UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Adoption of Guidelines for Financing Requests	:	**General Order No. M-274**

By resolution of the Board of Judges for the Southern District of New York; it is resolved that the Guidelines for Financing Requests, annexed hereto, are hereby adopted and are to take effect as of the date of this order.

Dated: New York, New York
September 9, 2002

/s/ Stuart M. Bernstein
STUART M. BERNSTEIN
Chief United States Bankruptcy Judge

GUIDELINES FOR FINANCING REQUESTS

The purpose of this document is to establish guidelines for cash collateral and financing requests under sections 363 and 364 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court"). Although it is recognized that each case is different, the Guidelines are designed to help practitioners identify common material issues that typically are of concern to the Court (at least on the first day of a case and/or where there is limited notice), and to highlight such matters so that, among other things, determinations can be made, if necessary, on an expedited basis.

Substantively, these Guidelines do not purport to establish rules that cannot be varied, but they do require disclosure of the "Extraordinary Provisions," discussed below, that ordinarily will not be approved in interim orders without substantial cause shown, compelling circumstances and reasonable notice.

It will be evident that many of the following guidelines are designed to deal with debtor in possession financing requests documented with a loan agreement and (for want of a better term) a long-form financing order. However, the Court would welcome the use of simplified orders, whenever possible, particularly in smaller cases and in connection with the debtor's use of cash collateral not involving the extension of new funds.

These guidelines are intended to supplement the requirements of sections 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 4001(b) and (c).

I. MOTIONS

A. MOTION CONTENT

1. Single motion.

(a) A single motion may be filed seeking entry of an interim order and a final order, which orders would be normally entered at the conclusion of the preliminary hearing and the final hearing, respectively, as those terms are used in Bankruptcy Rules 4001(b)(2) and (c)(2). In addition, where circumstances warrant, the debtor may seek emergency relief for financing limited to the amount necessary to avoid immediate and irreparable harm to the estate pending the preliminary hearing, but in the usual case, only a preliminary and a final hearing will be required.

(b) If the financing is to be extended pursuant to a loan agreement or similar agreement ("Agreement"), the Agreement should be attached to the motion.

(c) The motion should also include a copy of any proposed order for which entry is sought.

(d) Motions must be double-spaced and in form comply with all applicable rules of the Court.

2. Description of use of cash collateral or the material provisions of DIP financing. The motion should ordinarily contain the following disclosure relative to the use of cash collateral or the financing, either in the text of the motion or in an attached term sheet:

(a) amount of cash to be used or borrowed, including (if applicable) committed amount, maximum borrowings (if less), any borrowing base formula, availability under the formula, and the purpose of the borrowing;

(b) material conditions to closing and borrowing, including any budget provisions;

(c) pricing and economic terms, including interest rates, letter of credit fees, commitment fees, any other fees, and the treatment of costs and expenses of the lender (and its professionals);

(d) collateral or adequate protection provided to the lender and any priority or superpriority provisions, including the effect thereof on existing liens, and any carve-outs from liens or superpriorities;

(e) maturity, termination and default provisions, including events of default, effect on the automatic stay and any cross-default provisions; and

(f) any other material provisions, including any Extraordinary Provisions, as defined in Section II(A), any provisions relating to change of control, and key covenants.

3. Adequacy of Budget. Any motion for new financing or use of cash collateral must also include disclosure by the debtor as to whether it has reason to believe that any budget to which the debtor will be subject under the order will be adequate (in the context of all assets available to the debtor) to pay all administrative expenses due and payable during the period covered by the financing or the budget.

4. Extraordinary Provisions. The motion must disclose prominently whether the financing includes any of the Extraordinary Provisions set forth in section II (A) of these Guidelines, and any accompanying order must also set forth these provisions prominently and conspicuously.

5. Efforts to Obtain Financing. The motion should describe in general terms the debtor's efforts to obtain financing, the basis on which the debtor determined that the proposed financing was on the best terms available, and material facts bearing on the issue of whether the extension of credit is being extended in good faith.

6. Emergency Applications. A motion that seeks entry of an Emergency Order or Interim Order should also describe the amount and purpose of funds sought to be borrowed on an emergency or interim basis and set forth facts to support a finding that immediate or irreparable harm will be caused to the estate if immediate financing is not obtained at a preliminary hearing or on an emergency basis.

