

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)
)
TRADE AM INTERNATIONAL, INC.,)
)
Debtor.)
_____)

CASE NO. 13-62588-MGD
CHAPTER 7

**TRUSTEE'S MOTION FOR EXAMINATION OF
AND DOCUMENT PRODUCTION BY NICHOLAS HOWARD**

S. Gregory Hays (“Trustee”), the Chapter 7 Trustee for the bankruptcy estate of Trade Am International, Inc. (“Debtor”) files this *Trustee’s Motion for Examination of and Document Production by Nicholas Howard* (the “Motion”) for an order authorizing the examination of and document production by Nicholas Howard (“Mr. Howard”) pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and in support thereof, shows the Court as follows:

BACKGROUND

Administration of the Case

1. On June 6, 2013 (the “Petition Date”), certain creditors of Debtor commenced the above-captioned bankruptcy case (the “Case”) by the filing of an involuntary Chapter 7 petition for relief against the Debtor.
2. On August 6, 2013, the Court entered an Order for Relief in the Case [Docket No. 35] (the “Order”). Among other things, the Order directs the Debtor to comply with Rules 1007(a)(2), (b)(1), and (c) of the Bankruptcy Rules by filing the requisite documents.

3. On August 7, 2013, the United States Trustee filed notice of appointment of Trustee as interim trustee in the Case and scheduled the Section 341(a) meeting of creditors on September 4, 2013 [Docket No. 37].

4. On August 29, 2013, several parties filed notice of their intention to elect a trustee at the Section 341 meeting [Docket No. 41].

5. No one appeared on behalf of the Debtor at the Section 341 meeting.

6. The United States Trustee was unable to convene the Section 341 meeting or conduct the requested election because the Debtor has not filed a list of creditors, as required by Rule 1007(a)(2) of the Bankruptcy Rules and as ordered by the Court. Accordingly, the Debtor's creditors, other than those involved in filing the involuntary petition in this Case, have not received notice of the commencement of the Case and notice of the Section 341 meeting, and have not had an opportunity to file a proof of claim and otherwise qualify to vote for a candidate for a permanent trustee.

7. The administration of this Case has been severely hampered by the Debtor's failure to fulfill its duties under the Bankruptcy Code and the Bankruptcy Rules, and the Debtor's failure to obey an order of this Court.

8. On October 10, 2013, the Court entered its *Order Designating Person Responsible for Preparing Creditor List, Schedules, and Statements* [Docket No. 58] (the "Designation Order"), which designated Trustee as the responsible person to file Debtor's list of creditors, schedules, and statements of financial affairs.

9. Since the Petition Date and the entry of the Designation Order, the Trustee has moved the Debtor's accounting servers and some of the most recent business records from the residence of the former President of the Debtor, Mr. Ajay Loiwal ("Loiwal") to the Trustee's

offices. In addition, the Trustee has sent Rule 2004 document production requests to several parties in interest, including Deutsche Bank AG Cayman Islands Branch AG Cayman Islands Branch (“Deutsche Bank”), Jupiter IL, LLC (“Jupiter”), L R Resources, Inc. (“LRRRI”), Great American Liquidators (“GAL”), and Cratos CLO I Ltd and/or Cratos Capital Management, LLC n/k/a JMP Credit Advisors CLO I LTD (“Cratos”), as well as letters to former law firms of the Debtor waiving the attorney client privilege and requesting the turnover of documents from those professionals. The Trustee is still awaiting many of the requested documents.

10. Accordingly, as of the undersigned date, the Trustee has been unable to file the Debtor’s list of creditors, schedules, and statements of financial affairs.

11. Since the Petition Date, the Trustee has continued to pursue collection of the remaining portion of the Judgment (defined below). In October 2013, the Cincinnati Insurance Company (“CIC”) paid the Trustee approximately \$5.7 million (the “Insurance Proceeds”) in satisfaction of the remaining portion of the Judgment.

Pre-Petition Transactions

12. On or about September 21, 2010, LRRRI purchased certain business operations, assets, and intellectual property of the Debtor (the “Purchase”). In connection with the Purchase, at least \$255,000 was paid or payable to Debtor.

13. During 2010, GAL sold certain assets of the Debtor (the “GAL Sales”). Upon information and belief, the proceeds of this sale(s) were distributed to Deutsche Bank and/or Cratos.

14. On or about September 21, 2010, Jupiter¹ entered into that certain *Assignment and Assumption* agreement with Deutsche Bank whereby, among other things, Deutsche Bank assigned its interest in Deutsche Bank's loan and related loan documents with the Debtor to Jupiter in consideration for \$284,118.93 (the "Deutsche Bank Assignment"). Upon information and belief, Jupiter used the Debtor's funds to make this payment. As part of this transaction Jupiter also sold Deutsche Bank a participation interest in the assigned loan.

