

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

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In re:
TOUSA, INC., *et al.*,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF TOUSA, INC., *ET AL.*,

Plaintiff ,

vs.

CITICORP NORTH AMERICA, INC., *ET AL.*,

Defendants.

Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

Adv. Pro. No. 08-1435-JKO

**RESPONSE TO FIRST LIEN DEFENDANTS' MOTION
FOR ENTRY OF ORDER**

The Official Committee of Unsecured Creditors of TOUSA, Inc., et al. (the "Committee" or "Plaintiff") hereby responds to the Motion for Entry of Order filed last Friday afternoon [DE #1028]. In this "motion," the defendant Citicorp North America, Inc. and certain First Lien Term Loan Lenders ("First Liens") argue against joint and several liability for their professional fee disgorgement obligation. In response, the Committee notes the following:

- The First Liens' pleading is untimely. The parties had fully briefed the joint-and-several-liability issue in connection with the Committee's Motion to Set Payment Amounts, with oral argument having taken place on May 17, 2010. There is no

basis for the First Liens filing this additional pleading, especially without seeking leave of Court. Accordingly, this pleading should be stricken as improper.¹

- The First Liens assert that the Committee failed to satisfy the legal and factual predicates for joint and several liability. Yet, the First Liens never identify a single element where the Committee's proof is lacking. In fact, it is clear that defendants in a fraudulent conveyance action are subject to joint and several liability. See *In re IVDS Interactive Acquisition Partners*, 302 F.app'x. 574, 576 (9th Cir. 2008) (joint and several liability is appropriate "against joint tortfeasors acting in concert or through independent acts to produce a single injury. Performing a fraudulent transfer is a tort.") (citations omitted); *In re South Florida Title, Inc.*, 104 B.R. 489 (Bankr. S.D. Fla 1989) ("The trustee has proved that the Lengos were the persons for whose benefit the fraudulent and voidable transfer was made. He is, therefore, entitled, under 550(a)(1), to judgment. . . jointly and severally.").
- The First Liens complain that they will be substantially prejudiced by having to purchase new bonds and post new collateral. This argument is mystifying. The Committee has informed the First Liens and this Court that it is not seeking any additional bonds from the defendants in connection with the entry of the final order. [D.E. 984]

¹ Despite having engaged in nearly daily communications with the Committee for weeks in connection with reaching agreement on the totals in the proposed final order, the First Liens never apprised the Committee of their intention to file this "motion." Instead, the First Liens informed the Committee and filed this pleading within two hours after being told that the Committee would shortly be submitting the proposed final orders on payment amounts.

- The First Liens maintain that they should be excused from joint and several liability because the Committee can simply rely on the bonds that were posted on a proportional liability basis. The Committee, however, is faced with numerous different bonds posted by numerous different surety companies on behalf of the dozens of First Liens and other defendants. Unfortunately, untoward things can happen with surety bonds. The Committee may be unprotected if any of the First Lien Lenders allow the surety bonds to lapse.² Surety companies have on occasion been unable to meet their obligations. Or, one or more of the First Liens may be found not liable on appeal or may otherwise be unable to satisfy its obligations. In these eventualities, the Committee would not receive a full recovery if the professional fees liability of the First Liens and Second Liens³ was not joint and several. The First Liens should not be permitted to shift the risk of non-collection to the Committee.
- The First Liens argue that imposing joint and several liability will be unfair to those First Lien defendants who had a relatively small percentage of the First Lien Term Loan. Yet, that is always the case with joint and several liability – by its nature, joint and several liability makes all defendants, including those with a smaller role, liable for the full amount. If this “inequity” were a basis for escaping joint and several liability, the doctrine would never be employed.

² While the First Liens’ most recent pleading indicates that the bonds cannot be withdrawn, they have previously represented to the Court that they pay annual premiums on the bonds. See Opposition to the Committee’s Motion to Stay Briefing, No. 10-cv-600019-AJ (S.D. Fla.) [D.E. #27], at 11 (“Bonds cost money; bonding requirements for longer periods of time cost more money since bonding premiums are annual.”). If a First Liens defendant fails to pay the annual premium, the bond may be withdrawn and the Committee will lose that protection.

³ The Second Liens’ professional fee disgorgement should also be a joint and several obligation.

The First Lien defendants have put forward no sound justification for why their professional fees -- that were incurred by all the First Liens defendants on a joint basis and benefitted all First Liens defendants on a joint basis -- should not be treated as a joint and several liability.

CONCLUSION

For the above-foregoing reasons, the First Liens' Motion for Entry of Order should be stricken. In addition, for the reasons set forth in prior pleadings and oral argument, the Court should enter the Committee's proposed order which would make the First Liens and Second Liens subject to joint and several liability for their professional fee disgorgements.

Dated: July 6, 2010

I HEREBY CERTIFY that the undersigned attorneys are appearing *pro hac vice* in this matter pursuant to court order dated July 10, 2008 [D.E. 1360, 1362, 1363 in Ch. 11 No. 08-10928]

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2010, the foregoing Response was filed electronically with the Clerk of the Court, and served via Notice of Electronic Filing upon registered ECF users through the Court's CM-ECF system. I further certify that I caused copies of the foregoing Motion to be served by email upon all other parties named on the attached Service List.

/s/ Patricia A. Redmond
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