B. NOTICE

1. Notice of the hearing on (i) the Interim and (ii) the Final Order shall be given to the persons required by Rules 4001(b)(3) and 4001(c)(3), as the case may be, the United States Trustee and any other persons whose interests may be directly affected by the outcome of the motion or any provision of the proposed order. Notwithstanding the foregoing, emergency and interim relief may be entered after the best notice available under the circumstances; however, emergency and interim relief will ordinarily not be considered unless the United States Trustee and the Court have had a reasonable opportunity to review the motion, the financing agreement, and the proposed interim order, and the Court normally will not approve provisions that directly affect the interests of landlords, taxing and environmental authorities and other third-parties without notice to them.

2. Prospective debtors may provide substantially complete drafts of the motion, interim order, and related financing documents to the Office of the United States Trustee in advance of a filing, and the United States Trustee will hold such documents in confidence and without prejudice to the prospective debtor, and attempt to comment on such documents on or shortly after the filing. Debtors are strongly encouraged to provide drafts of financing requests, including proposed orders, to the United States Trustee as early as possible in advance of filing.

3. The hearing on a Final Order will not commence earlier than 15 days after service of the motion, in accordance with Bankruptcy Rules 4001(b)(2) and 4001(c)(2), and ordinarily will

not commence until there has been a reasonable opportunity for the formation of a Creditors Committee under 11 U.S.C. §1102 and either the Creditors Committee's appointment of counsel or reasonable opportunity to do so.

C. PRESENCE AT HEARING.

Except as otherwise ordered by the Court:

1. Counsel for the postpetition lender (or the entity whose cash collateral is to be consensually used) must be present at any hearing with respect to its financing or its collateral; and

2. A business representative of the debtor and lender and any party objecting to the financing, each with appropriate authority, must be reasonably available by telephone or present at the hearing for the purpose of making necessary decisions.

II. ORDERS

A. EXTRAORDINARY PROVISIONS.

The following provisions in a cash collateral or DIP financing order, or in a financing agreement to be approved under such an order, called "Extraordinary Provisions," must be disclosed conspicuously in the motion and order and justification therefor separately set forth:

1. Cross-Collateralization. Extraordinary Provisions include all provisions that elevate prepetition debt to administrative expense (or higher) status or secure prepetition debt with liens on postpetition assets that such debt would not have by virtue of the prepetition security agreement or applicable law (for the purposes of these Guidelines, "Cross-Collateralization"), unless such status and liens are limited in extent to that necessary to accord the prepetition lender in a reorganization case adequate protection against a decline in the value of its collateral during the postpetition period. In connection with a request for Cross-Collateralization, the Court will consider, among other factors:

(i) the extent of the notice provided;[1]

(ii) the terms of the DIP financing and a comparison to the terms that would be available absent the Cross-Collateralization;

(iii) the degree of consensus among parties in interest supportive of Cross-Collateralization;

(iv) the extent and value of the prepetition liens held by the prepetition lender (and in particular the amount of any "equity cushion" that the prepetition lender may have), and

(v) whether Cross-Collateralization will give an undue advantage to prepetition lenders without a countervailing benefit to the estate.

An order approving Cross-Collateralization must ordinarily reserve the right of the Court to unwind the postpetition protection provided to the prepetition lender in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, and (where appropriate) priority of the prepetition lender's claims or liens, or a determination that the prepetition debt was undersecured as of the petition date, and the Cross-Collateralization unduly advantaged the lender.

2. "Rollups." Rollups include the application of proceeds of postpetition financing to pay, in whole or in part, prepetition debt. Determination of the propriety of a rollup will normally take into account, to the extent applicable, the factors mentioned above in connection with Cross-Collateralization, and, in addition, the following:

(a) the nature and amount of new credit to be extended, beyond the application of proceeds of postpetition financing used to pay in whole or in part the prepetition debt;

[1] *See Otte v. Manufacturers Hanover Commercial Corp., (In re Texlon Corp.)* 596 F.2d 1092 (2d Cir. 1979).

