral Proceeds* (the "Motion") pursuant to which the Agent seeks an order authorizing and directing Francis C. Morrissey, Esq., the court-appointed special receiver of certain of SPU's assets (the "Special Receiver"), to turn over to the Agent the collection proceeds of accounts receivable

within the Receiver's possession, custody, and control (the "Collateral Proceeds") that are subject to the First Lien.

As set forth more fully herein, and as supported by facts set forth in the *Affidavit of Andrew Moore in Support of Certain Motions for Injunctive and Equitable Relief* (the "Moore Affidavit"),¹ the Agent is entitled to the entry of an order authorizing and directing the Special Receiver to turnover to the Agent the Collateral Proceeds presently within his possession, custody, and control.

I. Relevant Background and Procedural History

SPU is a corporation formed under the laws of the Commonwealth of Massachusetts with a principal place of business located at 5 Commonwealth Avenue, Unit No. 5, Woburn, Massachusetts 01801. (Moore Aff. ¶ 2.) On March 17, 2011 SPU and its affiliates entered into a certain *Collateral Agreement* (the "Collateral Agreement")² with the Agent, as agent for, and for the benefit of the Lenders, pursuant to which SPU granted the Agent a valid, first priority security interest in all, or substantially all of its assets, including without limitation, all Accounts, cash and currency, Deposit Accounts, Documents, Equipment, Fixtures, General Intangibles, Instruments, Inventory, Goods, and all Proceeds, products, and accessions thereof or thereto (the "Collateral"). (Moore Aff. ¶ 3.) On October 31, 2012 SPU and its affiliates entered into a certain *Amendment and Restatement Agreement* (the "Restatement Agreement")³ with the Agent, as agent for, and for the benefit of the Lenders, pursuant to which SPU restated and reaffirmed to the Agent its guarantees of the indebtedness of its parent and affiliates originally granted

¹ The Moore Affidavit was previously filed in support of certain preliminary relief sought by the Agent, including, among others, the appointment of the Special Receiver.

² A true and accurate copy of the Collateral Agreement is annexed to the Moore Affidavit as Exhibit B.

³ A true and accurate copy of the Restatement Agreement is annexed to the Moore Affidavit as Exhibit C.

pursuant to the facilities agreement dated 21 July 2006 and made between, among others, SPU and the Agent in various capacities (the "Existing Facility Agreement").⁴ (Moore Aff. ¶ 4.)

On November 2, 2012 the Agent, as agent for, and for the benefit of the Lenders, caused a duly executed and authenticated UCC-1 Financing Statement (the "Financing Statement")⁵ to be filed and recorded with the Secretary of the Commonwealth of Massachusetts perfecting the Agent's security interest in and to the Collateral. (Moore Aff. ¶ 5.) At no time since the filing of the Financing Statement has the Agent or the Lenders executed, authenticated, or filed or recorded any release of the security interest in and to any of the Collateral. (Moore Aff. ¶ 5.)

Prior to initiating this civil action, the Agent made demand on SPU under the guarantee in the Restatement Agreement for the full amount of SPU's indebtedness which amount was then immediately due and payable. (Moore Aff. ¶ 8.) As a result of one or more Events of Default as defined in and under the terms of the Restatement Agreement, the Agent was entitled under the terms of the Existing Facility Agreement, the Restatement Agreement, and the Collateral Agreement to immediately exercise all of its rights in and to the Collateral. (Moore Aff. ¶ 8.)

As of the date hereof, SPU is indebted to the Agent and the Lenders in the aggregate amount of €71,926,281 Euro of principal demanded debt plus interest thereon and other amounts owed to the Lenders under the Restatement Agreement and the Finance Documents as defined therein, which amount, is immediately due and payable by SPU under the terms of the Existing Facility Agreement, the Restatement Agreement, and secured under the Collateral Agreement. (Moore Aff. ¶ 6.)

On or about December 18, 2013 the Agent initiated this proceeding by filing its *Complaint* accompanied by, among other motions, its *Ex Parte Motion for (I) Immediate*

⁴ A true and accurate copy of the Existing Facility Agreement is annexed to the Moore Affidavit as Exhibit D.

