UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE SIXTH CIRCUIT

In re: CHIEFTAIN STEEL, LLC, *et al.* Debtors.	BAP No. 19-8005 Appeal From U.S. Bankruptcy Court Western District of Kentucky – Bowling Green
DINSMORE & SHOHL LLP, BINGHAM GREENEBAUM DOLL LLP, FOX ROTHSCHILD LLP, and PHOENIX MANAGEMENT SERVICES, LLC Appellants, v. UNITED CUMBERLAND BANK Appellee.	Originating Case Information Case No. 16-10407 Chapter 11 Hon. Joan A. Lloyd

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF KENTUCKY

APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to 6th Cir. R. 26.1, Appellants make the following disclosures:

1. Is Dinsmore & Shohl LLP a subsidiary or affiliate of a publically owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is Bingham Greenebaum Doll LLP a subsidiary or affiliate of a publically owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

3. Is Fox Rothschild LLP a subsidiary or affiliate of a publically owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

4. Is Phoenix Management Services, LLC a subsidiary or affiliate of a publically owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

5. Is there a publically owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellants – three law firms and a professional financial advisor which were denied payment of their professional fees through what should have been the customary and regular use of a carve-out of certain collateral in a bankruptcy case – request that the Court hold oral argument in this appeal. The Appellants believe that the Court will be best served if the issues on appeal are subject to direct questioning by the panel given the significance of enforcing carve-outs.

JURISDICTIONAL STATEMENT

This is an appeal by Appellants Dinsmore & Shohl LLP ("Dinsmore"), Bingham Greenebaum Doll LLP ("BGD"), Fox Rothschild LLP ("Fox"), and Phoenix Management Services, LLC ("Phoenix" collectively, the "Professionals") from the *Memorandum Opinion* and *Order* [Docket No. 424] (the "Opinion") entered on March 13, 2019 by the United States Bankruptcy Court for the Western District of Kentucky (the "Bankruptcy Court"). The Opinion constitutes a final judgment. The Bankruptcy Court had jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334 and the matter is a core proceeding under 28 U.S.C. § 157(b). Furthermore, the confirmed Plan provided that the Bankruptcy Court retained jurisdiction over the matters raised by the Professionals. [Docket No. 249-1 § 13.02]. The Professionals timely filed their Notice of Appeal from the Court's Opinion and *Order Denying Professionals' Motion to Compel Turnover And Payment Of Carve-Out Held By United Cumberland Bank* [Docket No. 425] on March 26, 2019. This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 158(a)(1).

STATEMENT OF ISSUES

Should UCB be compelled to turn over the allowed Professionals' fees pursuant to the terms of the Carve-Out contained in the Interim Cash Collateral Orders and the Amended Plan of Reorganization?

STATEMENT OF THE CASE[1]

United Cumberland Bank ("UCB") admits that it has already collected $141,977.37 from a reorganized, and now insolvent, debtor. Nevertheless, UCB refuses to honor the terms of a carve-

[1] The facts set forth in this section are all contained in the documents identified in the Amended Designation, Statement of Issues on Appeal [Docket No. 429].

out ("Carve-Out") of the proceeds of its collateral, which were reserved for the Professionals' exclusive benefit.

On May 2, 2016, Chieftain Steel, LLC filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and commenced this chapter 11 bankruptcy case. On May 20, 2016, the Office of the United States Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") [Docket No. 52]. On June 24, 2016, the Bankruptcy Court entered orders authorizing the Committee to retain BGD and Fox as the Committee's counsel [Docket Nos. 83 and 84]. On July 20, 2016 the Bankruptcy Court entered an order authorizing the Committee to retain Phoenix as the Committee's financial advisor [Docket No. 92]. On August 22, 2016 the Bankruptcy Court entered an order authorizing Chieftain Steel, LLC to retain Dinsmore as its counsel [Docket No.109]. On September 9, 2016, Floyd Industries, LLC (together with Chieftain Steel, LLC, the "Debtors") filed its own voluntary petition for relief under chapter 11 of the Bankruptcy Code. Floyd Industries, LLC's resulting chapter 11 bankruptcy case was jointly administered with Chieftain Steel, LLC's bankruptcy case [Docket No. 124].

On July 8, 2016, the Bankruptcy Court entered the *Agreed Order (I) Authorizing Debtor to Utilize Cash Collateral of Prepetition Lender; (II) Granting Adequate Protection to Prepetition Lender Pursuant to 11 USC. §§ 105, 361 And 363; and (III) Providing Notice of Final Hearing* [Docket No. 91] (the "First Interim Cash Collateral Order"). The First Interim Cash Collateral Order provides for the Carve-Out in an amount to be determined later.

On August 4, 2016, the Bankruptcy Court entered the *Second Agreed Order (I) Authorizing Debtor to Utilize Cash Collateral of Prepetition Lender; (II) Granting Adequate Protection to Prepetition Lender Pursuant to 11 USC. §§ 105, 361 and 363; and (III) Providing Notice of Final Hearing* [Docket No. 101] (the "Second Interim Cash Collateral Order"). The Second Interim

Cash Collateral Order requires UCB to set aside $20,000 per month for Dinsmore and $20,000 per month for the other Professionals. Specifically, the Second Interim Cash Collateral Order states:

> Payment of any amounts on account of the Post-Petition Replacement Liens, the United Cumberland Pre-Petition Indebtedness, and the United Cumberland Pre-Petition Liens, shall be subject and subordinate to payment of the Carve-Out. For purposes of this Agreed Order, the Carve-Out shall mean (i) any, fees, costs, disbursements, charges and expenses (as allowed by the Bankruptcy Court) of attorneys, accountants and other professionals of (x) the Debtor retained in the Chapter 11 Case pursuant to Sections 327, 328, 330, 331 and 1103 of the Bankruptcy Code and (y) the Committee; provided, however, that the aggregate amount of the Debtor's fees, costs, disbursements, charges and expenses entitled to priority as part of the Carve-Out under clause (i) above shall not exceed $20,000 per month and the Committee's fees, costs, disbursements, charges and expenses entitled to priority as part of the Carve-Out under clause (i) above shall not exceed $20,000 per month. The Debtor shall pay the Carve-Out as funds permit without causing an overdraft.

(Second Interim Cash Collateral Order § 9(a)). Each of the subsequent 11 Interim Cash Collateral Orders entered in the bankruptcy cases also provided for the Carve-Out. [*See* Docket Nos. 111, 113, 129, 139, 147, 175, 177, 197, 198, 219, and 245]. On April 17, 2017 the Court entered the Final Cash Collateral Order which included the Carve-Out up to any amount approved by the Bankruptcy Court. [Docket No. 246]. Each of the Cash Collateral Orders was negotiated, and agreed to, by UCB.

Further, each of the Cash Collateral Orders made all of UCB's liens and claims "subject to" the above Carve-Out. For example, Sections 5 and 6 of the First Interim Cash Collateral Order provide:

> 5. Subject to the Carve-Out, United Cumberland's post-petition liens on the post-petition collateral of the Debtor shall at all times be senior to the rights of all other persons, including, without limitation, the Debtor and any successor trustee in this case or any subsequent case under the Bankruptcy Code.

> 6. Subject to the Carve-Out, in the event that the adequate protection granted to United Cumberland hereunder fails to adequately protect United Cumberland's interests in the cash collateral, the United Cumberland Pre-Petition Collateral and/or the post-petition collateral, United Cumberland is hereby granted, without further order of the Court, an administrative expense claim which shall have priority of the kind specified in section 507(b) of the Bankruptcy Code over any and all administrative expenses of the kind specified in section 507(a)(1) of the Bankruptcy Code.

(Final Cash Collateral Order, §§ 5-6).

On April 18, 2017, the Debtors filed the *Second Amended Plan of Reorganization* [Docket No. 249-1] (the "Plan"). The Plan recognizes the Carve-Out and states that the Professionals' fees will be paid in full when awarded by the Bankruptcy Court, specifically:

> [H]olders of Professional Fee Claims shall receive Cash in an amount equal to the allowed amount of their respective Bankruptcy Court-approved Professional Fee Claims. . . Any award by the Bankruptcy Court shall be paid in full in such amounts as are Allowed by an Order of the Bankruptcy Court, *first*, from any Carve-Out amounts held in escrow by an Entity asserting such Professional Fee Claim and, *second*, if Carve-Out amounts held by the Entity are exhausted, the Professional Fee Claim will be payable as soon as practicable, and in any event within forty-five (45) days' of entry of an order approving the Professional Fee Claim."

Plan § 3.05 (emphasis in original).

On May 24, 2017, the Bankruptcy Court entered the Confirmation Order confirming the Plan. On August 9, 2017, pursuant to the Plan and Confirmation Order, the Bankruptcy Court entered an *Order Granting Agreed Motion with Respect to Pending Fee Applications* [Docket No. 303] (the "Committee's Professionals' Fee Order") which authorized the allowance and payment of: (1) BGD's fees and expenses in the amounts of $126,247.88 and $603.74, respectively; (2) Fox's fees and expenses in the amounts of $25,612.38 and $535.69, respectively; and (3) Phoenix's fees and expenses in the amounts of $41,658.69 and $32.10, respectively.

On August 10, 2017, pursuant to the Amended Plan and Confirmation Order, the Bankruptcy Court entered an *Order Granting Final Application for Compensation for Ellen Arvin Kennedy and Dinsmore & Shohl LLP* [Docket No. 306] (the "Debtor's Counsel's Fee Order," and together with the Committee's Professionals' Fee Order, the "Fee Orders") which authorized the allowance and payment of Dinsmore's fees and expenses in the amounts of $296,476.00 and $5,178.15, respectively.

