

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re)	Chapter 7
)	
TRADE AM INTERNATIONAL, INC.,)	Case No. 13-62588-MGD
)	
Debtor.)	Judge Diehl
_____)	
)	
JUPITER IL,)	
)	
Movant,)	
)	
v.)	
S. GREGORY HAYS, as Interim Trustee,)	
)	
Respondent.)	
_____)	

**MOTION FOR CLARIFICATION OR RECONSIDERATION AND
NOTICE CONCERNING CASH COLLATERAL**

Jupiter IL, LLC, a Texas LLC (“Jupiter”) hereby (i) moves for clarification or reconsideration of the order entered on October 10, 2013 at Docket No. 57 (the “Administrative Expense Order”), to express that the Administrative Expense Order does not authorize the respondent (the “Trustee”) to expend any Warehouse Insurance Proceeds or anything else that the “Lenders,” as defined below, assert to be their cash collateral, and (ii) for the removal of all doubt, to notify the Trustee as set forth below. Jupiter represents:

Case Background

1. The case captioned above was filed as an involuntary chapter 7 case on June 6, 2013 (the “Petition Date”) [Docket No. 1].
2. The order for relief was entered against Trade AM International, Inc. (“Trade AM” or the “debtor”) on August 7, 2013 at Docket No. 35 (the “Order for Relief Date”).

3. The Respondent, Mr. Hays, was appointed interim trustee under 11 U.S.C. § 701(a)(1) on August 7, 2013, as noticed on that day at Docket No. 37.

4. No trustee has been elected or designated under 11 U.S.C. § 702, so Mr. Hays continues to serve under 11 U.S.C. § 701(b).

Jurisdiction and Authority

5. The United States Bankruptcy Court for the Northern District of Georgia (the “Court”) has jurisdiction and authority to act for the reasons set forth in the footnote.¹

6. This document is a motion to alter or amend a judgment under Rule 9023, making applicable F.R.Civ.P. 59, or in the alternative, a motion for relief under F.R.B.P. 9024, making applicable F.R.Civ.P. 60, in either instance for reasons set forth in paragraph 25 below.

The Administrative Expense Order

7. The Administrative Expense Order followed a hearing on October 8, 2013, in which, among other things, the Trustee (both himself and through counsel) discussed the need to

1. The Bankruptcy Court has jurisdiction in this contested matter, and authority to enter a final judgment in it, as follows:

- a. 28 U.S.C. § 1334 (a), (e) give the district court jurisdiction over this bankruptcy case and over all property of the estate.
- b. Venue is proper under 28 U.S.C. §§ 1408, 1409;
- c. 28 U.S.C. § 157(a) permits the district court to refer matters to bankruptcy judges;
- d. The district court referred matters to bankruptcy judges, to the full extent permitted in 28 U.S.C. § 151-58, through its Local Rule 83.7;
- e. 28 U.S.C. § 157(b)(1) provides that bankruptcy judges “may hear and determine,” and may issue final judgments, on matters that (i) are referred as set forth in the clause just above, and (ii) are “core proceedings;” and
- f. The Application commenced a core proceeding under 28 U.S.C. § 157(b)(2)(A) (administration of the estate) and (M) (orders approving the use of property).

employ people to find information needed for the bankruptcy case, primarily by cranking up Trade Am's file server.

8. The Trustee filed an application seeking the Administrative Expense Order (the "Application") on October 9 at Docket No. 56.

9. The Court signed the Administrative Expense Order the same day, and it was entered as Docket No. 57 on October 10, 2013.

10. The Administrative Expense Order recites in pertinent part, "with no adverse interest being represented, it is hereby / ORDERED that the Trustee's Application is GRANTED pursuant to the terms set forth therein."

11. The Application at par. 12 requests authority to incur up to \$5,000.00 of expenses without further court approval, and in its prayer then "prays that [the Trustee] is authorized to incur and pay these and other necessary expenses as required in connection with this case . . ." (emphasis added).

12. The two words of immediate concern are "and pay." Without limitation, Jupiter fears that that the Trustee will use the Lenders' cash collateral, as explained below, before the Lenders have an opportunity to stop that use, and that the Lenders will then have no practical way to get their money back.

The Lenders' Cash Collateral

13. Jupiter has heard through the Trustee's reports to the Court that the Trustee has possession of money (the "Insurance Proceeds"), in an amount of approximately \$6,000,000 or less, that The Cincinnati Insurance Company paid in partial satisfaction of a judgment (the "Judgment") entered in Trade Am International, Inc. v. The Cincinnati Insurance Company, N.D. Ga. CAFN 1:08-cv-03711-ECS (the "District Court Case"). (Cincinnati Insurance Company

apparently paid the rest of the judgment directly to Trade Am's District Court Case law firm.) Jupiter is not aware of any other assets that the Trustee now holds.

14. The Insurance Proceeds are "cash collateral" of the Lenders, as that term is used in 11 U.S.C. § 363. The Lenders hold a perfected, first priority lien on that money, as follows.²

15. Trade Am entered into a credit agreement dated December 26, 2006 with **Deutsche Bank AG, Cayman Islands Branch** ("Deutsche Bank"), among others (the "Original Credit Agreement"), which has since been amended by at least eleven consecutively-titled amendments (the Eleventh Amendment to Credit Agreement is dated April 5, 2010) and an additional amendment described in footnote 3 below (collectively, as further amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement").

16. The Credit Agreement memorialized a loan (the "DB Loan"). The outstanding amount of principal and interest on the DB Loan on the Petition Date exceeded \$9,000,000.

