

**IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS
KANSAS CITY DIVISION**

In re:)	
)	Case No. 08-22786-DLS
BROOKE CORPORATION, <i>et al.</i> ,)	(Jointly Administered)
a Kansas corporation,)	Chapter 11
)	
Debtors.)	

**APPLICATION OF DZ BANK TO DISTRIBUTE BASC ASSETS
SUBJECT TO THE COURT’S MARCH 13, 2009 SETTLEMENT APPROVAL ORDER**

COMES NOW DZ Bank AG Deutsche Zentral-Genossenschaftsbank (“DZ Bank”), a party-in-interest, as Agent for Autobahn Funding Company, LLC, to move the Court for an Order permitting The Bank of New York Mellon (“BNYM”) to distribute assets that are the property of Brooke Agency Services Company, LLC (“BASC”), a Delaware limited liability company, in accordance with the security interests and collateral rights of DZ Bank and certain other secured creditors. In support of its Motion, DZ Bank respectfully states as follows:

INTRODUCTION

1. DZ Bank submits this Motion to obtain possession of certain collateral pledged to DZ Bank by BASC in a Security Agreement dated June 19, 2008 (the “DZ BASC Collateral”). The DZ BASC Collateral consists of BASC’s assets (other than real estate) that are not subject to the security interests of the other Securitization Company Lenders or of DZ Bank that were perfected before the June 19, 2008 Security Agreement.¹

2. As the Chapter 7 Trustee concluded in entering to the settlement agreement recently approved by the Court, DZ Bank has a senior, perfected security interest in this collateral. The Trustee also correctly concluded that there is no economically viable claim to

¹ The Securitization Company Creditors, in addition to DZ Bank, are: Fifth Third Bank, Bayerische Hypo-und Vereinsbank, AG (HVB) (now known as Unicredit, AG New York Branch), and BNYM.

avoid DZ Bank's lien under Section 548 of the Bankruptcy Code, 11 U.S.C. 548, or state law and agreed that DZ Bank should receive all of the DZ BASC Collateral.²

3. Accordingly, it is appropriate to confirm the Trustee's obligations under his settlement agreement with DZ Bank, recently approved by the Court, and transfer the DZ BASC Collateral to the Bank while making due provision for the Securitization Company Creditors that have security interests in other BASC assets.

4. The relief sought by this Motion finally resolves issues left open by the following Orders:

- a. The Court's February 12, 2009 Order partly approving and partly disapproving the terms of a proposed compromise and settlement between the Chapter 11 Trustee and the Securitization Company Creditors (Document No. 486).
- b. The Court's March 13, 2009 Order approving the restated Settlement Agreement between the Trustee and the Securitization Company Creditors (the "Restated Settlement Agreement") (Document No. 532).
- c. The Court's December 23, 2009 Order approving a compromise and settlement between the Chapter 7 Trustee and DZ Bank regarding the enforceability of DZ Bank's security interests in certain assets of Brooke Capital and the DZ BASC Collateral (Document No. 1074). *See* n.1, *supra*.

JURISDICTION AND VENUE

5. In its February 12, 2009 Order (at 4-5), the Court held that it had jurisdiction under 28 U.S.C. §§ 157 and 1334 over the BASC assets at issue in this Motion, *see id.* at 5, and its reasons are incorporated by reference. The Court authorized the establishment of a depository for BASC assets, stating that the Court was "willing to accept the funds and would appear to be in a better position than the District Court to adjudicate the claims to the funds." *Id.*

² *See* December 23, 2009 Order (Document No. 1074), ¶¶ 13-17, *discussed infra*. By contrast, the Trustee and DZ Bank agreed to settle the Trustee's claims to avoid DZ Bank's lien on assets of Brooke Capital Corporation ("Brooke Capital") on a 49%/51% basis. *See id.*, ¶¶ 9-12; November 24, 2009 Settlement Agreement between Chapter 7 Trustee and DZ Bank, ¶¶ 1-2 (Document No. 985-2).

at 12 n.3.

