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JEANNE A. NAUGHTON, CLERK

FEB 01 2018

U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY *Jeane A. Naughton* DEPUTY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re:

**HIGHER EDUCATION MANAGEMENT
GROUP, INC.,**

Debtor.

Case No.: 15-28724 (JKS)

Chapter 7

DECISION AND ORDER REGARDING MOTION FOR RELIEF FROM STAY

The relief set forth on the following pages, numbered two (2) through ten (10), is hereby
ORDERED.

John K. Sherwood
HONORABLE JOHN K. SHERWOOD
UNITED STATES BANKRUPTCY JUDGE

Dated: February 1, 2018

Page 2

Debtor: Higher Education Management Group, Inc.
Case No.: 15-28724 (JKS)
Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

WHEREAS:

1. This matter is before the Court on the motion for relief from the automatic stay filed by Hands On Technology Transfer, Inc. ("HOTT") and Roland Van Liew.¹ The movants contend that they are creditors of Higher Education Management Group, Inc. (the "Debtor") and that their claims are secured by 2,500,000 of the Debtor's shares of common stock in Aspen Group, Inc. ("AGI"), which are now equal to 208,333 shares due to a split in the stock that reduced the value of each share to 1/12 of the previous amount.² AGI also happens to be a creditor of the Debtor and has filed a proof of claim based on a judgment in the amount of \$688,631 plus a contingent claim of over \$6 million.³
2. The Court takes judicial notice that on January 31, 2018, AGI closed at \$8.24 per share and the market value of the Debtor's 208,333 shares in AGI was \$1,716,663.92.⁴
3. The Debtor's original schedules reflected that Mr. Van Liew had a secured claim in the amount of \$750,000 but that the claim was disputed.⁵ Almost two years later, the schedules were amended to provide that HOTT and Mr. Van Liew were both secured creditors of the Debtor, that their claims totaled \$1.1 million and were no longer disputed claims.⁶ Patrick Spada, the Debtor's president, signed the original schedules filed with the Bankruptcy

¹ ECF No. 26.

² Certification of Roland Van Liew, ¶ 10, ECF No. 26.

³ Amended Claim 1-2.

⁴ "Court can take judicial notice of public stock price quotations." § 201:8 Correct Judicial Notice, Bankr. Evid. Manual § 201:8 (2017 ed.).

⁵ ECF No. 9.

⁶ ECF No. 34.

Page 3

Debtor: Higher Education Management Group, Inc.

Case No.: 15-28724 (JKS)

Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

Court and is jointly liable with the Debtor on the obligations to HOTT and Mr. Van Liew.

Thus, it is logical that he would like to see these obligations satisfied from the proceeds of the AGI stock as opposed to his personal assets.

4. AGI, the holder of a potentially large unsecured claim against the Debtor, opposes the motion for relief from the stay. The motion is also opposed by the Debtor's Chapter 7 Trustee, Steven P. Kartzman (the "Trustee").
5. The Court has considered the following evidence and legal authority which support the claims of HOTT and Mr. Van Liew and their security interests in the AGI stock:
 - a. On August 23, 2010, HOTT and Mr. Van Liew entered into a settlement agreement with the Debtor, Mr. Spada and Aspen University, Inc. (AGI's predecessor) resolving litigation that was pending in the United States District Court for the District of Massachusetts.⁷ Pursuant to the settlement, the Debtor and Mr. Spada agreed to entry of judgment against them in the amount of \$1.2 million and to payment terms for satisfaction of the amount due. Upon receipt of the first installment payment, HOTT and Mr. Van Liew delivered their equity interests in the Debtor to Mr. Spada.⁸ Based on the settlement agreement and related documents, HOTT and Mr. Van Liew have made a strong case that they are creditors of the Debtor.
 - b. Turning to HOTT and Mr. Van Liew's status as secured creditors, the settlement also called for a pledge agreement by Mr. Spada, whereby he pledged his stock in

⁷ Ex. A, ECF No. 101.

⁸ The claims of HOTT and Mr. Van Liew against AGI were dropped.

