UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	Chapter 7
	)	
TRADE AM INTERNATIONAL, INC.,	)	Case No. 13-62588-mgd
	)	
Debtor.	)	
	)	

SUPPLEMENT TO JUPITER'S OBJECTION TO THE TRUSTEE'S MOTION FOR AUTHORITY TO USE CASH COLLATERAL IN ORDER TO PAY CERTAIN TAX CLAIMS

Jupiter IL, LLC ("Jupiter") hereby supplements its objection, filed on March 21, 2014 at Docket No. 93, to the trustee's motion, filed on March 5, 2014 at Docket No. 84 (the "Motion"). We assume the reader's familiarity with both those documents.

We write concerning this statement:

> 22. . . . Jupiter and Deutsche have not filed proofs of claim in this Case or otherwise provided the Trustee with documents that establish the basis of their alleged secured claims much less establish their asserted interest in the Insurance Proceeds. Moreover, Jupiter and Deutsche still have not fully responded to the Trustee's pending document production requests. Therefore, Jupiter and Deutsche have not established any entitlement to adequate protection of their asserted interest in the Insurance Proceeds.

Motion par 22 at p. 6.

Please note the first sentence. It asserts a fact, namely, that these secured creditors have not "otherwise provided the Trustee with documents that establish the basis of their alleged secured claims . . .". Our understanding is the opposite. Margaret E. Holland, of Holland, Johns & Penny, L.L. P., in Fort Worth, Texas, was corporate counsel to the debtor and then to Jupiter.

At the trustee's request, she sent two boxes of documents to his counsel in January, 2014. She has forwarded us paper copies of those documents. She has forwarded us an email copy of the trustee's counsel's email, dated January 31, 2014, acknowledging receipt of what she sent.

Our two boxes show ample evidence to put the trustee on notice of Jupiter's and Deutsche Bank's assertions of interest in the cash collateral. The trustee has not yet asked for more.

If by any chance there is some mix-up, whether intentional or not, the trustee is welcome to Jupiter's copies. I now hold those two boxes. In addition, Jupiter and Deutsche Bank will promptly get the trustee, through counsel, copies of their loan documents in two logical packages: one for the original Deutsche Bank loan; and one for the transfer to Jupiter.

Now please note the second sentence. It asserts a point of law, namely, that two putative secured creditors lose what would otherwise be their rights to cash collateral because they have not "established" something at this stage of the case. To review, this case has yet seen nothing more than general requests for documents. There has been no particular request, say, for a missing loan amendment or UCC filing. There has been "no good faith effort to resolve" anything under BLR 7037-1(a). There has been no adversary complaint under F.R.B.P. 7001(2). There has been no request for a bar date.

Again our understanding differs from the trustee's. As Jupiter's counsel, I do not believe that a secured creditor can lose its right to adequate protection of an asserted interest in property for failure to "establish" its right at this stage of this case. Rather, the question at this stage is whether the trustee has adequate notice that Jupiter and Deutsche Bank assert such interests.

As background, a bankruptcy court's grant of adequate protection of an interest in collateral is not a gift. Nor is it a potential benefit that a court of equity may balance against the

legitimate concerns of other parties in a case.[1] Rather, adequate protection of an interest in property is a minimum constitutional requirement. It stems directly from the Fifth Amendment's words, "nor shall any person . . . be deprived of . . . property[] without due process of law." "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935).

Accordingly, for example, a bankruptcy court order selling property free and clear does not remove the interest of someone who had no notice, no matter what the order says, because removing that property interest without notice violates the due process clause. Ray v. Norseworthy, 90 U.S. 128, 135, 137 (1875); Factors' and Traders' Insurance Company v. Murphy, 111 U.S. 738, 743 (1884). And accordingly, an interest in estate property is not removed by the interest holder's failure to file a proof of claim at all. Rather, liens are said generally to "pass through" bankruptcy, in rulings traced to Long v. Bullard, 117 U.S. 617 (1884), and now codified in 11 U.S.C. § 506(d)(2) (lien is not void if a claim is not an allowed secured claim "due only to the failure of any entity to file a proof of such claim").

The due process is embodied in F.R.B.P. 7001(2) (adversary proceeding required for a proceeding to determine the validity, priority, or extent of a lien or other interest in property), among other places. So if a trustee knows of an asserted interest, he or she cannot ignore it. For example, if a trustee finds an open mortgage in the title search on real property, the court will not remove that lien simply because the lienor misses the bar date. Rather, the trustee must file a quiet title action and give proper notice under F.R.B.P. 7004.

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1. At paragraph 23 at p. 6, the Motion explains that the trustee needs the money to prevent harm to the estate. That reason is insufficient. The test is "benefit to the holder of such claim[,]" 11 U.S.C. § 506(c). There is none here. Every month mortgagees sell properties at foreclosure, and thereby trigger taxable events to their mortgagors. But the mortgagees have no obligation to apply those proceeds first to pay taxes on mortgagors' resulting, phantom income, if any.

With that background, the trustee's argument concerning adequate protection is unclear. If the trustee is asserting that he doesn't have adequate notice that the security interests exist under applicable nonbankruptcy law, then either the facts belie that assertion, or we can quickly remedy it. (See above.)

On the other hand, if the trustee is asserting that Jupiter and Deutsche Bank have lost their interests in property by a failure to act – that they lose $100K because they have not yet "established" anything – then the due process clause and bankruptcy rules appear to disagree. And before the trustee asserts that anyone has lost anything by failing to file a proof of claim, he at least ought to ask for a bar date.

Conclusion

The Motion should be denied.

Dated: March 24, 2014
Atlanta, Georgia

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Certificate of Service

I hereby certify that today I served the following by electronic mail:

Sean Kulka at sean.kulka@agg.com

/s/Bill Rothschild
William L. Rothschild
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