15. On or about September 21, 2010, Jupiter also entered into that certain *Assignment and Assumption* agreement with Cratos whereby, among other things, Cratos assigned its rights and obligations as agent under Debtor's various loan agreements with Deutsche Bank to Jupiter in consideration for \$15,881.07 (the "Cratos Assignment"; together with the Deutsche Bank Assignment, the "Assignments"). Upon information and belief, Jupiter used the Debtor's funds to make this payment. As part of this transaction Jupiter also sold Cratos a participation interest in the assigned loan.

16. Prior to the Petition Date in August 2008, the Debtor's warehouse flooded. The Debtor's warehouse was insured by CIC; however, the Debtor and CIC disagreed on the amount due under the Debtor's policy with CIC. The Debtor ultimately sued CIC in federal district court, Trade Am International, Inc. v. The Cincinnati Insurance Company, N.D. Ga. CAFN 1:08-cv-03711-ECS (the "District Court Case") in order to recover under the policy.

17. A jury awarded the Debtor \$9.12 million in the District Court Case (the "Judgment"). CIC appealed, and the Eleventh Circuit affirmed the Judgment. CIC had not satisfied the Judgment as of the Petition Date. On April 12, 2013, CIC paid King & Spalding

¹ Upon information and belief, Jupiter was represented by Debtor's long-time corporate counsel Holland, Johns & Penny, L.P., and was formed for the specific purpose of purchasing the Debtor's loan from Deutsche Bank. Upon information and belief, in September of 2010, Jupiter was owned and controlled by Debtor's then acting president, Ajay Loiwal.

(the Debtor's counsel in the District Court Case) just over \$3.5 million in partial satisfaction of the Judgment.

18. Jupiter claims, presumably by virtue of the Assignments, that it holds an interest in the Insurance Proceeds and that the Insurance Proceeds constitute its cash collateral within the meaning of Section 363 of the Bankruptcy Code. *See* Docket Nos. 33 and 61. Notwithstanding the Deutsche Bank Assignment, Deutsche Bank also claims that it holds an interest in the Insurance Proceeds and that the Insurance Proceeds constitute its cash collateral within the meaning of Section 363 of the Bankruptcy Code. *See* Docket No. 69.

19. Upon information and belief, at all times relevant to the Purchase, the GAL Sales, the Assignments, and the District Court Case, Mr. Howard served as the Chief Financial Officer of the Debtor. Based on previous conversations with Mr. Howard off the record, Mr. Howard has an in-depth understanding and knowledge of the Debtor, the Debtor's finances during Mr. Howard's tenure at the Debtor, the Debtor's management, and the facts and circumstances relating to the Assignments and any related agreements, and the liquidation of the Debtor's assets.

REQUESTED RELIEF

20. Due to the above circumstances, the Trustee requests the examination of Mr. Howard in order to: (i) assist him in satisfying his obligations under the Designation Order, (ii) further investigate the above-referenced transactions, including the Assignments, (iii) investigate Debtor's business dealings with the Cratos, Deutsche Bank, Jupiter, LRRI, and GAL, (iv) investigate Deutsche Bank, Cratos, or Jupiter's interest, if any, in the Insurance Proceeds, (v) determine what proceeds were paid to Deutsche Bank and/or Cratos directly from the liquidation of the Debtor's assets, (vi) determine the source of funds that

Jupiter used to acquire a claim against the Debtor and/or a security interest, if any, in the Debtor's assets, including the Insurance Proceeds.

21. The Trustee requests the examination of Mr. Howard commence at a mutually agreeable time, at the offices of Arnall Golden Gregory LLP 171 17th Street, N.W., Suite 2100, Atlanta, Georgia 30363-1031 (the "Offices of the Trustee's Counsel") and continue from day to day thereafter until complete.

22. The Trustee also seeks to have Mr. Howard produce all of the records and documents more fully described on Exhibit "A," attached to this Motion, at a mutually agreeable time at the Offices of the Trustee's Counsel.

WHEREFORE, the Trustee respectfully requests that this Court:

(a) issue an order authorizing the Trustee to conduct the examination of Mr. Howard, and directing Mr. Howard to produce the records and documents requested in this Motion specifically identified on Exhibit A; and

(b) grant the Trustee such other and further relief as the Court may deem just and proper.

Dated: March 27, 2014.

