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ATTORNEYS FOR WACHOVIA FINANCIAL SERVICES, INC. AND FIFTH THIRD BANK

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
LEWIS EQUIPMENT COMPANY, INC.,	§	CASE NO. 09-45785-rfn11
et al., ¹	§	
	§	Chapter 11
Debtors.	§	
	§	

**OBJECTION TO TRUSTEE’S EMERGENCY MOTION TO APPROVE LIMITED
AUTHORIZATION FOR THE USE OF CASH COLLATERAL**

COMES NOW Wachovia Financial Services, Inc. (“**Wachovia**”) and Fifth Third Bank (“**Fifth Third**,” together, the “**Parties**”), and files this their Objection (the “**Objection**”) to the Trustee’s Emergency Motion to Approve Limited Authorization for the Use of Cash Collateral (the “**Motion**”) and would respectfully show the Court as follows:

I.
Background Facts

1. Lewis Equipment Company, Inc. (“**LEC**”), LWL Management LLC (“**LWL**”), Lewis Crane & Hoist, Inc. (“**LC&H**”) and several other affiliated companies (collectively, the “**Debtors**”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on

¹ Other debtors include LWL Management, LLC, case no. 09-45786; Hardrock Machine Shop, LLC, case no. 09-45787; Great White Transportation, LLC, case no. 09-45788; Lewis Crane & Hoist, Inc., case no. 09-45790; Rock Island Rigging, Inc., case no. 09-45792; and Hardrock Road Properties, LLC, case no. 09-45814.

September 18, 2009 (the “**Petition Date**”). As of the Petition Date, Debtors owed Wachovia at least \$8,185,786.44, and owed Fifth Third at least \$4,820,357.55. The Parties both anticipate they will have substantial unsecured claims in these cases.

2. Shortly after the Petition Date, Debtors apprised this Court that they transferred more than \$9 million out of the Debtors’ bank accounts, and into various financial repositories throughout the country shortly prior to the Petition Date (the “**Disputed Funds**”). Debtors stated that the Disputed Funds would be returned to the estates, and would be placed in bank accounts held at The Frost National Bank (“**Frost**”). However, Debtors reserved the right to contest, at a later date, the validity of Frost’s interest in the Disputed Funds², since no effort had been made as of the Petition Date to trace these funds back to dispositions of Frost’s original collateral. While this Court granted Debtors the use of the Disputed Funds, the Final Order Authorizing Debtors’ Use of Cash Collateral (the “**Final Order**”) only granted Frost a first-priority post-petition security interest in the Disputed Funds “to the extent of any diminution in value of the Cash Collateral.” *See* Final Order, at ¶ 7, Docket No. 327. As Section 363(a) of the Bankruptcy Code defines “Cash Collateral” as “cash . . . in which the estate and an entity other than the estate [has] an interest . . . includ[ing] the proceeds [thereof],” it is clear that the Final Order preserved Debtor’s reservation of rights to dispute Frost’s interest in the Disputed Funds. 11 U.S.C. § 363(a). To the Parties’ knowledge, no resolution of this dispute has occurred in these cases—no adversary trial or contested hearing has been conducted, no settlement motion has been filed, and no order effectuating a settlement has been signed by this Court.

² In Debtors’ Emergency Motion for Interim and Final Use of Cash Collateral (the “**Original Cash Collateral Motion**”), filed of record in these cases on September 22, 2009 at Docket No. 23, they state that while it was contemplated that Frost would be granted replacement liens in the Disputed Funds, “if and/or to the extent that Frost’s asserted lien in Cash Collateral is later determined to be unenforceable and/or is avoided, then such Replacement Liens shall not inure to the benefit of Frost and shall not be enforceable by Frost.” Original Cash Collateral Motion, at ¶ 23.

3. On February 19, 2009, the Court ordered the appointment of a Chapter 11 Trustee in this case (the “**Trustee**”), and also terminated Debtors’ use of the Disputed Funds. The Trustee has now filed the Motion, seeking use of the Disputed Funds. However, the cost demanded by Frost to use these funds—even though its interest is still disputed—is extremely high, and frankly, unreasonable. Further, the insufficient cuts proposed by the Trustee in the budget attached to the proposed order granting the Motion (the “**Proposed Order**”) are troublesome, and shows that Debtors run the risk of increasing their potential administratively insolvency by the end of March because of the superpriority administrative expense claims the Motion proposes to grant to Frost.

II. **DISCUSSION AND REQUEST FOR RELIEF**

4. The Motion contemplates that Debtors will be allowed use of the Disputed Funds through the end of March, 2010. While the exact amount of authorization remains somewhat unclear, it is clear that the budget attached to the Proposed Order contemplates the use of approximately \$1.7 to \$1.9 million of the Disputed Funds between now and the end of March (the “**Budgeted Amount**”).³ The Motion makes clear that Frost will consent to the use of the Budgeted Amount if, and only if, Debtors, the Trustee, and this Court agree to the following conditions:

- The immediate payment of \$3 million of the Disputed Funds to Frost to “pay down” its pre-petition indebtedness.
- This Court granting a first-priority post-petition replacement lien in the remaining amount of the Disputed Funds, according to the terms contained in the Final Order.

³ It is worth noting that while the Budgeted Amount includes a provision for the payment of adequate protection payments “to be determined at a later time,” this Court has previously entered binding orders setting the appropriate amount of adequate protection for many parties-in-interest in this case, including both Wachovia and Fifth Third.

