UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

IN RE:

AA FLORIDA BRIDAL RETAIL COMPANY, LLC, *et al.*,

Debtors.
_____/

Case No. 17-18864-PGH
Chapter 7
(Jointly Administered)

JOINT MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW CARDCONNECT TO APPLY FUNDS IN ITS RESERVE ACCOUNT TO SATISFY, IN PART, ITS SECURED CLAIM

Any interested party who fails to file and serve a written response to this motion within 14 days after the date of service stated in this motion shall, pursuant to Local Rule 4001-1(C), be deemed to have consented to the entry of an order granting the relief requested in the motion.

Creditor CardConnect, LLC (f/k/a Financial Transaction Services, LLC ("***CardConnect***"))[1] and the chapter 7 trustee, Margaret J. Smith (the "***Chapter 7 Trustee***"), hereby file, pursuant to sections 362(d) and 553 of title 11 of the United States Code (the "***Bankruptcy Code***"), this *Joint Motion for Relief from the Automatic Stay to Allow CardConnect to Apply Funds in Its Reserve Account to Satisfy, In Part, Its Secured Claim* (the "***Motion***").

JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

[1] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Merchant Application and Agreement, Program Terms, Security Agreement, Intercreditor Agreement and/or the Reserve Letter, as applicable (each defined herein).

BACKGROUND

A. Procedural Background.

On July 14, 2017 (the "***Petition Date***"), each of the Debtors filed a separate voluntary petition commencing cases under chapter 7 of the Bankruptcy Code (collectively, the "***Chapter 7 Cases***") in the United States Bankruptcy Court for the Southern District of Florida (the "***Bankruptcy Court***").

B. The Credit Card Processing Arrangement between CardConnect and the Debtors.

On or about October 2, 2012, CardConnect and the Debtors and certain Debtor affiliates entered into a merchant services arrangement through which CardConnect, until July 3, 2017, provided credit card processing services for the Debtors. Pursuant to the terms of the arrangement, as memorialized through that certain Merchant Processing Application, dated as of October 11, 2012 (as superseded on June 20, 2016 pursuant to that certain Merchant Application and Agreement, a copy of which is attached hereto as **Exhibit B** (the "***Merchant Application and Agreement***")),[2] and the terms of which are outlined in that certain *Merchant Services Program Terms and Conditions*, a copy of which is attached hereto as **Exhibit C** (as amended from time to time pursuant to its terms, the "***Program Terms***"), CardConnect processed credit card charges for the Debtors in exchange for fees.

Credit card processing arrangements, such as the arrangement between CardConnect and the Debtors are ubiquitous. Pursuant to the terms of the Merchant Application and Agreement here, and in return for the Debtors' undertaking the obligations therein, CardConnect agreed to process bankcard payments ("***Card Transactions***") in connection with the sale of the Debtors' merchandise prior the commencement of the Chapter 7 Cases.

[2] Due to the confidentiality of certain terms in the Merchant Application and the Program Terms, counsel has redacted non-material portions of Exhibit B and Exhibit C, and personal identifiers in accordance with Local Rule 5005-1(A)(2)(a).

By way of brief background – CardConnect provides merchant credit card processing to banks and directly to merchants. These credit card processing services consist of submitting electronic transactions to Card Brands[3] Visa, U.S.A., Inc. ("***Visa***") and Mastercard International, Inc. ("***Mastercard***") as well as dealing with the reversals or Chargebacks (defined below) of those transactions, among other services.

Visa and MasterCard exchange Card Transactions among the thousands of banks that are their members. In the normal course, a card charge takes the following path:

- A consumer (referred to in the industry as a "cardholder") enters into an agreement to obtain a bankcard with a bank that is a member of Visa or MasterCard. The bank that issues this card is referred to as the "Issuing Bank."

- Merchants, like the Debtors, enter into an agreement with a bank who is a member of Visa or MasterCard to obtain the right to accept bankcards and to be paid for the charges accepted by the merchant. The bank that enters into such a relationship acquires the card transactions and is referred to in the industry as an "Acquiring Bank." CardConnect provides processing related services on behalf of Acquiring Banks and is a party to the merchant processing agreement.

- A bankcard transaction is initiated when a cardholder makes a purchase from a merchant or otherwise permits a merchant to charge his or her card.

- The merchant will swipe or manually enter the cardholder's card information into an issuer-approved point of sale terminal or approved non-face-to-face software program, and in doing so electronically sends an authorization request to the Issuing Bank who then responds to the merchant regarding whether the card being used in the transaction has enough credit available (or "open to buy") for the transaction. If the merchant receives an authorization approval code the sale can proceed.[4] If the merchant receives a response that the card does not have enough credit available for the transaction, the transaction is declined.