17. To secure that debt, the Credit Agreement memorializes the first priority lien on the Insurance Proceeds through an unbroken chain that begins with the granting of a security interest in various insurance proceeds through the Original Credit Agreement, that continues through the definition of "Warehouse Insurance Proceeds" in the Seventh Amendment to Credit Agreement, dated April 1, 2009, and through the Judgment itself,³ to the partial satisfaction of the Judgment through the Insurance Proceeds.

2. The documents evidencing the loan, the security interests, and their perfection are voluminous. Some of those documents have been filed in the District Court Case. We will make all relevant (and unprivileged) documents available to the Trustee and his counsel at everyone's convenience, and if need be, will file pertinent portions in this case.

3. Most amendments are serially numbered "[Nth] Amendment to Credit Agreement." In addition, there is an amendment through letter dated June 30, 2010, that expressly adds to the collateral schedule "[a]ny commercial tort claim that is or may be asserted in connection with [the District Court Case], and any transaction, matter or case related thereto."

18. The Lenders' interest in the Warehouse Insurance Proceeds, and down the chain to the Insurance Judgment and the Insurance Proceeds, is properly perfected.

19. Jupiter and DB are now two of the three entities holding legal or beneficial interests in the Insurance Proceeds, and Jupiter is the agent for all three, as follows.

20. Trade Am and certain of its subsidiaries made the Original Credit Agreement with **Cratos Capital Management, LLC**, a Delaware limited liability company ("Cratos"), as the arranger and administrative agent.

21. By September 21, 2010, Deutsche Bank held approximately 94.7% of the lenders' interests in the DB Loan, and Cratos held the remaining approximate 5.3%.

22. Deutsche Bank, Cratos, and Jupiter (the "Lenders") entered into the following transaction by documents dated September 21, 2010:

- a. Cratos assigned and Jupiter assumed Cratos' interest in the DB Loan, including without limitation all Cratos' interests in Trade Am's property securing the DB Loan;
- b. Deutsche Bank assigned and Jupiter assumed Deutsche Bank's interest in the DB Loan, including without limitation all Deutsche Bank's interests in Trade Am's property securing the DB Loan;
- c. Jupiter became the Successor Agent, to Cratos as original Agent, under the Credit Agreement; and
- d. Jupiter contemporaneously sold participations in the DB Loan back to Deutsche Bank and to Cratos. Deutsche Bank and Cratos (called the "Participants" in the applicable agreement) participate vis a vis each other in the same proportions that they held the DB Loan just before the transaction (see paragraph 21 above). The

Participants' share vis a vis Jupiter (called the "Seller" in that agreement) depends on the amount ultimately recovered.

The Lenders' Concern

23. The Lenders do not consent to any use of their cash collateral. The Lenders have never consented to any use of their cash collateral. To the best of Jupiter's knowledge, the Lenders have never been asked to consent to the use of their cash collateral.

24. The Administrative Expense Order can be read two ways. One reading, without a knowledge of bankruptcy law or a full memory of the October 8 hearing, is that the Trustee reported that he has a lot of money in hand, that the Application asks to "pay" \$5,000, that "no adverse interest" was "represented," and that the Administrative Expense Order granted the Application -- so that the Trustee has authority to use the money on hand to pay the referenced expenses.

25. Another, and we believe better, reading is that the Administrative Expense Order did not authorize any use of the Insurance Proceeds, for four sets of reasons, among others:

- a. In fact, an interest adverse to the use of the Insurance Proceeds was represented at the October 8 hearing – in open court, Jupiter's counsel stated the position of DB and Jupiter that the Insurance Proceeds were fully liened;
- b. A general authorization to pay money, such as found in the Administrative Expense Order, by reference to the Application, does not constitute an authorization to use cash collateral under 11 U.S.C. § 363(b)(1);
- c. A cash collateral authorization requires notice, opportunity to be heard, a waiting period, and other things, see, e.g., F.R.B.P. 4001(b) -- none of which occurred here.

- d. Similarly, 11 U.S.C. § 506(c) does not apply here because, first, the Administrative Expense Order does not expressly say so; second, there has been no showing that the Trustee's proposed use of those funds – however essential they may be to this bankruptcy case – meets the requirements of § 506(c), including without limitation conveying “any benefit to” the Lenders, as that term is used in § 506(c); and third, when asked at the October 8 hearing, the Court expressly reserved a ruling on § 506(c), because no such motion was before her.

This Pleading

26. This pleading has two purposes. First, Jupiter requests that the Court express that the Administrative Expense Order does not constitute the Court's authorization to spend any portion whatsoever of the Insurance Proceeds – of course without prejudice to the Trustee's right to request any use of the Lenders' cash collateral upon proper notice and opportunity to be heard.

27. Second, the Lenders hereby put the Trustee on notice of everything written above, including without limitation their now express denial of consent to his use of any of their cash collateral.

28. In addition, Jupiter serves notice that the Lenders reserve all rights regarding the Insurance Proceeds and all other cash collateral, including without limitation, the right to seek relief from the automatic stay regarding any part or all of their cash collateral.

WHEREFORE Jupiter requests that the Court clarify or modify, as the case may be, the Administrative Expense Order, to express the following: the Administrative Expense Order does not constitute the Court's authorization to spend any Insurance Proceeds, without prejudice to the Trustee's right to request any use of cash collateral upon proper notice to the Lenders and opportunity of for them to be heard. Jupiter also requests such further relief as is just.

Dated: October 15, 2013
Atlanta, Georgia

/s/Bill Rothschild
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CERTIFICATE OF SERVICE

I hereby certify that today I served the document to which this certificate is attached by causing a copy to be deposited in the United States mail, postage prepaid, and by email, to

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