

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION  
[www.flsb.uscourts.gov](http://www.flsb.uscourts.gov)

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**

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS'  
MOTION FOR MODIFICATION OF  
CASE MANAGEMENT ORDER**

The Official Committee of Unsecured Creditors of TOUSA, Inc., et al. (the "Committee" or "Plaintiff") hereby moves for modification of the Case Management and Scheduling Order (Adv. Pro. D.E. No. 3) (July 15, 2008) (the "Case Management Order" or "Order") to reschedule the trial date to June 15, 2009.

From the outset of the adversary proceeding, the Committee has been mindful of the importance of prosecuting this lawsuit as quickly and efficiently as possible. The Committee has proceeded on an expedited basis, recognizing the significance of this litigation to the

Debtors' reorganization. The Committee well understands and has heeded the Court's admonitions about the need to proceed economically and with dispatch.

The Committee believes that other parties to this lawsuit have likewise acted in good faith in the discovery process to date. The Debtors, the defendants, and third parties have generally worked with the Committee in a cooperative fashion in addressing discovery issues. Through no one's fault, however, it is now virtually impossible to meet the highly ambitious timetable set by the original Case Management Order. The Order called for a trial on March 9, 2009, with deadlines for fact and expert discovery calculated so as to meet that trial date. To meet this aggressive timetable, nearly everything had to break right. Unfortunately, despite the best efforts of many, this has not occurred. In several key respects, discovery has been slower than anticipated. The documents required by the Committee's experts have taken longer to arrive, and the accounting records and issues that our experts have to untangle are more complex than expected. In addition, the Committee has received many more documents – over one-and-a-half million pages so far – than it expected when the Case Management Order was entered, and these documents have mainly arrived later than had been called for by the Order. As a result, in order to properly develop the facts of this large and complicated case, the Committee requires additional time to conduct discovery and produce its expert reports.

This delay in the trial date will not adversely affect the Debtors' proposed Plan process. On October 13, 2008, the Debtors filed their Joint Plan of TOUSA, Inc. and its Affiliated Debtors and Debtors in Possession Under Chapter 11 of the Bankruptcy Code [D.E. # 1952] (the "Plan"). The proposed Plan contemplates the continuance of the litigation after the Debtors'

emergence from chapter 11 through the assignment of the litigation to a litigation trust.<sup>1</sup> Modification of the Case Management Order, as requested herein, will permit the parties to devote the time necessary to evaluate matters related to the Plan.

Because a delay in the schedule is necessary for the Committee to have a fair opportunity to present its case to this Court, and because delay will not prejudice the Debtors or other parties, the Committee requests that the Case Management Order be revised to provide that the Committee's expert reports will be due March 27, 2009, and trial of this action will commence on June 15, 2009, with the other deadlines modified consistent with this new trial date.<sup>2</sup>

## ARGUMENT

### **I. The Committee's Experts Need Additional Time To Prepare Their Reports**

The expert reports are critical in this case. In proving that fraudulent transfers occurred on July 31, 2007, the Committee will seek to demonstrate that the Conveying Subsidiaries were already insolvent on that date or were rendered insolvent by the transfers. Expert testimony will be used to show the insolvency of the Conveying Subsidiaries. The Committee's experts will necessarily rely on the Debtors' accounting records in conducting their analysis.

The original Case Management Order called for the Committee's expert reports to be filed on December 29, 2008. Order, at 5. This expert report deadline was based on the assumption that the Debtors' document production would be largely completed by July 25, 2008. *Id.* at 4. This did not occur. For a variety of reasons, the Committee received the majority of

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<sup>1</sup> The Committee is currently analyzing the Plan and accompanying disclosure statement and reserves all of its rights with respect thereto.

<sup>2</sup> A comparison of the current discovery deadlines and the proposed new deadlines is set out in Appendix A, attached hereto.

