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Court of Appeals
Division III
State of Washington
11/9/2018 3:21 PM

**Court of Appeals Case No. 359263
Spokane County Superior Court Case No. 17-2-01864-8**

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

In re: BATES DRUG STORES, INC., dba BATES PHARMACY &
MEDICAL SUPPLY

CARDINAL HEALTH 110, LLC,
Appellant/Petitioner/Creditor,

v.

BANNER BANK, a Washington corporation,
Respondent/Secured Creditor.

BRIEF OF RESPONDENT, BANNER BANK

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II. INTRODUCTION

Banner Bank, the first-position secured creditor, prevailing party below, and respondent herein (“Banner Bank” or “Respondent”), by and through its attorneys of record, HACKER & WILLIG, INC., P.S., respectfully submits this Brief of Respondent regarding the appeal filed by purported creditor and appellant Cardinal Health 110, LLC (“Cardinal” or “Petitioner”). Cardinal’s UCC1 Financing Statement sets forth the name of the secured party as “Cardinal Health,” which is also confirmed in the parties’ Subordination Agreement. CP 172-173, CP 71-72. No explanation is given as to how “Cardinal Health 110, LLC” has standing in this appeal.

Cardinal filed a Notice of Appeal of: (1) the Order on Motion to Determine Lien Priority and Other Matters (the “Lien Priority Order” attached hereto as **Appendix A**), and (2) the Order Granting Banner Bank’s Motion to Distribute Funds (the “Disbursement Order” attached hereto as **Appendix B**) (collectively, the “Orders”), entered by the Spokane County Superior Court (the “Trial Court”) on October 31, 2017 and February 26, 2018, respectively. Cardinal initially appealed, prematurely, only the Lien Priority Order. *See*, Case No. 356876. Cardinal’s prior appeal was dismissed as premature on its face.

The context for, and substance of, the Orders is straightforward:

the Lien Priority Order found that Cardinal entered into a written Subordination Agreement with Banner Bank, which expressly and undeniably subordinated Cardinal's security interest, and gave priority to Banner Bank's security interest. **Appendix A**. Cardinal did not seek any stay of the Lien Priority Order below and Banner Bank filed a motion to allow distribution of sale proceeds of Banner Bank's collateral to Banner Bank as the first-position secured lender. The resulting Disbursement Order (**Appendix B**) found that Banner Bank's claims are superior to Cardinal's claims, and therefore that Banner Bank is entitled to priority disbursement from the sale of Banner Bank's collateral.

Cardinal's appeal stems from the general receivership proceedings of Bates Drug Stores, Inc., aka and dba Bates Pharmacy and Medical Supply ("Bates Drug"), in which Mr. Barry Davidson was appointed as general receiver (the "Receiver") (and with respect to the proceedings, the "Receivership"). Banner Bank and Cardinal are both creditors in the Receivership. The details of the Receiver's administration of the receivership estate do not bear on the substance of Cardinal's appeal. Rather, the key contracts were executed between Banner Bank and Bates Drug, and Banner Bank and Cardinal, in 2012 and 2014. The operative, dispositive contract for review by this Court is the Subordination Agreement executed by Banner Bank and Cardinal in July of 2014, which

provides:

[Cardinal]'s security interest in [Bates Drug]'s assets, together with any and all rights, interest, title or lien against or respecting said security interest, shall be and is hereby declared subordinate, inferior and junior in priority to the security interest of [Banner] Bank in [Bates Drug]'s assets.

Appendix C.

Cardinal presented a misleading definition of “UCC Filing” to the Trial Court, and repeats same in this appeal. The Subordination Agreement clearly defines “UCC Filing” as:

Subordinated Creditor [Cardinal] has extended credit to Bates Drug Stores, Inc. (“Borrower”) secured by certain personal property of Borrower, including, but not limited to all assets of Borrower, as more particularly described in and as evidenced by that certain UCC-1 Financing Statement No. 2012-026-6202-1, filed on January 26, 2012, and all amendments thereto and continuations thereof (the “UCC Filing”).]

Appendix C; also, CP 71.

Cardinal misstates the Subordination Agreement when it argues, as it does throughout its Appellant’s Brief, that the subordination was limited “only to assets set forth in [Banner] Bank’s UCC filing [sic.] statement[.]” *E.g.*, Appellant’s Brief, pg. 8 (emphasis added). Putting aside Cardinal’s misreading, the record is quite clear: the UCC Filing that was/is subordinated is Cardinal’s UCC Filing, which claims a security interest by Cardinal in “all assets of Borrower [Bates Drug].” **Appendix C.** Cardinal

knew and understood the form and content of the Subordination Agreement when it executed same, and does not argue to the contrary in this appeal. All of Cardinal's security interests in the assets of Bates Drug, if any, were subordinated to Banner Bank, to the extent there was any conflict between Banner Bank's security interest and Cardinal's purported security interest.

Banner Bank assigns no error to any decision made by the Trial Court. All the Trial Court's rulings, orders, and judgments should stand and be affirmed. Therefore, Banner Bank respectfully requests that this appeal be dismissed, attorneys' fees ordered, and the case remanded for entry of a corresponding order and judgment in favor of Banner Bank against Cardinal.

III. STATEMENT OF THE CASE

Cardinal's "Statement of Case" [*sic.*] includes nuance from the Receivership that is not relevant to Cardinal's appeal, and its separate "Statement of Relevant Facts" is subjective and, again, misstates or omits key facts. Therefore, Banner Bank must set forth a fair statement of the record in this matter.

A. Banner Bank and Bates Drug Enjoyed a Long Loan History.

Banner Bank, through its predecessor (American West Bank),

extended two loans to Bates Drug to fund its business operations. CP 75. On or about October 4, 2012, Bates Drug executed a promissory note under loan number xxxxx8754 in the amount of \$750,000.00 to memorialize a loan it received from Banner Bank (the “8754 Loan”). CP 76. A Commercial Security Agreement, Business Loan Agreement, and other ancillary loan documents were executed that same day. *Id.* A second promissory note related to the 8754 Loan (in effect, a Change in Terms Agreement) was executed on March 9, 2017, in which the maturity date was extended to February 28, 2018, and the principal balance on the 8754 Loan was reduced to \$720,000.00. *Id.* The 8754 Loan was fully advanced and the entire principal amount is outstanding. *Id.* As of August 2017, the balance of the 8754 Loan was \$761,593.92. *Id.*

On or about October 30, 2012, Bates Drug executed another promissory note under loan number xxxxx8720 in the amount of \$905,000.00 to memorialize a second loan it received from Banner Bank (the “8720 Loan”). CP 76. A Commercial Security Agreement, Business Loan Agreement, Commercial Guaranty, Deed of Trust, and other ancillary loan documents were also executed on that date. *Id.* As of August 2017, the balance of the 8720 Loan was \$767,667.60. *Id.*

Under the 8754 Loan, on or about October 4, 2012, Bates Drug granted a blanket Commercial Security Agreement (the “Security

Agreement”) to secure all loans, obligations, debts, or liabilities of Bates Drug to Banner Bank. CP 76, 88. The Security Agreement provides, in part, as follows:

COLLATERAL DESCRIPTION. The word “Collateral” as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the Indebtedness and performance of all other obligations under the Note and this Agreement:

All Inventory, Accounts and Equipment

In addition, the word “Collateral” also includes all of the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

(A) All accessions, attachments, accessories, tools, parts, supplied, replacements of and additions to any of the collateral described herein, whether added now or later.

(B) All products and produce of any of the property described in the Collateral section.

(C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.

(D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party’s insurer, whether due to judgment, settlement or other process.

(E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

CP 88.

Banner Bank, by way of its predecessor, perfected its blanket security interest by filing a UCC1 Financing Statement on October 10, 2012, under filing number 2012-284-8659-5. CP 361, 97. The 8754 and 8720 Loans are cross-collateralized. CP 88.

Bates Drug continued to operate after the 8754 and 8720 Loans were made, which it had done for decades, but ran into financial trouble that led to an assignment for the benefit of creditors and appointment of the Receiver in May 2017. CP 22.