6. The March 13, 2009 Order (at 6) provides that “the Court shall have continuing jurisdiction over the parties to enforce provisions of the Restated Settlement Agreement.” Accordingly, the Court also has jurisdiction to provide the relief sought by this Motion under 11 U.S.C. § 105(a) to enforce the terms of a settlement agreement approved and ordered by the Court. *See, e.g., In re Berg*, 376 B.R. 303, 314 (Bankr. D. Kan. 2007).

7. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 157 and 1334.

8. This matter is a core proceeding pursuant to 28 U.S.C. § 157.

BACKGROUND

9. Debtor Brooke Capital operated a large franchise system under which franchisees operated insurance agencies pursuant to franchise agreements with Brooke Capital (either in its own name or as successor to Brooke Franchise Corporation).

10. To become a Brooke Capital franchisee, each applicant executed a standard Brooke Capital Franchise Agreement.

11. Each franchisee thereby agreed that ownership of commissions would belong to Brooke Capital or its designated affiliate -- not the franchisee.

12. Specifically, Section 1.3 of the Franchise Agreement defines “Agent of Record” as

“the owner of all Sales Commissions. In the alternative, the person to whom all Sales Commissions are irrevocably assigned.”³

13. Section 15.3 of the Franchise Agreement completes the identification of Brooke Capital or an affiliate as Agent of Record (and owner of all commissions) by providing:

“Franchisee agrees to make Brooke (for the purposes of this Section 15.3,

³ A copy of a typical executed Franchise Agreement is attached *infra* as Exhibit A. The paragraphs cited here may have different paragraph numbers than in other Franchise Agreements.

‘Brooke’ shall include any subsidiary or affiliate of Brooke) the Agent of Record for all Policies sold . . . ”

The next sentence of Section 15.3 imposes a duty on the franchisee to assign commissions and profit-sharing payments to “Brooke” if the insurance company refuses to make Brooke the Agent of Record.

14. In Section 20.1 of the Franchise Agreement, the franchisee agrees that “all Profit Sharing Commissions or amounts paid shall be retained by Brooke.”

15. In addition, all or substantially all Brooke Capital franchisees which borrowed funds from Brooke Credit Corporation (now Aleritas Capital Corporation) executed an Agent Agreement Addendum Regarding Lender Protection (the “Agent Addendum”).

16. Section 4 of the Agent Addendum provides that the “Franchise Agent agrees that all Sales Commissions and Profit Sharing Commissions shall be owned by the Master Agent (for the purposes of this subparagraph, ‘Master Agent’ shall include a subsidiary or affiliate of Master Agent).” The first paragraph of the Agent Addendum defines Brooke Capital Corporation (or Brooke Franchise Corporation) as the “Master Agent.” An example of an Agent Addendum is attached *infra* as Exhibit B.

17. Since no later than July 31, 2006, and possibly earlier, Brooke Capital designated BASC as the “agent of record,” as the February 12, 2009 Order (at 3) finds.⁴

18. On June 19, 2008, BASC and DZ Bank executed a Security Agreement granting DZ Bank a security interest in substantially all of BASC’s personal property. (A copy of the Security Agreement is attached *infra* as Exhibit D.) In particular, Section 2(i)(a) of the Security Agreement granted DZ Bank a security interest in “all moneys due and to become due under or in connection with any such Brooke Franchise Agreement (whether in respect of Sales

⁴ A copy of the July 31, 2006 Assignment Agreement between Brooke Franchise Corporation, as Brooke Capital’s predecessor, and BASC is attached *infra* as Exhibit C.

Commissions, fees, expenses, indemnities or otherwise).”

19. While the Security Agreement granted a priority security interest with respect to most of BASC’s assets, Section 2(i) subordinates DZ Bank’s security interests “to the extent the Pledgor [BASC] is required to remit the proceeds of any Sales Commissions to The BNYM, as trustee under any Term Securitization entered into by the Pledgor prior to the date hereof.”⁵

20. Later on June 19, 2008, DZ Bank filed a UCC-1 financing statement with the Delaware Secretary of State identifying the collateral in the parties’ Security Agreement.⁶ This same-day filing perfected DZ Bank’s security interest. *See* 6 Del. Code § 9-310(a).