Page 4

Debtor: Higher Education Management Group, Inc.
Case No.: 15-28724 (JKS)
Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

the Debtor (not the AGI stock) to HOTT and Mr. Van Liew as collateral for the debt.⁹ Further, under section 2.8 of the settlement agreement, the Debtor and Mr. Spada agreed to deliver to HOTT and Mr. Van Liew a Uniform Commercial Code (“U.C.C.”) security interest in the amount of \$1 million against any and all assets owned by Mr. Spada and the Debtor.¹⁰ On October 22, 2010, HOTT filed a U.C.C. Financing Statement in Nevada, the state of Debtor’s incorporation.¹¹ This pledge of all the Debtor’s assets forms the basis for HOTT and Mr. Van Liew’s claims that they had a security interest in the AGI stock and perfected their lien against that stock in October 2010.

- c. U.C.C. § 9-305(c)(1) states that “the local law of the jurisdiction in which the debtor is located governs: (1) perfection of a security interest in investment property by filing.” The Debtor was incorporated in the State of Nevada at the time of the initial settlement agreement. Thus, Nevada state law applies to the 2010 settlement agreement and U.C.C. Financing Statement. Since Nevada has adopted Article 9 of the revised U.C.C., choice of law is immaterial.
- d. The U.C.C.’s definitions of certain terms and categories are important to the Court’s analysis. A security is defined by U.C.C. § 8-103(a) as “a share or similar equity interest issued by a corporation, business trust, joint stock company or similar entity.” Thus, the AGI shares are securities. Next, U.C.C. § 9-102(49) defines

⁹ Ex. B, ECF No. 101.

¹⁰ Ex. A, ECF No. 101. The settlement agreement refers to Ex. B and C for a full description of the collateral.

¹¹ Ex. C, ECF No. 101. Mr. Van Liew may have filed a U.C.C. Financing Statement on the same day but only the filed copy for HOTT is part of the record.

Page 5

Debtor: Higher Education Management Group, Inc.
Case No.: 15-28724 (JKS)
Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

“investment property” as “a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.”

Therefore, the AGI shares, as securities, fall within the category of “investment property.” Lastly, U.C.C. § 9-102(74) defines a “security agreement” as “an agreement that creates or provides for a security interest.” Here, the settlement agreement is the security agreement because it created the security interest. The primary issue is whether the AGI shares were sufficiently described as collateral in the settlement agreement to create a security interest in the shares which would be perfected by filing a proper U.C.C. financing statement pursuant to U.C.C. § 9-312(a).¹²

- e. According to U.C.C. § 9-203(b)(3)(A), “a security interest is enforceable against the debtor and third parties with respect to the collateral only if: ... (3) one of the following conditions is met: (A) the debtor has authenticated a security agreement that provides a description of the collateral” A security interest in investment property is also enforceable if the secured party has “control” over the collateral. U.C.C. § 9-203(b)(3)(D). Here, there is an authenticated security agreement which describes collateral, but no control over the AGI stock. Thus, HOTT and Mr. Van Liew’s secured status under the 2010 settlement agreement is based solely on the description of the collateral.

¹² “A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing [a financing statement].” U.C.C. § 9-312(a).

Page 6

Debtor: Higher Education Management Group, Inc.

Case No.: 15-28724 (JKS)

Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

f. Sufficiency of description of collateral in a security agreement is governed by U.C.C. § 9-108. U.C.C. § 9-108(b) states, in relevant part, that “a description of collateral reasonably identifies the collateral if it identifies the collateral by: (1) specific listing; (2) category; (3) ... a type of collateral defined in [the Uniform Commercial Code]; ... or (6) ... any other method, if the identity of the collateral is objectively determinable.” In this case, the collateral was fully described in section 2.8 of the settlement agreement and attached Exhibits “B” and “C” thereof. More specifically, the exhibits share an identical “Schedule A” that consists of seven sections and provides a full description of various forms of collateral.¹³ After careful review, the Court finds that nowhere in “Schedule A” does it include a specific listing of the AGI shares under subsection 9-108(b)(1). Furthermore, “Schedule A” does not list a category that would include the AGI shares under subsection 9-108(b)(2) or a type of collateral defined in the U.C.C. under subsection 9-108(b)(3). As mentioned above and as defined in the U.C.C., the AGI shares are securities that fall under the category of “investment property.” Use of that term would have been sufficient to encompass the AGI shares, but the term “investment property” is not used in the settlement agreement or “Schedule A.” Finally, “Schedule A” does not include any other method that would make the AGI shares objectively determinable under subsection 9-108(b)(6). Although the word “stock” is included in section 1 of “Schedule A,” the surrounding words and context

¹³ Ex. A, ECF No. 101.

Page 7

Debtor: Higher Education Management Group, Inc.