B. Cardinal Also Claims A Security Interest in the Assets of Bates Drug; Any Such Interest is Subordinate to the Security Interests of Banner Bank.

Cardinal claims a competing security interest in assets of Bates Drug. CP 124, 145. However, in July 2014, Cardinal entered into a written Subordination Agreement with Banner Bank in order to induce Banner Bank to continue to extend credit to Bates Drug. CP 71. Therein, Cardinal agreed that:

[Cardinal]'s security interest in [Bates Drug]'s assets,

together with any and all rights, interest, title or lien against or respecting said security interest, shall be and is hereby declared subordinate, inferior and junior in priority to the security interest of [Banner] Bank in [Bates Drug]'s assets.

CP 71.

The language of the Subordination Agreement executed by Cardinal is amazingly clear, as is the reason the parties executed the Subordination Agreement:

[T]o induce [Banner] Bank to continue to extend credit to [Bates Drug], [Cardinal] is willing to subordinate its security interest in [Bates Drug]'s assets, as set forth in the UCC Filing, to the security interest of Bank in the same assets[.]

CP 71. Banner Bank provided the foundational credit facilities to assist the ongoing business operations of Bates Drug, while Cardinal “provides pharmaceutical product on a wholesale basis nationwide to businesses such as Bates Drug[.]” Appellant’s Brief, pg. 6. In any event, the parties agreed that Banner Bank was to be in first position as to all of Banner Bank’s security interests, and that all of Cardinal Health’s security interests were subordinated. CP 71.

Cardinal claimed in the Trial Court that the Subordination Agreement only applies to “certain assets” and insinuates that the Subordination Agreement somehow excludes reference to “general intangibles.” CP 129, 126. In making this claim, Cardinal disingenuously

misquoted to the Trial Court the Subordination Agreement in an attempt to limit the extent of its agreed subordination, claiming, “[t]he Subordination Agreement . . . limit[ed] the subordination only to assets set forth in the Bank’s UCC filing [*sic.*] statement[.]” CP 129. Whether due to a gross misunderstanding of the documents in the record, or to a misguided notion that patently false statements can win an argument, Cardinal has repeated this statement several times in the present appeal. *E.g.*, Appellant’s Brief, pg. 8.

A quick read of the short and plain Subordination Agreement confirms that, while clear, it is also necessarily comprehensive:

[Cardinal’s] security interest in [Bates Drugs’] assets, together with any and all rights, interest, title or lien against or respecting said security interest, shall be and is hereby declared subordinate, inferior and junior in priority to the security interest of [Banner] Bank in [Bates Drugs’] assets.

CP 71.

Further, Cardinal’s own UCC1 Financing Statement, which it somehow claims is superior to Banner Bank’s, is expressly referenced in the Subordination Agreement, defined therein as the “UCC Filing.” CP 71. Thus, Cardinal’s Financing Statement, of which all parties were aware at the time of execution of the Subordination Agreement, is expressly referenced by name, date, and recording number, and thereby incorporated into the Subordination Agreement. *Id.* By incorporating its UCC Filing

into the Subordination Agreement, Cardinal explicitly subordinated its rights to Banner Bank in all of the collateral described therein:

All Debtor's fixtures, goods, machinery, equipment, vehicles, inventory, leasehold improvements, accounts, accounts receivable, including without limitation, those maintained with a bank or other financial institution, and all money, letter of credit rights and letter of credit proceeds and assignments thereof, chattel paper, including electronic chattel paper, documents, notes receivable, instruments, investment property, contract rights, general intangibles (including without limitation, all intellectual property, trade names, trade marks, trade secrets, service marks, patents, patent applications, copyrights[.] . . .

CP 149.

William M. Bates, the son of the founder and former owner of Bates Drug, believed "that the Banner [Bank] obligation was significantly oversecured by [Bates Drug's] assets[.]" and that he "was not advised that [Bates Drug's] assets were pledged as security to a party other than [Banner Bank] or that [Bates Drug] owed significant sums to Cardinal Health." CP 193. It stands to reason, then, that Cardinal's security interest, if it existed, was fully subordinated to Banner Bank's blanket security interest, which is fully acknowledged by Bates Drug's former principal. *Id.*

C. The Receiver Has Sold All Property and Assets of the Receivership Estate, and Disbursed All Proceeds to Banner Bank.

On June 7, 2017, the Trial Court heard argument and granted the

Receiver's Motions for Orders Authorizing Sale of Assets to Geneva Woods Pharmacy Washington, LLC ("Geneva Woods") (the "LTC Asset Motion") [CP 599]; and to Sixth Avenue Medical Building Pharmacy, Inc. ("Sixth Avenue Medical") (the "Retail Asset Motion") [CP 606]. The Trial Court entered Orders on both Motions and the sales closed shortly thereafter as follows:

- Geneva Woods. The Receiver collected \$202,500.00 for the LTC accounts, \$42,352.05 for the LTC inventory, less credit of \$30,000.00, for a total of \$214,852.05. CP 43, 100-103.
- Sixth Avenue Medical. The Receiver collected \$75,000.00 for the retail accounts and \$38,918.59 for the inventory, for a total of \$113,918.59. *Id.*

At the time the sales closed, the Receiver withheld payment to Banner Bank on the basis that under the terms of the purchase and sale agreements, there was a "dispute" as to whether Banner Bank's security interest attached to the sale proceeds and should be given priority, or was inferior to Cardinal's security interest, despite Cardinal agreeing to subordinate its security interest to Banner Bank's, but the Receiver "support[ed] the disbursement of Receivership funds to the holders of senior secured creditors as soon as the lien priorities are established through a final Order of this Court[.]" CP 121.

D. Banner Bank Proactively Filed its Motion to Determine Lien Priority, and the Trial Court Agreed.

The assets sold by the Receiver represented numerous examples of the types of collateral Cardinal subordinated to Banner Bank. CP 602, 608. Chief among them, according to Bates Drug's Asset Purchase Agreement with Geneva Woods, are the "pharmacy and medical supplies, products and services[.]" CP 377. In addition, Bates Drug's assets include "contracts and other agreements," inventory, books and records, and all general intangibles. CP 380. Each of these asset categories are, stem from, arise out of, or represent records and data relating to Bates Drug's accounts, inventory, and equipment, all of which are undeniably part of Banner Bank's collateral as operation creating accounts. CP 88.

The Asset Purchase Agreement defines intangibles as follows:

[C]ustomer lists, customer records, contact information, telephone numbers and website addresses, Seller's internally-created report generation software, files, charts, scripts, provider lists, patients and referral sources, referral relationships, and business information currently used by Seller in connection with the operation of the LTC Business, and associated goodwill (the "Intangibles").

CP 380.

All of these assets are included in Banner Bank's Security Agreement, which states in part:

In addition, the word 'Collateral' also includes all the following, whether now owned or hereafter acquired,

whether now existing or hereafter acquired, and wherever located:

...

(C) All accounts, general intangibles, instruments, rents monies, payments and all other rights, arising out of the sale, lease consignment or other disposition of any of the property described in this Collateral section.

...

(E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

CP 88.

Goodwill, here, which the Receiver purportedly included in "Intangibles," cannot have any significant value since the business name, phone number, address, logo, proprietary packaging, etc., were not sold as part of the Asset Purchase Agreement. CP 380, 602, 608.

Banner Bank filed a motion to determine lien priority on or about August 8, 2017. CP 39. Cardinal opposed Banner Bank's Motion and filed its own untimely "Motion to Disburse Funds to Cardinal Health." CP 124. The Receiver filed a declaratory response relating primarily to creating a hold-back for administrative expenses. CP 118-121. Oral argument was held on August 25, 2017, and all sides were permitted extensive time to plead their case. CP 615. Subsequently, at the request

of the Trial Court, Banner Bank submitted a post-hearing brief on August 28, 2017. CP 221. Cardinal submitted no such post-hearing brief.