THE PRIOR SETTLEMENTS AND ORDERS

21. On March 13, 2009, the Court entered its Order approving in its entirety a restated settlement agreement between the Chapter 11 Trustee and the Securitization Company Creditors (including DZ Bank). *See* Document No. 532.⁷

22. Paragraph 4 of the Restated Settlement Agreement set aside commissions payable to franchisees (the “Other Agents”) that did not have loans from the Securitization Company Creditors until the validity of DZ Bank’s security interest could be adjudicated. Paragraph 4 provides:

“To the extent the allocation process described in Paragraph 2 allocates insurance sales commission receipts to Other Agents, those sales commission receipts will be paid promptly after such allocation into the BASC Depository and held until disbursed pursuant to subsequent court order or settlement that resolves the claims of the Debtors, if any, and other parties in interest, including, without limitation, the validity and enforceability of DZ Bank’s alleged security interest in such funds.”

⁵ BNYM has acted as Trustee for itself and the other Securitization Company Creditors.

⁶ A copy of the financing statement is attached *infra* as Exhibit E.

⁷ A copy of the Restated Settlement Agreement is attached *infra* as Exhibit F.

23. The Court's March 13, 2009 Order not only approved the Restated Settlement Agreement as fair and equitable, it also authorized and directed the Chapter 11 Trustee to "take all necessary steps to effectuate the terms of the Settlement Agreement" and to "establish the BASC Depository." Order at 5. Under the Order, its terms are binding on the Chapter 7 Trustee as successor to the Chapter 11 Trustee. *Id.* at 6.

24. On information and belief, the commissions due to the "Other Agents" have been allocated by Navigant Consulting, Inc., pursuant to the March 13, 2009 Order, but have not been distributed to the Trustee to set up the BASC depository. DZ Bank does not have any power to direct this transfer. Nonetheless, the funds remain available at BNYM, as intended by the Court, for distribution pending the outcome of this Motion.

25. On December 23, 2009, the Court entered an Order (Document No. 74) approving a follow-up settlement agreement (the "DZ Lien Settlement Agreement") between the Chapter 7 Trustee and DZ Bank regarding DZ Bank's security interests in the property of Brooke Capital and the BASC assets at issue on this Motion.⁸

26. In the DZ Lien Settlement Agreement, the Chapter 7 Trustee and DZ Bank stipulated and agreed that:

- a. "DZ Bank has a first priority security interest in the BASC . . . collateral described in the BASC Security Agreement." 6th recital.
- b. DZ Bank is entitled to all of the DZ BASC Collateral (which excludes collateral pledged to other Securitization Company Creditors) as well as later-acquired Brooke collateral. ¶¶ 4, 5.
- c. DZ Bank would, on approval, be released from "any and all liability, claims, . . . arising out of the granting of collateral by . . . BASC to DZ Bank." ¶ 13.

⁸ A copy of the DZ Lien Settlement Agreement is attached *infra* as Exhibit G.

27. The December 23, 2009 Order recites that:

- a. “As Trustee of BASC’s parent, following his investigation of the facts, the Trustee concluded that DZ Bank has a valid, perfected first security interest in the non-real property assets of BASC, except for certain exclusions unaffected by the Settlement Agreement submitted with this Motion for approval.” ¶ 15.
- b. “The Trustee further concluded that any potential benefit for any fraudulent transfer claim under Section 548 or the KUFTA related to BASC did not justify the expenditure of Brooke Corp. or other bankruptcy assets to pursue a claim on behalf of BASC, a non-debtor.” ¶ 16.

28. The December 23, 2009 Order required DZ Bank to seek a further order of the Court, after notice to all interested parties and all parties on the Creditor Matrix, before the disposition of the BASC assets in the BASC depository. *Id.*, Decree ¶ 6. DZ Bank’s Motion, with notice to the those parties, fulfills the Court’s direction.