Respectfully submitted,

ARNALL GOLDEN GREGORY, LLP

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EXHIBIT A

DEFINITIONS

- A. As used herein, the word “document” is intended to have the broadest permissible meaning under the Federal Rules of Civil Procedure and shall mean any written, printed, recorded, taped, electromagnetically recorded or encoded, electronically stored, graphic or other matter of every type and description that is or has been in the possession, custody, or control of you or any of your agents and attorneys, or of which you have knowledge, and shall include without limitation, the following: letters, correspondence, books, articles, reprints, resolutions, minutes, communications, messages, e-mails, electronic communications, electronically stored information, notes, loan documents, collateral documents, stenographic or handwritten notes, memoranda, diaries, contracts, subcontracts, bids, worksheets, drafts, agreements, records, resumes, invoices, receipts, bills, cancelled checks, financial statements, audit reports, tax returns, calendars, schedules, affidavits, statements, summaries, studies, calculations, estimates, diagrams, sketches, drawings, plans, photographs, tapes, videotapes, movies, recordings, transcriptions, work orders, computer print-outs, computer disks, data processing cards, data storage cards, and the like; and where originals of such documents are not available or are not in your possession, custody or control, every copy of every such document; and every copy of every such document where such copy is not an identical copy of the original or where such copy contains any commentary or notation whatsoever which does not appear on the original.
- B. As used herein, “Assignments” shall mean that certain *Assignment and Assumption* agreement dated or about September 21, 2010, between Deutsche Bank and Jupiter, and that certain *Assignment and Assumption* agreement dated September 21, 2010 between Cratos and Jupiter.
- C. As used herein, “Bankruptcy Code” shall mean title 11 of the United States Code.
- D. As used herein, “Corporate Attorneys” shall refer to Margaret Holland and the law firm of Holland, Johns & Penny, L.P.

- E. As used herein, “Cratos” shall mean Cratos CLO I Ltd and/or Cratos Capital Management, LLC n/k/a JMP Credit Advisors CLO I LTD, and their officers, employees, authorized agents, and representatives.
- F. As used herein, “Debtor” shall mean Trade Am International, Inc., and its employees, authorized agents, attorneys, representatives, and to any other person that is or has ever acted for or on behalf of Debtor.
- G. As used herein, “Deutsche Bank” shall refer to Deutsche Bank AG Cayman Islands Branch and its officers, employees, authorized agents, and representatives.
- H. As used herein, “GAL” shall mean Great American Liquidators and its officers, employees, authorized agents, and representatives.
- I. As used herein, “GAL Sales” shall refer to the sale of any of the Debtor’s property or assets, whether real or personal, by GAL in calendar year 2010.
- J. As used herein “Insurance Proceeds” shall mean any and all funds that The Cincinnati Insurance Company paid to the Debtor or the Debtor’s bankruptcy estate in connection with the satisfaction of the Debtor’s judgment against The Cincinnati Insurance Company in that certain litigation ending in the United States District Court styled as Trade Am International, Inc. v. The Cincinnati Insurance Company, N.D. Ga. CAFN 1:08-cv-03711-ECS.
- K. As used herein, “Jupiter” shall mean to Jupiter IL, LLC and its officers, employees, authorized agents, and representatives.
- L. As used herein, “Howard” shall mean Nicholas Howard.
- M. As used herein, “Ladha” shall mean Ashutosha Ladha.
- N. As used herein, “Lowal” shall mean Ajay Loiwal.
- O. As used herein, “LRRRI” shall mean L R. Resources, Inc. and its officers, employees, authorized agents, and representatives.
- P. As used herein, “Petition Date” refers to June 6, 2013, the date when certain creditors of the Debtor commenced an involuntary bankruptcy proceeding against the Debtor initiating (Case No. 13-62588-MGD) under Chapter 7 of the Bankruptcy Code.
- Q. As used herein, “Purchase” shall refer to the purchase of the Debtor’s business operations, assets, and intellectual property by LRRRI in the third or fourth quarter of 2010.
- R. As used herein, “Trustee” shall refer to S. Gregory Hays, Chapter 7 Trustee for the Debtor.

REQUESTS

1. Any and all documents in Howard's possession relating to or that refer to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.
2. Any and all documents in Howard's possession relating to the Debtor from the four years preceding the Petition Date.
3. All correspondence and communications between Howard and Ladha related to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.
4. All correspondence and communications between Howard and Loiwal related to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.
5. All correspondence and communications between Howard and the Corporate Attorneys related to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.
6. All correspondence and communications between Howard and Jupiter related to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the

Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.

7. All correspondence and communications between Howard and Deutsche Bank related to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.

8. All correspondence and communications between Howard and Cratos related to the Purchase, the GAL Sales, the Assignments and related transactions or agreements, the Insurance Proceeds, any lien, security interest, or UCC filings provided by the Debtor to Deutsche Bank, Cratos, or Jupiter, and the source of funds Jupiter used to acquire a claim against the Debtor or acquire a lien and/or security interest in any assets of the Debtor.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the following parties with a true and correct copy of the foregoing *Trustee's Motion for Examination of and Document Production by Nick Howard* by depositing same in the United States Mail, postage prepaid, addressed to:

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This 27th day of March, 2013.

/s/ Sean C. Kulka
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