- The merchant will then electronically send all of its transaction records for the day to its processor (like CardConnect) on behalf of the Acquiring Bank.

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[3] Bankcards operate differently than single issuer cards such as American Express, Discover or Diners Club in that American Express, Discover and Diners Club deal directly with both cardholders and merchants. In the case of the bankcards Visa and Mastercard, different banks have relationships with the cardholders and the merchants. Accordingly, complex issues relating to the allocation of risk of loss arise in bankcard transactions that do not arise in single issuer transactions.

[4] That approval code does not, however, warrant to the merchant that the person actually using the card is the actual cardholder or that the transaction the merchant submits will not ultimately be charged back.

- The Acquiring Bank and/or a processor on its behalf will then bundle all the transactions it receives from its various merchants daily, and will send those transactions electronically to the appropriate bankcard company (*i.e.*, Visa or MasterCard).

- The bankcard company will then send the transactions it receives to the Issuing Banks.

- The Issuing Banks wire to the bankcard company the funds represented by the total of all the transactions remitted to it by the various Acquiring Banks through the bankcard company. The Issuing Banks then bill their cardholders during the normal billing cycle.

- The bankcard company will aggregate the funds they receive from the thousands of Issuing Banks, and distribute them among the Acquiring Banks according to the total amount of transactions submitted by each Acquiring Bank.

- The Acquiring Banks, and/or a processor on its behalf, will then distribute the funds they receive to their merchants according to the transactions submitted by the merchants.

Generally, this process works smoothly. But in the event a cardholder disputes a Card Transaction with its Issuing Bank—*e.g.*, if a merchant fails to deliver a wedding dress—the Issuing Bank could reverse the transaction and "short" or "decrease" that day's funding by the disputed amount *despite the fact* the processor (here, CardConnect) on behalf of the Acquiring Bank had already made a full provisional payment to the merchants (here, the Debtors) based on that Card Transaction having been previously approved by the Issuing Bank. The industry refers to these as "Chargebacks."

Regulations set forth by the bankcard companies allow Issuing Banks and their cardholders several months to dispute transactions once it is processed and funded. The amount of potential Chargebacks at any one time is uncertain and exposes CardConnect to substantial financial risk. That risk is based, in part, on the nature of business, transaction volume, average ticket, future delivery date for the merchandise or services that are the subject of the transaction,

as well as the financial position of the merchants submitting the transactions, who may or may not have the ability to support the financial risk associated with those Card Transactions.

Therefore, Credit Card Processors typically require that (i) obligations owed by the debtor to the Credit Card Processor are secured by the debtor's assets; and (ii) a "reserve account" be established to protect against such risk. CardConnect required both here.

First, on September 12, 2014, the Debtors and CardConnect entered into that certain Security Agreement, a copy of which is attached hereto as **Exhibit D** (the "***Security Agreement***"), granting CardConnect a security interest in, among other things, and as further described in the Security Agreement, substantially all of the Debtors' existing and after-acquired assets (the "***Security Interest***"). The Security Interest secures the performance and discharge of the Debtors' "Obligations,"[5] up to an amount of $5,000,000, including the Debtors' obligations to "pay the Charge Backs, adjustments, fees and other charges and amounts and any other obligations or liabilities of the Debtors to [CardConnect] . . . ." (Security Agreement, §2(a)).

Contemporaneously with CardConnect's and the Debtors' entry in the Security Agreement, the Debtors, CardConnect, and FSJC V, LLC (the Debtors' other secured lender) ("***FSJC***"), entered into that certain Intercreditor Agreement, a copy of which is attached hereto as **Exhibit E** (the "***Intercreditor Agreement***"). Pursuant to the Intercreditor Agreement, FSJC agreed to fully subordinate any and all of its security interests in the Debtors' domestic assets to

[5] As defined in Section 2 of the Security Agreement, Obligations means:

> (a) To pay the Charge Backs, adjustments, fees and other charges and amounts and any other obligations or liabilities of the Debtors to the Secured Party under the Processing Documents in accordance with the terms thereof;
>
> (b) To repay to the Secured Party all amounts advanced by the Secured Party hereunder or otherwise on behalf of the Debtors, including, without limitation, for taxes, levies, insurance, repairs to or maintenance or storage of any Collateral; and
>
> (c) To reimburse the Secured Party, on demand, for all of the Secured Party's expenses and costs, including the fees and expenses of its counsel, in connection with the enforcement of this Security Agreement.

Security Agreement, § 2.

