

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
:
In re : Chapter 11
:
STAR TRIBUNE HOLDINGS : Case No. 09-10244 (RDD)
CORPORATION, *et al.*, :
:
:
Debtor. :
:
----- x

**MOTION OF THE UNITED STATES TRUSTEE FOR
RECONSIDERATION OF THIS COURT’S FINAL ORDER
AUTHORIZING DEBTORS (i) CONTINUE TO USE EXISTING
CASH MANAGEMENT SYSTEM AND (ii) MAINTAIN EXISTING
BANK ACCOUNTS AND BUSINESS FORMS**

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:

Diana G. Adams, the United States Trustee for Region 2 (the “United States Trustee”), in furtherance of her duties and responsibilities pursuant to 28 U.S.C. § 586(a)(3), (5) and (8), moves this Court for an order, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, made applicable in Bankruptcy Cases pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure. The United States Trustee respectfully requests that the Court reconsider its Final Order Authorizing Debtors (i) Continue to Use Existing Cash Management System and (ii) Maintain Existing Bank Accounts and Business Forms dated February 6, 2009 (the “Final Order”). ECF Doc. No. 69.

I. INTRODUCTION

The Court should reconsider its Final Order which impliedly authorizes Wells Fargo to remove pledged collateral and render the Debtors’ cash balances without any of the protections

contemplated by Section 345(b) of the Bankruptcy Code. At the final hearing on the Debtors' Motion seeking Authority to Continue to Use Existing Cash Management System, the Court granted that portion of the Motion relieving the Debtors and Wells Fargo Bank from the obligations of section 345(b), but made it clear that in the meantime the Debtors should investigate the cost of obtaining a bond for its cash balance of approximately \$28 million.

In granting that Order, the Court was not briefed on the controlling caselaw regarding what circumstances constitute "cause" for the granting of a Section 345(b) waiver. Furthermore, the Court was not informed that Wells Fargo had apparently pledged approximately \$40 million and was not given specific information regarding the accounts in which the cash balances were held and finally, was not informed as to whether those cash balances were insured by the Federal Deposit Insurance Corporation.

The lack of sufficient information provided to the Court which may have resulted in the Court reaching a different determination if it had been so advised is a basis for the granting of a motion to reargue under section 59(e) of the Fed. R. Civ. P. As discussed in detail below, while it is not the intent of Congress to handcuff larger, more sophisticated debtors, the objective is always to make sure that the funds of a debtor are invested prudently and safely. Here, Wells Fargo sought and received a waiver of the requirements of section 345(b) which inured only to the benefit of Wells Fargo and to the detriment of the Debtors' cash balances. However, in receiving that waiver, the movants failed to make a showing of "cause" as to why this waiver should be permitted, failed to address the controlling decisions with respect to a waiver under section 345(b), and failed to bring relevant information to the attention of the Court. The United States

Trustee asks the Court to grant the motion to reargue and consider the discussion below so that this important issue can be fully addressed.

II. BACKGROUND

1. On January 15, 2009, (the “Petition Date”), the Star Tribune Holdings Corporation (“Holdings”) and Star Tribune Company (“Star Tribune”) (together the “Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have operated their business and managed their properties as debtors in possession pursuant to Bankruptcy Code sections 1107 and 1108.

2. The Debtors are a newspaper and media company that publishes in both print and on-line the Star Tribune newspaper, the newspaper with the highest daily circulation in the State of Minnesota. The Star Tribune is ranked nationally as the 10th largest Sunday newspaper and the 15th largest daily newspaper based on circulation.

3. On January 16, 2009, the Court conducted a hearing on various motions, including the instant Motion, filed by the Debtors (the “First Day Motions”).

4. Among the First Day Motions, the Debtors filed a Motion seeking Authorization to Continue to Use Existing Cash Management System and Maintain Existing Bank Accounts and Business Forms (the “Motion”). ECF Doc. No. 7.

Cash Management System

5. Pursuant to the Cash Management System, the Debtors collect, concentrate, invest in overnight accounts and disburse the funds generated by the Debtors’ operations. The Cash Management System also enables the Debtors to perform cash forecasting and reporting, monitor the collection and disbursement of funds and maintain control over

intercompany obligations and the administration of their Bank Accounts. Motion, ¶ 5, p. 3; ECF Doc. No. 7.

