

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.

TENNENBAUM MULTI-STRATEGY
MASTER FUND, TENNENBAUM CAPITAL
SPC, MARATHON FINANCING I, B.V., and
FALL CREEK CLO Ltd.

Defendants.

Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

Adv. Pro. No. 10-02242

**STIPULATION BETWEEN THE COMMITTEE AND
TENNENBAUM MULTI-STRATEGY MASTER FUND**

Tennenbaum Multi-Strategy Master Fund (“*TMS*”) and the Official Committee of Unsecured Creditors of TOUSA, Inc. (the “*Committee*”) hereby stipulate as follows:

WHEREAS, on July 14, 2008, the Committee commenced adversary proceeding no. 08-1435 (the “*Initial Adversary*”), which remains pending before the Court, by filing a complaint, which was subsequently amended three times before trial (as amended, the “*Initial Complaint*”);

WHEREAS, on October 13, 2009, the Court entered findings of fact and

conclusions of law (the “**Initial Findings of Fact**”) (D.E. #658)¹ and a judgment (the “**Initial Judgment**”) in respect of the Initial Adversary (D.E. #659);

WHEREAS, on October 23, 2009, Citicorp North America, Inc., in its capacity as Administrative Agent to the First Lien Term Loan (“**Citi**”) and certain First Lien Lenders (as defined herein) filed the First Lien Term Loan Defendants’ Motion for Clarification of Judgment and Order (the “**Citi Motion**”) (D.E. #696);

WHEREAS, on October 23, 2009, TMS filed the Motion of Tennenbaum Multi-Strategy Master Fund to Alter, Amend, Clarify or Seek Relief From Judgment (the “**Relief Motion**”) (D.E. #703) on the grounds that, among other things, TMS was not properly served with any complaint filed in the Initial Adversary and, therefore, the Initial Judgment is not binding upon TMS;

WHEREAS, on October 30, 2009, the Court entered amended findings of fact and conclusions of law (the “**Amended Findings of Fact**”) (D.E. #722) and an amended final judgment (the “**Amended Judgment**”) (D.E. #721) in respect of the Initial Adversary, which, by their terms, amended and replaced the Initial Findings of Fact and Initial Judgment, respectively;

WHEREAS, on January 22, 2010, the Committee filed the adversary complaint (the “**New Complaint**”) commencing the above-captioned adversary proceeding (the “**New Adversary**”), naming TMS and certain other entities as defendants, and seeking various relief, including disgorgements and attorneys fees, from defendant TMS;

WHEREAS, on January 29, 2010, the Court entered the Order Setting Filing and Disclosure Requirements for Pretrial and Trial in the New Adversary (the “**Scheduling**

¹ All docket references contained herein refer to the docket maintained in the Initial Adversary.

Order”);

WHEREAS, on February 2, 2010, the Court approved a stipulation between TMS and the Committee in the New Adversary, pursuant to which TMS agreed to accept service of the New Complaint solely on its own behalf and the Committee agreed that TMS’s deadline to file an answer or other responsive pleading was extended through and including March 29, 2010;

WHEREAS, on February 9, 2010, the Court approved a stipulation between TMS and the Committee in the Initial Adversary providing, among other things, that TMS (i) is not a party to any findings, judgments, or amendments thereof in the Initial Adversary, (ii) is not obligated to post a bond or other security in connection with any appeals of the Court’s orders in the Initial Adversary, and (iii) would agree to withdraw the Relief Motion;

WHEREAS, on February 23, 2010, the Committee served the following discovery requests (the “*Discovery Requests*”) upon TMS in the New Adversary: (i) First Set of Requests for Production of Documents and Things, with a response deadline of March 29, 2009 and (ii) First Set of Interrogatories, with a response deadline of March 24, 2010; and

WHEREAS, on March 16, 2010, the Committee filed the Motion of the Official Committee of Unsecured Creditors to Set Payment Amounts in the Initial Adversary (the “*Motion to Finalize Amended Judgment*”) (D.E. 937) and, upon further proceedings before the Court in the Initial Adversary, the parties expect that the Court’s order in connection with the Motion to Finalize the Amended Judgment will determine the amount of diminution in value of the liens granted by the Conveying Subsidiaries,

disgorgements by defendants, attorneys fees, and other damages to which the plaintiffs are entitled (such order or orders, when entered by the Court and including such determinations, the “**Finalization Order**”);

WHEREAS, the Court held a hearing regarding the Motion to Finalize Amended Judgment on May 17, 2010, and has scheduled a further hearing on the Motion to Finalize Amended Judgment on June 9, 2010;

WHEREAS, on March 23, 2010, the Court approved a stipulation between TMS and the Committee, whereby the Committee agreed to extend TMS’s deadline to (i) answer or otherwise plead in response to the New Complaint, and (ii) respond to the Discovery Requests, through and including April 30, 2010.