Debtors' documents *after* July 25. As recently as October 3rd, Debtors produced approximately 125,000 additional pages. Declaration of Michael L. Waldman ("Waldman Decl.") ¶ 3 (attached as Appendix B hereto). While the Committee appreciates the Debtors' efforts in producing substantial numbers of documents, the fact that many of Debtors' financial documents were not received until recently (and the Committee still has not received some relevant documents) has slowed the work of our experts.<sup>3</sup> Declaration of Bernard A. Katz ("Katz Decl.") ¶¶ 3, 7 (attached as Appendix C hereto).

The work of the Committee's experts also was hindered by their lack of access to the HSP and Essbase systems containing Debtor accounting information. Access to this important useful database and accompanying software was the subject of the motion to compel previously heard by the Court. See Committee's Motion to Compel Debtors to Provide Access to an Electronic database and Accompanying Software [Adv. Pro. D.E. 8]. At the time of the original Case Management Order, the Committee expected that its experts would be granted access to this database information beginning in July. Because of the objections of the Debtors and ensuing litigation, the Committee's experts did not gain full access to the HSP and Essbase database systems until mid-September. Katz Decl. ¶ 3.

Perhaps most importantly, aspects of the experts' analysis have proven to be more challenging than had been anticipated at the time of the Case Management Order. In late July, the Debtors provided the parties with a lengthy and complicated spreadsheet containing

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<sup>3</sup> In addition to the delays in receiving the Debtors documents, the Committee's experts also have lacked other documents relevant to their analysis. For example, the experts are very interested in the documents of TOUSA's auditors, Ernst & Young. Despite the fact that the Committee promptly served a subpoena on Ernst & Young, no Ernst & Young documents were received until October 7, 2008.

information about the trial balances of TOUSA and various subsidiaries as of July 31, 2007.<sup>4</sup> Since that spreadsheet was produced, the Committee has asked the Debtors and their advisors certain fundamental questions about the trial balances. On September 3, 2008, the Committee provided the Debtors with a list of written questions about the July 31, 2007 trial balance. . Because of scheduling difficulties, the Debtors were unable to schedule a meeting to address these critical questions until October 16. The Committee hopes to obtain important information regarding the Debtors' July 31, 2007 trial balance at that meeting. Katz Decl. ¶ 5. Understanding the Debtors' trial balance information is the foundation for much of the work to be done by the Committee's experts.

In addition, intercompany balances may be a key element of the Committee's solvency analysis. Katz Decl. ¶6. According to the preliminary data provided by Debtors, the intercompany balances appear to involve large dollar amounts. On August 5, 2008, the Debtors and their advisors met with the parties to discuss the intercompany balances. At this meeting, the Debtors advised that determining what comprises these intercompany balances posed a difficult and potentially time-consuming problem. The Debtors stated that their examination of one month (August 2007) of intercompany transactions was extremely labor intensive, taking a substantial number of manhours to complete. In recent correspondence, the Debtors also indicated that the raw material for calculating the intercompany balances may be scattered among thousands of boxes maintained in storage. The Committee's numerous questions about the intercompany balances also are on the agenda for the October 16 meeting with Debtors and

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<sup>4</sup> The Debtors created the July 31, 2007 trial balance spreadsheet for this litigation, not in the ordinary course of their business. Moreover, the Debtors' July 31, 2007 trial balance spreadsheet continues to be refined, with the Debtors producing several revised versions during the past few weeks.

defendants. *Id.* Like the difficulties that have arisen concerning the trial balance, the issues concerning the intercompany balances were not anticipated when the Case Management Order was entered, and have materially slowed the work of the Committee's experts.

Because they did not receive many relevant documents until relatively recently, and because the issues have proven more challenging than expected, the Committee's experts require additional time to conduct their solvency analysis. The Committee's experts estimate that they will need an additional three months beyond the original December 29, 2008 deadline to produce their reports. Katz Decl. ¶ 7. Moving the deadline for the Committee's expert report by three months to March 27, 2009 would necessitate moving the trial a like period. Given the paramount role played by the experts' analyses in this case, the Committee believes it essential that the deadlines in the Case Management Order be extended to give the experts adequate time to complete their work.

