

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:) Chapter 11
)
TWG CAPITAL, INC.,) Case No. 12-11019-BHL-11
)
Debtor.)

**FIRST DAY MOTION FOR ENTRY OF AN ORDER AUTHORIZING
THE DEBTOR TO PAY CERTAIN COMMISSIONS TO DOWNLINE AGENTS
FROM CERTAIN TRUST FUND RECEIVED BY THE DEBTOR,
AND REMIT TO ONE OR MORE SPECIAL PURPOSE VEHICLES RECEIPTS
RECEIVED BY THE DEBTOR IN TRUST AS SERVICER IN WHICH THE DEBTOR
HAS NO EQUITABLE INTEREST**

TWG Capital, Inc. (the "Debtor"), the debtor and debtor in possession in the above-captioned Chapter 11 case (the "Chapter 11 Case"), files this motion (the "Remission Motion") for entry of an order authorizing the Debtor to remit to (i) the IR7 Downline Agents (as defined herein) those certain Commission Monies (as defined herein) remitted monthly to the Debtor by IR7 (as defined herein) in trust, as a custodian, designated for payment to the IR7 Downline Agents, and (ii) to the appropriate SPV (as defined herein) those SPV Receipts (as defined herein) that may from time to time be remitted to the Debtor in trust, as a custodian, in accordance with the Debtor's servicing obligations to such SPV. The proposed form of the order granting this Remission Motion is attached hereto as Exhibit A.

In support of this Motion, the Debtor relies on the Declaration Of Mark P. Nondorf In Support Of Chapter 11 Petitions and First Day Applications and Motions [Doc. No. 4] (the "Nondorf Declaration"), and may present additional evidence at the hearing on the Remission Motion.

JURISDICTION

1. On September 14, 2012 (the "Petition Date"), the Debtor filed with the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (the "Court"), its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. as amended (the "Bankruptcy Code") commencing the Chapter 11 Case.

2. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. No trustee, examiner, or committee has been appointed in the Chapter 11 Case.

4. This Court has jurisdiction to consider this Remission Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

5. The statutory bases for the relief sought herein are Sections 105(a), 363, 541 and 1108 of the Bankruptcy Code.

6. The Debtor submits the Remission Motion qualifies as a "First Day Motion" as defined and allowed under Rule B-9013-3 of the Local Rules of the United States Bankruptcy Court for the Southern District of Indiana (the "Local Bankruptcy Rules").

7. Pursuant to Local Bankruptcy Rule B-9013-3, the Court shall schedule and conduct a hearing on a First Day Motion within two business days (if possible) of the filing of a First Day Motion.

BACKGROUND AND EVENTS LEADING TO FILING

8. As more fully set forth in the Declaration of Mark P. Nondorf in Support of Chapter 11 Petition and First Day Applications and Motions (the "Nondorf Declaration"), the

Debtor is a specialty finance company that services the insurance industry. Insurance agents and agencies own predictable renewal commission rights on certain types of insurance policies ("Insurance Commission Receivables," commonly referred to in the industry as "ICRs") that generate significant cash flows over extended periods of time. The Debtor provides a range of products and services based on the value of the ICRs.

9. The Debtor's business consists of three primary segments. The Debtor's most significant line of business is providing liquidity to insurance agents and agencies by serving as an originator to special purpose vehicles ("SPVs") for the purchase of ICRs at a rate less than the expected value of their future cash flows. The Debtor earns origination fees for this service. Second, the Debtor services on behalf of SPVs and other parties ICR asset portfolios, using proprietary technology. The Debtor earns a servicing fee for this service. Finally, the Debtor's wholly owned subsidiary, IR Finance 1, LLC ("IR Finance") makes loans to insurance agencies and collateralizes the loans with future insurance commissions. The Debtor services the loan assets and insurance commission collateral on behalf of IR Finance.

10. On or around July 12, 2007, the Debtor entered into an origination and servicing contract with its wholly owned subsidiary, Insurance Receivables 7, LLC ("IR7"), whereby the Debtor would receive (i) an origination fee for purchases placed in IR7's debt facility and (ii) a servicing fee for monitoring and processing commission payments that were received under the purchases (the "IR7 Servicing Agreement"). On or around May 13, 2008, the Debtor, Inservico, Inc. ("Inservico") and other parties, including lenders to IR7 (the "IR7 Lenders") entered into that certain Back-Up Servicing Agreement (the "Back-Up Servicing Agreement"). On August 13, 2010, the Debtor was terminated as the IR7 servicer and pursuant to the Back-Up Servicing Agreement, the IR7 Lenders purportedly appointed Inservico as

successor to the Debtor as the servicer with respect to the IR7 Servicing Agreement. Inservico disputes any allegation that it has any obligations under the Back-Up Servicing Agreement or the IR7 Servicing Agreement. With reservation of Inservico's position, by that certain Subservicing Agreement between Inservico and the Debtor dated as of September 13, 2012 (the "Subservicing Agreement"), Inservico has subcontracted the servicing of IR7 to the Debtor. The origination and servicing fees from IR7 are currently the Debtor's primary source of revenue. Inservico is a 62.47% owner of the Debtor.

