

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

IN THE MATTER OF:

ASP PLATING COMPANY,

Debtor.

Case No.: 22-02169-jwb

Chapter 7 – Filed: 10/25/2022

Hon. James W. Boyd

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TRUSTEE’S MOTION TO: (A) APPROVE CARVE-OUT AGREEMENTS WITH FIFTH THIRD BANK AND THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY; (B) APPROVE 506(C) WAIVER; AND (C) AUTHORIZE, BUT NOT DIRECT, THE TRUSTEE TO DISTRIBUTE NET SALE PROCEEDS

Thomas A. Bruinsma, Chapter 7 Trustee (“Trustee”), for his *Motion to: (A) Approve Carve-Out Agreements with Fifth Third Bank and the Michigan Department of Environment, Great Lakes, and Energy; (B) Approve 506(C) Waiver; and (C) Authorize, But Not Direct, the Trustee to Distribute Net Sale Proceeds* (the “Motion”) states as follows:

1. Thomas A. Bruinsma is the duly appointed, acting and qualified Chapter 7 Trustee in the above-captioned case.
2. By this Motion, the Trustee asks the Court to approve stipulations between the Trustee and Fifth Third Bank (“Bank”), and the Trustee and the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) establishing a carve-out for the estate in net proceeds realized from the sale of estate assets that are subject to Bank and EGLE liens (the “Carve-Out Agreements”).
3. The statutory bases for the relief requested herein is sections 105(a), 363, 506(c) and 704(a) of Title 11 of the United States Code, as amended (the “Bankruptcy Code”).

4. On January 16, 2023, the Court entered its *Order Approving Trustee's Motion for Sale of Real and Personal Property Free and Clear of Liens Pursuant to 11 U.S.C. §363(f)* [Dkt. No. 31] (the “Sale Order”) authorizing the Trustee to sell substantially all of Debtor’s assets (the “ASP Assets”) free and clear of liens, claims and encumbrances, including substantially all of Debtor’s inventory, equipment, and other personal property (the “ASP Personal Property”), and certain real estate located at 1251 Fulton, Grand Haven, Michigan (the “ASP Real Property”).

5. Fifth Third Bank holds a first lien in the ASP Personal Property, including inventory and equipment, securing a claim scheduled in the amount of \$369,053.32.

6. EGLE holds a claim of interest in the ASP Real Property securing a claim for reimbursement of certain remediation in the filed amount of \$275,000.00.¹

7. The Trustee sold the ASP Assets, including the Real Property, at auction on March 21, 2023, for a gross sale price of \$262,777, plus a 10% buyer’s premium. The sale closed on May 4, 2023.

8. The Bank and EGLE consented to the sale of the ASP Assets and have agreed to a carve-out from sale proceeds to cover certain costs of administration, to reimburse the estate for certain sale expenses and other charges, and for the general benefit of the bankruptcy estate and creditors.

9. Together, EGLE and the Bank agreed to carve out from sale proceeds subject to EGLE and the Bank’s liens the total sum of: (i) repair expenses, utilities and other costs of maintaining the ASP Real Estate, bankruptcy costs of administration, including Trustee’s

¹ EGLE’s proof of claim, designated claim 3-1 in the amount of \$275,000.00, was filed on April 24, 2023. The Trustee only became aware of the existence of a consensual lien of record in the ASP Real Property granted by “ASP & Manufacturing Company, Inc.” to the State of Michigan Department of Environmental Quality after the Sale Order was entered.

commission and case professional fees, and expenses associated with marketing and closing the sale of the ASP Real Property (collectively, the “Administrative Expense Carve-Out”); plus (ii) 15% of the remaining sale proceeds net of the Administrative Expense Carve-Out (collectively, the “Estate Carve-Out”).

10. The Trustee anticipates that the Administrative Expense Carve-Out, including maintenance, repairs, utilities, and other closing costs of \$53,177, will total approximately \$100,000.00, leaving \$162,000.00 in sale proceeds net of the Administrative Carve-Out.

11. EGLE will receive 60% of the net sale proceeds or approximately \$97,200.00 after the Administrative Carve-Out and has agreed to “cap” its unsecured deficiency claim at an amount equal to the difference between EGLE’s secured distribution and its \$275,000.00 claim.

12. The Bank will receive 25% of the net sale proceeds, or approximately \$40,500.00 after the Administrative Carve-Out and has reserved its full unsecured deficiency claim.