II. **The Committee Needs Additional Time To Review The Large Volume of Recently Produced Documents**

The Case Management Order was premised on the early production of documents to the Committee. The Committee requested the Debtors' documents even before filing the Complaint, and the Order directed their production by July 25th. The Order also allowed the Committee to serve written discovery requests on other parties beginning on July 16, 2007, only two days after the Complaint was filed. Order, at 4. The Order then called for a "[rolling] production of documents by all other parties [that] shall commence within 30 days of service." *Id.* The rolling production for this first stage was to be completed by October 3. *Id.* Based on the expectation that the Committee would receive the bulk of the documents in July, August and early September, the Case Management Order called for fact depositions to begin September 18 for Debtor employees and October 20 for defendant and third party witnesses.

The reality has been, however, that the vast majority of documents have been produced in September and October. A number of parties did not begin their rolling production until September, and the bulk of the documents did not arrive until late September and October. Moreover, the sheer number of documents has been staggering. The Committee has received approximately 1,650,000 pages from the Debtors, defendants and third parties. Waldman Decl. ¶ 2. Defendant Citicorp North America, Inc. (“Citicorp”) has alone produced more than 735,000 pages of documents, with roughly two-thirds of its production being received after September 1st. *Id.* ¶ 3. The following chart shows the total number of pages produced to date, as well as the number of pages produced in September and October:

<b>Producing Party</b>	<b>Total Documents (Pages) Produced</b>	<b>Documents (Pages) Produced in September and October</b>
<b>Debtors</b>	400,748	151,692
<b>Citigroup North America, Inc.</b>	738,739	429,299
<b>Senior Transeastern Lenders</b>	111,980	93,562
<b>Alix Partners, LLP</b>	176,439	166,836
<b>Lehman Brothers, Inc.</b>	207,260	148,086
<b>Wells Fargo Bank, N.A.</b>	26,963	26,817
<b>Ernst &amp; Young LLP</b>	3,316	3,316
<b>Total</b>	<b>1,665,445</b>	<b>1,019,608</b>

See Waldman Decl. ¶ 3.

In addition, some participants in the July 31, 2007 transaction have not yet produced some or all of their documents. For example, although they received their subpoena months ago, the Falcone Entities (TOUSA’s partner in the Transeastern joint venture and the recipient of almost \$50 million from TOUSA as part of the July 31, 2007 transactions) are still in the process of collecting and producing their responsive documents. Waldman Decl. ¶ 4. The Committee

also has filed a motion to compel Alix Partners to produce all responsive documents. Furthermore, the Committee is filing a motion challenging the Debtors' 100-page privilege log.

The large numbers of documents and their relatively late production has made the current schedule impracticable. The Case Management Schedule currently would require depositions to begin immediately (actually, to have begun weeks ago) and end by December 6<sup>th</sup>. This timetable does not provide adequate time for the Committee to review the documents that it has received in advance of the depositions. The Committee needs additional time to review and understand the produced documents before it can responsibly identify deponents and take deposition testimony. The need for a delay in the deposition deadlines in order to allow the Committee to complete its document review and deposition preparation compels a modification of the Case Management Order.

### **III. The Modification Of The Schedule Will Not Delay The Debtors' Plan Process**

As set forth above, the Plan filed by the Debtors explicitly contemplates the Debtors emergence from chapter 11 prior to the resolution of the litigation. Under the Debtors' proposed Plan, a litigation trust would be established for continued prosecution of this adversary litigation post- confirmation. The Debtors are seeking approval of the disclosure statement for the Plan on November 12, 2008 and the proposed Plan contemplates a confirmation hearing on January 21, 2009. Modification of the Case Management Order would be an advantageous by better permitting the parties to focus their time and resources on issues related to the Plan process.

### **CONCLUSION**

The Committee has worked diligently to meet the ambitious deadlines in the Case Management Order. Unfortunately, for the reasons set forth above, the Committee cannot adequately prepare its case for trial in the allotted time. Accordingly, the Committee requests

that this Court modify the Case Management Order to establish new dates for depositions, expert reports and trial, consistent with the Proposed Order accompanying this motion.

