ORIGINAL

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FILED AND FILED
2003 OCT 15 PM 12:59
UNITED STATES BANKRUPTCY COURT
PATRICIA GRAY, CLERK

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

VSS Enterprises, LLC, a Nevada limited liability company, dba Castaways Hotel, Casino and Bowling Center, Debtor.	Case No. 03-17939-LBR Chapter 11 Date: October 15, 2003 Time: 1:30 p.m.

Creditor Trust Fund's Conditional Opposition to Debtor's Emergency Motion for Order (i) Authorizing Post-Petition Financing, etc. and Alternative Request for Relief

The Creditor Trustees of the HEREIU Welfare Fund ("Fund"), by and through their attorneys, Kevin B. Christensen, Chartered, hereby submit their conditional Opposition to the Debtor's Emergency Motion for Order (i) Authorizing Post-Petition Financing on a Secured Basis Pursuant to 11 U.S.C. §364(c) and (f) and (ii) Scheduling a Further Hearing Pursuant to Bankruptcy Rule 4001(c) ("Emergency Motion")[1]. The Fund's conditional Opposition is based upon the Points and Authorities, Affidavit of Counsel and Exhibits attached hereto, together with any oral argument presented at the time of the Emergency Motion hearing. Subject only to Debtor's express in Court confirmation and this Court's Order that all delinquent post-petition fringe benefit contributions ("Post-Petition Delinquencies") owed to the Fund will be paid by the Debtor from the requested post-petition financing ("Post-Petition Financing"), the Fund

[1]The Emergency Motion was served by facsimile upon counsel for the Fund at 3:32 p.m. on Tuesday, October 14, 2003.

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respectfully requests that Debtor's Emergency Motion be denied.

In the alternative, pursuant to 11 USC §503(a) and (b), the Fund respectfully requests the Court's Order (i) classifying the Post-Petition Delinquencies as "administrative expenses" and (ii) ordering the same paid from any further Post-Petition Financing approved pursuant to the Debtor's Emergency Motion.

I

Summary of Prior Proceedings

At the hearing on June 26, 2003 for Debtor's initial Emergency Motion for Order Authorizing Post-Petition Financing, etc. ("Initial Emergency Motion"), counsel for the Debtor, Gerald Gordon, Esq., in response to the Fund's demands for assurances that post-petition fringe benefit contributions would be paid by the Debtor ("Post-Petition Contributions"), expressly confirmed to the Court and the Fund that the Fund's welfare contributions would be paid under the Debtor's budget and the Court's payment Order. The Court's instructions expressly authorized payment of wages and benefits, including the Fund. At the July 16 and 23, 2003 continued hearings on the Initial Emergency Motion, the Debtor and the Court again confirmed that the Post-Petition Contributions should be paid as "reasonable and necessary expenses" of the day-to-day operations of the Debtor.

As of this date, the Debtor has expressly repudiated its assurances to the Court and the Fund by the following:

1. On September 25, 2003, the Debtor's CFO, James Van Woerkom, advised the Union by letter ("CFO Letter") of its intention not to pay Post-Petition Contributions to the Fund based upon its perceived right to a credit. See true and correct copy of CFO Letter, attached to the Affidavit of Counsel as Exhibit "1";
2. The Fund's administrator reports a Post-Petition Contributions default to the Fund

for August, 2003 of $109,403.09; and in addition, as of this date, the Debtor has failed to report and pay its September, 2003 Fund contributions estimated at approximately $110,000.00 (total estimated delinquency is $219,403.09 - "Post-Petition Delinquencies").

II

The Debtor Should be Ordered to Pay Its Post-Petition Delinquencies to the Fund

The Post-Petition Delinquencies constitute intentionally unpaid "administrative expenses" under 11 USC §§503(b)(1)(A) and 507(a)(1) for "actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Post-Petition payments for services rendered to the estate are administrative expenses and "are not property of the estate" and are allowable as administrative expenses. Otte v. United States, 419 US 43 (1974); Local Loan v. Hunt, 292 US 234 (1943); and 124 Cong. Rec. H 11095 (Sept. 28, 1978).

