

Dated: March 04, 2021
The following is ORDERED:



A handwritten signature in black ink, appearing to read "M. Ruthie Hagan".

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
EAS Graceland, LLC
Debtor

Case No. 20-24484
Chapter 11

**OPINION AND ORDER GRANTING FIRST INTERIM APPLICATION FOR
ALLOWANCE OF GLANKLER BROWN, PLLC FOR COMPENSATION AND
REIMBURSEMENT OF EXPENSES TO ATTORNEYS FOR DEBTOR IN POSSESSION**

This matter came before the Court for hearing on February 9, 2021 upon Glankler Brown, PLLC's First Application for Allowance of Compensation and Reimbursement of Expenses (the "First Interim Fee Application") [DE 111] and iBorrow REIT, L.P.'s Limited Objection to the First Interim Fee Application (the "Limited Objection") [DE 129].

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B) arising out of a contested matter governed by FED. R. BANKR. P. 9014. Accordingly, the Court has both the statutory and constitutional authority to hear and determine these proceedings subject to the statutory appellate

provisions of 28 U.S.C. § 158(a)(1) and Part VIII (“Bankruptcy Appeals”) of the Federal Rules of Bankruptcy Procedure.

Glankler Brown, PLLC (the “Firm”) seeks an interim award of fees and expenses for services rendered to EAS Graceland LLC (the “Debtor”) and its bankruptcy estate, and seeks to apply a pre-petition retainer currently held in the Firm's trust account. iBorrow REIT, L.P. (“iBorrow”) does not object to the amount of the requested fees and expenses; however, it argues that any approved compensation should not be paid from the pre-petition retainer on the grounds that the retainer constitutes iBorrow’s cash collateral and iBorrow’s interest in such cash collateral is superior to any claim of the Firm. After considering the entire case record as a whole, the following shall constitute the Court’s findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The relevant background facts may be briefly stated as follows.

BACKGROUND

iBorrow asserts the Debtor is indebted to it by virtue of a promissory note in the amount of \$3,337,831.00 (as of September 15, 2020). [Claim 11-1]. iBorrow claims a first priority perfected security interest and liens in the “Collateral” as defined in that certain Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing. The security agreement between iBorrow and the Debtor also granted a security interest in “[a]ll funds, accounts, deposits, instruments, documents, contract rights, general intangibles, notes, and chattel paper arising from or by virtue of any transaction related to the Premises....” [Claim 11-1, pp. 89-92].

On September 15, 2020 (the “Petition Date”), the Debtor filed a voluntary petition under Chapter 11 of Title 11 of the United States Code. Prior to the Petition Date, the Debtor transferred to the Firm, and the Firm took possession of, \$35,000.00 for pre-petition services and as a pre-

petition retainer to secure the Firm's promise to represent the Debtor in the above-captioned bankruptcy case (“Pre-Petition Retainer”). Such funds came from an undisclosed account. There is no evidence in the record that the monies transferred to the Firm were from any account iBorrow held or had control over. Indeed, while a receivership proceeding was pending prior to the Petition Date, no receiver was appointed at the time of the transfer of funds.

In the First Interim Fee Application, the Firm seeks an interim award of fees in the amount of \$38,272.50, and an interim award of expenses in the amount of \$2,033.40, for a total interim award of \$40,305.90. It is customary for the Court to permit payment of 80% of approved fees and 100% of approved expenses in connection with interim applications such as this, and the Firm requests payment. The Firm seeks to apply the Pre-Petition Retainer to pay fees and expenses authorized by the Court.

iBorrow does not object to the reasonableness of the fees requested. iBorrow objects to the use of the Pre-Petition Retainer to pay whatever fees and expenses may be approved by the Court. iBorrow claims that it holds a perfected, first priority security interest in all of the Debtor's property and, as such, the Pre-Petition Retainer constitutes cash collateral that cannot be used, absent consent, without adequate protection. Additionally, iBorrow asserts that the Pre-Petition Retainer may be needed to help fund the business operations of the Debtor. iBorrow further asserts that the Debtor has no unencumbered assets with which it can offer adequate protection to iBorrow. Therefore, iBorrow argues that the Debtor may not use the Pre-Petition Retainer to pay the Firm's attorney's fees and expenses. iBorrow acknowledges it has an equity cushion, but claims it is “barely” fully secured.

ANALYSIS

Once counsel is authorized to represent a debtor-in-possession in a Chapter 11 case, §§ 330 and 331 govern the award of fees and expenses to such counsel. Specifically, § 330(a)(1) permits the Court to award counsel reasonable compensation for actual and necessary services rendered and reimbursement for actual and necessary services and expenses. Pursuant to § 331, the Court may approve and order the interim disbursement of attorney's fees and expenses that are otherwise allowable under § 330. Section 331 was drafted to permit the Court to award compensation to counsel during the case rather than force counsel to wait until the end of a case to receive any compensation. Counsel must file an application setting out the details of the services rendered and the amount requested, and must disclose the source of any compensation paid or promised to be paid.