6. The Cash Management System is implemented through accounts maintained at Wells Fargo Bank, N.A. (“Wells Fargo”). Motion, ¶¶ 5-14; pp. 3-7 and Exhibit C; ECF Doc. No. 7.

7. The Debtors’ Investment Guidelines under their Credit Agreements allow the Debtors to invest their cash balances in cash and cash equivalents. At the time the Motion was filed, the Debtors stated that cash balances were not invested in cash equivalents. Motion, ¶ 13, p. 5.

8. In the Affidavit of David W. Montgomery Pursuant to Rule 1007-2 of the Local Bankruptcy Rules of the Southern District of New York filed with the Court on January 16, 2009, Schedule 4, included a consolidated balance sheet for the Debtors for the period ended December 28, 2008 showing *inter alia* cash of \$26,859,000.00. ECF Doc. No. 14.

9. On January 16, 2009, the Court approved an interim order Authorizing the Debtors to Continue to Use Existing Cash Management System and Maintain Existing Bank Accounts and Business Forms (the “Interim Order”) . ECF Doc. No. 30.

Hearing on Final Order

10. On February 6, 2009 a hearing was held with respect to a final order pertaining to the Motion. The Final Order included a paragraph not included in the Interim Order that read as follows:

ORDERED that the Debtors and any entity with which money is deposited or invested by the Debtors in accordance with the Investment Policy are relieved from the obligations under

section 345(b) to obtain a bond or to deposit securities of the kind specified in 31 U.S.C. § 9303; and it is further

Final Order, pp. 6-7. ECF Doc. No. 69.

11. At the hearing held on February 6, 2009, Debtors' counsel stated that the Debtors' cash balance was approximately \$28 million. Transcript of February 6, 2009 Hearing ("Transcript"), Tr. at 29, Lns 6-8. A copy of the Transcript is attached hereto as Exhibit A.

12. At the hearing, the Court stated that it would "authorize it [the order] for now and have the debtors look at the cost of getting a bond." Tr. at 30, Ln 6.

13. Upon information and belief, Debtors' counsel has inquired, and determined to date, that a cost of obtaining a bond to protect the Debtors' cash balance would be at least \$250,000.00. Upon information and belief, the Debtors do not intend to secure a bond to protect its cash balances.

Authorized Depositories

14. In the Southern District of New York, the United States Trustee designates a bank an "Authorized Depository" after the bank undertakes, with respect to amounts not insured by the Federal Deposit Insurance Corporation (the " FDIC"), to maintain collateral in accordance with Section 345(b) with respect to funds held on behalf of a bankruptcy estate.

15. According to a report accessible to the United States Trustee, as of January 28, 2009, Wells Fargo had provided collateral with respect to its bankruptcy estates in the amount of \$4,229,000.18. As of February 10, 2009, Wells Fargo increased its bankruptcy collateral to \$40,007,312.12. *See* Declaration of Brian Masumoto attached hereto as Exhibit B ("Masumoto Declaration").

16. Upon information and belief, there are authorized depositories in the Southern District of New York that are willing to pledge collateral to protect the funds held on behalf of a bankruptcy estate.

II. DISCUSSION

A. Applicable Rules.

17. Federal Rule of Bankruptcy Procedure 9023 provides that "Rule 59 F.R.Civ.P. applies in cases under the Code, except as provided in Rule 3008." Fed. R. Civ. P. 9023. Federal Rule of Civil Procedure 59(e) provides as follows:

(e) Motion to Alter or Amend Judgement

A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

18. Rule 9023-1 of the Local Bankruptcy Rules for the Southern District of New York ("Local Bankruptcy Rule 9023-1") provides as follows:

Rule 9023-1 MOTIONS FOR REARGUMENT

(a) A motion for reargument of a court order determining a motion shall be served within 10 days after the entry of the Court's order determining the original motion, or in the case of a court order resulting in a judgment, within 10 days after the entry of the judgment, and, unless the Court orders otherwise, shall be made returnable within the same amount of time as required for the original motion. The motion shall set forth concisely the matters or controlling decisions which counsel believes the Court has not considered. No oral argument shall be heard unless the Court grants the motion and specifically orders that the matter be reargued orally.