- This Court granting a super-priority administrative expense claim to Frost to protect it against any diminution in value of its collateral, according to the terms contained in the Final Order.

The Parties argue that these terms are onerous, and that Debtors, the Trustee, and all creditors in these cases (besides Frost) should not be burdened with them simply to allow Debtors to maintain the going-concern value of Frost's collateral. While the Parties have no problem at this time with Debtors continuing as a going-concern, and understand that this ultimately may benefit Frost to a greater extent than other creditors, they find it unreasonable for Frost to argue it has a right to have its cake and eat it too—demanding it be provided with replacement liens, and administrative priority claims for diminution, while at the same time being given the authority to raid Debtors' coffers to pay down pre-petition debt with funds in which it may not have an interest.

A. Payment of the \$3 Million to Frost is Improper

5. As previously stated, it is clear that a dispute remains as to whether Frost has an interest in the Disputed Funds. This dispute has never been resolved. Indeed, in the Proposed Order Frost and the Trustee contemplate that paragraph 7 of the Final Order, which preserved Debtors' reservation of rights to dispute Frost's interest in the Disputed Funds, remains in full force and effect.⁴ Yet, even in light of that, Frost proposes that it be allowed to draw down \$3 million of the Disputed Funds to pay a portion of its pre-petition indebtedness. Were all creditors so lucky. Simply put, this requested relief is improper and should not be granted. Instead, Debtors should be allowed to retain the \$3 million, and such funds should only be

⁴ Specifically, the Proposed Order provides that "all provisions of the Final Order governing: . . . (ii) the grant of replacement liens to Frost; [and] (iii) the grant of a superpriority claim to Frost . . . shall apply with full force to the Trustee's usage of Cash Collateral." This clearly keeps paragraph 7 of the Final Order in place which recognizes that Frost's interest in the Disputed Funds has not yet been settled, as stated in the reservation of rights found in the Original Cash Collateral Motion.

distributed by the Trustee, if at all, at the end of this case, once it has been determined that Frost has an interest in the Disputed Funds, and after a determination by this Court as to whether Frost has a diminution claim against Debtors' estates.

6. In addition, even as a gauge of adequate protection, payment of the \$3 million to Frost by the Trustee is inappropriate. Here, the Budgeted Amount is only \$1.7 to \$1.9 million. Yet, Frost not only seeks adequate protection through a replacement lien in the remaining amount of the Disputed Funds, as well as a superpriority administrative claim against the same, but also in payment of \$3 million in cash to "setoff" against its pre-petition indebtedness. This level of adequate protection is inappropriate in this case, and should not be granted.

B. The Budgeted Amount Shows Debtors will Deepen their Administrative Insolvency Only for the Benefit of Frost, and at the Expense of All Other Creditors

7. The Parties are troubled by the fact that the Budgeted Amount shows that Debtors will likely lose between \$400,000 and \$500,000 for the month of March. This fact, combined with Frost's request that it be provided with an administrative superpriority claim to protect its interests, shows that all creditors besides Frost will be materially harmed through Debtors' operations in the month of March. Indeed, whether or not Debtors' estates were administratively insolvent up to this point, their operation in March at a deficit will likely push them over that ledge, to the detriment of the Parties and all other similarly-situated creditors.

8. Because the value created by this case remaining in Chapter 11 inures to the benefit of Frost to a greater extent than to any other creditor, it should not be rewarded with an administrative priority claim for merely protecting its own interests, especially where doing so only decreases the chance that all other creditors will receive a recovery from any litigation proceeds obtained by the Trustee from Kyle Lewis. The Parties do not object to Frost protecting

its own interests, but argue that those interests will be adequately protected without Frost being given the right to assert an administrative priority claim that will prejudice all others.

9. Further, the Parties urge this Court to require the Trustee to make deeper immediate cuts in Debtors' budget for the month of March. To allow Debtors to operate at a \$400,000 to \$500,000 deficit merely decreases its ability to pay any recovery to creditors other than Frost at the end of these cases. The Trustee has indicated in the Motion which locations need to be shut down, and there is no reason they should not be shut down immediately. While the Parties have been told that certain cost cuts will only be realized in April, and to expect a balanced budget in the future, the time for the Trustee to act is now, as this Court and all other parties realize that April or some future month may be too late. The Trustee must provide a budget that allows Debtors to operate at least at break-even, or else he is spinning his wheels here in this case, at the expense of all creditors, and this case should simply be converted.

WHEREFORE, PREMISES CONSIDERED, the Parties respectfully request that this Court (i) deny the Motion insofar as it contemplates that: (a) Frost be provided with payment of \$3 million of the Disputed Funds; (b) Frost be provided with both a replacement lien on Cash Collateral, as that term is defined in the Bankruptcy Code, as well as a superpriority administrative expense claim for diminution in the value of its collateral; and (c) Debtors be allowed to operate at a substantial loss for the month of March, 2010; and (ii) grant them any further relief to which they may be entitled.

Respectfully submitted,

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FINANCIAL SERVICES, INC.
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CERTIFICATE OF SERVICE

The undersigned certifies that he served all parties requesting notice in this case with a copy of the foregoing Objection via this Court's ECF electronic filing system on the date of filing of the Objection. To the extent that a party-in-interest requesting notice did not receive notice via this Court's ECF system, service of the Objection will be accomplished through United States Mail, First Class, e-mail, and/or facsimile no later than the next business day following the date of service hereof.

/s/ Cameron W. Kinvig
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