

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

BROOKSTONE HOLDINGS CORP., *et al.*,

Debtors.

Chapter 11

Case No. 18-11780 (BLS)

Hearing Date: August 28, 2019 at 1:30p.m.(E.T.)

Obj. Deadline: August 14, 2019 at 4 p.m. (E.T)

Related D.I. No. 1290

**RESPONSE OF YANG MING (AMERICA) CORP. TO LIQUIDATING TRUSTEE'S
OBJECTION TO CLAIM NUMBER 687**

Yang Ming (America) Corp., on behalf of Yang Ming Marine Transport Corp. (“Yang Ming”), as its general agent, by and through its undersigned counsel, submits this Response (the “Response”) to the Liquidating Trustee’s sixth omnibus (substantive) objection filed on July 29, 2019 [Docket No. 1290] to Yang Ming’s proof of claim number 687 (the “Objection”). The Objection seeks to reclassify claim number 687, filed in the amount of \$15,800.00, from secured to unsecured.

BACKGROUND FACTS

1. Yang Ming Marine Transport Corp. is an entity existing under the laws of Taiwan, and is a common carrier of goods via ocean going vessels. Yang Ming (America) Corp., its general agent in the United States, has its principal place of business at 1085 Raymond Boulevard, 9th Floor, Newark, New Jersey 07102.

2. Yang Ming carried cargo for the debtor, Brookstone Holdings Corp. (the “Debtor” or “Brookstone”), during the prepetition period, pursuant to certain bills of lading issued to the Debtor as shipper or consignee. The bills of lading constitute contracts of carriage between Yang Ming and Brookstone for shipment of cargo, as well as receipts for the goods.

3. The terms and conditions of Yang Ming's bill of lading (the "Bill of Lading") include a lien clause, whereby the Debtor acknowledged that Yang Ming had a lien on Brookstone's cargo for unpaid freight and related charges. A copy of the terms and conditions of the Bill of Lading showing the lien clause at Paragraph 25 is attached hereto as Exhibit "A."

4. Yang Ming's bills of lading contain the following lien provision:

The Carrier shall have a lien on Goods and any documents relating thereto (including this Bill), which shall survive delivery and release of such Goods, for any and all sums payable to the Carrier under the contract and/or any other contracts between the Carrier and the Merchant whether or not related to or concerned with the Carriage and expenses incurred by the Carrier for the account of the Merchant and for general average and salvage contributions to whomsoever due and for the costs of recovering same and for any penalties and assessments charged to the Carrier as a result of its Carriage of Goods. In order to recover any sums due the Carrier shall have the right to sell Goods by public auction or private treaty without notice to the Merchant. If on sale of Goods, the proceeds fail to cover the amount due and the costs and expenses incurred, the Carrier shall be entitled to recover the deficit from the Merchant.

5. As of the petition date, the Debtor owed \$15,800.00 to Yang Ming for ocean carriage services rendered pursuant to bills of lading containing the aforementioned lien clause.

THE CLAIM AND THE OBJECTION

6. Yang Ming filed claim number 687 as a secured claim in the amount of \$15,800.00 for unpaid pre-petition carriage of cargo services and related charges (the "Claim").

7. On July 29, 2019, the Liquidating Trustee filed the Objection to the Claim.

8. In the Objection, on Exhibit A, Page 3, the Liquidating Trustee seeks to reclassify the Claim from secured to unsecured. The Liquidating Trustee states that the reason for the reclassification is that "The Claim asserts a 'maritime lien' for goods delivered prepetition. A maritime lien, however, can only be perfected against a vessel. *See* 46 U.S.C. § 31342. The Debtor did not own a vessel against which a maritime lien could be asserted. The Debtors'

Books and records indicate that the goods sold were delivered prepetition and were not secured by any other collateral. The Claim, therefore, is not secured.”

9. Contrary to the Objection, the basis for Yang Ming’s secured status is not a maritime lien on a vessel.

10. Pursuant to general maritime law and the Bill of Lading, Yang Ming had a lien on all cargo in its possession for unpaid freight charges and extended freight charges, including detention charges or demurrage. *See Matter of Commonwealth Oil Refining Company, Inc.*, 734 F.2d 1079, 1081 (5th Cir. 1984), *citing The Lake Galera*, 60 F.2d 876, 879 (2d Cir. 1932) (“Demurrage, it is true, is sometimes referred to as being a form of “extended freight”).

