

1 Objection", stating: "Generally, Bank of America does not oppose
2 the Court's authorization of the Debtor's use of cash collateral
3 on the same terms as the prior cash collateral orders entered by
4 the Court." However, the Bank had a number of concerns over
5 several line items. For present purposes, the relevant one was
6 payment of interim professional fees from the Bank's cash
7 collateral. The Bank objected to that provision, which allocated
8 \$420,000 for professional fees for the period February 18 through
9 April 14.

10 On the eve of the February 17 hearing, Debtor filed a
11 "Reply . . ." in it, Debtor explained its approach to managing
12 the case, discussed its objectives and its efforts, and set out
13 some theories on why not all its assets were subject to the
14 Bank's security interest, both through application of § 552, and
15 an argument based on a case captioned In re Cafeteria Operators,
16 L.P., 299 B.R. 400 (Bankr. N.D.TX 2003). Of course, no party had
17 a chance to reply to Debtor's new arguments. In reply to the
18 Bank's position regarding professional fees, the Debtor stated:

19 Professionals are working to protect and
20 preserve the value of this estate and the
21 Debtor has budgeted partial payments of
22 professional fees for the law firms and
23 financial advisors. Subject to the filing of
24 fee applications and approval of this Court,
25 payment of professional fees on an interim
26 basis is necessary, appropriate and permitted
by the Bankruptcy Code, as Bank of America
and its counsel well know.

25 The OCC joined in the Debtor's position and asserted that
26 not all the cash available to the Debtor was the Bank's cash

1 collateral. The OCC noted that the Debtor "does not operate in a
2 vacuum and requires the assistance of professionals to administer
3 the estate."

4 At the hearing, Debtor and the OCC reiterated their
5 arguments, and the Bank reiterated its willingness to agree to
6 cash collateral use as in the prior orders. The Bank restated
7 its position against interim use of collateral for professional
8 fees. Counsel for Debtor responded:

9 I think that to basically say to the
10 debtor and its professionals, "You have
11 to hire an investment advisor today, or
12 we're not going to allow for payment of
13 professional fees" defeats the purpose of the
14 bankruptcy code. It flies in the face of the
15 exclusivity, and it basically says to the
16 professionals, "Go out and build value for
17 the estate and the bank, but we're not going
18 to make sure that you get compensated on even
19 any small amount."

20 Following argument, the Court was persuaded that
21 authorization to use cash collateral should continue on the same
22 terms as before. Then the Court stated:

23 So I think the real issue at this point in
24 time is the payment of professionals. And
25 I've got to say that I'm persuaded by the
26 Cafeteria Operator's line of approach that
there is in fact value added to the services
to the funds that are generated by this
debtor operating on a post-petition basis,
and what that tells me is there is a
nonattached fund that's available to not only
help pay professionals, but to provide
adequate protection to B of A as well. And I
think that that combined with the 120,000
payments over the five weeks is an
appropriate form of adequate protection for
the bank, along with appropriate replacement
liens to the extent that the value of their
actual collateral is diminished during that

1 operating period of time. And so on that
2 basis and with that, I will allow it, but -
3 and the concern will be with respect to the
4 120,000 or so estimated professional fees
5 which won't be expended in the interim
6 because there won't have been fee apps
7 submitted to me for review and approval and
8 the rest of that on a notice basis anyway.
9 But because of Cafeteria Operators with which
10 I am persuaded, I do believe there will be a
11 fund that's available to satisfy it
12 regardless of whether it comes from B of A's
13 collateral or not, but so the budget that has
14 been submitted with respect to the final
15 motion as adjusted would include that
16 authorization.

17 That was followed by a colloquy between the Court and Bank's
18 counsel, during which counsel addressed the Cafeteria Operator's
19 issue and challenged whether this estate had such "free cash".
20 He stated it would "be a very, very complicated analysis"
21 The Court responded: "And I'm hoping we won't get there." The
22 parties then agreed to a further hearing date and use of cash
23 collateral through that date. It was understood, and stated on
24 the record that no professional fees could be paid unless there
25 was an interim fee application. Counsel for the OCC noted that
26 the Debtor was planning to file a motion for approval of an
interim compensation procedure. Debtor has filed such a motion,
and hearing on it has been continued. The Bank has filed a
limited objection to preserve its position concerning whether
such fees could be paid from its cash collateral.