(b) whether the advantages of the postpetition financing justify the loss to the estate of the opportunity to satisfy the prepetition secured debt otherwise in accordance with applicable provisions of the Bankruptcy Code, and the burdens on the estate of incurring an administrative claim;

(c) whether the rollup can be unwound (see below);

(d) availability under the terms of the DIP financing and a comparison to the terms that would be available in the absence of the rollup;

(e) the extent to which prepetition and postpetition collateral can, as a practical matter, be identified and/or segregated;

(f) the extent to which difficult "priming" issues would have to be addressed in the absence of a rollup; and

(g) whether the postpetition advances are used to repay a pre-bankruptcy, "emergency" liquidity facility secured by first priority liens on the same collateral as the postpetition financing, where the prepetition facility was provided in anticipation of, or in an effort to avoid, a bankruptcy filing.

An order approving a rollup must ordinarily reserve the right of the Court to unwind the paydown of the prepetition debt in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, and (where appropriate) priority of the prepetition lender's claims or liens, or a determination that the prepetition debt was undersecured as of the petition date.

3. Waivers and concessions as to validity of prepetition debt. The Court will not consider as extraordinary the debtor's stipulation as to validity, perfection, enforceability,

priority and non-avoidability of a prepetition lender's claim and liens, and the lack of any defense thereto, provided that:

(a) the Official Committee of Unsecured Creditors (the "Committee"), appointed under section 1102 of the Bankruptcy Code, has a minimum of 60 days (or such longer period as the Committee may obtain for cause shown before the expiration of such period) from the date of the order approving the appointment of counsel for the Committee to investigate the facts and bring any appropriate proceedings as representative of the estate; or

(b) if no Committee is appointed, any party in interest has a minimum of 75 days (or a longer period for cause shown before the expiration of such period) from the entry of the final financing order to investigate the facts and file a motion seeking authority to bring any appropriate proceedings as representative of the estate; provided that

(c) the foregoing periods may be shortened in prepackaged or pre-arranged cases for cause shown.

4. Waivers. Extraordinary Provisions include those that divest the Court of its power or discretion in a material way, or interfere with the exercise of the fiduciary duties of the debtor or Creditors Committee in connection with the operation of the business, administration of the estate, or the formulation of a reorganization plan, such as provisions that deprive the debtor or the Creditors Committee of the ability to file a request for relief with the Court, to grant a junior postpetition lien, or to obtain future use of cash collateral. Notwithstanding the foregoing, and where duly disclosed, it will not be considered "extraordinary" for the debtor to agree to repay the postpetition financing in connection with any plan; for the debtor to waive any right to incur

liens that prime or are pari passu with liens granted under section 364; for a financing order to contain reasonable limitations and conditions regarding future borrowings under section 364 or cash collateral usage under section 363 (including consent of the lender, subordination of future borrowings to the priorities and liens given to the initial lender, and repayment of the initial loan with the proceeds of a subsequent borrowing); and for an order to provide that the lender has no obligation to fund certain activities of the debtor or the Committee, so long as the debtor or Committee is free to engage therein.

5. Section 506(c) waivers. Extraordinary Provisions include any waiver of the debtor's right to a surcharge against collateral under section 506(c); factors to be considered in connection with any order seeking such a waiver include whether the debtor's rights are (to the extent permitted by law) delegated to the Committee (or, if a Committee is not appointed, to any party in interest) and whether the carve-out includes expenses under section 726(b) (see below).

6. Liens on avoidance actions. Extraordinary Provisions include the granting of liens on the debtor's claims and causes of action arising under sections 544, 545, 547, 548 and 549 (but not liens on recoveries under section 549 on account of collateral as to which the lender has a postpetition lien), and the proceeds thereof, or a superpriority administrative claim payable from the proceeds of such claims and causes of action.

7. Carve-outs. Provisions relating to a carve-out that will be considered "extraordinary" include those that provide disparate treatment for the professionals retained by the Committee compared to professionals retained by the debtor or that do not include the fees of the U.S. Trustee, the reasonable expenses of Committee members, and reasonable fees and expenses of a trustee under section 726(b); however, reasonable allocations among such expenses can be proposed, and the lender may refuse to include in a carve-out the costs of litigation against it (but

not the costs of investigating whether any claims or causes of action exist). Provisions relating to carve-outs should make clear when the carve-out takes effect (and, in this connection, whether it remains unaltered after payment of interim fees made before an event of default under the facility), and any effect of the carve-out on availability under the postpetition loan.