After a thorough review of all applicable facts and legal authority, the Trial Court agreed with Banner Bank, granted its Motion, and issued a letter decision on October 9, 2017 (the “Letter Ruling”). **Appendix D**; CP 224. Therein, the Trial Court surveyed and examined the security interests of both Banner Bank and Cardinal. *Id.* After a full hearing and several rounds of briefing, the Trial Court concluded that Banner Bank had priority in the proceeds from the sale of the assets by the Receiver. CP 228. The Court requested that Banner Bank prepare an order memorializing this decision, which Banner Bank promptly presented to the Court. *E.g.*, CP 240-244. The Lien Priority Order was subsequently entered on October 31, 2017. CP 313.

E. The Receiver Delayed, and Banner Bank Moved to Have Its Funds Disbursed.

Following the extended rounds of briefing and the full hearings before the Court, the Receiver did not promptly make payment to Banner Bank, though he paid himself for negotiating the Geneva Woods and Sixth Avenue Medical sales, so after more than six weeks Banner Bank filed its Motion to Disburse Funds and the Declaration of Arnold M. Willig in support thereof on or about December 18, 2017. CP 317-327. The

Receiver filed a Limited Objection on or about February 8, 2018, which primarily conveyed to the Trial Court that it should consider the Receiver's administrative costs in any order of disbursement of funds to Banner Bank from the sale of its collateral. CP 341. Cardinal filed an Objection on or about February 8, 2018; which claimed that because Cardinal's first, premature appeal was not yet dismissed, the Trial Court should deny Banner Bank disbursement of its collateral proceeds, or that the Trial Court should hold Banner Bank's monies in the Registry of the Court indefinitely. CP 340 ("In the even [*sic.*] that the appeal is successful, it will make much more sense for all parties if the funds in dispute are still in the registry of the court."). As with the Motion to Determine Lien Priority, Cardinal did not seek a stay pending appeal.

The Trial Court again heard oral argument on February 9, 2018, ruled in favor of Banner Bank, and overruled Cardinal's Objection. CP 629. At the conclusion of the hearing, Banner Bank and the Receiver agreed to present a joint disbursement order that addressed both immediate payment to Banner Bank and consideration of the receivership estate's ongoing administrative costs. CP 346-348. Banner Bank and the Receiver presented the Disbursement Order on February 22, 2018, which Order was entered by the Trial Court on February 26, 2018. *Id.* Accordingly, the Receiver executed partial disbursement to Banner Bank,

and sought authority to make further distribution to Banner Bank by way of the Receivership Termination Order. **Appendix E**.

F. The Receivership Has Concluded.

Following entry of the Orders and disbursement to Banner Bank, the Receivership progressed toward an orderly conclusion. In May 2018, the Receiver petitioned the Trial Court for an order approving final report, discharging receiver, releasing cash deposit in lieu of bond, and terminating receivership, which matters were heard and granted in June 2018. **Appendix E**. There is no further live proceeding that can offer any relief to Cardinal; the Receivership has concluded.

IV. ISSUES PRESENTED FOR REVIEW

Using Cardinal's framework, Banner Bank offers the following *revised* Statement of Issues:

1. Whether the Subordination Agreement subordinated all of Cardinal's security interests to Banner Bank when it provides: "[Cardinal]'s security interest in [Bates Drug]'s assets, together with any and all rights, interest, title or lien against or respecting said security interest, shall be and is hereby declared subordinate, inferior and junior in priority to the security interest of [Banner] Bank in [Bates Drug]'s assets"?

2. Whether Banner Bank's blanket security interests were

properly perfected when the Loan Documents are all signed and uncontroverted, Banner Bank's UCC1 Financing Statement was properly filed and is uncontroverted, and Cardinal's own security instruments call into question the legitimacy of its secured party status and standing?

3. Whether, on this record, the Trial Court was correct in disbursing funds to Banner Bank following two (2) full hearings on all parties' respective claims to the sale proceeds held by the Receiver?

All three questions, and all issues pertaining thereto, should be answered in the affirmative, and this appeal dismissed immediately.

V. STANDARD OF REVIEW

Cardinal's stated Standard of Review is incorrect. In undertaking the broad legal and evidentiary analysis necessary to render the Lien Priority Order, and separately the Disbursement Order, a multi-step motion process, the ordinary summary judgment standard of review is not applicable here. In fact, this was not a summary judgment case, the proceedings in the Trial Court did not result in a judgment in favor of any party, and summary judgment was not granted in favor of any party.

On this record, the Trial Court engaged in fact finding in order to determine the intent of Banner Bank and Cardinal as to the controlling document, the Subordination Agreement. CP 224-228, 313-316, 346-348. Though it is Banner Bank's position that the Subordination Agreement

and all other Loan Documents are not ambiguous, Cardinal argues – and argued in the Trial Court – that the Subordination Agreement *is* ambiguous, containing meanings and terms that are simply not present in the contract. In making these arguments, however, Cardinal opened the door to the Trial Court undertaking factual determinations as to the parties’ intentions as to the contracts they signed.

Determining the intent of the parties to an ambiguous deed or contract is a question of fact. *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 567, 716 P.2d 855 (1986) (deed); *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999) (contract). A finder of fact ascertains the intent of the parties by examining the actual language and the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). A trial court’s determination of the parties’ intent will be reversed on appeal only if it is not supported by substantial evidence. *Martinez*, 94 Wn. App. at 943 (emphasis added). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212,

220, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987). *Grigg Apiaries, Inc. v. Fisher*, 2001 Wash. App. LEXIS 1426, pgs. 8-9.

On the present record and considering the above-stated standard of review, the Trial Court carefully considered all arguments, declarations, and legal authority in entering its Orders, all the Orders are supported by substantial evidence. A review of page one of the Subordination Agreement, alone, confirms for any fair-minded, rational person that all of Cardinal's security interests are subordinated to Banner Bank's security interests. Then, upon an examination of the documentation and perfection of Banner Bank's security interests, substantial evidence supported the Trial Court's directive to the Receiver that it disburse the sale proceeds to Banner Bank. The Orders of the Trial Court should be affirmed.

VI. LEGAL AUTHORITY & ARGUMENT

The Trial Court correctly applied the controlling law in finding the facts, deciding the issues presented, and entering its Orders. The Letter Ruling of Superior Court Judge Raymond F. Clary on Banner Bank's Motion to Determine Lien Priority discussed in great depth Judge Clary's reasoning, which later gave rise to his ruling in favor of Banner Bank on its Motion to Disburse Funds. **Appendix D**; CP 224-228; CP 313-316; CP 346-348. This Court is respectfully requested to review the transcript of both hearings and the full complement of the accompanying comments by

Judge Clary in his Orders.

A. Cardinal Subordinated All Its Security Interests to Banner Bank.

It is dispositive that Cardinal subordinated all of its comprehensive security interests to Banner Bank, and the Court need look no further.

Cardinal's UCC1 Financing Statement sets forth a collateral description that is extremely broad:

All Debtor's fixtures, goods, machinery, equipment, vehicles, inventory, leasehold improvements, accounts, accounts receivable, deposit accounts, including without limitation, those maintained with a bank or other financial institution, and all money, letter of credit rights and letter of credit proceeds and assignments thereof, chattel paper, including electronic chattel paper, documents, notes receivable, instruments, investment property, contract rights, general intangibles (including without limitation, all intellectual property, trade names, trade marks, trade secrets, service marks, patents, patent applications, copyrights, literary rights, royalties, data bases, software and software systems, licenses, franchises, customer lists, goodwill, and tax refunds), books and records, prescription files, patient lists, computer programs and records, and all other personal property, tangible or intangible (including, without limitation, all signs, appliances, cash registers, computers, computer software, shelving, check-out counters, compressors, freezers, coolers, display cases, customer records, sundries, tobacco products, prescription and over-the-counter pharmaceutical products, health and beauty aids, home healthcare products and general merchandise and supplies); all accessions and additions to, substitutions for, and replacements of any of the foregoing; all proceeds or products of any of the foregoing; and all rights to payments under any insurance or warranty, guaranty, or indemnity payable with respect to any of the foregoing (collectively, the "Collateral").

CP 359; CP 105-108.