11. The prolonged impact of the financial crisis that hit in 2008 has impaired the performance of the Debtor's purchased asset portfolio, and the Debtor has sustained significant losses as a result. The financial crisis has also impacted the insurance industry as a whole, which caused the Debtor to experience lower than projected cash flows. The Debtor has also been required to sustain unexpected costs of litigation, including arbitration resulting from the Debtor's discovery of misrepresentations by the seller in the purchase of Medicare Supplemental policies (the "AIMC Arbitration"). During the AIMC Arbitration, the senior lenders on the IR7 debt facility declared an event of default that resulted in the immediate termination of new originations within the IR7 debt facility, thereby further impairing the Debtor's cash flow.

12. The Debtor has taken many measures to prevent the filing of the Chapter 11 Case. The Debtor has worked with investment bankers for over three years to develop and execute recapitalization strategies. However, traditional financing sources have been constrained, and the Debtor has been unable to raise sufficient capital to implement its business plan.

13. A more in depth discussion of the Debtor's business and the circumstances precipitating the filing of the Chapter 11 Case is set forth in the Nondorf Declaration, which is incorporated by reference herein.

14. On September 14, 2012, the Debtor filed its *First Day Motion for Interim Order (i) Authorizing Debtor to Obtain Postpetition Financing Pursuant to 11 U.S.C. § 364(c) and 364(d); (ii) Granting Liens and Superpriority Claims; and (iii) Scheduling a Final Hearing* (the "DIP Motion"), pursuant to which the Debtor seeks entry of an order (the "DIP Order") approving the proposed post-petition financing from Carmel Funding, LLC, as lender, in the maximum aggregate amount of \$340,000 (the "DIP Financing"), all as provided for in that Debtor In Possession Loan Agreement entered into between the Debtor and the Lender (the "DIP Agreement"). As contemplated in the DIP Motion and per the DIP Agreement (the capitalized terms used in the remainder of this paragraph are defined in the DIP Agreement), the "DIP Obligations" shall be secured by automatically perfected security interests and "Liens" granted pursuant to Section 364(c) of the Bankruptcy Code, with first priority on all "Collateral," subject and subordinate only to (i) the "Carveout" and (ii) "Permitted Liens"; provided, however, that the "Interim DIP Advance" shall not be secured by a "Lien" on claims and causes of action arising under chapter 5 of the Bankruptcy Code unless and until the "Final DIP Order" is entered. In addition, the Lender will be entitled to super-priority administrative status for the obligations of the Debtor to it under the DIP Agreement.

RELIEF REQUESTED

A. Commission Monies

15. In the ordinary course of business, pursuant to the IR7 Servicing Agreement and the Subservicing Agreement, on or around the 11th of each month IR7 makes a

payment to the Debtor (the "IR7 Monthly Payment") that consists of three components: (i) the servicing fee payable to the Debtor; (ii) the reimbursement of expenses allowed by the IR7 Servicing Agreement payable to the Debtor or third parties; and (iii) the sum of monthly commissions (the "Commission Monies") due by IR7 to agents or brokers (the "IR7 Downline Agents"). The Debtor and IR7 have this arrangement to facilitate payment of the Commission Monies to the IR7 Downline Agents because IR7 does not maintain bank accounts with outgoing wire and check writing authority.

16. On September 11, 2012, the Debtor received the IR7 Monthly Payment in the ordinary course of business by transfer from IR7 to the Debtor's operating account at Key Bank, account # xxxxxxxx2951(the "Operating Account"). Thereafter, also on September 11, 2012, in accordance with its agreement and obligations to IR7, via and on account of the Commission Monies component of the September 2012 IR7 Monthly Payment, per data provided by IR7 to the Debtor, the Debtor wrote checks to 26 IR7 Downline Agents from the Operating Account, check numbers 1763 - 1788, aggregating the sum of \$12,934.03 (the "September Commission Remissions").

17. The Debtor receives the Commission Monies component of the IR7 Monthly Payment in trust, purely as a custodian for the purpose of distributing the Commissions Monies consistent with IR7's monthly instructions. The Debtor does not have any equitable interest in the Commission Monies, including the September Commission Remissions.

