

ANDERSON & KARRENBERG

Stephen P. Horvat (6249)
50 West Broadway #600
Salt Lake City, Utah 84101
Telephone: (801) 534-1700
Facsimile: (801) 364-7697
shorvat@aklawfirm.com

SHERMAN ATLAS SYLVESTER & STAMELMAN LLP

Joshua S. Bratspies (JB-0895) (admitted *pro hac vice*)
210 Park Avenue, 2nd Floor
Florham Park, NJ 07932
Telephone: (973) 302-9700
Facsimile: (973) 845-2546
jbratspies@shermanatlas.com

Attorneys for Garnishees
UBS Financial Services Inc. and UBS Bank USA

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

**FEDERAL TRADE COMMISSION and
UTAH DIVISION OF CONSUMER
PROTECTION,**

Plaintiffs,

vs.

ZURIXX, LLC, *et al.*,

Defendants.

**MOTION AND MEMORANDUM BY
GARNISHEES UBS FINANCIAL
SERVICES INC. AND UBS BANK USA
TO MODIFY AND LIMIT WRITS OF
GARNISHMENT PURSUANT TO
28 U.S.C. § 3013**

(Hearing Requested)

Case No. 2:19-cv-00713-DAK-DAO

Judge Dale A. Kimball

Magistrate Judge Daphne A. Oberg

STATEMENT OF RELIEF SOUGHT AND GROUNDS FOR MOTION

Garnishees UBS Financial Services Inc. and UBS Bank USA (collectively, “UBS”), by and through their undersigned counsel, hereby file this Motion and Memorandum, pursuant to 28 U.S.C. § 3013, for a Court Order: (1) recognizing the seniority of UBS Financial Services Inc.’s first priority lien and security interest in certain brokerage accounts that defendants Christopher A. Cannon (“Mr. Cannon”) and CAC Investment Ventures, LLC (“CAC”) maintain at UBS Financial Services Inc.; and (2) modifying and limiting the Writs of Garnishments that were issued to UBS, and lifting any necessary preliminary restraints, to allow UBS to satisfy the outstanding loan that is due and owing to UBS Financial Services Inc. out of the assets in Mr. Cannon’s and CAC’s brokerage accounts prior to remitting any account funds to Plaintiffs pursuant to the Writs of Garnishment. UBS respectfully requests a hearing on this Motion.

PRELIMINARY STATEMENT

Plaintiffs are unsecured, civil judgment creditors. On February 15, 2022, Plaintiffs obtained a stipulated monetary judgment [ECF No. 365] against Mr. Cannon and CAC in the amount of \$2,333,333.33. In an effort to collect on their monetary judgment, Plaintiffs have now caused Writs of Garnishment [ECF Nos. 388-395] to be issued to UBS with respect to certain brokerage accounts that Mr. Cannon and CAC maintain at UBS Financial Services Inc. These brokerage accounts had a combined, fair market value of approximately \$3.8 million as of July 31, 2022.¹

¹ Mr. Cannon’s and CAC’s brokerage accounts at UBS Financial Services Inc. are invested in, among other things, positions that remain subject to market fluctuation.

However, as a result of an outstanding loan that UBS Financial Services Inc. previously extended to CAC, UBS Financial Services Inc. has a perfected, first priority lien and security interest of \$2,511,963.05 (as of July 31, 2022) in Mr. Cannon's and CAC's brokerage accounts. Interest, fees and other expenses continue to accrue on this outstanding loan to CAC in accordance with the terms of the parties' credit line agreement.²

Under well-established law, UBS Financial Services Inc.'s security interest and lien in Mr. Cannon's and CAC's brokerage accounts is senior to and has priority over Plaintiffs' unsecured claim to such funds. Accordingly, UBS is requesting that the Court recognize the seniority of UBS Financial Services Inc.'s lien and modify the Writ of Garnishments (and lift any necessary preliminary restraints) to allow UBS to satisfy the outstanding loan that is due and owing to UBS Financial Services Inc. out of the assets in Mr. Cannon's and CAC's brokerage accounts prior to remitting any account funds to Plaintiffs pursuant to the Writs of Garnishment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY³

A. The UBS Secured Loan

On or about September 26, 2016, CAC entered into a Credit Line Agreement with UBS Financial Services Inc. (Darvin Aff. at Exh. A, Credit Line Agreement.) Under the terms of the Credit Line Agreement, CAC borrowed money from UBS Financial Services Inc. at certain times

² There also is a combined, outstanding balance of \$190,899.05 (as of February 28, 2022) that is due and owing to UBS Bank USA under certain credit cards maintained by Mr. Cannon and/or CAC. Pursuant to the terms of the parties' cardmember agreement, UBS Bank USA has a right of offset against the assets held in Mr. Cannon's and/or CAC's brokerage accounts at UBS Financial Services Inc. While not the subject of this Motion, UBS is reserving all rights and remedies with respect to this outstanding credit card debt.