The Subordination Agreement further defines “UCC Filing” as Cardinal’s UCC1 Financing Statement, and thus all of Cardinal’s security interests in the “Collateral” described above are subordinated to Banner Bank. CP 71. In fact, Banner Bank and Cardinal took the time to specify exactly which UCC1 Financing Statement they meant to be the UCC Filing defined in the Agreement: “that certain UCC-1 Financing Statement No. 2012-026-6202-1[,]” which of course is Cardinal’s UCC1 Financing Statement. CP 349.

Therefore, here, it does not matter what Banner Bank’s security interests are, or what Cardinal’s security interests are: Cardinal’s security interests – whatever they may be – are subordinated to Banner Bank’s security interests – whatever they may be.

Under Washington law, a party’s priority rights under a subordination agreement are strictly limited to the express terms and conditions of the agreement. *Ban-Co Inv. Co. v. Loveless*, 22 Wn. App. 122, 587 P.2d 567 (1978); *Campanella v. Ranier Nat’l Bank*, 26 Wn. App. 418, 420, 612 P.2d 460, 462 (1980).

Here, even according to a “strict construction” standard, the Subordination Agreement is so clear, and Cardinal’s contractual

subordination is so broad, that Banner Bank's priority claim to the Receiver's sale proceeds should prevail.

B. The Receiver Correctly Disbursed All Sale Proceeds to Banner Bank, as Proceeds and Written Records of "Accounts."

Washington law provides that "the receiver, with the court's approval and after notice and hearing, may use, sell, or lease estate property other than in the ordinary course of business." RCW 7.60.260

(1). Regarding order of payment of claims, RCW 7.60.230 provides:

(1) Allowed claims in a general receivership shall receive distribution under this chapter in the order of priority under (a) through (h) of this subsection and, with the exception of (a) and (c) of this subsection, on a pro rata basis.

(a) Creditors with liens on property of the estate, which liens are duly perfected under applicable law, shall receive the proceeds from the disposition of their collateral. However, the receiver may recover from property securing an allowed secured claim the reasonable, necessary expenses of preserving, protecting, or disposing of the property to the extent of any benefit to the creditors. If and to the extent that the proceeds are less than the amount of a creditor's allowed claim or a creditor's lien is avoided on any basis, the creditor is an unsecured claim under (h) of this subsection. Secured claims shall be paid from the proceeds in accordance with their respective priorities under otherwise applicable law.

RCW 7.60.230 (West 2018 ed.) (emphasis added).

Banner Bank holds a priority security interest in, primarily, all inventory, accounts, and equipment of Bates Drug. CP 88. But Banner

Bank's collateral description does not stop there:

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

(A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.

(B) All products and produce of any of the property described in this Collateral section.

(C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.

(D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.

(E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

CP 88.

As the Trial Court found, since the date of origination of the 8754 Loan, October 4, 2012, Bates Drug granted the blanket Security Agreement to secure all loans, obligations, debts, and/or liabilities of

Bates Drug to Banner Bank. CP 79-86. Banner Bank perfected its blanket security interest by filing a UCC1 Financing Statement on October 10, 2012. CP 361. The 8754 and 8720 Loans are cross-collateralized. CP 88.

There can be no reasonable question that Banner Bank's blanket security interest covers inventory, accounts, and equipment, along with the records and data, and proceeds of same. CP 88. The Receiver's Order Authorizing Sale [Geneva Woods] describes the assets sold as part of that Order, all of which are, stem from, or are derived from Banner Bank's collateral. CP 599-605. The Receiver's Order Authorizing Sale [Sixth Avenue Medical] similarly describes the assets sold, all of which similarly are products of Banner Bank's collateral. CP 606-611 (together, the "Sale Orders"). The primary asset categories sold by the Receiver were inventory and accounts, and Banner Bank's collateral description unquestionably covers both. CP 88.

Much was made by Cardinal in the Trial Court about "customer lists" and Cardinal's failed argument that Banner Bank does not have a security interest in "customer lists." CP 127, 131, 132. In support of its same futile argument in this appeal, Cardinal cites *Levitz v. Arons Arcadia Ins. Agency (In re Levitz Ins. Agency)*, 152 B.R. 693 (1992), a Bankruptcy Court case interpreting the Massachusetts enactment of the Uniform Commercial Code under Massachusetts law for the proposition that

customer lists are not accounts. *Levitz* has no legal bearing whatsoever on the present case. In *Levitz*, a creditor was granted a security interest in “the customer list annexed hereto as Exhibit ‘A’ and incorporated herein by reference.” *Id.* at 695. The *Levitz* Court found only that the security interest granted was intended to cover customer lists and not accounts. *Id.* at 698. *Levitz* did not consider whether a customer list could be a “record or data” relating to an account.

Cardinal next cites *In re Blankinship-Cooper, Inc.*, 43 B.R. 231 (1984), another Bankruptcy Court case, this time out of Texas and applying/interpreting the Texas Business Commerce Code, which is equally unpersuasive. Finally, Cardinal cites a Ninth Circuit case entitled, *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746 (1998), but this opinion does not even mention the words “customer list,” “account,” or “goodwill,” and is otherwise wholly inapplicable to the instant case on appeal.

Each of these cases referenced above was decided prior to the 2001 revisions to the Uniform Commercial Code, pursuant to which the definition of “accounts” was expanded to include collateral that was considered “general intangibles” under prior versions of the Code. *See*, RCW 62A.9A-102(a)(2) and the official comments thereto.

Of note is that Cardinal cited these same three cases to the Trial

Court in opposition to Banner Bank’s Motion to Disburse Funds [CP 131-132], and the Trial Court found them equally unconvincing. It appears Cardinal was not able to find a single applicable case from this jurisdiction to support its argument here.

As the Trial Court found, customer lists are derived from “Accounts,” and indeed “customer lists” and/or “customer records” are very often simply lists of “accounts” or customers.

The Uniform Commercial Code defines “account” as follows:

(A) “Account,” . . . means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or information contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state. The term includes health-care-insurance receivables.

RCW 62A.9A-102(a)(2) (West 2018 ed.).

Official Comment No. 5 to RCW 62A.9A.102 provides:

5. Receivables-Related Definitions.

a. **“Account”**; **“Health-Care-Insurance Receivable”**; **“As-Extracted Collateral.”** The definition

of “account” has been expanded and reformulated. It is no longer limited to rights to payment relating to goods or services.

RCW 62A.9A-102, Official Comment #5 (West 2018 ed.).

Further, in Washington, a valid security interest attaches to after-acquired property, including accounts receivable. *Prime Constr. Co. v. Seattle-First Nat'l Bank*, 16 Wn. App. 674, 677, 558 P.2d 274, 276 (1977).

Banner Bank unquestionably has a first position security interest in the inventory and accounts, including accounts receivable. CP 88. Inclusive in this security interest is all the records and data relating to the inventory and accounts receivable. *Id.* This also includes general intangibles relating to the collateral. *Id.* This, of course, includes customer lists, customer records, contact information, telephone numbers and website addresses, Bates Drug’s internally-created report generation software, files, charts, scripts, provider lists, patient and referral sources, referral relationships and business information. *Id.*

In sum, Banner Bank holds a first position security interest in all the identified assets which have been sold. None of these records would exist independently of the accounts receivable, and they are therefore part of Banner Bank’s collateral.

The Trial Court agreed and ordered the Receiver to disburse \$327,191.00 to Banner Bank. CP 346-348. At the outset of the

Receivership, more than \$1,529,261.52 was owed to Banner Bank on its outstanding loan obligation. CP 76. Therefore, given Cardinal's blanket subordination, and Banner Bank's comprehensive first-position security interest, the Trial Court correctly ordered disbursement to Banner Bank.

C. Cardinal's Argument Centering on "General Intangibles" is a Red Herring.

Without support in the record, Cardinal falsely claims that Banner Bank's "security agreement . . . does not include general intangibles." Appellant's Brief, pg. 13. This is incorrect: Banner Bank's Commercial Security Agreement covers, *in addition* to the other collateral categories mentioned: "All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section." CP 88.