The Emergency Motion initially seeks $2,000,000 and up to $10,000,000 after final hearing. Pg. 2, ll. 2 and 14 of Emergency Motion. The Emergency Motion asserts that the Post-Petition Financing is necessary to allow the Debtor "to remain operational", "for working capital", "to finance the operations of the Castaways" and that closure would be "disastrous for the Debtor, [and] its employees..." Pg. 7, ll. 2, 8, 19 and 24. Exhibit "1" to the Van Woerkom Declaration does not list payments earmarked for the Fund; however, Exhibit "1" does include a $3,390,000.00 in projected use of the funds for "Reorganization Costs-Other", "Operational Subsidy" and "Capital Reserve". Payment of the Debtor's Post-Petition Delinquencies should be required from these discretionary funds. See Exhibit "1" to Declaration .

Continued health coverage by the Fund for the hundreds of hotel employees covered by the Debtor's Collective Bargaining Agreement with the Union is an essential portion of the

negotiated compensation package voluntarily assumed by the Debtor. These payments are essential to the continued operation of the Debtor and its business. The CFO Letter appears to constitute a repudiation of the Debtor's August and September, 2003 Post-Petition Contribution payment obligations. Without formal rejection of the Collective Bargaining Agreement through the procedures required under 11 USC §1113, the compensation package (including Fund contributions) remains in effect as a Post-Petition administrative priority and obligation of the Debtor. Therefore, the Post-Petition Delinquencies in the estimated sum of $219,403.09 should be ordered paid by the Debtor from any Post-Petition Financing approved by the Bankruptcy Court (in addition the Order should be amended to include this obligation and the language of the Order should be amended to correct certain clerical errors)[2].

III

Conclusion

The Bankruptcy Court should only grant the Debtor's Emergency Motion if the Court conditions its approval upon the Debtor's payment of the Post-Petition Delinquencies owed to the Fund and the Debtor's continuing obligation to timely pay and report Post-Petition Contributions.

Respectfully Submitted,

Kevin B. Christensen, Chartered

By: _____
Kevin B. Christensen, Esq.
Attorneys for the HEREIU Welfare Fund

[2]Page 2, line 2, change "of" to "or" after "pre-petition"; page 4, line 1, change "collusions" to "conclusions" - possible Freudian slip; and page 4, line 15, should include the sentence "The Debtor shall pay any post-petition fringe benefit contributions accrued and owed to the HEREIU Welfare Fund, which are administrative expenses."

AFFIDAVIT OF COUNSEL

STATE OF NEVADA)
:SS.
COUNTY OF CLARK)

Kevin B. Christensen, being first duly sworn, now deposes and says that:

1. I am an attorney licensed to practice before the Federal and State Courts of the State of Nevada. The law firm of Kevin B. Christensen, Chartered has been retained by the Fund as Counsel. I have personal knowledge of the factual and procedural matters herein set forth.

2. Exhibits "1 and 2" attached hereto are true and correct copies of the CFO Letter and the Post-Petition Delinquencies Summary.

3. Your affiant, after receipt of the CFO Letter, sent a response ("CFO Letter Response") to Debtor's counsel objecting to the Debtor's asserted contribution credit and correcting the Debtor's misunderstanding of its Post-Petition Contributions pay and report obligations under Articles 25 and 26 of the Collective Bargaining Agreement between the Local Joint Executive Board of Las Vegas and the Debtor (as successor-in-interest). A true and correct copy of the CFO Letter Response is attached hereto as Exhibit "3".

Further your affiant sayeth naught.

Kevin B. Christensen, Esq.

Subscribed and Sworn before me,
this 15 day of October, 2003.

Notary Public

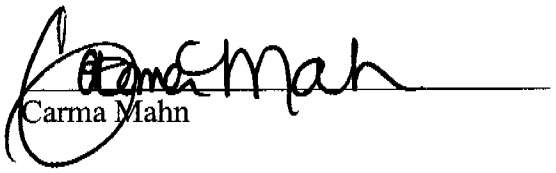
Notary Public - State of Nevada
COUNTY OF CLARK
CARMA MAHN
My Appointment Expires May 5, 2005
No. 93-1483-1