Following entry of the Committee's Professionals' Fee Order, the reorganized Debtors made partial payments to BGD which BGD shared with its co-professionals to the Committee. However, the timing and amount of these payments were far less than what was required under the terms of the Committee's Professionals' Fee Order. As a consequence, on November 15, 2017, BGD wrote the reorganized Debtors' counsel, requesting that the reorganized Debtors pay past due fees. [*See* letter dated November 15, 2017 Docket No. 409-2]. The reorganized Debtors have not made any payments to BGD since that date. Currently, BGD is owed not less than $83,728.00 from the carved-out funds in UCB's control. Fox and Phoenix are owed not less than $37,962.48 collectively.

Following the entry of the Debtor's Counsel's Fee Order, the reorganized Debtors made partial payments to Dinsmore. However, the timing and amount of these payments were far less than what was required under the terms of the Debtor's Counsel's Fee Order. Currently, $180,646.47 remains unpaid from Dinsmore's judicially approved fees. Of this amount, $105,717.00 should be paid by UCB under the terms of the Carve-Out.

In the meantime, UCB collected at least $141,977.37 in proceeds of its collateral and may yet collect hundreds of thousands or millions more from the sale of mortgaged real estate and

distributions in the Pennyrile Bankruptcy Case. [*See* Docket No. 416-1 ¶ 4].At the same time, UCB has ignored the Carve-Out it agreed to with the Professionals.

On May 7, 2018, BGD and Dinsmore jointly wrote Scott Bachert, counsel to UCB, demanding payment of $105,717.00 to Dinsmore and $121,690.48 to BGD for distribution to BGD, Fox, and Phoenix. [*See* Docket No. 409-1 (letter to Bachert)]. Mr. Bachert informed Dinsmore that UCB disagreed with the Professionals' demand.

Under the Plan's terms, the Debtors were reorganized as The Pennyrile Company, LLC ("Pennyrile"). Unfortunately, Pennyrile was unable to pay its debts as they came due and is now a chapter 7 debtor in the case proceeding as *In re The Pennyrile Company, LLC*, chapter 7 bankruptcy case no. 18-10046-jal (the "Pennyrile Bankruptcy Case").

On October 5, 2018, the Professionals filed their *Joint Motion To Compel Turnover And Payment Of Carve-Out Held By United Cumberland Bank* [Docket No. 409] (the "Carve-Out Motion"). After the matter was fully briefed [Docket Nos. 414 & 415], the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") issued its opinion in *E. Coast Miner LLC v. Nixon Peabody LLP* (*In re Licking River Mining, LLC*), 911 F.3d 806 (6th Cir. 2018). The Bankruptcy Court permitted further filing based on that opinion. [Docket Nos. 419 & 422]. Ultimately, the Court denied the Professionals' Motion. [Docket No. 424]. This appeal followed.

STANDARD OF REVIEW

The Bankruptcy Court's legal determinations are reviewed *de novo*. *Darrohn v. Hildebrand (In re Darrohn)*, 615 F.3d 470, 474 (6th Cir. 2010) (citing *Shaw v. Aurgroup Fin. Credit Union*, 552 F.3d 447, 449 (6th Cir. 2009)). *De novo* review means that "the appellate court determines the law independently of the trial court's determination." *Meyer v. IRS* (*In re Myers*), 216 B.R. 402, 403 (B.A.P. 6th Cir. 1998) (internal citations omitted).

The Bankruptcy Court's interpretations of the Cash Collateral Orders, the Plan, and the Fee Applications are reviewed for abuse of discretion. *Licking River Mining*, 911 F.3d at 810 (citing *Harper v. The Oversight Comm.* (*In re Conoco, Inc.*), 855 F.3d 703, 714 (6th Cir. 2017). However, "[t]o the extent the appeal involves review of the entire contract, including statutory construction of provisions of the Bankruptcy Code as applied to the contract, that review is *de novo*." *Id.*

SUMMARY OF ARGUMENT

The Sixth Circuit expressly ruled in *Licking River* that "the carve-out funds pursuant to court order are earmarked for the exclusive benefit of the court-appointed chapter 11 professionals." 911 F.3d at 812. The Bankruptcy Court's Opinion narrowed that holding, determining that the Professionals did not include certain magic words that would enable their Carve-Out to survive Plan confirmation or the subsequent chapter 7 filing, or even restrict UCB from collecting on the very carve-out it negotiated and agreed to.

Yet, the Carve-Out survives Plan confirmation because it was referenced in the Plan itself and referenced in the fee applications awarded by the Bankruptcy court *post-confirmation*. Furthermore, nothing about the debtor's involuntary chapter 7 proceeding affects the Carve-Out approved by the Bankruptcy Court in the chapter 11 action. UCB's improper retention of proceeds of collateral while refusing to pay the Professionals directly violates the Court's Orders. Therefore, UCB's actions to collect sums from the reorganized debtor, Pennyrile, violate the very agreement it negotiated, and it should pay the Professionals their fees as previously agreed.

ARGUMENT

The Bankruptcy Court set a dangerous precedent in denying the Professionals' Carve-Out Motion [Docket No. 424] which, if not reversed, will lead to many more disputes between professionals and creditors to companies in bankruptcy, compromising the effective administration of the bankruptcy process. The Bankruptcy Court ruled that creditors could ignore the terms of

negotiated carve-out provisions absent express language specifically stating that the creditor must pay back funds improperly retained. Moreover, the Bankruptcy Court's Opinion, if affirmed, would require parties to include magic words in cash collateral orders to allow the carve-out to be enforceable post-confirmation, or in a subsequent chapter 7 proceeding. This Court should vacate the Bankruptcy Court's Opinion.

Carve out agreements are required for an effective bankruptcy system. As the Bankruptcy Appellate Panel for the First Circuit explained:

> a 'carve-out agreement' is generally understood to be an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out of its lien position. The carve out is intended to guarantee that a lien or super-priority will not reach certain funds, usually up to a maximum dollar amount, in order that professional fees can be paid. Justification for the carve out has rested upon a general appeal to the needs of the bankruptcy system, not upon the Bankruptcy Code.

Costa v. Robotic Vision Sys. (*In re Robotic Vision Sys.*), 367 B.R. 232, 237 n.23 (B.A.P. 1st Cir. 2007) (internal quotes and citations omitted).

Carve-outs for legal counsel are "a normal and enforceable provision in cash collateral stipulation." *In re Rite Indus., Inc.*, No. B-99-12653C-11G, 2000 WL 33673764, at *4 (Bankr. M.D.N.C. Aug. 16, 2000).[2] These carve-outs are "needed to foster the reorganization process." *In re Evanston Beauty Supply, Inc.*, 136 B.R. 171, 177 (Bankr. N.D. Ill. 1992).

These "needed" and "enforceable" agreements would lose all meaning if creditors could collect on their liens in spite of previously negotiated and agreed to carve-outs. UCB did just that when it collected on its liens which are subordinate to the rights of the Professionals. The Bankruptcy Court ruled that the Debtors were obligated to pay the Carve-Out, not UCB. Yet

[2] Pursuant to 6th Cir. BAP LBR 8014-1(c), unpublished opinions cited in this brief are attached as Addendum A.

permitting UCB to keep these funds undercuts one of the most critical means of ensuring professionals are paid in chapter 11 proceedings.

I. THE CARVE-OUT SURVIVES PLAN CONFIRMATION IN THE CHAPTER 7 PROCEEDING.

Section 363 of the Bankruptcy Code only permits debtors to spend cash collateral with consent of the creditors that have security interests in that cash collateral. UCB consented to the debtors' use of cash collateral after negotiating the interim and final Cash Collateral Orders. These orders are "a kind of consent decree construed for enforcement purposes as a contract." *Ohio Farmers Ins. Co. v. Hughes-Bechtol, Inc.* (*In re Hughes-Bechtol, Inc.*), 225 F.3d 659 (table), 2000 WL 1091509, at *3 (6th Cir. 2000) (citation omitted) (internal quotation marks omitted). "The cash collateral order is not merely a contract formed between two parties. Rather, it is a compromise forged under the auspices of the court, which the court was obliged to reject if it did not serve the purposes of the bankruptcy law." *Id*. at *8.

Many courts even "insist on a carve out from a super-priority status and post-petition lien in a reasonable amount designed to provide for payment of the fees of debtor's and the committees' counsel and possible trustee's counsel in order to preserve the adversary system. Absent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced." *In re Ames Dep't Stores*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990).

The purposes of the Cash Collateral Orders here are to protect UCB's interests in the Debtors' assets, permit the Debtors to operate with funds otherwise secured by UCB, and to ensure the Professionals are paid for their efforts in advancing these essential goals of the bankruptcy process. UCB voluntarily and explicitly made its pre-petition liens, pre-petition indebtedness, and post-petition replacement liens "subject and subordinate to payment of the

Carve-Out." [*See* Final Cash Collateral Order Docket No. 246 p. 7]. UCB explicitly "agreed and consented to" these terms. *Id.* at p. 10.

Yet after Pennyrile was forced into its chapter 7 proceeding UCB began collecting as though it hadn't agreed to make its prepetition and postpetition liens subject to the Carve-Out. Indeed, brazenly ignoring the terms of its agreement, UCB accused the Professionals of seeking "to jump to the front of the line" when the Professionals simply moved the Bankruptcy Court to compel UCB to turn over the Carved-Out sums UCB had improperly collected. [Docket No. 414 p. 4].