Cardinal would have this Court conclude that, even though general intangibles is clearly mentioned above, in any way "arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section[.]" that "Banner Bank never had a security interest in general intangibles through its security agreement with Bates Drug[.]" Appellant's Brief, pg. 14. Again, this is simply false. At a minimum, if any of Banner Bank's collateral is sold, including inventory, accounts, and

equipment, and/or the proceeds thereof, Banner Bank's security interest in general intangibles comes into play. Here, this is precisely what happened with the Geneva Woods sale and the Sixth Avenue Medical sale: the Receiver sold both tangible assets (inventory, equipment) and intangible assets (accounts, general intangibles). Therefore, the "general intangibles" stated in Banner Bank's Commercial Security Agreement were "arising out of a sale . . . of any of the property described in this Collateral section." CP 88.

For this reason, even if this Court takes the narrow reading and view of the assets sold by the Receiver, disagreeing with the Trial Court and finding that all assets sold were "general intangibles," Banner Bank's security interest in "general intangibles" would still exist as it arises out of the Receiver's sale of Bates Drug's inventory, accounts, and equipment. CP 88. Further, Cardinal's security interest would still be subordinated because all of its security interests were subordinated to Banner Bank. CP 71.

Further, logically, customer lists, customer records, contact information, telephone numbers, and website addresses, and Bates Drug's internally-created report generation software, files, charts, scripts, provider lists, patients, referral sources, and referral relationships are clearly and unambiguously "records and data" and/or "general intangibles" directly

relating to and derived from Bates Drug's accounts and inventory, and are therefore part of Banner Bank's collateral. CP 88. There is no other source for this data. Customer lists, records, and contact information are essentially lists of people and entities who owe (or owed) Bates Drug money for either good or services provided (i.e., accounts). Again, these are all "accounts" and the records, data, and general intangibles derived from those accounts are subject to Banner Bank's security interest. CP 88. To suggest that these are an independent asset is absurd and to unilaterally label these assets as "intangibles" in the purchase agreement does not change the nature of what is being sold.

Therefore, Cardinal's argument here must fail.

D. Cardinal's Claimed Security Interest is Not Properly Perfected.

RCW 62A.9A-502 provides the required contents of a financing statement, which includes: "the name of the secured party or representative of the secured party." In this case, Cardinal's UCC1 financing statement fails this general requirement because it names only "Cardinal Health" [CP 172] while the Security Agreement names "Cardinal Health 110, Inc. f/k/a Whitmire Distribution Corporation" as "Secured Party" [CP 167]. There is no evidence that "Cardinal Health," which has an address of 7000 Cardinal Place, Dublin, Ohio 43017,

according to its UCC1 financing statement, is the same entity as “Cardinal Health 110, Inc.,” which lists its address in the security agreement as 801 C Street NW, Auburn, Washington 98001. *Compare*, CP 172 and 167. Further, it is not clear whether “Cardinal Health 110, Inc.” is, or purports to be, the same thing as “Cardinal Health 110, LLC,” as Cardinal’s pleadings claim. Even the Brief of Appellant is vague and leaves Cardinal, as the appellant entity, entirely undefined.

Under the UCC in Washington, RCW 62A.9A-506 details the effect of errors and/or omissions in a financing statement, and finds it effective “unless the errors or omissions make the financing statement seriously misleading.” RCW 62A.9A-506 (West 2018 ed.) (emphasis supplied). Clearly, failing to correctly name the secured party is seriously misleading. And this is not merely a typo: Cardinal Health exists as its own entity, as does, presumably Cardinal Health 110, Inc. and Cardinal Health 110, LLC. There is no evidence that the party that filed the UCC1 financing statement had been granted any security interest by Bates Drug at all; and there is also no evidence that the party that filed the UCC1, or the party that is named “secured party” on the security interest, are even owed money by Bates Drug.

Further, a simple business search with the Washington Secretary of State’s office (<https://www.sos.wa.gov/corps/>) of “Cardinal Health”

reveals that there is an intricate web of 17 different “Cardinal Health” entities operating in Washington presently, each one purportedly governed by a different other “Cardinal Health” entity. Given this confusing landscape within “Cardinal Health” alone, entities that engage in secured transactions involving Cardinal Health must pay close attention to who they are actually doing business with.

Here, “Cardinal Health,” alone, filed the UCC1 and signed the Subordination Agreement, while Cardinal Health 110, LLC was the purported claimant in the Receivership [CP 160], and Cardinal Health 110, Inc. was granted the purported security interest [CP 167]. Throughout its own filings in the record, Cardinal flip-flops between referring to itself as “Cardinal Health” [*e.g.*, CP 139] and “Cardinal Health 110, LLC” [*e.g.*, CP 155]. Given this confusion, Cardinal has not made any effort to substantiate its right to enforce any purported security interest, and thus it cannot prevail in this appeal.

E. Banner Bank Is Entitled to Attorneys’ Fees and Costs Incurred in this Appeal.

Pursuant to the terms of the Promissory Notes and Commercial Security Agreements, Banner Bank is entitled to repayment of all its attorneys’ fees and costs incurred in this matter, including on appeal. CP 81, 85, and 91. As the prevailing party in the Trial Court on the specific

issues Cardinal has appealed, Banner Bank respectfully requests an award of such fees and costs, including pursuant to RAP 14.1-14.3, and RAP 18.1.

Cardinal, even if it prevails in this appeal, is not entitled to an award of attorneys' fees or costs for the sole reason that it did not "devote a section of its opening brief to the request for the fees or expenses." RAP 18.1(b). As an afterthought, without citing to the record or to any legal authority whatsoever, and without separating the request into a "section" in its Brief of Appellant, Cardinal states as the final line of its Brief that it "seeks its reasonable attorney fees and costs incurred in bringing this appeal." Appellant's Brief, pg. 20. This does not meet the standard of RAP 18.1 and should be denied outright.

VI. CONCLUSION

The Trial Court considered and addressed a great deal of evidence presented by the parties; heard argument on several motions within the context of the administration of the receivership estate; and ultimately issued its Letter Ruling in favor of Banner Bank, along with the Lien Priority Order and the Disbursement Order. All Orders entered by the Trial Court are supported by substantial evidence, are fair considering the respective positions of the parties, and are rational given the clarity of the Subordination Agreement and the proper documentation of Banner Bank's

loans and security interests. The Subordination Agreement as to all of Cardinal's security interests is so clear that no misstatement and/or mischaracterization of same should be accepted.

On this record, there is only one reasonable conclusion: that Banner Bank's proper perfection of its security interests, and its contractual priority among the creditor parties in this matter, supports and justifies disbursement of the collateral sale proceeds to Banner Bank.

Therefore, Banner Bank respectfully requests that all Orders, rulings, and other actions of the Trial Court be affirmed, that this appeal be dismissed, and that this matter be remanded for entry of judgment against Cardinal in favor of Banner Bank for its attorneys' fees and costs incurred in this appeal.

DATED this 9th day of November, 2018.

Respectfully submitted,

HACKER & WILLIG, INC., P.S.



Arnold M. Willig, WSBA #20104
Elizabeth H. Shea, WSBA #27189
Charles L. Butler, III, WSBA #36893
Attorneys for Respondent, Banner Bank

VII. APPENDICIES

APPENDIX A

COPY
Original Filed
OCT 31 2017
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

In re: The General Receivership of

BATES DRUG STORES, INC. dba
BATES PHARMACY AND MEDICAL
SUPPLY, a Washington corporation.

No. 17-2-01864-8

Order on Motion to Determine Lien
Priority and Other Matters

BASIS

THIS MATTER came before the Court on Banner Bank's motion to determine lien priority and disburse funds and Cardinal Health's objection, motion for priority and disbursement of funds.

