UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
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In re:	)	Chapter 11 Cases
	)	
TOUSA, INC., et al.,	)	Case No. 08-10928-JKO
	)	
Debtors.	)	Jointly Administered
	)	

STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC., ET AL., IN RESPONSE TO LIMITED OBJECTION AND RESERVATION OF RIGHTS FILED BY CITICORP NORTH AMERICA, INC., AS ADMINISTRATIVE AGENT, TO DEBTORS' MOTION FOR AUTHORITY TO USE CASH COLLATERAL

The Official Committee of Unsecured Creditors (the "Committee") of TOUSA, Inc., et al. (collectively, the "Debtors"), by and through its undersigned counsel, hereby files this response (the "Response") to the Limited Objection and Reservation of Rights filed by Citicorp North America, Inc., as Administrative Agent, to Debtors' Motion for Authority to Use Cash Collateral [D.E. # 2862] (the "Objection").[1] In support of this Response, the Committee respectfully submits as follows:

1. By the Cash Collateral Motion, the Debtors seek entry of a further order authorizing the Debtors' use of the Prepetition Secured Parties' alleged Cash Collateral for a limited three month period through July 31, 2009 "on terms substantially similar to those contained in the Second Cash Collateral Order."[2] Cash Collateral Motion at ¶8. The Committee believes that maintenance of the status quo as proposed by the Debtors is critical in light of the

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[1] The Objection was filed in response to the Debtors' Third Motion for Authority to Use Cash Collateral [D.E. #2658], (the "Cash Collateral Motion").

[2] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Cash Collateral Motion or the Amended Second Final Order (I) Authorizing Limited Use of Cash Collateral Pursuant to Section 105, 361 and 363 of the Bankruptcy Code, (II) Granting Replacement. Liens, Adequate Protection and Super Priority Administrative Expense Priority to Secured Lenders [D.E. # 2402] (the "Second Cash Collateral Order"), as applicable.

advanced stage of these chapter 11 cases and the July 13, 2009 trial date in the Committee Action.

2. In the Objection, however, the First Lien Agent alleges that the circumstances of these cases have so drastically changed, that a new set of rules must apply to the Debtors' use of Cash Collateral. In support of its Objection, the First Lien Agent relies on the alleged substantial decline in the value of the First Priority Lenders' purported Collateral over the last three months. To support its position, the First Lien Agent erroneously relies on the value of the Borrowing Base since December 2008, ignoring the recent filing of the Wind-Down Plan and related Projections (each as defined below).

3. Specifically, the Debtors have set upon the wind down path[3] and, in fact, have now filed a chapter 11 plan (the "Wind Down Plan") and related disclosure statement[4] to implement such wind down. As such, Borrowing Base values are not the correct measure of the value of the Collateral. Rather, the more relevant measure of value is gleaned from the projections that underlie the Wind Down Plan (the "Projections"). Although the Projections show an aggregate recovery to the First Priority Lenders of less than 100%, to date, the Debtors have already exceeded the conservative assumptions set forth in the Projections.

4. The First Priority Lenders' arguments have not changed since the Debtors first sought to use Cash Collateral; they have made clear time and time again that they vigorously disagree with the prosecution of the Committee Action and the funding for such prosecution out of Cash Collateral. This Court is well aware that the First Lien Agent has repeatedly sought to influence the outcome of the Committee Action by challenging its source of funding. However, this Court has ruled at lease twice and the District Court has affirmed, that the use of Cash

[3] The First Lien Agent has fully supported the Debtors' wind down process.

[4] The Debtors are seeking to schedule the disclosure statement hearing for May 14, 2009.

Collateral to compensate the Committee's professionals in connection with the prosecution of the Committee Action is appropriate. *See* Transcript of Hearing, June 10, 2008 at 271:13-18 ("I told you all before that I don't believe professionals should be engaged in the business of funding a reorganization and I won't approve a cap on the litigation expenses or the other expenses incurred by the creditors' committee"); Order Dismissing Appeals; Affirming Order of Bankruptcy Court; Closing Case (S.D. Fla. February 6, 2009 Case No. 08-61317); Transcript of Hearing, January 9, 2009 at 146:4-7 ("I am disinclined to put a restriction on the use of cash in the debtors' possession to pay all categories of administrative expenses, including the committee's professional fees.").

5. The finish line for the Committee Action is in sight – factual discovery is substantially completed, expert reports have been submitted, and the parties are on the verge of trial. Particularly in light of the damaging evidence uncovered in fact discovery and the strength of the Committee's recently produced expert reports, any attempt to cut off the Committee's funding for the Committee Action must be seen for what it is—an attempt to eliminate a challenge that the First Priority Lenders cannot defeat on the merits.