CardConnect. (*See* Intercreditor Agreement, § 1). Additionally, pursuant to the Intercreditor Agreement, CardConnect is granted the "sole and exclusive right to restrict or permit, or approve or disapprove, the sale, transfer or other disposition of Collateral of the [Debtors], other than any sale . . . in the ordinary course of business." (Id., § 5).

Second, in conjunction with the entry into the Security Agreement and the Intercreditor Agreement, certain of the Debtors executed that certain Reserve Acknowlegement (sic) and Acceptance, dated September 12, 2014, a copy of which is attached hereto as **Exhibit F** (the "***Reserve Letter***"), setting forth certain terms with respect to the creation and funding of a reserve account (the "***Reserve Account***"), established to mitigate the risk of CardConnect being unable to collect amounts owed to it from the Debtors.

The Reserve Account is held at Wells Fargo Bank, and the funds are held by CardConnect and commingled with reserves created under other credit processing arrangements that CardConnect has with other merchants; but the Reserve Account is accounted for on the general ledger on a merchant-by-merchant basis. The balance in the Reserve Account attributable to the Debtors is $1,039,398.60 (the "***Reserve Account Balance***"). CardConnect's Security Interest expressly includes the "Reserve Account Collateral," which is defined to include:

> the Reserve Account, together with (i) all substitutions, additions, replacements, rollovers, splits, products, and accessions for, of and/or to such Reserve Account; (ii) all funds now or hereafter held in or credited to the Reserve Account; (iii) wire transfers of funds, automated clearing house entries, credits from merchant card transactions and other electronic funds transfers or other funds deposited in, credited to, or held for deposit in or credit to, such Reserve Account, and (iv) any and all interest and rights to receive interest now or hereafter earned on the Reserve Account . . . .

(Security Agreement, § 1(m)). CardConnect perfected its Security Interest by filing appropriate "UCC-1" forms in relevant jurisdictions, copies of which are attached hereto as **Exhibit G**.

However, CardConnect's Security Interest in the Reserve Account is also perfected through its possession and control of the account, as provided under Pennsylvania state law (*see* 13 Pa. Cons. Stat. §§ 9104 and 9327(1)), which governs the Security Agreement (Security Agreement, § 8.04).

The terms of the Reserve Letter include that the Reserve Account remain in CardConnect's possession, that the Debtors "shall not have any access to or control over the Reserve Account or the funds contained therein," and that the funds may be utilized by CardConnect to secure and/or satisfy Obligations of the Debtors. The terms of the Reserve Letter merely confirm the rights under the Security Agreement, which likewise grants CardConnect broad setoff rights (the "***Setoff Rights***"), including, without limitation, the right "to apply toward and set off against and apply to the then unpaid balance of the Obligations . . . any funds in the Reserve Account . . . ." (Security Agreement, § 7.04).

C. CardConnect's Claims Against the Chapter 7 Estates Related to Credit Card Processing.

In light of the volume of credit card charges processed for, among other things, customer deposits received by the Debtors until only days before the commencement of the Chapter 7 Cases, since the Petition Date and as of November 6, 2017, CardConnect has reimbursed the relevant Credit Card Issuers approximately $2.31 million related to Chargebacks. An accounting provided by CardConnect is attached hereto as **Exhibit A**.

Because the Debtors' operations ceased, CardConnect remains exposed to significantly more Chargeback liability than that described in the preceding paragraph. Accordingly, CardConnect's first-priority, secured claim against the Debtors as of the date hereof (considering

Chargeback liability only),[6] is in the aggregate amount of at least $2.31 million (and increases by the day).[7]

BASIS FOR RELIEF

CardConnect should be granted relief from the automatic stay to pursue its valid Setoff Rights. As an initial matter, the Chapter 7 Trustee has consented to the relief requested herein, as announced during the telephonic hearing that took place on September 6, 2017 ("[T]he Chapter 7 trustee consents [to] the release of the reserve funds that CardConnect is currently holding in a reserve account to be documented via an agreed motion to be filed before Your Honor." Sept. 6, 2017 Hrg. Tr. at 4:22-5:1.) During a meet and confer in advance of the September 6th hearing, FSJC also expressly consented to the relief requested herein.

Section 362(a)(7) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" of "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." 11 U.S.C. § 362(a)(7). The automatic stay does not terminate a creditor's right to setoff pursuant to section 553(a) of the Bankruptcy Code. *See Stephenson v. Salisbury (In re Corland Corp.)*, 967 F.2d 1069, 1076 (5th Cir. 1992) ("The automatic stay . . . 'does not defeat the right of setoff; rather, setoff is merely stayed pending an orderly examination of the debtor's and creditor's rights.'");

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6 CardConnect expressly reserves its rights to supplement, clarify, revise, or correct any and all amounts described herein, and nothing contained herein shall constitute a waiver of any of CardConnect's claims whatsoever against any person or entity, including with respect to the Reserve Account Balance and/or any agreement and/or governing document referred to herein.