The Professionals negotiated the Carve-Out with UCB, yet the Professionals have been denied its protections. Thus, the collective rights and expectations of all parties-in-interest are *sorely* prejudiced. *See In re Ames* at 38. The Professionals diligently worked to protect the interests of their clients, yet UCB refuses to permit their compensation. Other professionals will be reticent to take somewhat risky clients in bankruptcy if creditors are permitted to ignore carve-outs in future actions.

Licking River addressed issues similar to those before the Court here. In that case, attorneys and other professionals for a debtor and its committee of unsecured creditors (the "Licking River Professionals") sought compensation under a negotiated carve-out in a chapter 11 proceeding. *Id.* at 808. The lenders opposed payment to the Licking River Professionals after the proceeding was converted to chapter 7. *Id*. The Sixth Circuit summarized the lenders' argument:

> Essentially, the Lenders contend that the Bankruptcy Code prohibits paying unsecured creditors such as the professionals from cash collateral secured by prepetition liens before paying secured creditors such as themselves, and that a proper interpretation of the Carve-Out does not provide to the contrary.

Id.

The Sixth Circuit found "no merit in the Lenders' arguments." *Id*. Like UCB's position that the Professionals are attempting to "jump in front of the line," the lenders in *Licking River* argued "that any property that came into the bankrupt estate after the conversion to Chapter 7 — presumably including any cash from the sale of assets — cannot be part of the cash collateral used to pay the professionals pursuant to the Carve-Out and should instead be distributed according to normal priority rules, thereby giving the Lenders priority over the professionals." *Id*. at 811. The *Licking River* Court rejected this argument, holding that "nothing in the Carve-Out or the cash collateral order prevents this use of post-conversion cash collateral to pay the professionals. . ." *Id*

The Bankruptcy Court here turns that analysis on its head. Indeed, the Bankruptcy Court noted that the "Sixth Circuit emphasized the wording of the carve-out which repeatedly stated that it provided for the payment of the professionals' fees when allowed 'at any time.'" [Docket No. 424 p. 7]. While here the specific words "at any time" are not found in the Carve-Outs, *nothing* in the Carve-Out, the cash collateral orders, or the confirmed Plan prevents the Carve-Out from being enforced post-confirmation or after the initiation of the chapter 7 action.

Section 1141 of the Bankruptcy Code provides that a plan and the order confirming a plan bind the debtor and the debtor's creditors. 11 U.S.C. § 1141. When a reorganization plan is "approved by the court, it becomes final, is binding upon the debtor, the security holders, and all other interested parties, and must be enforced as written." *Denver & R. G. W. R. Co. v. Goldman, Sachs & Co.*, 212 F.2d 627, 630 (10th Cir. 1954). The confirmed plan "becomes a binding contract between debtor and its creditors and is to be interpreted in accordance with general contract law." *Id.* In Kentucky, every word in a contract "must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument." *Siler v. White Star Coal Co.*, 190 Ky.

7, 12, 226 S.W. 102, 104 (1920).

UCB is bound by the Plan. The Carve-Out UCB agreed to in the Cash Collateral Orders survives Plan confirmation. Indeed, the Plan expressly references payments to the Professionals from the Carve-Outs:

> Any award by the Bankruptcy Court shall be paid in full in such amounts as are Allowed by an Order of the Bankruptcy Court, *first*, from any **Carve-Out** amounts held in escrow by an Entity asserting such Professional Fee Claim and, *second*, if **Carve-Out** amounts held by the Entity are exhausted, the Professional Fee Claim will be payable as soon as practicable,

[Plan § 3.05] (emphasis added).

Neither the Plan, nor the Bankruptcy Code, defines the term "Carve-Out." Rather, the only definition for the Carve-Out is included in the many interim and final cash collateral orders. The Carve-Out must survive confirmation of the Plan in order to give § 3.05 any effect at all. To hold that the Carve-Outs do not survive Plan confirmation would render the very provisions which refer to the Carve-Outs meaningless, or a "mere surplusage." Accordingly, consistent with black letter contract law, the Carve-Out is not extinguished by confirmation.

This interpretation is confirmed in light of the Professionals' fee applications tendered and granted post-confirmation. The professionals moved the Bankruptcy Court to award their fees subsequent to the Plan confirmation. All fee applications specifically highlighted the Carve-Out as grounds for their award. [*See* Docket No. 272, 273, 274 at ¶ 5, Granted in Docket No. 303; *See also* Docket No. 275 at ¶ 10, Granted in Docket No. 306]. Two months *after* confirming the Plan, the Court granted Dinsmore's fee application, ruling:

> Dinsmore is entitled to the payment of the balance of any unpaid fees and expenses awarded pursuant to this Order from the Carve-Out in accordance with the Court's Orders authorizing the use of cash collateral by the Debtor [DE 51, 91, 113, 139, 147, 219, 246]. To the extent that funds from the Carve-Out are depleted, Dinsmore

> is entitled to payment of its remaining unpaid fees and expenses by the Reorganized Debtor.

Docket No. 306 p. 2.

In awarding fees "from the Carve-Out" post-confirmation, the Bankruptcy Court recognized that that Carve-Out necessarily survived confirmation. In light of this, UCB cannot seriously argue that Plan confirmation somehow extinguishes the Professionals' rights to be paid for their work in successfully processing the bankruptcy matter through that confirmation. And UCB did not object to these awards when it had the opportunity to do so. Accordingly, the bargain UCB struck with the Professionals regarding the Carve-Out survives Plan confirmation, and must be enforced.

The Court will not focus in isolation on a particular provision of the Final Cash Collateral Order to fashion an absurd result. *See Hughes-Bechtol*, 2000 WL 1091509, *4 (reversing district court, in part, for its improper focus on particular provisions of the cash collateral order in isolation), *accord Barr v. Charterhouse Grp. Int'l, Inc.* (*In re Everfresh Beverages, Inc.*), 238 B.R. 558, 578 (Bankr. S.D.N.Y. 1999) (refusing to interpret cash collateral order in a manner that "would lead to an absurd and unfair result").

There is no language requiring the Carve-Out to disappear either at confirmation or upon a subsequent bankruptcy action. Moreover, interpreting the Carve-Out to disappear in either instance would be an absurd result, one which is grossly unfair to the Professionals. Indeed, the purpose of the Carve-Out would be defeated if, once the debtor becomes insolvent, the Carve-Out becomes ineffective. The Professionals are entitled to the benefit of their court-approved bargain.

II. UCB MUST BE COMPELLED TO TURN OVER THE CARVE-OUT.

UCB offered several incorrect arguments in its briefing and oral arguments on the Professionals' Motion for Carve-Out. Indeed, at oral argument, UCB claimed that

> [T]here certainly is nothing in any of these orders that would allow the professionals to prime our pre-petition mortgage. Now if there's a replacement lien that's attached to anything, that would have attached to the post-petition accounts receivable and inventory, that would have been the issue of the cash collateral order. The orders do not say in addition we were going to prime the secured creditor's mortgage and security interest on the tangible assets.

November 15, 2018 Hearing Transcript p. 13, 2-9, Docket No. 419-1.

Here, every Cash Collateral Order contains language stating any payment on account of UCB's "Post-Petition Replacement Liens, the United Cumberland Pre-Petition Indebtedness, and the United Cumberland Pre-Petition Liens, shall be subject and subordinate to payment of the Carve-Out." See Cash Collateral Orders at ¶ 9(a). In fact, the Cash Collateral Orders are even more explicit than the cash collateral order in *In re Licking River*. The Sixth Circuit ruled that the lenders' "claims, liens, rights, and benefits" which were "subject and subordinate to the Carve-Out" under the cash collateral order included prepetition liens, though the lenders presented arguments to the contrary. *In re Licking River* at 812. The orders here do not require any interpretation to read into "lien" whether it is prepetition or postpetition.

In its briefing, UCB argued that the Professionals could not seek payment from UCB because the Plan confirmation is *res judicata*. [*See* Docket No. 414 p. 7-8]. Professionals, according to UCB, should have objected to the Plan in order to ensure payment of the carve-out retained by the Plan itself. Of course, this does not follow. The Professionals do not object to the Plan, nor do they believe the Plan is not *res judicata*. Indeed, the original Motion is for *enforcement* of the Plan.

The Bankruptcy Court did not adopt UCB's strained arguments, but instead parsed the language in the Carve-Out, demanding language explicitly permitting the Professionals to hold UCB to its end of the bargain. The key issue the Bankruptcy Court returned to was not so much whether the Carve-Out was still enforceable, but what entity should pay it:

> [there was no] language in the Confirmation Order shifting the responsibility of payment of the Professionals' fees from the Reorganized Debtor to UCB. [Docket No. 424 p. 7-8].
>
> nothing in the Cash Collateral Agreement or the Confirmation Order required payment of the Professionals' fees directly from UCB. [*Id.* p. 10].
>
> The Court has not found, nor has any party directed it to a provision in the Confirmation Order requiring payment directly from UCB. [*Id.* p. 11].
>
> The Court sees nothing in the Second Amended Plan or the Carve-Out that requires payment of the Professionals' fees directly from UCB's collateral post-confirmation. [*Id.* p. 12].

Yet the Court ignored the fact that the entire point and "effect of a carve-out is to allow affected professionals to look to the secured creditor's collateral where otherwise they would not be able to do so." *In re Molycorp, Inc.*, 562 B.R. 67, 76 (Bankr. D. Del. 2017). When bankruptcy professionals negotiate a carve-out with a secured lender in a cash collateral order, the carved-out funds are earmarked for "the exclusive benefit" of the professionals. *See In re US Flow Corp.*, 332 B.R. 792, 798 (Bankr. W.D. Mich. 2005) (quoted with approval in *In re Licking River,* 911 F.3d 806, 812).