11. Unquestionably, as a general rule, ship owners have a lien upon cargo for freight charges. *The Bird of Paradise*, 72 U.S. 545, 554 (1866). *Accord*, *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496, 499 (5th Cir. 1992) (“Under United States law, it has been settled for over a century that we presume a maritime lien exists in favor of a shipowner on cargo for charges incurred during the course of its carriage.”). *Also, see Atlantic Richfield Company v. Good Hope Refineries, Inc.*, 604 F.2d 865, 872 (5th Cir. 1979) (“Without doubt Atlantic Richfield had a lien on each cargo carried by Good Hope for all demurrage charges incurred during the course of its carriage. Such a lien arises by force of law and is present unless expressly waived in the charter.”).

12. Consequently, ship owners may retain the goods after the arrival of a ship at the port of destination until payment of the freight charges is made. *The Bird of Paradise*, 72 U.S. at 554. Such a lien is regarded in the jurisprudence of the United States as a maritime lien, because it arises from the usages of commerce, independently of the parties, and not from any statutory

regulations. Legal effect of such a lien is that the shipowner, as carrier by water, may retain the goods until the freight is paid. The Bird of Paradise, 72 U.S. at 555.

13. The parties to a maritime contract may also employ words in their contract to affirm the existence of the maritime lien, or even to extend its reach. Id. Further, the intervening insolvency of either party to a maritime contract cannot change the terms of the parties' agreement. 72 U.S. at 560 (“Intention of the parties in the contract of affreightment, as in other commercial contracts, must be ascertained from the language employed, the subject-matter, and the surrounding circumstances, and it is clear that the question of construction cannot be affected in the smallest degree by the subsequent solvency or insolvency of one of the contracting parties.”) (emphasis added).

14. In addition, then, to the lien created by general maritime law, Yang Ming had a lien on Brookstone’s cargo pursuant to the Bill of Lading. See WCI Steel, Inc. v. Seaway Marine Transport (In re WCI Steel, Inc.), 344 B.R. 838, 847 (Bankr. N.D. Ohio 2005) (“In addition to the general maritime lien, Seaway had a lien pursuant to section 14 of the Bill of Lading, which was incorporated into and became a part of the Contract.”).

15. In this case, the Bill of Lading extended Yang Ming’s lien on the Debtor’s cargo to cover unpaid freight charges, including any detention charges and/or demurrage. Further, the Bill of Lading extended Yang Ming’s contractual lien to any other cargo of the Debtor, even after delivery of the cargo for which the unpaid freight and other charges were due and unpaid.

16. In World Imports Ltd. v. OEC Group, 820 F.3d 576 (3d Cir. 2016), the United States Court of Appeals for the Third Circuit upheld a carrier’s lien on cargo for freight charges that were owed by the shipper on other cargo that had already been delivered. 820 F.3d at 580-

581. In other words, the Third Circuit held that a carrier's possessory lien can be extended by contract, even in circumstances where the carrier surrendered possession of the original goods.

17. The Third Circuit reasoned that "because it would frustrate commerce to require shipowners to retain their liens only by actual possession of the implicated cargo, a shipowner enjoys a strong presumption that, absent a clear indication to the contrary, he has not waived his cargo lien upon the delivery of that cargo." 820 F.3d at 584 (footnotes omitted). *See also Norden V. 25,001.078 Metric Tons of Fly Ash*, 308 F.Supp.3d 693 (SDNY 2018) (applying *In re World Imports*).

18. Thus, Yang Ming did not waive any of its possessory liens on the Debtor's cargo.

19. Therefore, Yang Ming had a maritime lien on the Debtor's cargo in its possession as well as a contractual lien that survived delivery of the cargo. As such, Yang Ming is secured.

CONCLUSION

20. Based on the foregoing, the Objection should be denied and the Claim should be allowed as a secured claim in the amount of \$15,800.00.

Dated: August 7, 2019

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EXHIBIT A

CERTIFICATE OF SERVICE

I, Daniel C. Kerrick, hereby certify that the foregoing has been served electronically upon all counsel receiving notice via CM/ECF and on the attorneys for the Liquidating Trustee by electronic mail on this 7th day of August, 2019.

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