6. Simply put, the adequate protection proposed by the Debtors will continue to adequately protect the First Lien Lenders during this critical stage of the Debtors' chapter 11 cases. The Cash Collateral Motion contemplates the continued provision of adequate protection to the Prepetition Lenders notwithstanding the disputed nature of their claims. This adequate protection includes the current payment of interest to the First Priority Lenders, replacement liens, the Adequate Protection Claims, the payment of the Prepetition Secured Parties' advisors' fees and expenses, and rigorous financial reporting requirements. These forms of adequate protection, together with amounts already paid (including the $175 million contingent pay-down

of the First Lien Debt), have provided, and continue to provide, sufficient adequate protection to the First Priority Lenders.

7. Given that the First Priority Lenders claims and liens are disputed (including the claims of the Revolver Lenders on appeal), and the discovery in the Committee Action continues to strengthen the Committee's case, the balance between the First Priority Lenders' entitlement to adequate protection and the need to provide the Debtors with cash has shifted. See In re Express One Int'l, Inc., No. 02-41981, 2002 Bankr. LEXIS 1952, at *12-13 (Bankr. N.D. Tex. Apr. 16, 2002) (finding that "the Court must take into account what is being protected. If a creditor holds a lien which is subject to legitimate attack, the possibility of the lien's avoidance may be considered in balancing the creditor's right to protection against the debtor's need to use the collateral."); see also Transcript of Hearing, January 9, 2009 at 145-46 (finding that the first lien term and second lien term lenders liens were subject to a high degree of risk and therefore it was therefore unclear what liens required protection). Specifically, the First Priority Lenders are not entitled to more adequate protection than at any other point in these cases and, in fact, under the standard articulated in Express One Int'l., are entitled to less protection of their alleged Collateral as the evidence mounts.

8. Moreover, the First Lien Agent apparently fails to recognize that its right to adequate protection is separate and distinct from its right to prevent a surcharge against the Collateral. Relying on Bankruptcy Code section 506(c) and related case law, the First Lien Agent attempts to direct the court away from the relevant Bankruptcy Code section to this matter – section 363. Bankruptcy Code section 506(c) is irrelevant where a creditor is adequately protected. In re ProAlert, LLC, 314 B.R. 436, 443 (B.A.P. 9th Cir. 2004) (finding that to require a debtor to show that "each and every expenditure, whether for operational or nonoperational expenses, directly benefited the secured creditor" would be often be impossible, even where the

creditor was adequately protected). Bankruptcy Code section 363, not 506(c) must govern this Court's ruling.[5] Because the First Priority Lenders are adequately protected, the Collateral is not "charged" as any diminution of value in the Collateral is compensated by the adequate protection package provided to the First Priority Lenders.

9. Although the current wind down Projections indicate the potential for a short fall on the recovery of the First Priority Lenders, the Committee believes that, based on the recent actual performance of the Debtors, the Projections are overly conservative and must be adjusted to reflect actual performance to date.

10. In sum, the adequate protection offered by the Debtors is more than sufficient to continue to protect the First Priority Lenders.

[5] The First Lien Agent challenges payment of the Committee's fees from "its" Collateral and asserts that its security interest is a property right protected by the Fifth Amendment. While the "concept of adequate protection is designed to represent the Fifth Amendment's protection of property interests," the Fifth Amendment does nothing to *enhance* the right to adequate protection that the First Lien Agent is entitled to in these cases. In re Briggs Transp. Co., 780 F.2d 1339, 1342 (8th Cir. 1985) ("there is no constitutional claim of the creditor to more than that [afforded by adequate protection]"); accord, Travelers Ins. Co. v. Bullington, 878 F.2d 354, 359 (11th Cir. 1989).

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Committee respectfully requests that the Court (i) overrule the Objection; (ii) find that the Prepetition Secured Lenders are adequately protected; (iii) authorize the Debtors' continued use of cash collateral on terms materially consistent with the Second Cash Collateral Order; and (iv) grant the Committee such other relief as this Court deems just, proper, and equitable.

Dated: April 22, 2009

Respectfully submitted,

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 to practice in this court set forth in Local Rule 2090-1(A).

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-and-

We hereby certify that the undersigned attorneys are appearing pro hac vice in this matter pursuant to Court orders dated February 27, 2008 and March 3, 2008.

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