Dated: October 16, 2008

I hereby certify that the undersigned attorneys, along with others at their firm, have conferred with Debtors' counsel in a good faith effort to resolve by agreement the issues raised herein, but have been unable to do so.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications in this Court set forth in Local Rule 2090-1(A)

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]

/s/ Patricia A. Redmond

/s/ Michael L. Waldman

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TOUSA, Inc., et al.*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 16, 2008, I caused a true and correct copy of the Official Committee of Unsecured Creditors of TOUSA, Inc., *et al.*'s Motion for Modification of Case Management Order to be served by e-mail on:

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s/ Michael L. Waldman

Michael L. Waldman



2. The Case Management Order (Adv. Pro. D. E. No. 3) is modified as follows:
  - i. Fact depositions shall begin December 1, 2008;
  - ii. Fact discovery (including all fact depositions and written discovery) shall close March 6, 2009;
  - iii. Plaintiff's expert reports shall be served by March 27, 2009;
  - iv. Defendant's expert reports shall be served by April 17, 2009;
  - v. Plaintiff's rebuttal expert reports shall be served by April 28, 2009;
  - vi. Depositions of Plaintiff's experts shall be April 29-May 8, 2009;
  - vii. Depositions of Defendants' experts shall be May 11, 2009–May 19, 2009;
  - viii. Summary judgment motions, if any, must be filed by May 20, 2009;
  - ix. Pretrial conference/hearing on motions shall be June 8, 2009;
  - x. Trial shall commence on June 15, 2009.

# # #

**Submitted by:**

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*Fraudulent Conveyance Adversary Proceeding Counsel for the Official Committee of  
Unsecured Creditors of TOUSA, Inc., et al.*

Copies to:

Patricia A. Redmond

*(Attorney Redmond shall upon receipt serve a copy of this Order upon all interested parties and  
file a certificate of service.)*

# APPENDIX A

## Appendix A

## CASE MANAGEMENT ORDER

	Current Schedule	Proposed* (3 month extension)
Fact Depositions begin	10/20/08	12/1/08
Close of Discovery	12/5/08	3/06/09
Expert Reports:		
Plaintiff	12/29/08	3/27/09
Defendant	1/19/09	4/17/09
Rebuttal	1/30/09	4/28/09
Expert Depositions		
Plaintiff	2/2/09 – 2/10/09	4/29/09 – 5/8/09
Defendant	2/11/09 – 2/19/09	5/11/09-5/19/09
Summary Judgment Briefs		
Motions	2/20/09	5/20/09
Oppositions	3/06/09	6/05/09
Pretrial Conference	3/03/09 -3/04/09	6/08/09
Trial	3/09/09	6/15/09

\* The proposed deadlines, while extended three months, attempt to keep to the time frames established in the original Case Management Order.

# APPENDIX B

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
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vs.

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Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

Adv. Pro. No. 08-1435-JKO

**DECLARATION OF MICHAEL L. WALDMAN IN SUPPORT OF THE  
OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION TO  
AMEND THE CASE MANAGEMENT ORDER**

I, Michael L. Waldman, hereby declare:

1. I am a partner in the firm of Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, counsel of record for plaintiff Official Committee of Unsecured Creditors of TOUSA, Inc. (the "Committee") in this action. I am fully familiar with the facts and circumstances set forth herein. I submit this declaration in support of the Committee's motion to amend the case management order.

2. The defendants and third parties in this action have, to date, produced 1,665,445 pages of documents. Of these, 1,019,608 pages have been produced since September 1, 2008. Even since October 3, the end date for the productions in response to

the Committee's initial document requests, non-debtor parties have produced 146,694 pages of documents.

3. With regard to particular parties, the Debtors have produced 400,748 pages, 151,692 since September 1; 126,057 of those pages were produced on October 3. The Debtors produced 224,292 pages after July 25, 2008. Citicorp North America, Inc. has produced 738,739 pages. 429,299 pages have been produced since September 1, 33,187 of those pages were produced on October 6. The senior Transeastern lenders have produced 111,980 pages, all since September 1, 93,562 of which were produced on October 6. Alix Partners, LLP has produced 176,439 pages, 166,836 since September 1. Lehman Bros., Inc. has produced 207,260 pages, 148,086 since September 1. Wells Fargo Bank, N.A., has produced 26963 pages, 26,817 since September 1. Ernst & Young LLP has produced 3,316 pages, all after October 3.