REASONS FOR GRANTING DZ BANK’S MOTION

29. Under the BASC Security Agreement, BASC has been legally entitled since no later than the Brooke Capital and Brooke Corporation Petition Date, October 28, 2008, to obtain possession of the collateral granted to DZ Bank by that Agreement.⁹

30. The Trustee has now satisfied the Court’s February 12, 2009 mandate that the Trustee investigate and resolve any claims that DZ Bank’s security interest in the DZ BASC Collateral is subject to avoidance. *See* February 12, 2009 Order at 7. As shown above, the Trustee concluded that DZ Bank has a senior, perfected security interest in the DZ BASC Collateral. The Trustee did not find sufficient grounds to challenge the lien as to justify litigation. December 12, 2009 Order, ¶ 16. The Trustee therefore agreed that DZ Bank was

⁹ Under Section 2(ii) of the BASC Security Agreement, DZ Bank’s right to take control of the DZ BASC Collateral is triggered by an “Event of Default” under DZ Bank’s August 29, 2006 Credit and Security Agreement, as amended (the “ARCSA”), with Brooke Credit Funding, LLC, Aleritas, and Brooke Corporation. Under Section 6.01(f) of the ARCSA, the bankruptcy filings by Brooke Corporation and Brooke Capital are “Events of Default.” Consistent with Local R. 9072.1, an excerpt of the ARCSA, containing the cover page, Section 6.01, and the signature pages, is attached *infra* as Exhibit H.

entitled to the all of the DZ BASC Collateral.

31. No creditor has a claim to the DZ BASC Collateral that is superior to DZ Bank's senior, fully perfected security interest in the DZ BASC Collateral. As far as DZ Bank is aware, there is no enforceable judgment of any kind against BASC, let alone a claim entitled to priority ahead of DZ Bank's security interest.¹⁰

32. The relief sought by DZ Bank in this Motion is not intended to and will not affect the allocation provisions for BASC funds, including commissions, under the March 13, 2009 Settlement Agreement that are subject to the liens of other Securitization Company Creditor or liens perfected by DZ Bank before June 19, 2008. These funds do not constitute DZ BASC Collateral under the June 19, 2008 BASC-DZ Bank Security Agreement and are the source of Securitization Company Creditor distributions, including distributions by DZ Bank in that capacity, to their Brooke franchisee borrowers. Absent evidence of error brought before the Court, the allocation decisions of Navigant Consulting can and should continue to determine which after-acquired funds constitute DZ BASC Collateral consistent with the provisions of the DZ Lien Settlement Agreement approved by the Court in its December 23, 2009 Order.

WHEREFORE, DZ Bank respectfully requests that the Court enter an Order requiring The Bank of New York Mellon to distribute DZ BASC Collateral in its possession and all after-acquired DZ-BASC Collateral, as allocated by Navigant Consulting to DZ Bank in accordance with DZ Bank's priority, perfected security interest.

¹⁰ As discussed at the January 15, 2010 hearing, Roger Cunningham and RKC Financial Corporation have submitted an October 21, 2008 arbitration award against, *inter alia*, BASC and Debtors Brooke Capital and Brooke Corp. For the reasons stated during the hearing and in the January 14, 2010 letter of Mark J. Hyland to the Court (Document No. 1107), the award is not a valid claim. It is a default award, the award has never been confirmed, and claimants failed to join the Brooke securitization affiliates as necessary parties. Moreover, even a valid judgment lien arising after June 19, 2008 would be junior to DZ Bank's prior perfected lien.

Dated: February 18, 2010

Respectfully submitted,

DZ BANK AG DEUTSCHE
ZENTRALGENOSSENSCHAFTSBANK

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2010, a true and correct copy of the above and foregoing was served by electronically filing with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF System.

I hereby certify that on the 19th day of February, 2010, a true and correct copy of the above and foregoing was served via U.S. mail, first class, postage prepaid and properly addressed to the parties and/or counsel, who do not receive notice electronically via CM/ECF, as set forth on the matrix attached as an exhibit to the original of this Application on file with the Clerk.

s/ Scott A. Wissel
Attorney