

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

In Re:	§	Chapter 11
	§	
TMT USA SHIPMANAGEMENT LLC, <i>et al.</i> ,	§	Case No. 13-33740
	§	
Debtors.	§	Joint Administration Requested

**SHANGHAI COMMERCIAL & SAVINGS BANK’S OBJECTION TO DEBTORS’  
EMERGENCY MOTION FOR AN ORDER (I) AUTHORIZING THE DEBTORS TO  
USE CASH COLLATERAL OF EXISTING SECURED LENDERS, (II) GRANTING  
ADEQUATE PROTECTION FOR USE THEREOF, AND (III) SCHEDULING  
FINAL HEARING**

Without waiver of its right to assert its jurisdictional defenses, which rights were expressly reserved to it by the Court on the record at the hearing held on June 24, 2013, Shanghai Commercial & Savings Bank (“SCSB” or “Shanghai Bank”), a creditor in the jointly administered Chapter 11 cases of TMT USA Shipmanagement LLC and certain of its affiliates (collectively, “TMT”), hereby files its objection (the “Objection”) to *Debtors’ Emergency Motion for an Order (i) Authorizing the Debtors to Use Cash Collateral of Existing Secured Lenders, (ii) Granting Adequate Protection for Use Thereof, and (iii) Scheduling Final Hearing* [Docket No. 13] (the “Motion”) and in support hereof respectfully states as follows:

**PRELIMINARY STATEMENT**<sup>1</sup>

1. For the following reasons, the Debtor’s Motion should be denied:
  - A. The Debtors have failed to prove that the equity cushion, if any, in the respective vessels is sufficient to protect SCSB’s interests in the Collateral.
  - B. The Debtors have failed to prove that they own the cash in the Retention Accounts.

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<sup>1</sup> Capitalized terms utilized but not defined in this preliminary statement shall have the meaning ascribed to them in the Objection.

- C. The Debtors have failed to propose meaningful protections against improper use of SCSB's Cash Collateral to pay the prepetition claims of other creditors.
- D. The Debtors have failed to show that they can operate profitably postpetition.
- E. The Debtors' replacement liens and other Adequate Protection Proposals are insufficient to protect SCSB's interests in the Collateral.

### **BACKGROUND**

2. On June 20, 2013 (the "Petition Date"), the Debtors filed voluntary Chapter 11 petitions for relief.

3. As alleged by the Debtors, A Handy Corporation, B Handy Corporation, C Handy Corporation and B Max Corporation (the "Debtors") were indebted to SCSB on the Petition Date in an aggregate amount not less than \$69.7 million under credit facilities in which Shanghai is the lender or agent for a group of lenders (the "Shanghai Bank Facilities"). Docket No. 15 at ¶ 17. The Debtors each own the A Handy, B Handy, C Handy and B Max vessels, respectively. *See id.*

4. At issuance, the Shanghai Bank Facilities totaled \$79.7 million in the aggregate. *Id.* Each Shanghai Bank Facility is secured by a first priority mortgage on the vessel of the respective Debtor and is further secured by, among other things (i) assignments of earnings, (ii) assignments of charter, (iii) assignments of insurance, and (iv) assignments of requisition compensation by the respective Debtor (together with the Cash Collateral, as defined below, the "Collateral"). *Id.* SCSB is also secured by cash (the "Cash Collateral") held in certain retention accounts (collectively, the "Retention Accounts") established under each of the Shanghai Bank Facilities.

5. The Debtors' records reflect the current balances of the Shanghai Bank Retention Accounts are as follows:

Entity	Retention Account Balance
A Handy Corporation	\$1,210,402.12
B Handy Corporation	\$1,168,742.36
C Handy Corporation	\$1,205,301.31
B Max Corporation	\$1,604,166.81
	<b>\$5,188,612.60</b>

6. On the Petition Date, the Debtor filed its Motion requesting authority to use certain of the Cash Collateral to fund their operations.

7. In connection with its request, the Debtors propose to protect SCSB's interest in the Collateral by (i) providing it with an existing equity cushion, (ii) using the Cash Collateral to maintain the Debtors' going concern value by, among other things, satisfying the prepetition secured claims of certain maritime lien claimants, (iii) granting SCSB a postpetition replacement lien in the accounts receivable of the respective Debtors, subject to a \$2 million Carve Out (as defined in the Debtors' proposed order granting the Motion) for professionals' fees, and (iv) a superpriority administrative claim, subject only to the \$2 million Carve Out (collectively, the "Adequate Protection Proposal").

8. The Debtors have the burden of proving that their Adequate Protection Proposal is in fact adequate to protect SCSB's interest in the Collateral. 11 U.S.C. § 363(p)(1).