In *US Flow*, several related corporations filed chapter 11 cases which were jointly administered. *Id* at 793. The *US Flow* court entered two cash collateral orders which each included a carve-out for the attorneys representing the debtors and the committee. *Id.* at 793, 796. Following entry of the cash collateral orders, the bankruptcy cases were converted to proceedings under chapter 7. *Id.* at 793. The secured creditors, banks which held a first lien position in the debtor's collateral, also held $55,000 subject to a carve-out for the benefit of the bankruptcy professionals. *Id*. The Office of the United States Trustee moved to disgorge the carved-out funds from the banks. *Id.* at 798. The court ruled that the carved-out funds were not property of the debtors' bankruptcy estates, even though the debtors' secured creditors (those same secured

creditors that consented to the cash collateral orders), had not yet remitted payment to the professionals. *Id.* at 798. Critically, the *US Flow* court held that it would be unfair for professionals "to lose their entitlement to the carve-out funds after they relied upon a final nonappealable court order." *Id.* at 797. When presented with an objection that other creditors could benefit from those funds, the *US Flow* court noted that other creditors or parties in interest could have negotiated the carve-out differently. *Id*.

Here, the Cash Collateral Orders explicitly provide for the Professionals to be paid via the Carve-Out. Moreover, UCB's post-petition liens and administrative expense claims are subject to the Carve-Out. UCB consented to the Carve-Out for the Professionals' fees in over a dozen separate Cash Collateral Orders. UCB has collected at least $141,977.37 as the proceeds of its collateral and may recover much more from the sale of the real estate that is mortgaged to it. UCB agreed to "carve-out" from these proceeds funds to pay the Professionals – and no language in the Plan or Bankruptcy Court orders unwound that agreement. To allow UCB to set aside that agreement now would deprive the Professionals the benefit of their bargain and would allow UCB to evade both its own promises and the Bankruptcy Court's orders.

Thus, this Court should not demand language expressly "shifting responsibility" of the Carve-Out to UCB, when to do so would undermine the very purpose of the Carve-Out provision in the first place, i.e., to ensure that professionals essential to the proper function of the bankruptcy process are compensated. The Professionals would not have any right to pursue UCB for payment of the Carve-Out had UCB not collected on debts subordinate to the Professionals' fees. As any of UCB's liens are subject to the Carve-Out, funds UCB collected on those liens must *first* go to the Professionals in the Carved-Out Amounts.

CONCLUSION

The Bankruptcy Court's Opinion and Order should be reversed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all parties registered to receive electronic notice, via notice by the Court's CM/ECF service, on July 31, 2019.

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COUNSEL FOR APPELLANTS

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ADDENDUM A

2000 WL 33673764
Only the Westlaw citation is currently available.
United States Bankruptcy Court, M.D. North Carolina.

In re: RITE INDUSTRIES, INC., Debtor.
In re: POLYCHEM OF GEORGIA, INC., Debtor.

No. B–99–12653C–11G, B–99–12654C–11G.
|
Aug. 16, 2000.

MEMORANDUM OPINION AND ORDER

CARRUTHERS, Bankruptcy J.

***1** THIS MATTER came on for hearing before the undersigned bankruptcy judge on June 15, 2000, in Greensboro, North Carolina upon the Official Committee of General Unsecured Creditors of Rite Industries, Inc.'s Motion to Amend Order, or in the Alternative, For Relief from Order entered January 7, 2000. Charles Ivey and James Talcott appeared on behalf of Rite Industries, Inc., and Polychem of Georgia, Inc., (the "Debtors"), Christine Myatt appeared on behalf of the unsecured creditors' committee of Rite Industries, Inc., John Northern appeared on behalf of the unsecured creditors' committee for Polychem of Georgia, Inc., Christopher Strickland and John H. Small appeared on behalf of GE Capital Corporation ("GECC") and Robyn Palenske appeared on behalf of the Bankruptcy Administrator. After hearing the arguments of counsel and reviewing the briefs submitted, the Court makes the following:

FINDINGS OF FACT

The above captioned Debtors filed Voluntary Petitions for Reorganization under Title 11, Chapter 11 of the United States Bankruptcy Code on November 12, 1999. Upon the filing of the Petitions, the Debtors continued the operation of their businesses until substantially all assets of the Debtors' businesses were sold at a closing taking place on December 30, 1999. The cases were administratively consolidated by Order dated November 19, 1999.

On or about November 12, 1999, the court preliminarily approved a post-petition financing agreement between Debtors and GECC. On December 17, 1999, the court conducted a final hearing on the motion filed on November 12, 1999, pursuant to 11 U.S.C. §§ 361, 363 and 364, for Debtors to incur post-petition secured indebtedness and to grant a security interest and priority, and to authorize limited use of cash collateral and to provide adequate protection (the "DIP Motion"). On January 7, 2000, the court entered a Final Order allowing the DIP Motion. The Final Order provided for a carve-out for the payment of qualified fees and expenses of the professionals employed by the Debtors, up to a maximum aggregate amount not to exceed $300,000.00, and a separate, limited allowance for the payment of qualified fees and expenses of the professionals employed by the committees up to an aggregate amount not to exceed $25,000.00. Pursuant to a consent order entered on February 23, 2000, GECC agreed to pay all of the fees and expenses which were allowed by the court for compensation of professionals employed by the Debtors and the committees and by virtue of that order, the professionals for the committees were paid in excess of $25,000.00. It was further agreed that the Motion to Amend the January 7, 2000 Order would be heard at a later date.

For the reasons stated herein, the Motion to Amend, or in the Alternative, for Relief from the Order of January 7, 2000, will be denied.

ISSUE

The issue before the court is whether the funds advanced pursuant to the post-petition loan documents and earmarked for professionals under the carve-out should be distributed pro-rata to all outstanding and unpaid administrative claimants.

DISCUSSION

***2** At the time that the Debtors filed for Chapter 11, the Debtors were not intending to seek to reorganize, rather the Debtors wanted to sell the assets of the businesses. The Debtors did not have sufficient monies to continue to operate the businesses and the major secured creditor in the case, GECC, was undersecured. The creditor agreed to advance the sum of $3,000,000.00 to the Debtors as the creditor believed that it could recoup more of its loan if the Debtors were sold as ongoing concerns rather than liquidated. Therefore, GECC and the Debtors petitioned the court to approve DIP financing in the amount of $3,000,000.00. The court, after appropriate

notice, approved the post-petition loan under 11 U.S.C. § 364(c). Section 364 provides that a court may authorize a debtor to obtain credit or incur debt with priority over any or all administrative expenses specified in §§ 503(b) or 507(b). *See* 11 U.S.C. § 364(c)(1). The Debtors were allowed to borrow monies post-petition and, in exchange, gave the creditor a first priority lien on certain post-petition assets. GECC essentially agreed to fund the payment of attorney fees from its collateral and also to pay certain budgeted items, but the carve-out for professional fees will not be diluted by other unpaid administrative claims.

The purpose of the requested financing pursuant to the DIP Credit Agreement was to provide ongoing working capital to the Debtors and to pay, pursuant to court orders, fees, costs, expenses and disbursements to professionals retained by the Debtors and any official committees appointed by the court. The Final Order specifically states that, pursuant to §§ 363(e), 364(c)(1) and 364(d) of the Bankruptcy Code the post-petition loan had priority over any and all administrative expenses including, without limitation, those specified in §§ 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), (b), 553 and 726 of the Bankruptcy Code. As security for such post-petition obligations, the creditor was awarded a first priority senior security interest in the collateral and a lien upon all existing and after-acquired property of the Debtors of whatever kind or nature (exclusive of any avoidance actions available to the bankruptcy estate of the Debtors pursuant to §§ 544, 545, 547, 548, 549, 550, 553(b) or 724(a) of the Bankruptcy Code). Funds could only be released pursuant to an agreed upon budget with carve-outs for legal fees and expenses for the Debtors' counsel in an aggregate amount not to exceed $300,000.00 and for the unsecured creditors' committees in the aggregate amount not to exceed $25,000.00. The fees for legal expenses were segregated and held in an escrow account pending approval by the court. [1]

The committees now contend that the total amount allocated to legal fees, $325,000.00, should be used to pay all cost of administration claims and that the court "may not permit GE Capital to usurp the Court's authority to determine which administrative claims should be allowed and how the property of the estate should be disbursed." (Supplemental Mem. By Polychem Committee in Supp. of Mot. to Amend at 9.) The statement overlooks the fact that the post-petition financing agreement which was approved by the court, after notice and hearing, altered the normal priority scheme set forth in the Bankruptcy Code and granted the post-petition lender super-priority and that the court approved the terms and conditions of the loan including the carve-out provisions for professionals.

***3** A carve-out is an agreement by a creditor holding a secured or super-priority claim to earmark funds for payment of estate professionals whose claims would ordinarily have a lower priority. *See BII, Inc. v. Chapter 7 Trustee for IBI Sec. Serv., Inc. (In re IBI Sec. Serv., Inc.),* 133 F.3d 205, 208 n. 4 (2d Cir.1998)(citing 3 COLLIER ON BANKRUPTCY ¶ 364.04[2][d] (Lawrence P. King ed., 15th ed. rev.1997)).