³ This Statement of Facts and Procedural History is based on the accompanying Affidavit of Craig Darvin, dated August 31, 2022 (the "Darvin Aff."), along with the pleadings already on file with the Court.

and in certain amounts that CAC requested and that UBS Financial Services Inc. approved (the “Loans”). Pursuant to a separate Guaranty Agreement, dated September 26, 2016, Mr. Cannon unconditionally guaranteed to UBS Financial Services Inc. the prompt and full repayment of the Loans to CAC. (Darvin Aff. at Exh. B, Guaranty Agreement)

To secure repayment of the Loans, CAC and Mr. Cannon each granted UBS Financial Services Inc. a first priority lien and security interest in, among other things, the following brokerage accounts that CAC and Mr. Cannon maintain at UBS Financial Services Inc.: (1) Account No. 1G XXX17 held by CAC; (2) Account No. 1G XXX18 held by CAC; and (3) Account No. 1G XXX86⁴ held by Mr. Cannon (collectively, the “UBS Collateral Accounts”). (Darvin Aff, Exh. A, Credit Line Agreement at ¶ 6; Exh. B, Guaranty Agreement at ¶ 8.)

As of July 31, 2022, the Loans had an outstanding balance of \$2,511,963.05, and the UBS Collateral Accounts had a collective fair market value of \$3,820,171.94. (Darvin Aff. at Exh. C, July 2022 Loan Account Statement, and Exh. D, July 2022 UBS Collateral Account Statements.)

B. The Instant Action

In September 2019 – three years after UBS Financial Services Inc. entered into the Credit Line Agreement with CAC – Plaintiffs commenced the instant action against Mr. Cannon and other parties. The Court subsequently entered a Temporary Restraining Order [EFC No. 24], and then a Stipulated Preliminary Injunction Order [ECF No. 54], which contained, among other things: (1) an asset preservation provision enjoining the individual defendants, including Mr. Cannon, from disposing of more than \$50,000 without approval of the Court, and (2) an asset

⁴ As of November 2021, Account No. 1G XXX86 was converted into Account No. 1X XXX91.

freeze provision that applied to the named corporate defendants, which at that time did not include CAC.

In May 2020, Plaintiffs filed a First Amended Complaint [ECF No. 134] that, among other things, added CAC as a defendant to this action. Subsequently, in December 2021, the Court entered an Amended Stipulated Preliminary Injunction [ECF No. 346], which, among other things: (1) continued the asset preservation provision for the individual defendants, including Mr. Cannon, and stated, for the first time, that “the assets to be preserved of Christopher A. Cannon specifically include CAC Investment Ventures, LLC”; and (2) continued the asset freeze provision for the originally named corporate defendants, but did not extend the asset freeze provision to include CAC.

C. The Subject Writs of Garnishment to UBS

On February 15, 2022, Plaintiffs obtained a stipulated monetary judgment [ECF No. 365] against Mr. Cannon and CAC in the amount of \$2,333,333.33. The stipulated judgment further provides that “the asset freeze and asset preservation provisions imposed on Defendants in the Amended Stipulated Preliminary Injunction [ECF No. 346] remains in effect, but will be lifted for the sole purpose of transferring funds and assets to Plaintiffs and the Receiver...and will be dissolved for each Defendant upon completion of the transfers required by each Defendants....”

In an effort to collect on their monetary judgment, Plaintiffs have now caused Writs of Garnishment [ECF Nos. 388-395] to be issued to UBS with respect to the UBS Collateral Accounts that secure UBS Financial Services Inc.’s outstanding Loans to CAC.⁵

⁵ While Plaintiffs caused Writs of Garnishments to be issued to both UBS Financial Services Inc. and UBS Bank USA, the UBS Collateral Accounts are maintained solely at UBS Financial Services Inc. Mr. Cannon and CAC do not hold any assets or property at UBS Bank USA.

As set forth more fully below, UBS Financial Services Inc.’s security interest and lien in the UBS Collateral Accounts is senior to and has priority over Plaintiffs’ unsecured claim to such funds. Accordingly, UBS is requesting that the Court recognize the seniority of UBS Financial Services Inc.’s lien and modify and limit the Writs of Garnishments (and, if necessary, lift any preliminary restraints) to allow UBS to satisfy the outstanding Loans that are due and owing to UBS Financial Services Inc. out of the assets held in the UBS Collateral Accounts prior to remitting any account funds to Plaintiffs pursuant to the Writs of Garnishment.