WHEREAS, the Committee contends that TMS was transferred or is otherwise liable under 11 U.S.C. section 550 for \$2,382,424.83 in payments in its capacity as a First Lien Lender, and TMS contends that TMS received only \$536,127.95 (the “**Transfer Dispute**”).

IT IS STIPULATED AND AGREED:

1. Except to the extent otherwise provided for herein, TMS is bound by and shall be deemed to be a party to the Findings of Fact, Amended Findings of Fact, Amended Judgment, and the Finalization Order (collectively, the “**Initial Adversary Orders**”), and shall be bound by, deemed to be a party to, and enjoy the benefit or suffer the detriment of the Final Result (as defined below) of any appeal (the “**Appeal**”) from the Initial Adversary Orders as it applies to payments of principal and/or interest to the

First Lien Lenders² to the same extent as if TMS had appeared and defended the Initial Adversary and participated in such Appeal, *provided* that the parties hereby acknowledge that TMS became a First Lien Lender after the July 31 Transaction was consummated;³ *provided further* that TMS shall not be bound by any finding in any order entered in the Initial Adversary or any appeal from any such order (including, without limitation, the Initial Adversary Orders or any subsequent orders entered by any court that comprise the Final Result) that the First Lien Lenders failed to act in good faith under sections 548 and 550 of the Bankruptcy Code or any similar finding in connection with the provision of loans or other financial accommodations by the First Lien Lenders in connection with the July 31 Transaction (the “**Good Faith Defense**”); *provided further* that TMS shall waive the right to advance the Good Faith Defense against the Committee in the New Adversary at the Resolution Hearing in respect of the Transfer Dispute; *provided further* that if the Final Result does not provide that the First Lien Lenders other than an Original First Lien Lender acted in bad faith, TMS shall not have waived the right to advance the Good Faith Defense against the Committee in the New Adversary, nor shall have the Committee waived any right to seek further discovery on issues relating to the Good Faith Defense as to TMS; *provided further* that TMS’s waiver of the Good Faith Defense contemplated in the previous proviso shall in no way be construed as a waiver by TMS to assert the Good Faith Defense in connection with any litigation relating to the July 31 Transaction (other than in connection with litigation with the Committee as and to the extent set forth in the

² Unless otherwise indicated herein, all capitalized terms shall have the meanings ascribed to them in the Amended Findings of Fact (D.E. 722).

³ An Entity that was a First Lien Lender when the July 31 Transaction was consummated shall be referred to herein as an “**Original First Lien Lender**”.

immediately preceding proviso).

2. For purposes of this Stipulation and Order, “**Final Result**” means an order entered by the highest appellate court to which the Appeal proceeds and, as applicable, any implementing orders entered in any court upon remand once such orders become final and non-appealable.

3. Notwithstanding TMS’s agreement to be bound by the Final Result, TMS shall not be obligated to participate in (i) the Appeal, (ii) any lower court proceedings on remand, if any, or (iii) any appeal of any lower court orders entered on remand.

4. This Stipulation shall supersede the Scheduling Order with respect to TMS in all respects.

5. Provided that TMS (or another entity on behalf of TMS, as set forth in paragraph 14) posts a bond or other security under Paragraph 12, and maintains the security as described in Paragraph 14, the Committee shall not attempt to enforce (i) any agreement reached by the Committee and TMS by the Agreement Deadline or (ii) any judgment rendered by the Court at the Resolution Hearing against TMS pending the Final Result. TMS shall not be bound by any rulings or proceedings as to other defendants in the New Adversary.

6. TMS and the Committee will conduct limited discovery (the “**Limited Discovery**”) bearing on the Transfer Dispute.

7. In connection with the Limited Discovery (a) each party shall serve no more than 25 document requests and 12 interrogatories, (b) not more than five depositions shall be taken per side, and (c) to the extent possible, discovery shall be

conducted on an informal basis. The limitations contained in this paragraph may be enlarged (x) by agreement of both parties hereto or (y) by order of the Court. The parties reserve all rights under the Bankruptcy Rules and, as applicable, the Federal Rules of Civil Procedure (collectively, the “**Rules**”), to object to any discovery sought hereunder on any grounds cognizable under the Rules.

8. The Limited Discovery process will be completed no later than August 1, 2010 (the “**Discovery Deadline**”), unless an extension of time is agreed to by both parties hereto or ordered by the Court.

9. Following the Limited Discovery, TMS and the Committee will either (i) on or before September 1, 2010 (the “**Agreement Deadline**”), reach an agreement and enter into a stipulation regarding the Transfer Dispute, or (ii) present their dispute on this issue to the Court for resolution at a suitable hearing date after the Agreement Deadline (the “**Resolution Hearing**”).

10. If the Discovery Deadline is extended in accordance with paragraph 8, then the Agreement Deadline shall be rescheduled automatically to occur on the date which is 30 days after the extended Discovery Deadline.