In *In re American Resources Management Group,* 51 B.R. 713 (Bankr.D.Utah 1985), a lender agreed to post-petition financing under § 364. The terms of the financing included permission to use cash collateral for certain administrative expenses, including professional fees. The agreement provided for the payment of reasonable, necessary fees and expenses of the trustee and debtor's counsel and the reasonable and necessary costs of legal and accounting fees for the creditors' committee. *See id.* at 716 n. 5. A dispute arose when counsel for the creditors' committee requested to be paid more than the $15,000.00 allocated under the agreement. *See id.* at 718. The court ruled that the committee was limited to the $15,000.00 provided for in the agreement since the creditor could selectively waive its lien in this manner and the committee had not objected to the terms of the agreement. The court found that the unequal treatment of similarly situated creditors was warranted given that, otherwise, the estate, the creditors' committee and the trustee would be without the assistance of counsel. *See id.* at 721–22. The court reasoned that the post-petition loan was not freed from the creditor's lien to become part of the estate but rather that the creditor had agreed "that the trustee could make use of its cash collateral, so long as one such use was to pay the professional fees up to the stipulated maximums." James S. Cole, *The "Carve Out" from Liens and Priorities of Guarantee Payment of Professional Fees in Chapter 11,* 1993 Det. C.L.Rev. 1499, 1529 (1993)(discussing *In re Am. Resources Management Group,* 51 B.R. 713 (Bankr.D.Utah 1985)); *see also Official Unsecured Creditors' Comm. V. Stern, (In re SPM Manufacturing Corp.),* 984 F.2d 1305 (1st Cir.1993) (court held that where the secured creditor agreed to make payments to professionals out of the proceeds of its collateral, the creditor may provide for the payment of certain administrative claims and not others). Similarly, GECC and the Debtors entered a post-petition financing agreement under which the Debtors could make use of GECC's cash collateral, so long as it was used in part to fund the carve-outs for professional fees up to $325,000.00.

It is the contention of the committees that the funds are property of the estate and are available for distribution to all administrative claimants. The creditors' committees are asking that they be permitted to share in the $325,000.00 carve-outs as if they were § 506(c) expense awards. The creditors' committee argues that whether the professional fees are to be funded by post-petition financing, or by recovery of § 506(c) expenses, the result should be the same and that if there are insufficient funds in the estate to pay all of the allowed administrative expenses, the parties are required to share the funds of the estate on a pro-rata basis with the other administrative claimants. The creditors' committees further contend that while a creditor may limit the amount of monies that it chooses to loan the debtor on a post-petition basis, the creditor may not control the allocation of the monies in a manner that conflicts with the statutory priority and distribution section of the Bankruptcy Code. In support of this contention, the committees submitted case law supporting the proposition that monies that come into the estate under § 506(c) should be distributed on a pro-rata basis to all cost of administration claimants if there are insufficient funds available for payment in full. *See Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.),* 26 F.3d 481 (4th Cir.1994); *In re Debbie Reynolds Hotel & Casino, Inc.,* 238 B.R. 831 (9th Cir.1999); *In re Ben Franklin Retail Stores, Inc.,* 210 B.R. 315 (Bankr.N.D.Ill.1997).

***4** " 'Generally, administrative expenses are paid from the unencumbered assets of a bankruptcy estate rather than from secured collateral.' Section 506(c) codifies a common law exception to this general rule." *Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & L Lakeland, Inc.),* 128 F.3d 203, 207 (4th Cir.1997)(citing *JKJ Chevrolet,* 26 F.3d at 483). Section 506(c) provides, "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). However, § 506(c) is not applicable in the instant case.

First, while it is true that § 506(c) expenses that come into the estate are distributed on a pro-rata basis among administrative claimants, the court does not have before it an application for § 506(c) expenses. Moreover, rulings by the United States Supreme Court and the Fourth Circuit Court of Appeals make it clear that only the trustee and the debtor-in-possession have standing to ask a court for § 506(c) expenses for any party involved in a bankruptcy proceeding. *See Hartford Underwriters Ins. Co. v. Union Planter Bank, N.A.,* 120 S.Ct. 1942 (May 30, 2000); *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.),* 26 F.3d 481 (4th Cir.1994)(only the trustee and/or the debtor-in-possession have standing to ask a court for § 506(c) expenses for any party involved in a bankruptcy proceeding).

Second, the post-petition financing agreement between the Debtors and GECC was executed pursuant to § 361, 363 and 364 and granted GECC a super-priority lien pursuant to § 364. GECC consented to the carve-out of $300,000.00 for the Debtors' professionals and $25,000.00 for the professionals of the creditors' committees from the proceeds of the its § 364 super-priority post-petition financing. The DIP Financing Agreement specifically states that GECC will have priority over any § 506(c) expenses. The court finds that the carve-out funds at issue are completely separate from any § 506(c) expenses and the court disagrees with the contention of the committees that distribution scheme of the carve-out funds is analogous to the distribution of § 506(c) expenses such that the monies designated for the payment of professional fees, an amount not to exceed $325,000.00, is available for distribution to all administrative claimants.

Counsel "carve-out" fees are "a normal and enforceable provision in cash collateral stipulation." *Harvis Trien & Beck, P .C. v. Fed. Home Loan Mortgage Corp. (In re Blackwood),* 153 F.3d 61, 67 (2d Cir.1998); *see also BII, Inc.,* 133 F.3d at 208 n. 4 and *In re Augie/Restivo Baking Co., Ltd.,* 64 B.R. 236, 239 (Bankr.E.D.N.Y.1986). The terms of the carve-out were approved by the court and the court is unwilling to alter those terms. It would be unfair to now permit funds that were carved out for professionals to be obtained by other competing cost of administration creditors. While it may seem unfair to other cost of administration creditors, as the Supreme Court stated in *Hartford,* "[T]hey may insist on cash payment, or contract directly with the secured creditor or may be able to obtain a super-priority under § 364(c)(1), (2) or (3) or § 364(d)." *Hartford Underwriters,* 120 S.Ct. at 1950. An administrative claimant may protect his interest before incurring the risk of non-payment, and may be able to seek super-priority status under §§ 364(c)(2),(3) or 364(d). *See id.*

***5** "Negotiated 'carve-outs' have been the subject of various decisions and are viewed as being necessary in order to preserve the balance of the adversary system in reorganization. 'Carve-outs' for fees from super-priority post-petition liens are designated to provide for payment of fees of the debtors and unsecured committee's counsel, trustee's

counsel and other professional persons. 'Carve-outs' are used in order to avoid skewing the necessary balance of debtor and creditor protection needed to foster the reorganization process." *In re Evanston Beauty Supply, Inc.,* 136 B.R. 171, 177 (Bankr.N.D.Ill.1992); *see also In re Ames Dept. Stores, Inc.,* 115 B.R. 34, 38 (Bankr.S.D.N.Y.1990). Counsel for the unsecured creditors was unable to reach a "negotiated" carve-out agreement with GECC and opposed the Motion for Confirmation of the Sale and Approval of the Financing Order Pursuant to § 361 and § 364. The court, after a full hearing as to all the issues approved the Debtors' motion. The court will not now modify its order and find that the post-petition carve-out for professionals in the amount $300,000.00 and $25,000.00 for counsel for the Debtors and counsel for the unsecured creditors' committees, respectively, should now be shared on a pro-rata basis with all administrative creditors.

Typically attorneys fees are afforded priority under § 507(a)(1), but in some instances they have an even higher priority. In this case GECC agreed to carve-out a portion of the loan proceeds to be used exclusively to pay professionals. This allows the professionals to have the same super-priority as the post-petition lender. It does not mean that the $325,000.00 that was expressly carved-out of the post-petition loan is to be shared by all administrative creditors. A specific dollar amount of the loan proceeds was expressly reserved for each group of professionals and, therefore, the attorneys for the Debtors and the attorneys for the unsecured creditors' committees have priority over all other administrative creditors up to the respective amounts reserved.

CONCLUSION

The post-petition financing agreement was negotiated and bargained for, and only after a hearing was held where arguments of counsel were heard did the court enter a final order approving the financing agreement. The order granted professionals super-priority carve-outs for specific dollar amounts. The priority afforded the professionals exceeds any priority under §§ 506(c) or 507. And the terms of the distribution were specific and not on a pro-rata basis as is required under §§ 506 and 507. The limitation on the super-priority carve-out to counsel for the unsecured creditors' committees does not impair the committees' ability to discharge their statutory functions.

It is therefore ORDERED, ADJUDGED AND DECREED that the Motion to Amend Order, or in the Alternative, for Relief from Order is DENIED.

All Citations

Not Reported in B.R., 2000 WL 33673764

Footnotes

1 A retainer of $100,000.00 was paid, which is included in the total $300,000.00 carve-out for the Debtors' professionals.

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225 F.3d 659
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

In re: HUGHES-BECHTOL, INC., Debtor
OHIO FARMERS INSURANCE, CO., Appellee,
v.
HUGHES-BECHTOL, INC., Appellee,
KEYBANK NATIONAL ASSOCIATION, formerly known as Society National Bank, Appellant.

No. 98-4257, 98-4309.
|
July 27, 2000.

On Appeal from the United States District Court for the Southern District of Ohio.

Before BOGGS and SUHRHEINRICH, Circuit Judges, and POLSTER [*], District Judge.

Opinion

BOGGS, Circuit Judge.