The Court considered all materials filed in connection with the determination of lien priority and disbursement of funds, including Banner Bank's Motion; the Declaration of Jeff Norman in Support of Banner Bank's Motion to Determine Lien Priority and Disburse Funds; Declaration of Arnold M. Willig in Support of Banner Bank's Motion to Determine Lien Priority and Disburse Funds; GR 17(a)(2) Affidavit of Arnold M. Willig Re: Declaration of Jeff Norman in Support of Banner Bank's Motion to Determine Lien Priority and Disburse Funds; Objection of Cardinal Health to Banner Bank's Motion to Determine Lien Priority and Disburse Funds and Motion to Disburse Funds to Cardinal

1 Health; Memorandum in Support of Cardinal Health's Response to Banner Bank's Motion
2 and Cardinal Health's Motion to Disburse Funds; Cardinal Health's Supplemental
3 Objection, Motion and Memorandum in Support of Cardinal Health's Response to Banner
4 Bank's Motion and Cardinal Health's Motion to Disburse Funds; Declaration of Michael
5 Bergera in Opposition to Banner Bank's Motion to Determine Lien Priority and
6 Disbursement of Funds, and in Support of Cardinal Health's Motion to Disburse Funds to
7 Cardinal Health; and Declaration of David E. Eash in Opposition to Banner Bank's Motion
8 to Determine Lien Priority and Disbursement of Funds, and in Support of Cardinal
9 Health's Motion to Disburse Funds to Cardinal Health; Declaration Of General Receiver
10 Barry W. Davidson In Response To Banner Bank's Motion To Determine Lien Priority
11 And Disburse Funds; Banner Bank's Response in Opposition to Cardinal Health's Motion
12 for Disbursement, and Reply in Support of its Motion to Determine Lien Priority and
13 Disburse Funds; Declaration of Arnold M. Willig in Support of Banner Bank's Response
14 in Opposition to Cardinal Health's Motion for Disbursement, and Reply in Support of its
15 Motion to Determine Lien Priority and Disburse Funds; Banner Bank's Brief Post-Hearing
16 on its Motion to Determine Lien Priority and Disburse Funds; and all other documents;
17 and having heard arguments from counsel on August 25, 2017, and is fully advised.
18
19
20
21

22 FINDINGS

23 The Court finds that Cardinal Health 110, LLC d/b/a Cardinal Health ("Cardinal
24 Health") subordinated all its rights and interests in the assets of Bates Drug Stores, Inc. in
25 favor of Banner Bank. Cardinal Health's subordination of its interests induced Banner
26 Bank to continue to make loans that allowed Bates Drug Stores, Inc. to operate. The

1 Commercial Security Agreement which Bates Drug Stores, Inc. granted to Banner Bank on
2 October 4, 2012 is sufficiently broad to include all collateral sold by Barry W. Davidson, as
3 the General Receiver of Bates Drug Stores, Inc. (the "Receiver") in the Geneva Woods
4 Pharmacy Washington, LLC ("Geneva Woods") and Sixth Avenue Medical Building
5 Pharmacy, Inc. ("Sixth Avenue") transactions.
6

7 The Court issued a letter ruling (the "Letter Ruling") dated October 9, 2017, which
8 Letter Ruling is incorporated herein. Therein, the Court rendered a decision in Banner
9 Bank's favor and against Cardinal Health.

10 **ORDER**

11 **IT IS HEREBY ORDERED, ADJUGED AND DECREED:**

12
13 1. Banner Bank holds a properly-perfected, first position lien and security
14 interest, superior to that of Cardinal Health and other creditors, in the proceeds from the
15 Geneva Woods and Sixth Avenue transactions, except as otherwise reserved herein.

16
17 2. Cardinal Health's Objection and Motion to Disburse Funds to Cardinal
18 Health is denied.

19
20 3. The Receiver is entitled to reasonable compensation for facilitating the sales
21 to Geneva Woods and Sixth Avenue, as well as the remaining liquidation and administration
22 of the Receivership estate, including the tasks referenced in the Declaration of General
23 Receiver Barry W. Davidson In Response to Banner Bank's Motion to Determine Lien
24 Priority and Disburse Funds or otherwise.

25
26 4. The Receiver is authorized to retain the proceeds from its sale and winding
up of Bates Drug Stores Inc., including the Geneva Woods and Sixth Avenue transactions,

1 until the parties stipulate to an order disbursing an amount to Banner that retains enough
2 reserves to provide the Receiver sufficient funds for full administration of the Receivership
3 estate, including final expenses, costs of administration, and reasonable compensation to
4 the Receiver; or until further hearing and order from this Court.
5

6 Dated this 31 day of October, 2017.

7
8 
9 Raymond F. Clary
Judge

APPENDIX B

COPY
Original Filed
MAR 02 2018
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

RECEIVED
FEB 22 2018
DEPT. 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

In re: the General Receivership of

BATES DRUG STORES, INC. dba BATES
PHARMACY AND MEDICAL SUPPLY, a
Washington corporation.

No. 17-2-01864-8

**ORDER GRANTING BANNER
BANK'S MOTION TO DISBURSE
FUNDS**

BASIS

THIS MATTER came before the Court on Banner Bank's Motion to Disburse Funds (the "Motion"). The Court has considered all materials filed in connection with disbursement, including Banner Bank's Motion; the Declaration of Arnold M. Willig in Support of the Motion; the Limited Objection of Receiver to Banner Bank's Motion to Disburse Funds; the Objection [of Cardinal Health] to Banner Bank's Motion to Disburse Funds; Banner Bank's Reply in support of the Motion; and all other documents; and having heard oral arguments from counsel and the stipulation between Banner Bank and the Receiver read into the record on February 9, 2018, and is fully advised.

FINDINGS

The Court finds that Banner Bank is entitled to priority disbursement of the funds from the sale of its collateral pursuant to RCW 7.60.230(1)(a) in the amount of \$327,191.00 which represents a partial amount requested by Banner Bank of the \$351,661.00 from the sale of

1 Banner Bank's collateral, less Banner Bank's stipulated carve-out for partial costs of
2 administration of the Estate, and that all objections to the Motion are overruled.

3 **ORDER**

4 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

5 1. Banner Bank's properly-perfected, first position lien and security interest entitles it
6 to disbursement of the proceeds from the sale of its collateral, pursuant to RCW 7.60.230(1)(a);

7 2. Banner Bank is entitled to and shall receive immediate disbursement of funds in
8 the amount of \$327,191.00;

9 3. The Receiver is entitled to retain reasonable compensation for administration of
10 the Receivership in the amounts that have previously been paid to the Receiver following notice
11 to creditors and other parties in interest pursuant to RCW 7.60.180(4). The Receiver and the
12 professionals employed by the Receiver are entitled to further reasonable compensation in the
13 amounts previously noticed to creditors and other parties in interest pursuant to RCW
14 7.60.180(4), in an amount that does not reduce Banner Bank's entitlement to disbursement of
15 \$327,191.00;

16 4. The Receiver is hereby directed to immediately issue a check in the amount of
17 \$327,191.00, payable to Banner Bank as follows:

18 Banner Bank
19 ATTN: Jeff Norman
20 110 South Ferrall Street
21 Spokane, WA 99202

22 5. The Receiver may file a motion on shortened time on ten (10) days'
23 notice, plus three (3) days for mailing, seeking entry of an Order approving the
24 Receiver's final report, discharging the Receiver; releasing the Receiver's cash deposit
25 in lieu of bond; and terminating this Receivership.
26

**ORDER GRANTING MOTION
TO DISBURSE FUNDS - 2**


HACKER & WILLIG, INC., P.S.
ATTORNEYS AT LAW
520 Pike Street, Suite 2500
Seattle, Washington 98101-3225
Telephone (206) 340-1935

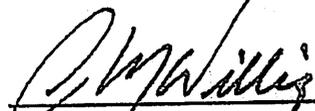
1 SO ORDERED this 26th day of February, 2018.

2
3 **RAYMOND F CLARY**

4 **The Honorable Judge Raymond F. Clary**
5 **SPOKANE COUNTY SUPERIOR COURT**

6 Presented by:

7 HACKER & WILLIG, INC., P.S.

8 

9 Arnold M. Willig, WSBA #20104

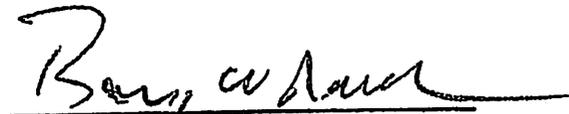
10 Elizabeth H. Shea, WSBA #27189

11 Charles L. Butler, III, WSBA #36893

12 Attorney for Secured Creditor Banner Bank

13 Approved as to form and
14 notice of presentation waived:

15 DAVIDSON BACKMAN MEDEIROS PLLC

16 

17 Barry W. Davidson, WSBA #07908

18 Jeremy S. Davidson, WSBA #41237

19 General Receiver of Bates Drug Stores, Inc.

20
21
22
23
24
25
26
**ORDER GRANTING MOTION
TO DISBURSE FUNDS - 3**

HACKER & WILLIG, INC., P.S.
ATTORNEYS AT LAW
520 Pike Street, Suite 2500
Seattle, Washington 98101-3225
Telephone (206) 340-1935

APPENDIX C

SUBORDINATION AGREEMENT

This Subordination Agreement (this "Agreement") is made and entered into this ____ day of July 2014, by and between Cardinal Health ("Subordinated Creditor") and AmericanWest Bank ("Bank").