11. TMS and the Committee will work in good faith to develop a briefing schedule in connection with the Resolution Hearing.

12. TMS shall be obligated to post a bond within 30 days of the later of the date (a) the Transfer Dispute is resolved and (b) the Finalization Order is issued.

13. The (a) agreement between TMS and the Committee, or (b) judicial determination after the Resolution Hearing, as applicable, shall determine the maximum amount of the bond to be posted by TMS, if any (the “**Bond Amount**”),

provided that the Bond Amount shall not exceed 100% of the amounts agreed or determined by the Court to be recoverable from TMS under 11 U.S.C. section 550, including prejudgment interest awarded, if any.

14. TMS shall have the right, in its sole discretion, to have Tennenbaum Multi-Strategy Fund SPV (Cayman) Ltd., a Cayman Islands exempted company (“*MSF-SPV*”), an entity that is the recent recipient of certain assets and liabilities of TMS, post bond on behalf of TMS in the form of (a) cash, (b) securities or bank debt (collectively, the “*Securities*”) that trade in an amount no less than 60% of its par value with an aggregate fair market value (including the amount of any cash, if any, that MFS-SPV may from time to time elect in its discretion to post in lieu of Securities consistent with clauses (a) and (c) in this paragraph) equal to the Bond Amount (the “*Securities Amount*”), or (c) any combination of cash and Securities in an account under the joint control of the Committee and MFS-SPV (the “*Securities Account*”). MFS-SPV agrees to maintain the Securities (and cash, if any) in the Securities Account in an amount equal to the Securities Amount until 30 days after the occurrence of the Final Result and until any dispute between the Committee and TMS regarding the disposition of the Securities Account is resolved. The parties will make good faith efforts to resolve any dispute regarding the disposition of the Securities Account; if the parties are unable to reach agreement, they shall submit their dispute to the Court for resolution. At the end of each quarter, TMS will provide the Committee a statement listing each Security that has been placed into the Securities Account and the Securities’ fair market value as reported to TMS’s investors. The fair market value of the Securities shall be reported to the Committee in accordance with the same procedures that TMS is contractually obligated

to use in preparation of financial statements and reports delivered to TMS's investors, as described in its Private Placement Memorandum. Not more than 15 days after the end of each calendar quarter, the Securities in the Securities Account shall be adjusted to provide that the Securities (and cash, if any) have a fair market value equal to the Securities Amount. MFS-SPV shall have the right from time to time to sell or remove Securities in the Securities Account, *provided* that prior to or concurrent with such sale or removal, MFS-SPV shall post other Securities in an amount such that all Securities and cash (if any) remaining in the Securities Account following such sale or removal have an aggregate fair market value equal to the Bond Amount. The Committee reserves the right to object to the Securities posted as not having an aggregate fair market value equal to the Bond Amount and to demand the posting of additional Securities that, in the aggregate with the other Securities and/or cash in the Securities Account, shall have the fair market value of the Bond Amount. In any proceeding before the Bankruptcy Court challenging the fair market value of the Securities placed in the Securities Account, the Committee shall bear the burden of proof to show that the amount of Securities posted by defendant is not equal to the Bond Amount. The parties agree that any dispute regarding this Agreement or the posting of the Bond Amount shall be decided by the Court. MFS-SPV consents to the jurisdiction of the Court to resolve any issues regarding any Securities that MFS-SPV posts in connection with this paragraph, and MFS-SPV agrees to be bound by the other obligations imposed on TMS by this paragraph.

15. TMS reserves the right to argue: (a) that the Bond Amount should be reduced to an amount equal to TMS's share of the net amount the First Lien Lenders would owe pursuant to the Amended Judgment (i) after entry of the Finalization Order,

and (ii) assuming all payments into and out of the Disgorgement Account (as defined in the Amended Judgment) have been made in accordance with the Amended Judgment, the First Lien Term Loan Credit Agreement, the Second Lien Term Loan Credit Agreement, and that certain intercreditor agreement dated as of July 31, 2007 (the “*Intercreditor Agreement*”) entered into in connection with the July 31 Transaction; and (b) the merits of the Citi Motion if the merits of Citi Motion have not already been resolved by the Finalization Order.

16. TMS reserves all rights with respect to any settlements or disputes between and/or among any of the First Lien Lenders, the Senior Transeastern Lenders, and the Second Lien Lenders with respect to distributions from the Disgorgement Account.

17. TMS reserves all other rights in connection with any suit, claim, cause of action, proceeding, or any other action taken by the Committee against TMS after the Bond Amount is agreed or judicially determined, and all other rights not specifically addressed in this Stipulation.

18. The Committee reserves all rights not specifically addressed in this Stipulation.

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Respectfully submitted this 2nd day of June, 2010.

Stipulated and Agreed to:

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