***1** This procedurally involved and factually complicated case arises out of the Chapter 11 reorganization of Hughes-Bechtol, Inc. ("HBI"), an Ohio construction contractor that filed a petition for relief on August 3, 1988. [1] Two adversary proceedings arose out of the HBI bankruptcy action. The bankruptcy court (Judge Waldron) decided *Ohio Farmers Ins. Co. ("OFIC") v. Hughes Bechtol, Inc.* by a June 29, 1990 declaratory judgment and partial summary judgment order. This "*OFIC Litigation* " became final when the bankruptcy court ordered that the adversary proceeding be closed on May 1, 1992. OFIC appealed the bankruptcy court's order and judgment on May 5, 1992, to the federal district court. The bankruptcy court meanwhile applied the summary judgment rationale in the *OFIC* case to a second adversary proceeding that involved the same key parties: *Hughes-Bechtol, Inc. v. Gust K. Newberg Construction, et al.* HBI had instituted the "*Newberg Litigation* " on March 3, 1989, but proceedings were deferred pending the outcome of the *OFIC Litigation.* This second adversary proceeding became final when the bankruptcy court ordered it closed on April 25, 1991, deciding that no issues remained unsettled after the ruling in the *OFIC Litigation.* OFIC appealed that order and judgment on May 3, 1991 to the district court.

The district court (Chief Judge Rice) reviewed the final orders in the *Newberg Litigation* and in the *OFIC Litigation* in separate cases now consolidated on appeal before this court. On August 4, 1993, the district court affirmed in part and reversed in part the bankruptcy court's conclusions of law in the *Newberg* litigation and remanded the proceeding to bankruptcy court for factual determinations made necessary by the disposition of the appeal. Subsequent motions for rehearing were granted. Some five years later, on September 21, 1998, the district court overruled those motions for rehearing and affirmed its August 4, 1993 decision and order, again remanding the case for factual determinations. On September 24, 1998, the district court also affirmed in part and reversed in part the bankruptcy court's conclusions of law in the *OFIC Litigation* and remanded that proceeding to bankruptcy court for factual determinations made necessary by the disposition of the appeal. The KeyBank National Association ("the Bank") timely filed an appeal to the Sixth Circuit on October 19, 1998 as to both the *Newberg* and *OFIC* matters. [2] Because we find the bankruptcy court's interpretation of the cash collateral order at issue in this case more persuasive than the district court's interpretation, we will REVERSE the district court in part, AFFIRM it in part, and REMAND the case to the bankruptcy court.

I

Before HBI filed its chapter 11 petition, the Bank made loans to HBI to fund working capital and equipment purchases. During that time, OFIC provided performance bonds (ensuring completion of work) and payment bonds (ensuring payment to job creditors) to HBI. At the time of HBI's bankruptcy filing, it owed the Bank $2,847,211 in principal and $45,127.37 in interest. HBI estimated that OFIC faced a liability of $3 to $4 million had HBI been unable to complete its projects post-petition. The Bank's pre-petition loans to HBI were secured by an interest in all of HBI's tangible assets, accounts receivable, and sales contract rights. The Bank financing arrangement then in place subordinated the Bank's claim for accounts receivable and other assets to OFIC as to OFIC's performance-bonded projects.

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***2** Faced with financial problems in 1987, HBI looked to the Bank and OFIC for help. Initially, the Bank extended a loan of $400,000 for working capital to HBI on April 1, 1988, contingent on OFIC's loaning HBI $200,000 for additional working capital, which it did. Operating as a qualified debtor-in-possession after its filing for reorganization, HBI later needed further financing for certain of its contracts whose completion would potentially enable effective reorganization of the business. The contracts included projects on which OFIC had issued performance bonds and projects on which no bonds were issued. Only the Bank was willing to provide post-petition financing. Specifically, upon Bankruptcy Judge Waldron's approval of a September 1, 1988 post-petition cash collateral order, the Bank claims that it agreed to a new revolving credit arrangement with HBI and an additional $1,000,000 loan, contingent on the Bank getting a first lien on all accounts receivable. No party ever appealed that order, nor sought modification of or relief from that order. The order represented a compromise agreement among, *inter alia,* HBI, OFIC, the Bank, and a group of unsecured creditors. The cash collateral order is the primary subject of this appeal.

Interpreting the cash collateral order to subordinate OFIC's interests in HBI's assets to its own, the Bank extended further funds to HBI, which allowed HBI to complete successfully its work on construction projects that were in progress. As a result, OFIC never had to honor any of the performance bonds it had outstanding at the time it entered into the cash collateral agreement. After the Bank's additional loans to HBI had gone most of the way toward eliminating OFIC's exposure on the performance bonds, OFIC began to contest the Bank's priority claim on the assets of the HBI estate, saying that the cash collateral order had only given the bank a superior claim to OFIC as to the *post*-petition accounts receivable and that certain trust fund language in some of the contracts precluded the proceeds of those contracts becoming part of the bankrupt's estate.

OFIC's March 13, 1989 complaint requested a determination as to the rights of OFIC and the Bank on ten construction contracts entered into by HBI pre-petition, but completed post-petition. The bankruptcy court's June 30, 1990 summary judgment decision in favor of HBI and the Bank held that: 1) the cash collateral order made the Bank's right to receive contract proceeds superior to OFIC's right; 2) notwithstanding certain trust fund language, all proceeds of construction contracts entered into pre-petition but completed post-petition by HBI were property of HBI's bankruptcy estate; and 3) OFIC was barred by both waiver and estoppel principles from receiving these contract proceeds until HBI's indebtedness to the Bank was fully discharged. On August 27, 1990, HBI moved for an order authorizing release of escrow funds, which the bankruptcy court sustained in a September 25, 1990 order directing that the funds be paid to the Bank.

***3** The district court decisions on appeal here affirmed the bankruptcy court decision in part, reversed it in part, and remanded the cases to the bankruptcy court to determine whether certain funds constituted pre- or post-petition accounts receivable. The September 21, 1998 *Newberg* decision upheld the bankruptcy court's finding that the funds from the Newberg contracts were part of the bankrupt's estate, but concluded that the cash collateral order gave priority to OFIC as to pre-petition accounts receivable. Specifically, the district court held that ¶ 11 of the cash collateral order gave OFIC priority by the plain language of that paragraph. It also denied that waiver or estoppel principles barred OFIC's claim to priority. The September 24, 1998 *OFIC* decision reiterated that the cash collateral order gave OFIC priority, and it also held that three of HBI's contracts with the state of Ohio contained trust language exempting them from inclusion in the bankrupt's estate. The court remanded the proceeding to the bankruptcy court to determine the amounts received by the Bank on the state contracts as well as the amount of pre-petition funds received.

II

"[I]n appeals from the decision of a district court on appeal from the bankruptcy court, the court of appeals independently reviews the bankruptcy court's decision, applying the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law." *In re Century Boat Co.,* 986 F.2d 154, 156 (6th Cir.1993) (citations omitted). We review a bankruptcy court's grant of summary judgment *de novo. See In re Shelton Harrison Chevrolet, Inc.,* 202 F.3d 834, 836 (6th Cir.2000). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

III

The key question in this case is who has priority as to pre-petition accounts receivable. To answer that question we must

determine what effect the cash collateral order had on the security interests of OFIC and the Bank. The bankruptcy and district courts agree that the cash collateral order is a kind of consent decree "construed for enforcement purposes as [a] contract [ ]." *Stotts v.. Memphis Fire Dept.,* 679 F.2d 541, 557 (6th Cir.1982). They disagree as to where construing the order like a contract leads. The principles of contract interpretation as recognized by this court first require looking to the explicit language of, in this case, the cash collateral order for "clear manifestations of intent." *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 654 (6th Cir.1996), *quoting International Union, United Automobile Workers v. Yard-Man, Inc.,* 716 F.2d 1476, 1479 (6th Cir.1983). Further, each provision in question should be interpreted "as part of the integrated whole." *Ibid.* If at all possible, each provision "should be construed consistently with the entire document and the relative positions and purposes of the parties ... [because] [t]he intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion." *Ibid.* In the face of ambiguity, courts should "look to other provisions of the agreement for guidance," always aiming "to settle on an interpretation which is harmonious with the entire agreement." *Golden,* 73 F.3d at 654, *quoting Yard-Man,* 716 F.2d at 1480. While keeping these different principles of interpretation in mind, a review of the courts' and parties' positions will best facilitate consideration of the cash collateral order's proper construction.

***4** In the final analysis, we hold that the district court erred in reversing the summary judgment decision of the bankruptcy court and ruling that the cash collateral order preserved OFIC's pre-petition interests in HBI's accounts receivable over those of the Bank. Instead, the cash collateral order was entered into to encourage post-petition financing for HBI in order to maximize the recovery to all of HBI's creditors. As such, it subordinated OFIC's priority position on pre-petition accounts receivable (as well as its position on post-petition accounts receivable) to the Bank contingent upon the Bank's extending a loan to HBI.

A. The district court's interpretation of the cash collateral order

The district court focused on particular provisions of the order in isolation and found them unambiguous. In particular, the district court read ¶ 11 to be dispositive on the issue of OFIC's subordination rights:

> It is further ordered that the security interest and liens granted herein to the Bank in prepetition property of the debtor or the estate shall be subject to any rights OFIC has as a result of the subordination language regarding accounts receivable on bonded jobs ... issued by the debtor to the Bank.

By the district court's reading, the order could not have stated any more clearly that the Bank's rights were subordinated to OFIC's interest in pre-petition bonded projects. The district court states that the bankruptcy court "ignored the express language of ¶ 11," but it did not respond to the bankruptcy court's interpretation of its own order that ¶ 11 only preserved OFIC's rights vis-à-vis unsecured creditors.