CERTIFICATE OF SERVICE

I, Carma Mahn, am an employee of the law firm Kevin B. Christensen, Chtd.. On the 15th day of October, 2003 at 12:00 noon, I delivered by facsimile transmission and by depositing in the U.S. Mail postage prepaid, a true and correct copy of the foregoing Creditor Fund Funds' Conditional Opposition to Debtor's Emergency Motion for Order (i) Authorizing Post-Petition Financing, etc., addressed to:

Gordon & Silver, Ltd.
Attn: Gerald M. Gordon, Esq.
Attn: Thomas H. Fell, Esq.
Attn: Ambrish S. Sidhu, Esq.
3960 Howard Hughes Pkwy, 9th Fl.
Las Vegas, NV 89109
Fax: 369-2666

U.S. Bankruptcy Judge Linda B. Riegle
U.S. Bankruptcy Court
333 Las Vegas Blvd. S.
Las Vegas, NV 89101
Fax: 388-6547



Carma Mahn

SEP 26 '03 PM2:32

September 25, 2003

Mr. Jim Bonaventure
H.E.R.E. International Union
1630 S. Commerce Street
Las Vegas, NV 89102

Dear Mr. Bonaventure:

Enclosed please find a copy of the Health and Welfare report for the period ending August 31, 2003 indicating a balance due of $109,403.09. As a result of hearings in U.S. Bankruptcy court, it has been determined that the payment made on July 16, 2003 in the amount of $137,636.67 for wages paid pre-petition, $137,636.67 should not have been remitted. As a result of this overpayment, we are hereby taking a credit against the August filing for the full amount due. This will leave a credit to be used in September in the amount of $28,233.58.

Please adjust your records accordingly.

Sincerely,

James Van Woerkom
Chief Financial Officer

CC: Tom Fell, Gordon and Silver

Enclosures

Exhibit
"1"

CASTAWAYS HOTEL/CASINO 6425-A WELFARE
DELINQUENCY BREAKDOWN

DELINQUENCY AMOUNTS		PRINCIPAL	INTEREST	LIQUIDATED DAMAGES	PMT ON ACCT	GRAND TOTAL
10/02 UNDERPAYMENT		13,415.19				
12/02 UNPAID PRINCIPAL		116,973.53				
1/03 UNPAID PRINCIPAL		102,965.80				
2/03 UNPAID PRINCIPAL		107,707.54				
ACCRUED INTEREST & LIQ. DAMAGES			3,168.37	3,168.37		
THROUGH 3/30/03						
3/03 UNPAID PRINCIPAL		96,399.24				
ACCRUED INTEREST & LIQ. DAMAGES			3,123.25	3,123.25		
THROUGH 5/15/03						
UNPAID 4/00 AUDIT INTEREST			377.43			
4/03 UNPAID PRINCIPAL		710.40				
4/03 UNPAID PRINCIPAL		106,353.33				
ACCRUED INTEREST & LIQ. DAMAGES						
THROUGH 6/15/03			2,890.46	2,890.46		
5/03 UNPAID PRINCIPAL		194,060.02				
ACCRUED INTEREST & LIQ. DAMAGES			1,821.17	1,821.17		
THROUGH 6/30/03						
6/03 REPORT AND CONTRIBUTION		137,636.67			(137,636.67)	
RECEIVED 7/22/03.						
ACCRUED INTEREST & LIQ. DAMAGES			2,792.46	2,792.46		
THROUGH 7/23/03.						
ACCRUED INTEREST & LIQ. DAMAGES			1,699.76	1,699.76		
THROUGH 8/06/03						
7/03 REPORT AND CONTRIBUTION		134,103.52			(134,103.52)	
RECEIVED 8/20/03.						
8/03 REPORT RECEIVED 9/29/03		109,403.09				
(Please see attached letter from employer.)						
TOTALS:		**1,119,728.33**	**15,872.90**	**15,495.47**	**(271,740.19)**	**879,356.51**
Prepared by: Andrea Reise						
9/30/03						

Exhibit
"2"

KEVIN B. CHRISTENSEN, CHARTERED

KEVIN B. CHRISTENSEN

LAURA J. WOLFF
EVAN L. JAMES
DARYL E. MARTIN

7440 W. Sahara Avenue
Las Vegas, Nevada 89117

Telephone (702) 255-1718
Fax (702) 255-0871
Email: KBChrislaw@aol.com

Via Facsimile and Regular Mail - 369-2666

September 30, 2003

Gordon & Silver, Ltd.
Attn: Thomas H. Fell, Esq.
3960 Howard Hughes Parkway, 9th Floor
Las Vegas, Nevada 89109