RECITALS:

WHEREAS, Subordinated Creditor has extended credit to Bates Drug Stores, Inc. ("Borrower") secured by certain personal property of Borrower, including, but not limited to all assets of Borrower, as more particularly described in and as evidenced by that certain UCC-1 Financing Statement No. 2012-026-6202-1, filed on January 26, 2012, and all amendments thereto and continuations thereof (the "UCC Filing");

WHEREAS, Bank has or will acquire, by virtue of a security agreement and UCC-1 financing statement, a security interest in the assets of the Borrower;

WHEREAS, Borrower has requested that Bank continue to extend credit to Borrower and Bank is willing to continue to extend credit to Borrower on the condition that all rights and interests of Subordinated Creditor in Borrower's assets be subordinated to the interest of Bank; and

WHEREAS, to induce Bank to continue to extend credit to Borrower, Subordinated Creditor is willing to subordinate its security interest in the Borrower's assets, as set forth in the UCC Filing, to the security interest of Bank in the same assets, on the terms and conditions set forth herein.

NOW, THEREFORE, for valuable consideration, the receipt and adequacy of which is hereby acknowledged, Subordinated Creditor and Bank hereby declare as follows:

1. Subordinated Creditor's security interest in Borrower's assets, together with any and all rights, interest, title or lien against or respecting said security interest, shall be and is hereby declared subordinate, inferior and junior in priority to the security interest of Bank in Borrower's assets.
2. This Subordination Agreement shall inure to the benefit of any assignors or successors of either Bank or Subordinated Creditor.
3. This Subordination Agreement shall be governed by and construed in accordance with laws of the State of Washington.
4. This Subordination Agreement may be executed in one or more counterpart originals all of which shall constitute one and the same instrument.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the undersigned has executed this Subordination Agreement as of the date first above written.

CARDINAL HEALTH

By: *Michael Berger*
Michael Berger

Its: Manager – Credit & Collections

Address: 7000 Cardinal Place
Dublin, OH 43017

AMERICANWEST BANK

By: *John Markey*

Its: Vice President

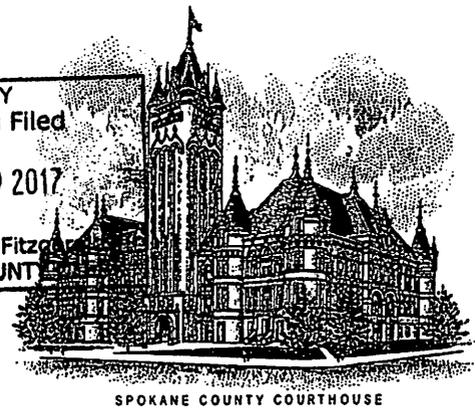
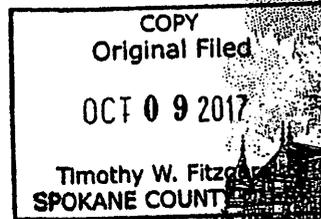
Address: 1105 Ferris St
Spokane, WA 99202

APPENDIX D

SPOKANE COUNTY SUPERIOR COURT

RAYMOND F. CLARY
JUDGE
DEPARTMENT 3

SPOKANE COUNTY COURTHOUSE
1116 W. BROADWAY, SPOKANE, WASHINGTON 99260-0350
Phone: (509) 477-4704 • Fax: (509) 477-5714
dept3@spokanecounty.org



October 9, 2017

Barry W. Davidson
Davidson Backman Medeiros
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Spokane, Washington 99201

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Attorney at Law
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David E. Eash
Ewing Anderson
522 W. Riverside, Ste. 800
Spokane, Washington 99201

Douglas J. Siddoway
Attorney at Law
601 W. Riverside, St, 1500
Spokane, Washington 99201

In re: Bates Drug Stores, Inc. d/b/a Bates Pharmacy and Medical Supply, No. 17-2-01864-8
Banner Bank's Motion to Determine Priority & Objection by Cardinal Health

Dear Counsel,

Please accept this letter as the Court's decision on priority between Banner Bank and Cardinal Health.

On May 18, 2017, a Petition for General Receivership was filed for Bates Drug Stores, Inc. d/b/a Bates Pharmacy and Medical Supply (abbreviated "Bates Drug" or "Bates"). (Clerk's Side Number 1, abbreviated "SN"). On the same day, an order was entered appointing Barry W. Davidson as the General Receiver. (SN 2).

On June 8, 2017, a contested hearing was held to authorize the sale of Bates assets.

An order was issued authorizing the sale of assets to Geneva Woods Pharmacy, (abbreviated "Geneva Woods"). (SN 38). A separate order was issued authorizing the sale of

Bates assets to Sixth Avenue Medical Building Pharmacy, Inc., (abbreviated "Sixth Avenue Medical"). (SN 39).

On June 20, 2017, Mr. Davidson sent an email reporting the status of the Geneva Woods and Sixth Avenue sales. The email described the assets sold as follows:

1. Geneva Woods. The sale to Geneva Woods proceeded smoothly through the valuation of inventory and payment for the LTC accounts (\$202,500.00) and the LTC inventory (\$42,352.05, less credit of \$30,000).
2. Sixth Avenue. Sixth Avenue paid the \$75,000.00 for the retail accounts, but there are lingering inventory issues. . .

On August 1, 2017, Mr. Davidson filed a report on the sale of assets to Geneva Woods. (SN 55). He described the assets and proceeds as:

- \$202,500.00 for the customer records and the Tamarack license
- \$12,252.05 for the LTC Business Inventory, representing payment of \$42,252.05 less a \$30,000.00 credit for the Cardinal Health Inventory funded by Geneva Woods prior to closing; and
- \$7,549.00 for the first installment payment of deferred consideration ...

Also on August 1, 2017, Mr. Davidson filed a report on the sale to Sixth Avenue Medical. (SN 54). He described the assets and proceeds as \$75,000 for retail accounts and \$38,918.57 for inventory for a total of \$113,918.57.

On August 7, 2017, Mr. Davidson filed his Receivership Report as of July 31, 2017. (SN 58). The proceeds from the two sales matched his August 1st reports.

August 8, 2017, Banner Bank filed a motion to determine priority in the proceeds of the Geneva Woods and Sixth Avenue sales. (SN 60). Banner and its predecessor American West Bank had made loans to Bates that enabled Bates to operate its business. In return, Banner received a security agreement and filed UCC-1 Financing Statements. Declaration of Jeff Norman, Exhibits C and D. (SN 62).

August 18, 2017, Cardinal Health objected to Banner's motion and sought priority in the proceeds of the Geneva Woods sale. Cardinal Health had supplied Bates with inventory that enabled Bates to operate. Cardinal Health also has a security agreement and filed UCC-1 Financing Statements. Declaration of Michael Berger, Exhibit A. (SN 73).

Back in 2014, Cardinal Health entered a Subordination Agreement with Banner Bank's predecessor, American West Bank. Declaration of Arnold Willig, Exhibit B. (SN 61) and Declaration of Michael Berger, Exhibit B. (SN 73).