8. Termination; Default; Remedies. Extraordinary Provisions include terms that provide that the use of cash collateral will cease, or the financing agreement will default, on (i) the filing of a challenge to the lender's prepetition lien or to the lender's prepetition conduct; (ii) entry of an order granting relief from the automatic stay (except as to material assets); (iii) the grant of a change of venue with respect to the case or any adversary proceeding; (iv) the making of a motion by a party in interest seeking any relief (as distinct from an order granting such relief); and (v) management changes or the departure, from the debtor, of any identified employees. Clauses providing a reasonable maturity date for the postpetition debt and for termination of the loan or default of the postpetition debt (if not repaid) on dismissal of the case or on confirmation of a plan of reorganization, or on conversion to Chapter 7, or on the appointment of a trustee or an examiner with expanded powers, will not be considered to be extraordinary. Termination of the postpetition lender's commitment to continue to advance funds after an event of default will not be considered extraordinary, but the following provisions will:

(a) failure to provide at least five business days' notice to the debtor and the Committee before the automatic stay terminates and the lender's remedies can be enforced; and

(b) failure to provide at least three business days' notice before use of cash collateral ceases, provided that the use of cash collateral conforms to any budget in effect.

B. INTERIM ORDERS.

An Interim Order will not ordinarily bind the Court with respect to the provisions of the Final Order provided that (i) the lender will be afforded all the benefits and protections of the Interim Order, including a DIP lender's section 364(e) and 363(m) protection with respect to funds advanced during the interim period, and (ii) the Interim Order will not bind the lender to advance funds pursuant to a Final Order that contains provisions contrary to or inconsistent with the Interim Order.

C. FORMAL PROVISIONS OF ORDERS

1. Findings of Fact. The order should limit recitation of findings to essential facts, including the facts required under section 364 regarding efforts to obtain financing on a less onerous basis and (where required) facts sufficient to support a finding of good faith under section 364(e). Non-essential facts regarding prepetition dealings and agreements may be included under the rubric of "stipulations" between the debtor and the lender or "background." Any emergency or interim order should include a finding that immediate and irreparable loss or damage will be caused to the estate if immediate DIP financing is not obtained and should state with respect to notice only that the hearing was held pursuant to Rule 4001(b)(2) or (c)(2), that notice was given to certain parties in the manner described, and that the notice was, in the debtor's belief, the best available under the circumstances. The Final Order may include factual findings as to notice. The Order should not incorporate by reference or refer to specific sections of a pre- or post- petition loan agreement or other document without a statement of the section's import. The Order should not contain any findings or provisions extraneous to the use of cash collateral or to the DIP financing.

2. Decretal Provisions. The Order should specify, in particular: any Extraordinary Provisions; any priorities or collateral granted; any effect of the borrowing on pre-existing liens;

bankruptcy-specific events of default and the consequences thereof; any provisions relating to adequate protection; any acknowledgments or stipulations by the debtor as to the prepetition debt; the purpose for which the loan is being made, and any restrictions on use of borrowings. The Order may permit the parties to enter into waivers or consents to the DIP loan agreement or amendments thereof provided that (i) the agreement as so modified is not materially different from that approved, (ii) notice of all amendments is filed with the Court, and (iii) notice of all amendments (other than those that are ministerial or technical and do not adversely affect the debtor) are provided in advance to counsel for any Committee, all parties requesting notice, and the U.S. Trustee.

3. Conclusions of Law. The interim order should not state that the Court has examined and approved the loan or other agreement; it may say, however, that the debtor is authorized to enter into it. Normally, the Interim and Final orders are sufficient if they state that the debtor is authorized to borrow on the terms and conditions of the loan or other agreement.

4. Order to Control. The order should ordinarily state that to the extent the loan or other agreement differs from the order, the order will control.

5. Statutory Provisions Affected. The order should specify those sections of the Bankruptcy Code that are being relied on, and identify those sections that are, to the extent permitted by law, being limited or abridged.

6. Conclusions re Notice. The Final Order may contain conclusions of law with respect to the adequacy of notice under section 364 and Rule 4001.