B. The bankruptcy court's interpretation of the cash collateral order

The bankruptcy court interpreted the order as a whole and concluded that "the overall structure and the specific provisions of the Cash Collateral Order result in a determination that OFIC deferred all of its otherwise available claims to the disputed funds until the total indebtedness due [the Bank] was paid." According to the bankruptcy court, the order's broad language in ¶¶ 13, 14, and 21 suggests that *all* funds received by HBI post-petition were to be applied against the indebtedness due the Bank. For example, the court cites ¶ 14, providing that:

> Any and all obligations and liabilities of the debtor and Debtor-In-Possession to the Bank shall have priority in payment over any other debts and obligations now in existence or incurred hereafter by the debtor or Debtor-In-Possession and over all costs and expenses of the administration of this or any subsequent bankruptcy.

This all-encompassing language contains no references to exclusions for debts or obligations owed to OFIC, even

though there clearly were "debts and obligations now in existence" due from HBI to OFIC.

The bankruptcy court interpreted the apparent reservation to OFIC in ¶ 11 of rights to payments from pre-petition bonded contracts to be a reservation vis-à-vis unsecured creditors, not vis-à-vis the Bank. According to the bankruptcy court:

> ***5** It was clear that the Unsecured Creditors' Committee asserted that OFIC's prepetition rights were only the rights of an unsecured creditor. The Cash Collateral Order reflects that all parties agreed that OFIC would retain its prepetition rights involving bonded jobs, provided any indebtedness due [the Bank] under the Cash Collateral Order had been paid.

The bankruptcy court also noted that the terms of disbursement for accounts receivable under the cash collateral order do not correspond to OFIC's maintaining subordination rights against the Bank. Assuming that OFIC maintained rights to payment from its pre-petition bonded projects, it is inconsistent for ¶ 21 to order that "*all* cash received from accounts receivable or other assets of the debtor or Debtor-In-Possession since filing, be and hereby are directed to be placed in appropriate accounts to be maintained at the Bank ... to be applied for debtor and Debtor-in-Possession's obligation to the Bank" (emphasis added). HBI could not give priority to OFIC for monies from accounts receivable relating to pre-petition bonded contracts if it had to turn over *all* cash received from accounts receivable to the Bank. The district court never addresses this question, and it appears that adopting the district court's (and OFIC's) interpretation on appeal would effectively eliminate ¶ 21 from the cash collateral order.

C. OFIC's position on the conflicting lower court interpretations

OFIC embraces the district court's holding, and describes the cash collateral order as an agreement to preserve existing positions on claims to accounts receivable while a final agreement was considered. OFIC claims that it wanted the order to affirm its priority to receive pre-petition receivables before it would agree to allow HBI to give security for new loans (presumably in the form of rights over post-petition receivables). OFIC adds that there was no reason for ¶ 11 to be in the cash collateral order unless OFIC was to retain its priority, but, as the bank argues, that does not preclude interpreting ¶ 11 as giving OFIC a priority vis-à-vis unsecured creditors or as the contingency in the event the Bank had chosen not to lend money to HBI.

OFIC further argues that the Bank would never have agreed to giving up half of the incoming accounts receivable in a proposed compromise if OFIC had already surrendered its rights in the cash collateral agreement itself. OFIC notes that a final agreement was reached in the form of a proposed October 17, 1988 "Motion to Settle and Compromise Controversy" to share contract funds outstanding on HBI jobs in an equal split. The bankruptcy court overruled that motion as unfair to potential recovery for unsecured creditors (though it may be noted that the unsecured creditors argued that only the Bank had a super priority position entitling it to receivables). In that November 16, 1988 decision, delivered only two and a half months after issuance of the cash collateral order, the bankruptcy court held that the subordination language in the Bank's state-filed security agreements "does not apply in light of the 364(c) order and the language in paragraphs 11 and 12 [of the cash collateral order]." The Bank may not have realized the full import of the cash collateral order until the November 16 decision:

> ***6** This court reads the language in 11 and 12 to say that as between the bank and O.F.I.C., to the extent that they both may have had an interest in accounts receivable, O.F.I.C. defers the receipt of its interest in those accounts receivables until the bank no longer has any interest in those accounts receivables, or at the minimum, until the debtor commits a post-petition default and O.F.I.C. declares that post-petition default and the debtor in possession actually stops performance on said job.

Thus, though the Bank appeared willing to compromise away the priority position it had attained via the cash collateral order, the court would not permit it: "[T]he court finds no basis to have the bank surrender its position to receive those

accounts receivable [*sic*] in favor of O.F.I.C. because to do so jeopardizes the potential rights of the unsecured creditors in this case." Although the unsecured creditors have since dropped out of the picture, the bankruptcy court's November 16, 1988 decision still sheds light on the proper interpretation of the cash collateral order. The very fact that the Bank tried to compromise away its priority position indicates that it indeed *had* (and therefore still has in the wake of the invalidated compromise) such a position.

D. The Bank's position on the conflicting lower court interpretations

The Bank contends that the cash collateral order is ambiguous, because its language is reasonably susceptible to more than one interpretation. *See Potti v. Duramed Pharms. Inc.,* 938 F.2d 641, 647 (6th Cir.1991); *see also In re Beta International, Inc.,* 210 B.R. 279, 285 (E.D.Mich.1996) (finding language to be ambiguous where a security interest is defined differently in two supplemental documents). The Bank argues that particular provisions of the order are not clear on their face. For instance, it says that it is not clear from the order itself what is meant in ¶ 11 by "any rights OFIC has as a result of subordination language," because the order neither contains the language nor the law necessary to interpret that language.

On appeal, the Bank also argues that the last sentence of ¶ 12 (recognizing OFIC's retained subordination rights to "all extra work claims resulting from the litigation pending on the Wright Patterson Air Force Base ceramics lab job") would be rendered superfluous if ¶ 11 already recognized retained subordination rights for OFIC in all pre-petition bonded contracts. This sentence's "in any case" phrasing has the ring of something that may have been intentionally superfluous, a kind of hyper-precaution. But the more interesting argument as to ¶ 12 arises from the previous sentence: "Subject to those conditions [that the Bank have priority over post-petition accounts receivable even on jobs bonded by OFIC], OFIC shall have the right to enforce any subordination rights it possesses against remaining accounts receivable on bonded jobs due Debtor-In-Possession upon such terms and conditions to be reached between the Bank and OFIC." Remaining accounts here must refer to *pre*-petition accounts since the Bank has already been awarded, earlier in the same paragraph, a security interest in all post-petition accounts receivable that are not in default. If OFIC's *enforcement* of its subordination rights are subject to terms "to be reached" between OFIC and the Bank, then ¶ 11 did not definitively settle those rights in OFIC. This might also help explain the genesis of the compromise agreement on accounts receivable reached between the Bank and OFIC that the bankruptcy court disapproved in November 1988.

***7** In addition, the Bank suggests that the conflicting views of the bankruptcy court and district court as to the plain meaning of the cash collateral order's terms show that it is ambiguous. Hence, the Bank urges consideration of surrounding circumstances beyond the "four corners" of the order. Ambiguity must be established before looking outside the bounds of the writing, because "where the terms of a written contract are clear and unambiguous the intention of the parties must be found therein, and extrinsic proof tending to substitute a contract different from that evidenced by the writing is inadmissible." *In re Bayer Cadillac, Inc.,* 164 B.R. 450, 452 (Bankr.E.D.N.Y.1994).

In turning to the context in which the order issued, the Bank asks whether OFIC would have agreed to the order as now construed by the Bank, and whether the Bank would have agreed to the order as now construed by OFIC. According to the Bank, "[t]he unrefuted evidence shows that OFIC, because of its contingent liability exposure if HBI completely defaulted, was prepared to give up its priority rights in favor of the Bank in order to obtain the Bank's agreement; however, the Bank was unwilling to provide further financing absent concessions from OFIC" (KeyBank's brief at 31). The Bank believes this circumstance compels the conclusion that its interpretation of the cash collateral order is correct.

The Bank further suggests that one possible way to harmonize the conflicting provisions in the cash collateral order is to interpret ¶ 11 as a contingent reservation of OFIC's rights. Though it is odd (given its plausibility) that neither the bankruptcy court, the district court, nor the Bank's opening brief offered this explanation, it resolves the competing claims of the parties herein quite satisfactorily. According to this view, "Paragraph 11 was meant to preserve OFIC's claimed rights in pre-petition receivables, but such rights were contingent upon certain occurrences, one of which was HBI's complete default due to the Bank's exercise of its discretion to not loan additional funds to HBI post-petition" (KeyBank's reply brief p. 7). In other words, the cash collateral order approved HBI's seeking, but did not mandate the Bank's extending, further financing to HBI. It thus recognized that should the Bank choose not to extend additional financing to HBI, the priority positions of the Bank and OFIC would revert to the status quo ante.

This explanation would also explain why the specific pre-petition reservation to OFIC *precedes* the more general priority rights for the Bank elaborated later in the order; it is not an exception carved out from an earlier broad grant of priority, but rather an affirmance of the existing arrangement should post-petition financing described later not materialize. Had such been the intent of the parties, it should have been more apparent on the face of the order. Moreover, OFIC's brief to the court implicitly rejects that interpretation, because it claims that the cash collateral order gave the Bank priority rights to HBI's post-petition receivables without any obligation on the Bank's part to make post-petition loans. Still, OFIC does not suggest why it would have agreed to the order's giving the Bank post-petition priority in accounts receivable in exchange for nothing, which might well suggest that ¶¶ 11 and 12 were *both* contingent on a loan being made. Though that interpretation is by no means inevitable, it has the virtues of interpreting the order not to give the Bank something for nothing and to give OFIC something useful from the Bank to induce it to yield its priority position.