B. SPV Receipts

18. Further, as part of the Debtor's servicing to the SPVs, from to time the Debtor receives funds directly by wire or check that are the property of a SPV in which the Debtor has no interest and, as part of Debtor's servicing obligation to the SPV, the Debtor is

obligated to remit to the appropriate SPV (the "SPV Receipts"). In the ordinary course of business, as and when the SPV Receipts are received, (i) if by wire into the Operating Account, Debtor causes a wire in the same sum to be sent to the appropriate SPV, and (ii) if by check, the Debtor endorses the check and remits the same to the appropriate SPV (collectively, the "SPV Trust Disbursements").

19. The Debtor receives the SPV Receipts in trust, purely as a custodian for the benefit of the SPVs respectively. The Debtor does not have any equitable interest in the SPV Receipts.

20. Accordingly, by this Remission Motion, the Debtor seeks (i) authority to pay the September Commission Remissions and all future Commission Monies in the ordinary course of business per its agreement and obligations to IR7, (ii) direction and authorization to Key Bank to honor the checks as presented that constitute the September Commission Remissions in the ordinary course of business; and (iii) authority to make the SPV Trust Disbursements as and when the SPV Receipts are received in the ordinary course of business.

APPLICABLE AUTHORITY

21. Section 541(d) of the Bankruptcy Code provides, in relevant part, as follows: "Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (a)(2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d).

22. Section 105(a) of the Bankruptcy Code provides "(t)he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this

title." 11 U.S.C. § 105(a). The purpose of Section 105(a) of the Bankruptcy Code is "to assure the Bankruptcy Court's power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction." 2 Collier, Bankruptcy ¶ 105.02, at 105-4 (15th rev. ed. 1988). Thus, Section 105(a) of the Bankruptcy Code essentially codifies the Bankruptcy Court's inherent equitable powers. See Management Technology Corp. v. Pardo, 56 B.R. 337, 339 (Bankr. N.J. 1985) (court's equitable power derived from Section 105).

23. As funds held by the Debtor in trust, the Commission Monies, including the September Commission Remissions, and the SPV Receipts, do not constitute property of the Debtor's estate. Beiger v. IRS, 496 U.S. 53, 59, 110 S. Ct. 2258 (1990) (citing to §541(d) and concluding that "[b]ecause the debtor does not own an equitable interest in property he holds in trust for another, that interest [i.e. equitable interest] is not "property of the estate."); Official Committee of Unsecured Creditors v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.), 997 F.2d 1039, 1059 (3rd Cir.) (recognizing that Congress intended exclusion created by section 541(d) to include funds held in express or constructive trusts), cert. denied, 510 U.S. 1110 (1994).

24. Further, the Debtor submits that the Commission Monies, including the September Commission Remissions, and the SPV Receipts are akin to so-called "trust fund" taxes, which are required to be collected and held in trust for payment to the appropriate taxing authorities. See, e.g., Begier, id.; In re Shank, 792 F.2d 829, 830 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customers is a "trust fund" tax); DeChiaro v. New York State Tax Commission, 760 F.2d 432, 433-34 (2d Cir. 1985) (same). To the extent such "trust fund" taxes are collected, they are not property of a debtors' estate under Section 541(d) of the Bankruptcy Code. See In re American Int'l Airways, Inc., 70 B.R. 102,

103 (Bankr. E.D. Pa. 1987) (excise and withholding taxes); In re Tap, Inc., 52 B.R. 271, 278 (Bankr. D. Mass. 1985) (withholding taxes). Similarly, while the Debtor's obligation to remit the Commission Monies and make the SPV Trust Disbursements does not exist as a matter of law, the Debtor nonetheless receives the Commission Monies and SPV Receipts with the express understanding that it has no interest in such monies, being obligated to (i) administer the Commission Monies as a pass-thru custodian for the benefit of IR7 and the IR7 Downline Agents, and (ii) remit the SPV Receipts by the SPV Trust Disbursements to the appropriate SPV.

25. For all the foregoing reasons, the Debtor believes that granting the relief requested herein is appropriate and in the best interest of the Debtor, its estate, and its creditors.

NOTICE

26. The Debtor has provided or will provide notice of the Remission Motion and the hearing thereon, by telephone, telecopy, electronic mail, overnight delivery service, or hand delivery, to (i) the office of the United States Trustee for the Southern District of Indiana; (ii) the Internal Revenue Service; (iii) the Debtor's twenty (20) largest general unsecured creditors; (iv) all secured creditors; and (v) any party who has filed an appearance and served same on the Debtor prior to service.

NO PRIOR REQUEST

27. No previous request for the relief requested herein has been made to the Court in the Chapter 11 Case.

WHEREFORE, for all of the foregoing reasons, the Debtor respectfully requests entry of an order granting the relief requested herein and such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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