In part the Cardinal Health Subordination Agreement provides:

WHEREAS, Subordinated Creditor [Cardinal Health] has extended credit to Bates Drug Stores, Inc. ("Borrower") secured by certain personal property of Borrower, including, but not limited to all assets of Borrower, as more particularly described in and as evidenced by that certain UCC-1 Financing Statement No. 2012-02606202-1, filed on January 26, 2012, and all amendments thereto and continuations thereof (the "UCC Filing");

WHEREAS, Bank has or will acquire, by virtue of a security agreement and UCC-1 financing statement, a security interest in the assets of the Borrower; (syntax original)

WHEREAS, Borrower has requested that Bank continue to extend credit to Borrower and Bank is willing to continue to extend credit to Borrower on the condition that all rights and interests of Subordinated Creditor [Cardinal Health] in Borrower's assets be subordinated to the interest of Bank; and

WHEREAS, to induce Bank to continue to extend credit to borrower, Subordinated Creditor [Cardinal Health] is willing to subordinate its security interest in the borrower's assets, as set forth in the UCC Filing, to the security interest of Bank in the same assets, on the terms and conditions set forth herein.

NOW, THEREFORE, for valuable consideration, the receipt and adequacy of which is hereby acknowledged, Subordinated Creditor [Cardinal Health] and Bank hereby declare as follows:

1. Subordinated Creditor's [Cardinal Health's] security interest in Borrower's assets, together with any and all rights, interest, title or lien against or respecting said security interest, shall be and is hereby declared subordinate, inferior and junior in priority to the security interest of Bank in Borrower's assets.
2. This Subordination Agreement shall inure to the benefit of any assignors or successors of either Bank or Subordinated Creditor.

(underline added) . . .

Banner's Security Agreement in part provides:

COLLATERAL DESCRIPTION. The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor [Bates Drug] is giving to Lender [American West Bank] a security interest for the payment of the Indebtedness and performance of all other obligations under the Note and this Agreement:

All Inventory, Accounts, and Equipment

In addition, the word "Collateral" also includes all the following, whether now owned or hereinafter acquired, whether now existing or hereafter arising, and wherever located:

- (A) All accounts, general intangibles, instruments, rents, monies, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.
- (B) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
- (C) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

(SN 62, Exhibit C) (bold original; underline added).

Banner's position is that it has priority in all proceeds of all assets because Cardinal Health signed the above quoted Subordination Agreement subordinating all its security or interests in the assets of Bates Drug to Banner's predecessor. (SN 60:4 lines 4-18 and SN 61).

Cardinal Health's position is that Banner's predecessor, (American West Bank), limited Banner's priority under the Subordination Agreement to the collateral description in Banner's (formerly American West's) UCC 1 Financing Statement. (SN 70, SN 71 and SN 73).

The Receiver did not take a position on priority between Banner and Cardinal Health. He did, however, request that disbursement be deferred to a point when "a reasonable reserve for the

final expenses and costs of administration of this Receivership can be established.” (SN 68:4 lines 11-15).

Review of the Recitals and terms of the Subordination Agreement shows that the “UCC Filing” that is referenced -- is Cardinal’s UCC-1 Financing Statement-- and the operative language subordinated all of Cardinal’s rights and interests in favor of Banner, to induce Banner to continue to make loans that allowed Bates to operate. (SN 61).

Moreover, Banner’s (formerly American West Bank’s) Security Agreement is broad enough to cover all collateral sold by the Receiver in the Geneva Woods and Sixth Avenue transactions. (SN 62, SN 54, SN 55, SN 58).

In summary, the Court finds that Banner Bank has priority in the proceeds from the Geneva Woods and Sixth Avenue Medical sales, as between Banner and Cardinal Health.

RCW 7.60.055 provides the Court with authority over application and distribution of Bates Drug’s assets and proceeds from the sale of assets. Given the complexity of winding up the affairs of Bates Drug as described by the Receiver during the hearing, the Receiver’s need for time to conduct an accounting and his need to determine a reasonable reserve for final expenses and costs of administration, the Receiver is authorized to retain the proceeds of the sale of Bates assets pending a stipulated order or further hearing and order.

Banner Bank’s lawyer shall prepare an order consistent with this letter decision. Presentment is set for **October 27, 2017, at 9:00 a.m, without oral argument**. If there is an objection to Banner’s proposed order the party objecting may submit a memorandum setting out the objection, any facts and authority supporting the objection and proposed alternative language for the order. If an objection is submitted, Banner may reply in a similar manner. If there is a motion for reconsideration, please wait until after the order contemplated by this decision is entered.

Sincerely,


Raymond F. Clary
Judge

APPENDIX E

CN: 201702018648

SN: 143

PC: 3

Honorable Raymond F. Clary

FILED

JUN 15 2018

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT, SPOKANE COUNTY,
STATE OF WASHINGTON

In re:

Case No. 17-2-01864-8

**BATES DRUG STORES, INC. d/b/a
BATES PHARMACY AND MEDICAL
SUPPLY, a Washington corporation.**

~~PROPOSED~~ →

ORDER:

- (1) APPROVING FINAL REPORT;**
- (2) DISCHARGING RECEIVER;**
- (3) RELEASING CASH DEPOSIT IN LIEU OF BOND; AND**
- (4) TERMINATING RECEIVERSHIP**

CLERK'S ACTION REQUIRED

THIS MATTER having come before the above captioned Court upon the Petition For Order: (1) Approving Final Report; (2) Discharging Receiver; (3) Releasing Cash Deposit In Lieu Of Bond; And (4) Terminating Receivership (the "Petition") filed by Barry W. Davidson (the "Receiver"), the general Receiver of Bates Drug Stores, Inc. d/b/a Bates Pharmacy and Medical Supply ("Bates Drug"). The Court has considered the Petition, the Receiver's Final Report and Accounting, the supporting Declaration of Barry W.

Page 1
Order Authorizing Termination
of Receivership and Related Relief
Bates\Pleadings.cn

DAVIDSON BACKMAN MEDEIROS
ATTORNEYS AT LAW
A PROFESSIONAL LIMITED LIABILITY COMPANY
1550 BANK OF AMERICA FINANCIAL CENTER
601 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201
FACSIMILE: (509) 623-1660
(509) 624-4600

1 Davidson in Support of the Petition, and the records and files herein, and the
2 Court having been fully advised in the premises and finding that the relief
3 requested in the Petition should be granted; NOW THEREFORE,
4

5 IT IS HEREBY ORDERED that the Final Report and Accounting of the
6 Receiver, in the form annexed to the Petition as Exhibit B, is approved.

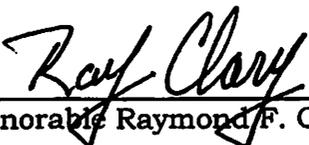
7 IT IS FURTHER ORDERED that the Receiver is authorized to distribute
8 all the sum of \$6,500.00 to compensate CliftonLarsonAllen LLP ("CLA") for
9 receivership accounting services, and the preparation of federal and state tax
10 returns for the fiscal years ending January 31, 2017 and January 31, 2018.
11

12 IT IS FURTHER ORDERED that the Receiver is authorized to distribute
13 all remaining receivership funds to Banner Bank.

14 IT IS FURTHER ORDERED that the Receiver is discharged and released
15 from any further duties and responsibilities as Receiver.
16

17 IT IS FINALLY ORDERED that the Clerk of the Spokane Superior Court
18 is authorized and directed to disburse the sum of \$1,000.00, which the
19 Receiver deposited in lieu of a bond, to the firm of Davidson Backman
20 Medeiros PLLC.
21

22 DATED this 15th day of June 2018.

23
24
25 

Honorable Raymond F. Clary

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Presented by:

DAVIDSON BACKMAN MEDEIROS PLLC



Barry W. Davidson, WSBA No. 07908
General Receiver for Bates Drug Stores, Inc.
d/b/a Bates Pharmacy and Medical Supply
and Attorney for General Receiver
1550 Bank of America Financial Center
601 West Riverside Avenue
Spokane, Washington 99201
Telephone: (509) 624-4600
Facsimile: (509) 623-1660

*No person or entity
filed and maintained
an objection or opposition
to this order or
appeared at the hearing*

Ray Clary, Judge
8/15/18
RAYMOND F CLARY

HACKER & WILLIG, INC., INC

November 09, 2018 - 3:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35926-3
Appellate Court Case Title: In re Bates Drug Stores, Inc.
Superior Court Case Number: 17-2-01864-8

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