Re: VVS Enterprises, LLC - Case No. BK-S-003-17939 LBR - HEREIU Welfare Fund and Southern Nevada Culinary and Bartenders Pension Trust - Demand for Post-Petition Contribution Payments - Notice of Debtor's Anticipatory Breach

Dear Tom,

As you are aware, this office represents the HEREIU Welfare Fund and Southern Nevada Culinary and Bartenders Pension Trust ("Trust Funds"). The Trust Funds are priority claimants [11 USC §507(a)(1) and (4)] in the above-entitled case. We are in receipt of a letter from the Debtor Castaway's Hotel & Casino ("Hotel" or "Debtor") CFO dated September 25, 2003 ("CFO Letter") referencing several issues that must be immediately addressed to the satisfaction of the Trust Funds.

The CFO Letter was sent to Mr. Jim Bonaventure at the Union's address; however, the Trust Funds are separate and distinct entities from the Union and all correspondence from your client related to the business of the Trust Funds must be addressed to this office or to the Administrator, ABPA, c/o Theresa Cochran, Vice President, 1820 East Sahara Ave., Suite 314, Las Vegas, Nevada 89104.

The letter indicates that there is a balance due of $109,403.09 owed to the HEREIU Welfare Fund for the period ending August 31, 2003 ("August Fund Payment") and erroneously asserts that:

1. As a result of Bankruptcy Court hearings it was determined that the July 16, 2003 payment of $137,636.67 should not have been remitted ("July Fund Payment");

2. The July Fund Payment "was for wages paid pre-petition"; and

3. As a result of overpayment Castaway's was taking a credit against the August Fund Payment and a further credit of $28,233.58 against the September contribution payment obligations ("September Fund Payment").

Please contact the Debtor immediately to advise the Hotel that any failure to pay the August Fund Payment or the September Fund Payment, or any portion thereof, will constitute a post-petition default in the Debtor's obligation to pay administrative priority [§507(a)(1)] business expenses necessary for the continued operation of the Hotel. The Trust Funds will immediately upon non-payment file a Motion with the Bankruptcy Court to compel the Debtor's payment of these priority administrative expenses. As you will recall, the Debtor and your office repeatedly confirmed to the Court that it was the Debtor's intention to continue its fringe benefit contributions to the Trust Funds post-petition.

Exhibit "3"

Please correct the Debtor's representation that the July Fund Payment was a pre-petition payment of wages. The fringe benefit contributions owed to the Trust Funds and the Union wages paid directly to the bargaining unit employees are mutually exclusive items and may not be set off one against the other. The July Fund Payment was clearly a payment "in the ordinary course of business" by the Debtor and does not justify any credit or offset under the Code.

To our knowledge, there have been no Bankruptcy Court hearings, nor any orders entered, determining that: (1) the July Fund Payment constituted pre-petition wages, (2) should not have been remitted and (3) entitled the Debtor to a credit. Each of these notions are expressly contrary to the requirements of the Code. The Debtor's assertions directly contradict the Orders entered by the Bankruptcy Court and the representations made by the Hotel and your office in response to the Trust Funds' repeated requests for confirmation of the Debtor's intention to continue its post-petition Trust Fund contributions.

In conclusion, the Trust Fund's records will not be adjusted to reflect any credit against the August and September Fund Payments; but rather, if these payments are not remitted on a timely basis, the Hotel will be in breach of its Trust Fund pay and report obligations under the collective bargaining agreement with the Union. Any such delinquency will be reported to the Court and appropriate post-petition remedies will be sought by the Trust Funds.

Please contact me immediately with written assurances that the Debtor has withdrawn the CFO Letter and will comply with the Trust Fund payment obligations discussed herein. If you have any questions, please contact me.

Sincerely,

Kevin B. Christensen, Esq.
Attorney for the Trust Funds

cc: Office of US Trustee (Barry Jenkins, Esq.)
Richard McCracken, Esq.
Mitch Whitehead, Esq.
ABPA (Attn: Theresa Cochran)
Denise Clark, Esq.

Enclosures