5. Weighing the arguments

***8** Keeping in mind that this court reviews the bankruptcy court's summary judgment ruling *de novo,* an interpretation of a consent order by the court that entered the order deserves respectful consideration. *Cf. Kendrick v. Bland,* 931 F.2d 421, 423 (6th Cir.1991) (affirming as reasonable a district court's interpretation of the phrase "major violation" in a prison conditions consent decree to mean an institution-wide violation of the order); *Brown v. Neeb,* 644 F.2d at 551, 558 n. 12 (6th Cir.1981) ("Few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it"); *But cf. United States v. Zipkin,* 729 F.2d 384, 389 (6th Cir.1984) ("An order entered by a judge should speak for itself and not be varied by parol testimony as to what was meant by its provisions").

To the extent that the district court took issue with the bankruptcy court's interpreting the cash collateral order to have a purpose in accordance with the policies underlying the bankruptcy laws, those objections were not well founded. The cash collateral order is not merely a contract formed between two parties. Rather, it is a compromise forged under the auspices of the court, which the court was obliged to reject if it did not serve the purposes of the bankruptcy law. For this reason, the bankruptcy court did not stray from the "four corners" of the cash collateral order in interpreting its language in a subsequent controversy; it merely informed its reading of the order by the obvious context of a bankruptcy proceeding. Contrary to the district court, this does not amount to an improper consideration of the parties' intent in acceding to the order.

Moreover, the *Kendrick* and *Brown* courts endorse looking to purpose when construing a consent decree. *See Kendrick,* 931 F .2d at 423; *see also Brown,* 644 F.2d at 557-58. The bankruptcy court properly considered that the object of the cash collateral order was to secure HBI's post-petition financing, and that such financing could be secured only if the priority interests in HBI's receivables were altered to give the Bank a superior priority in all receivables until HBI's debt to the Bank was paid. If the Bank relied in good faith on the bankruptcy judge's approval of the transaction for those purposes, this court should be loath to listen to OFIC's *ex post* objections.

The foregoing review of the interpretations of the lower courts and the parties suggests that the putatively plain language of ¶ 11 is a very thin reed on which to try to lean in overturning the bankruptcy court's decision. This is especially so given that recognizing priority to the Bank serves the purpose of the bankruptcy law to encourage financing of bankrupts, where such financing may enhance the recovery prospects of creditors, and given the burden of proof that rests with OFIC to establish that its reading of the cash collateral order is correct. But, as discussed herein, there are ample other reasons as well, including:

***9** •The all-encompassing language of ¶ 14 appears to give the Bank priority status over OFIC

•The plan for distributing accounts receivable in ¶ 21 accords with priority to the Bank

•¶ 11 could have merely been intended to affirm OFIC's position vis-à-vis unsecured creditors, or to recognize the status quo ante if the Bank had forgone extending a loan to HBI

•Since OFIC would not likely have given up priority to post-petition proceeds on bonded projects for nothing, ¶ 12 (like ¶ 11) was most likely contingent on the Bank extending a loan to HBI

•The bankruptcy court's § 364(c) order negates the language subordinating to OFIC the Bank's interest in the state-filed security agreements

•The practicalities of who would likely have agreed to what interpretation favor the Bank

•External evidence shows that the Bank may have relied in part on OFIC's representations about its understanding of the cash collateral order

•Even if the Bank did not rely on OFIC's representations, it may well have relied on the bankruptcy court's November 1988 decision interpreting the Bank to have priority, at least until OFIC's March 13, 1989 complaint was filed in this case, giving the Bank reason to believe otherwise

To be sure, none of these reasons is a sure winner and some may be questionable, but together they provide adequate support to affirm the bankruptcy court's decision granting priority to the Bank over HBI's pre-petition accounts receivable. That the Bank agreed to a 50/50 split with OFIC on accounts receivable in an aborted post-cash collateral order compromise proves little. OFIC suggests the Bank would have had no reason to agree to that arrangement if it had already gotten priority over pre-petition accounts receivable in the cash collateral order, but if ¶ 11 of the cash collateral order gave OFIC priority then it too would have had no reason to agree to the arrangement. Other considerations must have supported that compromise effort. Perhaps it was just an agreement under uncertainty whereby both parties sought to reduce their exposure. In any event, the weight of the evidence and legal doctrine supports the bankruptcy court's decision recognizing the Bank's priority over pre-petition accounts receivable.

IV

We turn next to whether the district court erred in reversing the summary judgment decision of the bankruptcy court by ruling that revenues received by HBI from three state contracts were excluded from HBI's bankruptcy estate because they were subject to an express trust provision. These three contracts contained, among many general conditions attached in an addenda, Article 17(i), stating:

> All monies paid on account to any contractor for materials or labor shall be regarded as fund in his trust for payment of any and all obligations relating to this Contract and no such amount of monies shall be permitted to accrue to the contractor until all such obligations are satisfied.

***10** OFIC claims that this language created a trust such that any monies received under these contracts could not go to HBI's estate unless and until all materials and labor had been paid. Since OFIC as surety had paid for that labor and materials, it argues that the monies that should have been set aside in trust now belong to it.

To meet its burden of demonstrating the creation of an express trust, OFIC must prove by clear and convincing evidence "a manifestation of intent to create a trust, there must be created a trust corpus, and there must be created a fiduciary relationship between the trustee and beneficiary." *In re Construction Alternatives, Inc.,* 2 F.3d 670, 677 (6th Cir.1993), *citing Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.,* 382 N.E.2d 1155, 1158 (1978); *see also Gertz v. Doria,* 578 N.E.2d 534 (Ohio App.3d 1989) (noting the clear and convincing evidence standard). In arguing that OFIC does not meet its burden, the Bank claims that neither the intent nor the trust corpus element has been met. The intent element was allegedly not met because the trust language was in boilerplate and never was subject to the parties' negotiation. Moreover, HBI disclaimed any knowledge of trust duties having been imposed via the state contracts.

Nor, argues the Bank, has the trust corpus requirement been met. Funds paid under these contracts were paid (and were allowed to be paid even by the terms of Article 17(i)) for general operating expenses incurred under the contract. According to the Bank, the failure to segregate trust funds precludes finding an express trust under the law of this circuit. *See Construction Alternatives, Inc.,* 2 F.3d at 676-77. Moreover, no discrete fund had been created as of the filing date for bankruptcy because no payments had yet been received, so no trust corpus could have existed at that time as necessary to prevent the monies from becoming part of the bankrupt's estate. *See id.* at 677; *see also In re Universal Trend, Inc.,* 114 B.R. 936, 942 n. 3 (Bankr.N.D.Ohio 1990). The fact that no funds had yet been paid to create a trust corpus distinguishes this case from *Federal Ins. Co. v. Fifth Third Bank,* 867 F.2d 330, 331-32 (6th Cir.1989), relied on heavily by OFIC and the district court.

Even if the elements of a trust were satisfied for state law purposes, the Bank argues, that would not necessarily mean

the trust should be recognized for bankruptcy purposes. A bankruptcy court in this circuit has previously declined to recognize a trust because "[a]llowing the subcontractors to receive the funds directly merely by operation of trust provision in construction contracts, in absence of a statute so requiring, ... would effectively allow unsecured creditors unjustifiably to be paid even ahead of secured creditors." *In re William Cargile Contractor, Inc.,* 151 B.R. 854, 859-60 (Bankr.S.D.Ohio 1993). According to the Bank, a debtor's estate should be interpreted broadly under § 541(a), because "to facilitate the rehabilitation of the debtor's business, *all* the debtor's property must be included in the reorganization plan." *United States v. Whiting Pools,* 462 U.S. 198, 203 (1983) (emphasis added). We agree. Thus, even if a trust exists, the money may be subject to inclusion in the bankrupt's estate, because HBI had a legal and beneficial interest in any trust. Contract proceeds that HBI ultimately earned by completing performance on the contracts are part of the bankrupt's estate. *See In re Glover Const. Co., Inc.,* 30 B.R. 873, 881 (Bankr.W.D.Ky.1983) (deeming progress payments due on uncompleted construction projects part of the general contractor's bankruptcy estate notwithstanding two public contracts subject to trusts). In short, OFIC failed to show that the trust was excludable from the bankrupt's estate, and it failed to prove the existence of a trust.

V

***11** Because we uphold the bankruptcy court's interpretation of the cash collateral order, there is no need to reach the question whether OFIC's behavior should have estopped it from asserting a priority superior to the Bank's over HBI's pre-petition accounts receivable.[3] Without treating the waiver and estoppel claims in detail, however, it may be noted that but for OFIC's inducements, the Bank would not have loaned money to HBI. While OFIC may never have agreed to release its rights to pre-petition funds through the Walker letter, it certainly implied at different times that it would or that the cash collateral order meant that it had.

For all of the above reasons, we REVERSE the district court in part, AFFIRM it in part, and REMAND the case to the bankruptcy court for further proceedings consistent with this opinion.

All Citations

225 F.3d 659 (Table), 2000 WL 1091509, 44 Collier Bankr.Cas.2d 1150

Footnotes

* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

1 HBI ceased operations during the district court's consideration of this dispute, and it has not participated in the appeal to this court. The bankrupt estate of HBI has insufficient funds to reimburse both OFIC and the Bank, so the unsecured creditors group cannot recoup anything, and thus no longer has an interest in the outcome of this dispute.

2 Newberg Construction paid its debt to HBI and was not a party to the appeal to the district court. However, Newberg's dropping from the case did not resolve to whom, between OFIC and the Bank, HBI had to deliver the money. KeyBank National Association (f/k/a Society National Bank) intervened in the district court proceeding below.

3 There is no need to reach this issue, though the district court noted that it would have agreed with the bankruptcy court on this point had it agreed with it on the interpretation of the order.

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