7 Such reference to CardConnect's claims excludes CardConnect's claims against the Debtors that have arisen in connection with the Debtors' use of Cash Collateral as authorized by this Court, which are additive to the claims described herein (collectively, the "***Cash Collateral Claims***"). (*See* ECF Nos. 46, 68, 77, 108 and 167). As stated by the Chapter 7 Trustee at the September 6th hearing, "[A]ny funds that are made available to CardConnect as replacement liens will not be reduced by any distribution until all of the secured claims by CardConnect are paid in full." Sept. 6, 2017 Hrg. Tr. at 5:2-5:5. Since the Petition Date, CardConnect has received a $100,789.85 distribution from the Chapter 7 Trustee. For the avoidance of doubt, such distribution, in addition to the Reserve Account Balance (upon its release) as described herein, shall be utilized by CardConnect to reduce claims other than the Cash Collateral Claims held by CardConnect against the Debtors' estates

see also U.S. v. Continental Airlines (In re Continental Airlines), 134 F.3d 536, 541 (3d Cir. 1998) ("We recognize that a right of set-off is preserved under § 553 in a bankruptcy proceeding . . .").

Section 553 of the Bankruptcy Code preserves a creditor's right to setoff under non-bankruptcy law, avoiding "the absurdity of making A pay B when B owes A." *Dzikowski v. N. Trust Bank Fla., N.A. (In re Prudential of Fla. Leasing, Inc.)*, 478 F.3d 1291, 1297 (11th Cir. 2007) (quoting *In re Patterson*, 967 F.2d 505, 508–09 (11th Cir. 1992)). As described above, the agreements entered into between the Debtors and CardConnect expressly establish the Setoff Rights of CardConnect.

Setoff rights are enforceable under section 553(a) of the Bankruptcy Code if three requirements are satisfied: "(1) the setoff must involve a mutual debt so that both the creditor and debtor owe each other money; (2) both sets of obligations must arise prior to the bankruptcy filing; and (3) the setoff cannot fall within three exceptions." *In re Dillard Ford, Inc.*, 940 F.2d 1507, 1512 (11th Cir. 1991) (internal citations omitted). As between CardConnect and the Debtors, the elements of section 553(a) of the Bankruptcy Code are satisfied. First, the mutuality of debt is present: CardConnect holds valid secured claims against the Debtors in the amount of at least $2.31 million (excluding any related and/or fees associated therewith and this proceeding), and CardConnect held, and continues to hold, the Reserve Account Balance with respect to the Debtors' credit card processing arrangement, which absent any claims held by CardConnect against the Debtors would otherwise constitute an amount that CardConnect would have to remit to the Debtors. Second, CardConnect's claims against the Debtors described herein, as well as the funding and establishment of the Reserve Account, arise from transactions

that occurred before the Petition Date. And third, the exceptions outlined in sections 553(a)(1)–(3) do not apply.

Additionally, relief from the automatic stay is also warranted for "cause" under section 362(d)(1) of the Bankruptcy Code. CardConnect's secured claim is in excess of $2.31 million while the Reserve Account Balance is only $1,039,398.60. Thus, (i) the Debtors do not have equity in the Reserve Account (*see* 11 U.S.C. § 362(d)(2)(A)), and (ii) because the Debtors are liquidating under chapter 7 and their operations have ceased, it cannot be argued that the funds constituting the Reserve Account Balance are necessary for an effective reorganization (*see* 11 U.S.C. § 362(d)(2)(B)).

Accordingly, CardConnect submits that its Setoff Rights are valid and enforceable and relief from the automatic stay is warranted under sections 362(d) and 553 of the Bankruptcy Code.

CardConnect requests that the Court waive the 14-day stay period pursuant to Bankruptcy Rule 4001(a)(3) so that CardConnect may immediately enforce any order granting relief from the automatic stay.

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WHEREFORE, CardConnect and the Chapter 7 Trustee respectfully request that this Court enter an order lifting the automatic stay to permit CardConnect to enforce its Setoff Rights by applying the funds in the Reserve Account to its secured claim against the Debtors' estates.[8]

Dated: November 13, 2017

Respectfully submitted,

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By: */s/ James N. Robinson*
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[8] *See* supra, footnote 3.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2017 a true and correct copy of the foregoing was served by CM/ECF or first-class mail on all parties listed below.

By: */s/ James N. Robinson*
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