### **OBJECTION**

9. SCSB objects to the Debtors' proposed use of the Cash Collateral because the Debtor's Adequate Protection Proposal is insufficient to protect SCSB's interest in the Collateral, as demonstrated below.

**A. The Debtors have failed to prove that the equity cushion, if any, in the respective vessels is sufficient to protect SCSB's interests in the Collateral.**

10. Courts have questioned the equity cushion theory of adequate protection and recognize that the theory is not totally persuasive. *See, e.g., In re Westchester Avenue Marina Realty, Inc.*, 124 B.R. at 166 (citing *In re Lane*, 108 B.R. 6 (Bankr. D. Mass. 1989)). This is especially true where, as here, the vessels securing SCSB's claims are wasting assets that are continuously depreciating in value with time and use and "the debtor has offered no additional payments...." *Id.*

11. If the Debtors do in fact enjoy an equity cushion, SCSB is entitled to postpetition interest on account of its secured claims. Yet nowhere in the Debtor's Adequate Protection Proposal do the Debtors propose to make *any* additional payments to SCSB, much less the full debt service to which it is entitled under the Shanghai Bank Credit Facilities or the postpetition interest to which it is entitled under 11 U.S.C. § 506.

12. "The mere fact that the Debtor [may enjoy] a so-called equity cushion ... does not mean that the debtor may float on this cushion out of ... troubled waters ...." *In re Westchester Avenue Marina Realty, Inc.*, 124 B.R. 161, 166 (Bankr.S.D.N.Y. 1991).

13. Here, there is no question that the Debtors are in troubled waters. When they filed their bankruptcy cases SCSB had already seized certain of their vessels after they had defaulted under the Shanghai Bank Credit Facilities and SCSB was in the process of seizing others. Many of the Debtors debtor-affiliates were in the same predicament. But the Debtors have failed to demonstrate how any equity cushion in the Collateral will enable them to reverse the misfortunes that have engulfed the shipping industry in general in recent years and the Debtors in particular.

14. Even when an equity cushion exists, "this does not constitute adequate protection

where post-petition interest is accruing, and the debtor is not able to pay expenses as they come due.” *In re Balco Equities Ltd., Inc.*, 312 B.R. 734, 749 (Bankr. S.D.N.Y. 2004) (citing *In re Fortune Smooth (U.S.) Ltd.*, 1993 WL 261478 at \*6 (Bankr. S.D.N.Y. July 6, 1993) (lifting stay “for cause,” notwithstanding an equity cushion of 14.89%)). Again, the Debtors are not in a position to pay their expenses as they come due, as demonstrated by the fact that they have not proposed to pay SCSB’s debt service postpetition.

15. Because the Debtors are no position to pay their expenses as they come due and because the Debtors have made no proposal to make additional payments to SCSB as part of their Adequate Protection Proposal, SCSB’s interests in the Collateral are not sufficiently protected by the Debtor’s proposal.

16. Upon information and belief, the Debtors have not had an appraisal of the fair market value conducted on account of the vessels by a qualified ship broker. Any appraisal provided the Debtor’s in connection with the original financing and construction of the vessels are unacceptable to demonstrate the current fair market value of the vessels in an “orderly liquidation value” scenario or otherwise. Such appraisals are not probative of the current fair market value of the vessels because the appraiser who provided the appraisal never conducted a physical inspection of the vessels. Fair market value takes into consideration the vessels’ ability to produce income, but since such appraisals were provided before the ships were placed into service, there could have been no examination of the Debtors’ books and records to determine its earning capacity.

**B. The Debtors have failed to prove that they own the cash in the Retention Accounts.**

17. To date, the Debtors have failed to carry their burden of proving that the cash in the Retention Accounts belongs to them. As discussed previously, the Retention Accounts were established and funded in connection with the construction and financing of the vessels before

the vessels were placed into service. Accordingly, the funds in the Retention Accounts could not have been earned by the Debtors' operation of the vessels. To the extent the funds in the Retention Accounts do not belong to the Debtors, such funds are not property of the Debtors' estates and cannot be used by the Debtors to reorganize, notwithstanding the Debtors' hold legal title to the property by virtue of the fact such money happens to be held in the Debtors' Retention Accounts. *See* 11 U.S.C. § 541(d).