Following the February 17 hearing, there was a skirmish over
competing proposed orders, which the court resolved. Meanwhile,
the Debtor gave "Notice of Continued Hearing Re First Day Motion

1 by Debtor For Order (A) Authorizing Interim Use of Cash
2 Collateral" for April 9. The Bank filed another limited
3 objection, agreeing to the use of its cash collateral on the same
4 terms as previously, but objected to the proposed payments of
5 professional fees, which had risen to \$680,000.

6 As part of its objection, the Bank pointed out that the
7 replacement lien Debtor proposed extended to post-petition
8 revenues generated by Debtor, so even if Cafeteria Operator's
9 might otherwise be applicable, the replacement liens encumbered
10 those revenues in favor of the Bank, at least to the extent the
11 Bank's collateral was otherwise diminished.

12 The Debtor responded the next day, which was on the eve of
13 the hearing. Debtor reiterated its view that: "To date, BofA has
14 refused to realistically address the benefits to BofA that this
15 Debtor and its professionals are providing." Debtor then argued
16 decisions supporting authority under 11 U.S.C. § 506(c)
17 to surcharge a creditor's collateral when expenses were "incurred
18 primarily for the benefit of the secured creditor" The
19 Debtor concluded:

20 It is not in this Estate's interest to
21 continue to incur administrative fees and
22 costs for BofA's benefit, which BofA has
23 refused to either acknowledge or pay. The
24 Debtor is seeking approval for use of cash
collateral based on the budget attached
hereto as Exhibit A, which budgets for and
provides for payment of professional fees.

25 The Court has not seen any fee applications to this point.
26 From outward appearances, the Debtor's and the OCC's

1 professionals seem to have accomplished some streamlining of the
2 Debtor, and to have reached the important decision of the major
3 approach for going forward, which will involve marketing the
4 Debtor as a going concern, which is what the Bank wants, as well.
5 While Debtor may not have reached that decision as quickly as the
6 Bank would have liked, it was arrived at in less than three
7 months from filing, which is not unreasonable. Moreover, the
8 decision has the support of the OCC, which is important to making
9 it happen. From what the Court has seen, both the Debtor and the
10 OCC have been well represented.

11 That said, one of the difficulties in proceeding with such
12 alacrity is the desire to resolve significant contested issues
13 on little or no notice. As already noted, the Debtor raised its
14 arguments under § 552 and Cafeteria Operators in its Reply filed
15 the day before the February 17 hearing, and no one had a chance
16 to review or oppose those arguments before the next-day hearing.
17 Then, the day before the April 9 hearing, the Debtor filed
18 another Reply, asserting its argument under § 506(c) for the
19 authority to surcharge the Bank's collateral. Again, there has
20 been no opportunity to tee up the issue with adequate opportunity
21 for the Bank to respond.

22 The Court believes that the Debtor has raised significant
23 issues under Cafeteria Operators, § 552, and § 506(c) which would
24 support allowing compensation to the Debtor's and OCC's
25 professionals if the requisite circumstances are found to exist.
26 But those issues have not been set up for determination by

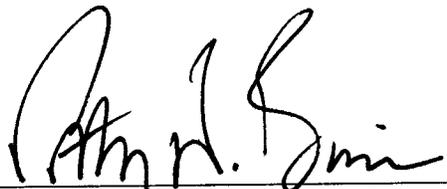
1 raising them the day before a hearing in a Reply pleading,
2 especially in the oblique context of a cash collateral motion.
3 When the issues are squarely raised and briefed, the Court will
4 address them.

5 In the meantime, the Court finds and concludes that interim
6 use of the Bank of America's cash collateral may continue to and
7 including May 13, 2010 on the same terms and conditions as in
8 the prior orders in this case. That does not include payment
9 from the Bank's cash collateral of the Debtor's or the OCC's
10 professionals without prior consent of the Bank, or unless
11 payment is from assets other than the Bank's collateral, and then
12 only after approval by the Court of either appropriate fee
13 applications or of a procedure for interim compensation pending
14 such applications.

15 Debtor has also raised in its Reply its desire to use its
16 financial advisor, CRG Partners Group to develop a book for
17 marketing the Debtor as a going concern. The Bank has expressed
18 its dissatisfaction with that selection. The Court does not have
19 an application before it to expand CRG's scope of employment, nor
20 have the Bank or other interested parties had an opportunity to
21 address such a proposal. If and when such an application is
22 filed and served, the Court will consider it.

23 IT IS SO ORDERED.

24 DATED: APR 12 2010

25 
26 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court