Local Bankruptcy Rule 9023-1.

19. Case law has identified various circumstances warranting the granting of a motion to reargue. In general, the grounds for a motion to reargue are as follows:

- The court overlooked controlling decisions or factual matters that might materially have influenced its earlier decision;¹ or
- There exists a need to correct clear error or prevent manifest injustice;² or
- Newly discovered evidence has been unearthed.³

In re Perry H. Koplick & Sons, Inc., 2007 WL 3076921, *4 (Bankr. S.D.N.Y.).

20. As discussed in further detail below, in the current case, it appears that all three of the grounds justifying the granting of a motion for reconsideration have been met.

- (1.) The first ground warranting the granting of a motion to reargue has been met because the Court has not had an opportunity to review controlling decisions under Section 345 and if it had, such review might have materially influenced its earlier decision.**

21. At the hearing, the Court stated that it would “authorize it [the order] for now and have the debtors look at the cost of getting a bond.” Tr. at 30, Ln 6. Therefore, the Court deferred the finding of “cause” under Section 345(b) in order for the Debtor to inquire into the cost of obtaining a bond with respect to the Debtors’ cash balances.

¹Citing *In re Asia Global Crossing, Ltd.*, 332 B.R. 520, 524 (Bankr. S.D.N.Y.2005); *In re Adelpia Business Solutions, Inc.*, 2002 WL 31557665, *1 (Bankr.S.D.N.Y.2002); *Family Golf Ctrs., Inc. v. Acushnet Co. & Fortune Brands, Inc. (In re Randall's Island Family Golf Ctrs., Inc.)*, 290 B.R. 55, 61 (Bankr.S.D.N.Y.2003).

²Citing *In re Asia Global Crossing, Ltd.*, 332 B.R. at 524; *Family Golf Ctrs.*, 290 B.R. at 61.

³Citing *In re Petition of Bird*, 222 B.R. 229, 235 (Bankr.S.D.N.Y.1998); (citing *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir.1983), *cert. denied*, 464 U.S. 864 (1983)).

22. Section 345 entitled “Money of estates” sets forth the protections in subparagraph (b) that are designed to safeguard the funds in a debtor’s bankruptcy estate. Section 345(b) reads as follows:

(b) Except with respect to a deposit or investment that is insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States or backed by the full faith and credit of the United States, the trustee shall require from an entity with which such money is deposited or invested —

(1) a bond—

(A) in favor of the United States;

(B) secured by the undertaking of a corporate surety approved by the United States trustee for the district in which the case is pending; and

(C) conditioned on—

(i) a proper accounting for all money so deposited or invested and for any return on such money;

(ii) prompt repayment of such money and return; and

(iii) faithful performance of duties as a depository; or

(2) the deposit of securities of the kind specified in section 9303 of title 31; unless the court for cause orders otherwise.

23. Section 345(b) presumes that debtors will obtain a bond for funds in excess of federal insurance or other government guarantees. 11 U.S.C. § 345(b). The bonding requirements have some flexibility in that debtors can choose from a variety of specified options.

24. One option is to obtain a traditional surety bond. 11 U.S.C. § 345(b)(1). Another is to post securities. 11 U.S.C. § 345(b)(2). Banks on the United States Trustee’s approved depository list insulate debtor-in-possession accounts that exceed federally guaranteed amounts by placing securities with the Federal Reserve Bank. See 31 U.S.C. §9303 (permitting posting of government securities in lieu of a surety bond). Wells Fargo, which maintains the Debtors’

accounts, has made this commitment – for debtor-in-possession accounts -- and it is on the United States Trustee’s list of approved depositories. *See* Masumoto Declaration, ¶ 2. Thus, Wells Fargo, routinely enters into collateralization agreements.