LEGAL ARGUMENT

The Writs of Garnishment to UBS state that they were issued pursuant to the Federal Debt Collection Procedure, 28 U.S.C. § 3205. As such, the Court is expressly authorized to modify and limit the Writs of Garnishment under 28 U.S.C. § 3013, which states:

The Court may at any time on its own initiative or the motion of any interested person, and after such notice as it may require, make an order denying, limiting, conditioning, regulating, or modifying the use of any enforcement procedure under this chapter.

As set forth more fully below, the Court should modify and limit the Writs of Garnishment at issue here because UBS Financial Services Inc.’s perfected security interest and lien in the UBS Collateral Accounts is senior to and has priority over Plaintiffs’ unsecured claim to such funds.

POINT I

UBS FINANCIAL SERVICES INC. HOLDS A VALID SECURITY INTEREST IN THE UBS COLLATERAL ACCOUNTS

A “security interest” is “an interest in personal property or fixtures which secures payment or performance of an obligation.” Utah Code Ann. § 70A-1a-201. Under the UCC in Utah and New York (whose law governs the relationship between UBS Financial Services Inc. and CAC under the Credit Line Agreement), a security agreement attaches and is enforceable against the

debtor when: (i) value has been given; (ii) the debtor has rights in the collateral; and (iii) either the debtor has signed a security agreement that describes the collateral or, where the collateral includes things like investment property, the creditor has control over the collateral. See Utah Code Ann. § 70A-9a-203; NY UCC Law § 9-203.

Here, UBS Financial Services Inc. acquired a valid and enforceable security interest in the UBS Collateral Accounts on or about September 26, 2016. This was when UBS Financial Services Inc. extended a credit line to CAC and, in turn, CAC and Mr. Cannon each pledged to UBS Financial Services Inc. as collateral all of the assets in the UBS Collateral Accounts.

Specifically, paragraph 6 of the Credit Line Agreement, entitled “Collateral; Grant of Security Interest; Right of Set-off,” provides, in relevant part:

As security for Client’s obligations to the Firm under this Agreement, Client hereby assigns, grants and conveys to the Firm a **first priority lien and security interest** in the following assets and rights of Client, wherever located and whether owned now or acquired or arising in the future:

(i) the collateral accounts specified above (each a “Collateral Account”); [and]

(ii) any and all money, credit balances, certificated and uncertificated securities, security entitlements, commodity contracts, deposits, certificates of deposit, instruments, documents, partnership interests, general intangibles, financial assets and other investment property now or in the future credited to or carried, held or maintained in any Collateral Account....

(Darvin Aff., Exh. A, Credit Line Agreement at ¶ 6 (emphasis added).)

Paragraph 8 of the Guaranty Agreement executed by Mr. Cannon, entitled “Collateral,” similarly states, in relevant part:

As security for Guarantor’s obligations to the Firm under this Guaranty, Guarantor hereby assigns, grants and conveys to the Firm **a first priority lien and security interest** in:

(i) the Guarantor's account(s) specified above ("Guarantor's Collateral Account") and any other accounts maintained by the Guarantor at the Firm; and

(ii) any and all cash, credit balances, stocks, bond, other securities, certificates of deposit, instruments, securities entitlements and other investment property now or hereafter carried, held or maintained therein....

(Darvin Aff., Exh. B, Guaranty Agreement at ¶ 8 (emphasis added).)

CAC and Mr. Cannon went on to specifically pledge and identify each of the UBS Collateral Accounts as a "Collateral Account" under the Credit Line Agreement and Guaranty Agreement. (Darvin Aff., Exh. A at p. 1; Exh. B at p. 1.) By virtue of the foregoing, UBS Financial Services Inc. clearly acquired a valid and enforceable security interest in the UBS Collateral Accounts. See Utah Code Ann. § 70A-9a-203; NY UCC Law § 9-203.

POINT II

UBS FINANCIAL SERVICES INC. PERFECTED ITS SECURITY INTEREST IN THE UBS COLLATERAL ACCOUNTS

Following the creation of a security interest, "perfection" is the step that makes the security interest effective against third parties (here, the Plaintiffs). See Corpus Juris Secundum, Secured Transactions, § 48 (2008). "The purpose of perfection of a security interest is to secure priority of the holder of a perfected interest against subsequent purchasers and lienholders." Id. Indeed, "when a security interest is perfected, it becomes a 'first lien' on the collateral unless there is already an interest or lien against the property." See American Jurisprudence, 2nd Ed., Secured Transactions, § 259 (2008).