4. Certain parties have not yet produced any documents responsive to the Committee's document requests. For example, the Falcone entities have not produced any documents to date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Michael L. Waldman

# APPENDIX C

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION  
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Chapter 11 Cases

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Jointly Administered

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**DECLARATION OF BERNARD A. KATZ**

I, Bernard A. Katz, say as follows:

1. I am a senior partner in J.H. Cohn LLP ("JHC"), an accounting and financial consulting firm located at 333 Thornall Street, Edison, New Jersey 08837. The Committee of Unsecured Creditors (the "Committee") has retained JHC to assist it with analyzing the accounting and financial issues in this case.

2. I respectfully submit this Declaration in support of the Committee's Motion for Modification of Case Management Order ("Motion"). The Case Management Order ("CMO") provides for the Committee's expert reports to be filed on December 29, 2008. As explained below, given what has transpired since the CMO was filed and despite the diligent work by the Committee's experts, the expert report deadline is unrealistic.

3. The Committee's experts and consultants are assessing the financial status of the Conveying Subsidiaries as of July 31, 2007 and immediately thereafter.<sup>1</sup> Many of the accounting and financial records that are fundamental to that analysis belong to the Debtors. Although the Debtors started their document production in May, a large percentage of the important accounting and financial records were produced months later, including a large number in September and October. Still others have been promised to the Committee, but have yet to be produced. Other important financial and accounting records of the Debtors reside on the HSP/Essbase system. The Debtors made the HSP/Essbase system available to the Committee's experts for purposes of this litigation on September 15, 2008.

4. The Committee's experts expect that documents from other entities, including accounting and financial information from Ernst & Young LLP, will be useful as we conduct the solvency analysis in this case. Ernst & Young's production came approximately one week ago, and additional documents are forthcoming.

5. In late July 2008, Debtors provided the Committee with a spreadsheet containing July 31, 2007 trial balances for TOUSA and various subsidiaries, which may be highly relevant to an analysis of the solvency of the Conveying Subsidiaries. The Committee's experts have been asking Debtors for fundamental information about that trial balances document since its production. In fact, at informational sessions held by the Debtors in August, we raised numerous questions about the July 31, 2007 trial balances. The Debtors responded that they would address our questions at a subsequent question and answer session, after we put our questions in writing. On September 3, 2008, the Committee provided the Debtors with a list of questions about the

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<sup>1</sup> This Declaration should not be construed to bind the Committee or its experts to a particular approach to or method of analyzing the Conveying Subsidiaries' insolvency.

trial balances. To date, the Committee's questions have not been answered. The Debtors have scheduled a question and answer session for October 16, 2008. The Committee's experts hope to learn important information about that document at that session.

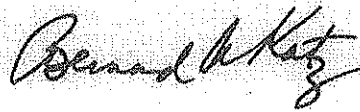
6. According to the preliminary data provided by the Debtors, the intercompany balances for some of the Conveying Subsidiaries are large. During the last few months, including at an August 5, 2008 meeting in New York, the Debtors explained that various challenges exist with respect to those balances as of July 31, 2007. According to the Debtors, reconciling the intercompany balances, dividing them up by legal entity, tracking them historically, and finding supporting documentation for intercompany transactions is difficult and time-consuming. The Committee is in the process of obtaining additional information regarding the intercompany balances, and expects to learn more at the question and answer session on October 16, 2008.

7. Given that documents have been produced later than expected (with some key documents still to be produced), access to HSP/Essbase was delayed, many fundamental questions about the trial balance and intercompany accounts have not been answered, and the intercompany analysis has proven to be more challenging than originally expected, I anticipate that the Committee's experts will need an additional three months beyond the original December 29, 2008 deadline to accurately and competently complete their forensic and accounting analysis and produce their expert reports.

8. The Committee's experts will continue to work diligently to complete their analysis.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2008.



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Bernard A. Katz