25. Section 345(b) allows an exception to the bonding and security requirement. The phrase “unless the court for cause orders otherwise” overruled the Third Circuit’s decision in *In re Columbia Gas Sys. Inc.* 33 F.3d 294 (3d Cir. 1994), which held that section 345’s deposit and investment requirements were mandatory. The legislative history of the amendment reflects that the bonding “requirement is wise in the case of a smaller debtor with limited funds that cannot afford a risky investment to be lost, [but] it can work to needlessly handcuff larger, more sophisticated debtors.” *H.R. Rep. 103-834, 103rd Cong. 2nd Sess. 24 (October 4, 1994); 140 Cong. Rec. H10767 (October 4, 1994)*. The objective always “is to make sure that the funds of a bankrupt that are obligated to creditors are invested prudently and safely.” *Id.*

26. Few cases address the standards for “cause” to allow the exception under section 345(b). In *In re Service Merchandise Company*, 240 B.R. 894 (Bankr.M.D. Tenn. 1999), the court considered the legislative history of the amendment and then listed the following ten factors to be considered in a “totality of the circumstances” inquiry:

1. The sophistication of the debtor’s business;
2. The size of the debtor’s business operations;
3. The amount of investments involved;
4. The bank ratings (Moody's and Standard and Poor) of the financial institutions where debtor-in-possession funds are held;
5. The complexity of the case;
6. The safeguards in place within the debtor's own business of insuring the safety of the funds;
7. The debtor's ability to reorganize in the face of a failure of one or more of the financial institutions;
8. The benefit to the debtor;

9. The harm, if any, to the estate; and
10. The reasonableness of the debtor's request for relief from § 345(b) requirements in light of the overall circumstances of the case.

Sevice Merchandise, 240 B.R. at 896. Under the facts, the *Service Merchandise* court found that cause existed because the case involved “large, sophisticated debtors with a complex cash management system. The debtors rely on multiple banks and multiple accounts to handle millions of dollars which flow through these accounts on a daily basis.” *Id.*

27. The Court did not have an opportunity to consider Section 345 in light of the controlling decisions and facts because it was awaiting information from the Debtors regarding their search for a bond at a reasonable cost. Rather than allowing these funds to be maintained in unprotected accounts because it is not clear at this juncture that the Debtors will be successful in locating a bond at a cost they will be willing to incur, the Court should reconsider the provision in the Final Order allowing Wells Fargo to avoid the need to pledge collateral to protect the Debtors cash balances.

28. On the existing record, there are no facts that establish cause under Section 345(b) to allow Wells Fargo to avoid its obligation to pledge collateral in order to protect the Debtors’ cash balances.

- (2.) **The second ground warranting the granting of a motion to reargue has been met because allowing Wells Fargo to avoid the collateralization requirements solely for its benefit and to the detriment of the Debtors’ bankruptcy estates would work a manifest injustice.**

29. In the past, the exception under Section 345(b) was generally sought by large, complex and sophisticated Debtors seeking to obtain a return in excess of the returns afforded by

Authorized Depositories on accounts fully protected by the collateralization requirements imposed by Section 345(b). No such possibility has been advanced in this case.

30. The only purpose of the provision in the Final Order excusing Wells Fargo from pledging the collateral required by Section 345 appears to benefit Wells Fargo to the detriment of the Debtors' bankruptcy estate.

31. There are Authorized Depositories in the Southern District of New York that would be willing to comply with the collateral requirements under Section 345(b) with respect to the Debtors' cash balances.

32. Based on the foregoing, to allow a bank that has undertaken to qualify as an Authorized Depository to be relieved of the very obligation that is the *raison d'être* of the designation as an Authorized Depository, simply at the will of the bank, without any justification, and to the detriment of the bankruptcy estate would render the program totally meaningless. Any Authorized Depository would be at a competitive disadvantage if it did not avail itself of the same benefit sought by Wells Fargo in this case. If every Authorized Depository sought the same relief sought by Wells Fargo and were granted such relief without limitation, the designation as an Authorized Depository would be meaningless.

33. Even if Wells Fargo is among the secured lenders in the Debtors' cases, that fact should have absolutely no impact on the judgement on whether to relieve Wells Fargo from its collateral obligations as an Authorized Depository. While it goes without saying that Wells Fargo has every incentive to see the Debtor succeed, it would be incorrect to assume that the interests of Wells Fargo and the Debtors are always identical.

34. In this uncertain economic environment, any bank, including Wells Fargo, may have any number of reasons to increase its reserves of unencumbered collateral.