**C. The Debtors have failed to propose meaningful protections against improper use of SCSB's Cash Collateral to pay the prepetition claims of other creditors.**

18. The Debtors' Motion states that the Debtors intend to use the Cash Collateral to pay prepetition claims that are alleged to be secured by maritime liens. But the Debtors' vague reference to maritime lien claimants leaves the Debtors with virtually unbridled discretion to pay prepetition claims. Maritime liens are "secret liens" because the holder of the lien need not take any action to record or otherwise provide notice of its lien. Furthermore, maritime liens arise upon a creditor's provision of "necessaries" to a vessel. "Necessaries" include a broad range of goods and services that enable a vessel to perform her intended function or mission. Under the Debtor's request for relief, the Debtor has unfettered discretion to determine whether a claimant holds a maritime lien. Because the Debtors should not be given *carte blanche* to write checks to satisfy the prepetition claims of preferred vendors at the expense of SCSB, the Debtors should be prohibited from paying such claims unless they can demonstrate that such claims are claims of a Debtor only (as opposed to a non-Debtor affiliate) that is entitled to a lien. Because the Debtors have failed to propose meaningful restrictions on which claims may be paid with SCSB's Cash Collateral, their Motion should be denied.

**D. The Debtors have failed to show that they can operate profitably postpetition.**

19. While the Debtors have proposed to use Cash Collateral to pay prepetition

maritime lien claims, they have failed to show that after doing so they will have any, much less sufficient, capital to operate the vessels.

20. While the Debtor's latest revenue projections greatly exceed the original budget they proposed, it seems unlikely that they have signed new charters, so SCSB is skeptical of the amount—especially since two of the Debtors' vessels remain arrested. And even if the Debtors could show that they would have enough money to operate the vessels, they have not shown that they could do so profitably.

21. Given the precarious nature of the Debtors' financial position and the likelihood that they will not be able to operate profitably postpetition in an industry that has fallen on hard times, and because there is no indication that the Debtors will be able to do anything more with the Cash Collateral than prolong their slide into a straight liquidation scenario, the Court should deny the Debtors' Motion.

22. If the Court allows the Debtors use of Cash Collateral, the Court should require strict adherence to the Debtor's proposed Cash Collateral budget by requiring that the Debtors not exceed any line item in the Budget by more than five percent (5%) in the given period and prohibit the Debtors from carrying over unused amounts under a line item, including the line item for professional fees, to other line items or to other periods.

23. Additionally, if the Court decides to allow the Debtor use of SCSB's Cash Collateral, the Court should condition the Debtor's use on the Debtors providing SCSB with the following protections, and all other protections to which SCSB is entitled under its Collateral documents:

- proof of proper insurance coverage for the vessels
- information as to the remaining bunkers of the 4 vessels.

- the crew employment contracts and information on outstanding wages for crews.
- information on provisions on board the 4 vessels to see if they require further provisions and supplies
- projected bunker and crew payments and provisions, calculated through July 17
- release of the freight/charter hire Debtors received or shall have received for the shipments on board B Handy and A Handy
- vessels under way shall have sufficient bunker and supplies
- explanation of the purpose of B Max's voyage to Brazil
- a mandate that the vessels turn on AIS systems (which, upon information and belief) one or more of the Debtors have disengaged) to allow the bank to inspect where the vessels are at all times
- information on vessels' chartering, satellite numbers and crew lists for SCSB to verify the vessels' situation from time to time

**E. The Debtors' replacement liens and other Adequate Protection Proposals are insufficient to protect SCSB's interests in the Collateral.**

24. The Debtors are requesting permission to use approximately \$4 million of SCSB's Collateral to pay the claims of other creditors. In return, they offer to adequately protect the bank's interest in that Collateral by granting the bank replacement liens in the Debtors' accounts receivable, but under the Debtor's proposal those replacement liens will be subject to a Carve Out equal to fifty percent (50%) of the value of the Collateral for payment of professional fees.

25. Likewise, the Debtors offer to grant SCSB a superpriority administrative expense claim to protect any diminution in value of the bank's Collateral but that superpriority status would also be subject to the \$2 million Carve Out.

26. By making the replacement liens and superpriority administrative claims subject to the Carve Out, the Debtors have drastically reduced the protection such measures would otherwise afford the Bank.

27. There is no legal support for a Carve Out, and SCSB does not consent to a Carve Out. Shanghai Bank is entitled to superpriority administrative expense claim to the extent of any diminution in the value of its Collateral and at this stage, given the uncertainty surrounding asset valuation, it is inappropriate to consider such a request, especially in an amount so large.

WHEREFORE, SCSB requests that the Court enter an order denying the Debtors' request to use cash collateral and granting SCSB such other and further relief as the Court deems just.

Dated: June 27, 2013

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that, on June 27, 2013, the foregoing *Objection* was served via the Court's ECF system on all parties entitled to receive electronic notice in these cases, including counsel for the Debtors, the United States Trustee and all parties who have filed a notice of appearance requesting such service, as indicated below:

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