Counsel to the debtor-in-possession in a Chapter 11 case typically receives a retainer prior to filing the petition, to ensure the payment of fees and expenses to be incurred in the case. 3 Collier on Bankruptcy, ¶ 328.02[1][b] at 328–6 (16th ed. 1997); *In re McDonald Bros. Constr., Inc.*, 114 B.R. 989, 999 (Bankr. N.D. Ill. 1990)). The retainer remains property of the client until the attorney uses the retainer to pay fees and expenses. *Id.* Upon the filing of a bankruptcy petition, the pre-petition retainer becomes property of the bankruptcy estate under § 541, and any unearned portion of the retainer must be returned. *Id.* at 999-1000. Any pre-petition retainer is subject to court review under §§ 330 and 331.

Debtor-in-possession counsel who obtains a pre-petition retainer to ensure payment of fees and expenses in a Chapter 11 case becomes a secured creditor, secured by a possessory security interest in money. Tennessee law provides an attorney a lien on a retainer paid by a client. *See In re Appalachian Star Ventures, Inc.*, 341 B.R. 222, 226 - 27 (Bankr. E.D. Tenn. 2006); *Starks v.*

Browning, 20 S.W.3d 645 (Tenn. App. 1999). As such, a Chapter 11 debtor's attorney is a secured creditor to the extent of the retainer. *In re Appalachian Star Ventures*, 341 B.R. 222.

Furthermore, the Firm holds a valid, enforceable security interest in the Pre-Petition Retainer. *See* TENN. CODE ANN. §§ 47-9-203 and 313. First, value was given by the Firm as the Firm promised to represent the Debtor in this bankruptcy case. Second, at the time the Debtor paid the Pre-Petition Retainer to the Firm, the Debtor owned the funds in its account (the source of the Pre-Petition Retainer). Also, the Firm is, and has been since the Petition Date, in possession of the Pre-Petition Retainer by virtue of holding the Pre-Petition Retainer in the Firm's trust account. TENN. CODE ANN. § 47-9-313. All of the requirements for attachment of a security interest under TENN. CODE ANN. § 47-9-203 are met. The Firm's security interest in the Pre-Petition Retainer is perfected by possession. TENN. CODE ANN. § 47-9-313.

The Court finds iBorrow has no interest in the Pre-Petition Retainer. “A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.” *See* TENN. CODE ANN. § 47-9-332. iBorrow has never suggested that the Firm was involved in collusion. Thus, upon payment of the Pre-Petition Retainer to the Firm, iBorrow lost entirely its security interest in such funds. Because iBorrow has no interest in the Pre-Petition Retainer, the Pre-Petition Retainer is not cash collateral. *See* 11 U.S.C. § 363(a) (non-debtor party must have an interest in the cash, deposit account, or other cash equivalent). The Debtor need not obtain iBorrow's consent for use of the Pre-Petition Retainer. *See* 11 U.S.C. § 363(c)(2)(A). The Firm is free to apply the Pre-Petition Retainer in payment of fees and expenses approved by this Court. *See In re Tuscany Energy, LLC*, 561 B.R. 910 (Bankr. S.D. Fla. 2016).

iBorrow relies on *In re Shivshankar P'ship LLC* for the proposition that a retainer that constitutes a secured creditor's cash collateral may be used to pay fees and expenses of the debtor's counsel only if the debtor provides adequate protection to the secured creditor. 517 B.R. 812, 824-26 (Bankr. E.D. Tenn. 2014). The court in *Shivshankar* did not address whether the retainer in question was in fact cash collateral; this fact appears not to have been disputed in *Shivshankar*. In the present case, the Court finds that iBorrow does not have a cash collateral interest in the Pre-Petition Retainer.

The Court has reviewed in detail the First Interim Fee Application presented by the Firm. The Court finds that the time expended by the Firm was appropriate for the task at hand and reasonable under the circumstances of the case. The Court is familiar with the experience, skill, and reputation of each of the individual lawyers who performed services for the Firm in this case. The Court finds that the hourly rates charged by the Firm are reasonable and appropriate hourly rates in light of the skill and experience of the individual lawyers and are consistent with prevailing rates in this district. In sum, the legal fees and expenses requested by the Firm are reasonable and appropriate for the work undertaken in this case and should be approved.

For the foregoing reasons, the Court ORDERS as follows:

1. The First Application for Allowance of Glankler Brown, PLLC for Compensation and Reimbursement of Expenses to Attorneys for Debtor in Possession [DE 111] is APPROVED to the extent provided herein.

2. Glankler Brown, PLLC. is awarded interim fees in the amount of \$38,272.50 and interim expenses in the amount of \$2,033.40. Glankler Brown, PLLC may apply its Pre-Petition Retainer in payment of 80%, or \$30,618.00, of the fees awarded and in payment of 100%, or

\$2,033.40, of expenses awarded, for a total of \$32,651.40, with the remainder subject to payment following consideration of the Firm's final fee application.

3. All fees and expenses awarded on an interim basis shall be subject to review at the time of a final fee application and possible return to the estate for any excessive fees paid pursuant to 11.U.S.C. § 330.

4. The Limited Objection [DE 129] is OVERRULED.

IT IS SO ORDERED.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

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