35. In any event, it should not be the responsibility of the Court to determine which motive animates a bank's request for relief from the collateralization requirements of Section 345(b). Simple enforcement of the collateralization requirements under Section 345(b), particularly when no cause has been shown to exist to do otherwise, ensures the safety of the cash in bankruptcy estates.

36. Finally, the prospective impact of the waiver contained in the Final Order may not be seen until a change in the circumstances such as the expiration of the temporary increased insurance coverage provided by the FDIC. To the extent that the funds are protected now by the temporary increased insurance coverage provided by the FDIC, such protection would cease upon the expiration of such temporary programs. Because the Final Order gives the Debtors and Wells Fargo a waiver from the collateralization requirements of section 345(b), upon the expiration of such coverage, Wells Fargo would not be required to pledge collateral thereby leaving the Debtors' cash balances unprotected.

- (3.) **The third ground warranting the granting of a motion to reargue has been met because there is newly discovered evidence that may be relevant to the issues of whether the requirements of section 345(b) should be waived.**

37. After the hearing held on February 6, 2009, the United States Trustee discovered that as of January 28, 2009, Wells Fargo had pledged collateral with respect to funds held on behalf of various bankruptcy estates in the amount of \$4,229,000.19, and that as of February 10, 2009, the amount of the pledged collateral had been increased to \$40,007,312.12. *See* Masumoto Declaration, ¶¶ 2-3. As of this date, the United States Trustee does not know when the additional

collateral was pledged and the reports do not identify the bankruptcy estates that are protected by the pledged collateral. Therefore, the United States Trustee does not know at this time whether the increased collateral was specifically pledged in order to protect the Debtors' cash balance of approximately \$28 million. However, if the additional collateral was posted for the benefit of the Debtors, the Court was not informed that by granting the Order, it would be permitting Wells Fargo to remove pledged collateral, which collateral was necessary to protect the Debtors' cash balances not otherwise protected by the FDIC.⁴

38. Another factor not known to the Court when it granted the Order was that it is not likely that the Debtors will bear the cost of bonding the Debtors' cash balances as the cost of a bond will be at least \$250,000.00. *See* Masumoto Declaration, ¶ 4-5. At the time of the hearing, the Court directed the Debtors to investigate the possibility of securing a bond to protect the cash deposits, thus impliedly indicating a concern as to the protection of those funds.

39. Even if a loan covenant requires the Debtors to maintain their accounts at Wells Fargo, given the availability of Authorized Depositories in the Southern District of New York willing to pledge collateral to protect funds held on behalf of bankruptcy estates, it may be unwise to require the Debtors to maintain their accounts at a bank that is unwilling to provide the basic protection required by Section 345(b).

40. In sum, it appears that at the time the Court granted the Order, it had not been provided with specific relevant information regarding such things as the amount of collateral posted by Wells Fargo, whether the granting of the Order would result in a withdrawal of

⁴At the present time, there is not sufficient information regarding the Debtors' accounts at Wells Fargo to determine to what extent the accounts are currently covered by the FDIC insurance coverage.

collateral as opposed to posting additional collateral, the exact nature of the bank accounts in Wells Fargo, the cost to the Debtors to obtain a bond, and the existence of any FDIC protections of the Debtors' accounts. If that relevant information had been provided to the Court, it appears likely that the Court, which evidenced a strong concern over the safety of such funds, may have reached a different conclusion.

CONCLUSION

Based on the foregoing, the Court should grant the United States Trustee's Motion for Reconsideration of the Court's Final Order, and eliminate the provision in the Final Order allowing Wells Fargo not to collateralize the Debtors' cash balances and should direct that the collateralization requirements set forth in Section 345(b) should be followed, without exception.

WHEREFORE the United States Trustee respectfully requests that this Court issue an order modifying the Final Order and granting such other relief that this Court deems appropriate.

Dated: New York, New York
February 17, 2009

Respectfully submitted,

DIANA G. ADAMS
UNITED STATES TRUSTEE

By: /s/ *Brian S. Masumoto*
Trial Attorney
33 Whitehall Street, 21st Floor
New York, New York 10004
Tel. No. (212) 510-0500
Fax. No. (212) 668-2255