When the collateral consists of "investment property," perfection can be accomplished only by the secured creditor's "control" over the collateral. See Utah Code Ann. § 70A-9a-314; NY UCC Law § 9-314 ("a security interest in investment property, deposit accounts, letter-of-credit

rights, or electronic chattel papers, or electronic documents may be perfected by control...”). Such control is established under the UCC where: (i) the secured party is the securities intermediary with whom the investment property is held; or (ii) the investment property account holder, the secured party and the securities intermediary have agreed that the securities intermediary will apply any value as directed by the secured party without further consent of the account holder. See Utah Code Ann. § 70A-9a-106; NY UCC Law § 9-106.

Here, UBS Financial Services Inc. perfected its security interest in the UBS Collateral Accounts by virtue of these brokerage accounts being maintained at UBS Financial Services Inc. (*i.e.*, the secured party). In addition, UBS Financial Services Inc. perfected its security interest in the Collateral Accounts by virtue of its control over them, as provided for in the Credit Line Agreement and the Guaranty Agreement. Specifically, paragraph 8 of the Credit Line Agreement, entitled “Remedies,” provides, in relevant part:

[W]henever the Firm deems it necessary or appropriate, the Firm may liquidate all or any part of the Collateral withdraw and/or sell such Collateral and apply such Collateral, as well as the proceeds of such Collateral, to any amounts owed to the Firm.

(Darvin Aff., Exh. A, Credit Line Agreement at ¶ 8.) The Guaranty Agreement contains virtually identical language and rights. (Darvin Aff., Exh. B, Guaranty Agreement at ¶ 8.)

Under the UCC, the foregoing gives UBS Financial Services Inc. a validly perfected security interest and lien in the UBS Collateral Accounts, which, as set forth more fully below, has priority over and trumps all other claimants and creditors. See Utah Code Ann. § 70A-9a-106; NY UCC Law § 9-106.

POINT III

BECAUSE UBS FINANCIAL SERVICES INC. HOLDS A VALID AND PERFECTED SECURITY INTEREST IN THE UBS COLLATERAL ACCOUNTS, UBS FINANCIAL SERVICES INC. HAS PRIORITY OVER PLAINTIFFS

“The purpose and effect of perfection under the UCC is to secure the priority of the holder of a perfected security interest in particular collateral.” See American Jurisprudence at § 259. Accordingly, a creditor with a perfected security interest has priority to the collateral over, among others, all of the debtor’s other creditors. See id. at § 262. The law on this point is incredibly well settled. See, e.g., Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 473 (1974) (“secured creditors have by law a priority in the hierarchy”); In re Real Property Located at [Redacted] Jupiter Drive, Salt Lake City, Utah, Case No. 2:05-cv-1013, 2007 WL 7652297, *3 (D. Utah Sept. 4, 2007) (Benson, J.) (“Under Utah law, it is clear that secured creditors have priority over unsecured, and that among secured creditors, the date of perfection determines relative priorities”); Insley Mfg. Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986) (secured creditor’s perfected security interest has “priority over anyone, anywhere, anyhow”).

Here, Plaintiffs are unsecured, civil judgment creditors. See In re Capitol Cleaners & Dryers, 233 P.2d 377, 380 (Utah 1951) (“An unsecured judgment creditor has no lien against the personal property of the debtor”). As a matter of well-settled law, UBS Financial Services Inc.’s prior, perfected, first priority lien and security interest in the UBS Collateral Accounts is senior to and has priority over Plaintiff’s unsecured claim to such account funds.

Accordingly, UBS Financial Services Inc. is entitled to satisfy the outstanding Loans from the assets maintained in the UBS Collateral Accounts before remitting any remaining assets to Plaintiffs pursuant to the Writs of Garnishment.

CONCLUSION

For the foregoing reasons, UBS respectfully requests the entry of a Court Order pursuant to 28 U.S.C. § 3013: (1) recognizing the seniority of UBS Financial Services Inc.'s first priority lien and security interest in the UBS Collateral Accounts; (2) modifying and limiting the Writs of Garnishments that were issued to UBS, and lifting any necessary preliminary restraints, to allow UBS to satisfy the outstanding Loans that are due and owing to UBS Financial Services Inc. out of the assets in the UBS Collateral Accounts prior to remitting any account funds to Plaintiffs pursuant to the Writs of Garnishment; and (3) granting UBS any further relief the Court deems just and proper.

DATED: September 1, 2022

ANDERSON & KARRENBERG

/s/ Stephen P. Horvat

- and -

SHERMAN ATLAS SYLVESTER &
STAMELMAN LLP

**Attorneys for Garnishees
UBS Financial Services Inc. and UBS Bank USA**