13. The bankruptcy estate will receive 15% of the net sale proceeds, or approximately \$24,300.00 for distribution to unsecured creditors.

14. In consideration of the Estate Carve-Out, the Trustee has waived section 506(c) and any further right or claim to surcharge or seek reimbursement from EGLE or the Bank for the costs and expenses of preserving or disposing of the ASP Assets. The Trustee believes that the Estate Carve-Out fairly allocates the cost of preserving and administering the ASP Assets among the Bank, EGLE, and the bankruptcy estate.

15. The Trustee believes the Carve-Out Agreements are in the best interest of the bankruptcy estate and assure that the sale of the ASP Assets will yield a benefit to the bankruptcy estate and unsecured creditors.

16. A carve-out agreement “is generally understood to be an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out of its lien position.” *In re U.S. Flow Corporation*, 332 B.R. 792 (W.D. Mich. 2005)(citing *In re Fortier*, 299 B.R. 183 (Bankr.W.D.Mich.2003), rev'd on other grounds, 315 B.R. 829 (W.D.Mich.2004). Carve-out agreements of this kind are routinely approved in cash collateral and other financing agreements, plans of reorganization, structured dismissals, and are routinely approved to facilitate the sale of collateral of undersecured creditors where, as here, the sale results in a benefit to the estate and unsecured creditors.

17. The Trustee further requests the authority, in his discretion, to make interim distributions of the net sale proceeds to EGLE and the Bank, subject to the terms of the Carve Out Agreements.

WHEREFORE, the Trustee requests that the Court enter an order substantially in the form of **Exhibit A** approving the Carve-Out Agreements and 506(c) waiver, authorizing, but not directing, the Trustee to distribute net sale proceeds to the Bank and EGLE, and granting such further relief as the Court deems just and appropriate.

Dated: May 26, 2023

By: /s/Stephen B. Grow
Stephen B. Grow
Warner Norcross + Judd LLP
150 Ottawa Ave NW, Suite 1500
Grand Rapids, Michigan 49503
(616) 752-2158
sgrow@wnj.com
Counsel for Thomas A. Bruinsma, Ch. 7 Trustee

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ORDER GRANTING TRUSTEE’S MOTION FOR INTERIM DISTRIBUTION

PRESENT: HONORABLE JAMES W. BOYD
United States Bankruptcy Judge

THIS MATTER having come to be heard upon the Trustee’s Motion for Interim Distribution (“Motion”) and the Court having noted due service of the Motion and the Court noting that no objections to the Motion to have been filed and the Court having reviewed the Motion and being fully advised in the premises:

IT IS THEREFORE ORDERED:

1. The Motion is granted;
2. The Trustee’s previous payments(s) for maintenance, repairs, utilities, insurance and other closing costs related to the Debtor’s real estate in the amount of \$53,153.00 is ratified as part of the carve out, being previously authorized and paid per sale Order;
3. The Trustee is authorized to make the following distributions as interim distributions in this cause:
 - The State of Michigan Department of Environment, Great Lakes and Energy sixty percent (60%) of the net sale proceeds after payment of the administrative expense carve-out in the amount of \$75,758.27;

- Fifth Third Bank twenty five percent (25%) of the net sale proceeds after payment of the administrative expense carve-out in the amount of \$31,565.94; and
- United States of America (US District Court Western Michigan February 10, 2023) for the payment of Restitution Order and Fine – \$27,212.54.

4. The Trustee is authorized to reserve the following sums for distribution in this cause subject to further order of this Honorable Court:

- The fees and expenses of Warner Norcross + Judd - \$32,882.50;
- The fees and expenses of CBH Attorneys & Counselors, PLLC - \$11,669.93; and
- A reserve for the fees and expenses of Thomas A. Bruinsma, Trustee - \$17,219.45.

5. The Trustee is authorized to retain the sum of \$18,939.57 representing the fifteen percent (15%) of the remaining sale proceeds after payment and allocation of administrative expenses; and

6. The Trustee is authorized and ordered to make distributions, either on an interim basis or final basis, consistent with the Motion.

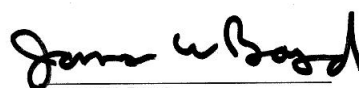
This Document Drafted By:
CBH Attorneys & Counselors, PLLC
141 East Michigan Avenue, Suite 301
Kalamazoo, MI 49007
Telephone: (269) 345-5156

END OF ORDER

IT IS SO ORDERED.

Dated November 7, 2023




James W. Boyd
United States Bankruptcy Judge