⁵ A true and accurate copy of the Financing Statement is annexed to the Moore Affidavit as Exhibit E.

Appointment of Special Receiver and (II) Order of Notice for Further Hearing on Continuation of Appointment of Special Receiver (the "Special Receivership Motion"). On December 30, 2013, after notice and a hearing, the Court entered its *Order for Appointment of Receiver on Notice* (the "Special Receivership Order") [Docket No. 17] granting the Special Receivership Motion and appointing the Special Receiver. Pursuant to the Special Receivership Order, the Special Receiver was authorized to, among other things, take immediate possession custody and control of all "tangible and intangible property that are collateral, including, but not limited to, . . . all accounts receivable . . ." Special Receivership Order, at ¶ 2.a.

On or about January 29, 2014, the Receiver filed his *Preliminary Inventory Pursuant to Mass Rule Civ. P. 66(b) and Superior Court Rule 51* indicating that he had received, and otherwise taken possession, custody and control of proceeds of SPU's Accounts (the "Receivables"), [Docket No. 26], which proceeds constitute Collateral Proceeds. Under the terms of the Collateral Agreement, the Collateral Proceeds are Collateral of the Agent for the benefit of the Lenders securing the repayment of SPU's indebtedness to the Agent and the Lenders. (Moore Aff. ¶ 17.) Accordingly, the Agent, for the benefit of the Lenders, is entitled to receive the Collateral Proceeds and apply the same in partial payment of SPU's indebtedness to the Agent and the Lenders. (Moore Aff. ¶ 18.)

II. Legal Standard

"A receivership is an equitable remedy designed to protect and preserve the assets of a corporate debtor for those creditors who the court ultimately decides are entitled to them." Charlette v. Charlette Bros. Foundry, Inc., 59 Mass. App. Ct. 34, 45 (2003) (citing New England Theatres, Inc. v. Olympia Theatres, Inc., 287 Mass. 485, 492 (1934)). "It is the duty of the Receiver to determine the validity and the preference to be accorded to the claims of creditors."

Hilti, Inc. v. HML Dev. Corp., 2007 WL 809792, *15 (Mass. Super. Ct. Feb. 13, 2007) (citing Old Colony Trust Co. v. Puritan Motors Corp., 244 Mass. 259, 261 (1923)). A receiver is permitted to make interim distributions to creditors during the pendency of the receivership and need not wait until all assets have been collected prior to making distributions to creditors. See e.g., Hilti, 2007 WL 809792 at *18-19.

III. Argument

The Agent, as a contract creditor holding an undisputed claim against SPU, and a valid, perfected first priority security interest in the Collateral Proceeds in the Special Receiver's possession, custody and control, is entitled to an order authorizing and directing the Special Receiver to make an interim distribution to the Agent of its cash collateral. Indeed, the Agent has established the validity and priority of the First Lien, giving it rights superior to all other potential SPU creditors, and comprehends no justifiable business reason for the Special Receiver to retain excess funds in the receivership estate while SPU owes so much to the Agent and the Lenders, particularly when the Agent holds the First Lien on Collateral Proceeds at issue. Even if competing creditor claims emerge in the future, an interim distribution amounting to less than one percent of the Agent's claim will not prevent other creditors from receiving a proportionate distribution, especially where additional Accounts and deposit accounts remain to be monetized. As a result, the Agent submits that the Court should enter an order authorizing and directing the Special Receiver to distribute to the Agent all Collateral Proceeds currently in his possession, custody, and control.

IV. Conclusion

For the foregoing reasons, and those that may be stated at any hearing on the Motion, the Court should enter an order authorizing and directing the Special Receiver to turnover to the

Agent the Collateral Proceeds and grant to the Agent such other and further relief as the Court deems just and proper.

LLOYDS BANK, PLC,
f/k/a Lloyds TSB Bank, plc,
in its capacity as Facility Agent,

By its attorneys,



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Dated: March 19, 2014

I HEREBY CERTIFY THAT A TRUE
COPY OF THE ABOVE DOCUMENT WAS
SERVED UPON (EACH PARTY APPEARING PRO SE
AND) THE ATTORNEY OF RECORD FOR EACH OTHER
PARTY BY MAIL (BY HAND) ON 3/19/14