Case No.: 15-28724 (JKS)

Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

suggest that this refers to goods and not a security.¹⁴ This ambiguous reference to stock is not reasonable identification of the AGI shares. Had HOTT and Mr. Van Liew intended to obtain a security interest in the AGI shares, they could have easily used the proper U.C.C. terminology, “investment property,” or provided a specific description of the shares. For these reasons, the settlement agreement did not sufficiently describe the AGI shares as collateral.

- g. HOTT and Mr. Van Liew argue in their supplement brief that the AGI shares were sufficiently described under U.C.C. § 9-108(a) because the settlement agreement states that the Debtor holds an ownership interest in Aspen and also indicated that they were securing their claims with all of the Debtor’s assets.¹⁵ U.C.C. § 9-108(a) states that “except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.” The Court is not persuaded by this argument. The reference to the stock was included in the recital provisions of the settlement agreement, but not in section 2.8 where the collateral is described. Section 2.8 incorporates by reference the lengthy “Schedule A” which describes various forms of personal property but, as stated above, does not refer to the AGI stock or use the term “investment property.” The fact that HOTT and Mr. Van Liew knew about the existence of the AGI stock but failed to specifically refer to it

¹⁴ *Id.*

¹⁵ ECF No. 101.

Page 8

Debtor: Higher Education Management Group, Inc.
Case No.: 15-28724 (JKS)
Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

in section 2.8 or “Schedule A” suggests that they did not consider it to be part of the collateral package.

- h. Moreover, a little more than two years later, HOTT and Mr. Van Liew took steps to fix the concerns raised above with respect to the attachment of the security interest in the AGI stock. On February 20, 2013, HOTT filed amended U.C.C. Financing Statements in Nevada, Delaware and New Jersey which used the term “investment property” and contained a specific reference to the AGI stock.¹⁶
- i. On July 1, 2013, section 2.8 of the settlement agreement was amended to specifically describe the collateral securing the Debtor’s obligations to HOTT and Mr. Van Liew as 2,500,000 shares of AGI.¹⁷ And, a pledge agreement was executed by Mr. Spada on behalf of the Debtor with respect to the Debtor’s AGI stock (as opposed to the stock in the Debtor which was the subject of the August 2010 pledge agreement).¹⁸
- j. HOTT and Mr. Van Liew took physical possession of the AGI stock certificate on or about July 19, 2013.¹⁹
- k. Based on the U.C.C. filings on February 20, 2013 and subsequent transactions described above, it appears that HOTT and Mr. Van Liew modified the security interest and correctly perfected the lien against the AGI stock that is the subject of

¹⁶ Ex. I-K, ECF No. 50. Mr. Van Liew may have filed amended U.C.C. Financing Statements on the same day but only the filed copies for HOTT are part of the record.

¹⁷ Ex. G, ECF No. 101.

¹⁸ Ex. H, ECF No. 101.

¹⁹ Certification of Roland Van Liew, ¶ 7, ECF No. 26.

Page 9

Debtor: Higher Education Management Group, Inc.
Case No.: 15-28724 (JKS)
Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

the motion before the Court. But, it is worth noting here that as of February 2013 and thereafter, the Debtor had lost its corporate charter. The Trustee and AGI contend that because of this, the Debtor lost its ability to transact business under Nevada law, which would include acts to execute or modify security agreements.

It is not necessary to decide this issue at this time.

6. The Trustee filed an adversary proceeding against HOTT and Mr. Van Liew on January 5, 2018 that seeks, among other things, to avoid the transfers of the AGI stock by the Debtor to HOTT and Mr. Van Liew as fraudulent conveyances.²⁰ Generally, the Trustee alleges that the transfer of the AGI stock of the Debtor to HOTT and Mr. Van Liew occurred at a time that the Debtor had ceased operations and that the transfer of the shares rendered the Debtor insolvent. HOTT and Mr. Van Liew have not formally responded to the Trustee's Complaint. Both New Jersey and Nevada law (N.J.S.A 25:2-31 and NRS 112.230) provide a four-year statute of limitations for fraudulent conveyance actions. On October 3, 2015, Debtor filed its Chapter 7 petition.²¹ On December 22, 2017, the Court approved a Consent Order executed by counsel for the Trustee and HOTT and Mr. Van Liew extending the statute of limitations under 11 U.S.C. § 108(a) and 11 U.S.C. § 546(a) through March 1, 2018.²² Because it is likely that the lien was not perfected until February 20, 2013 or July 1, 2013, the statute of limitations would not bar the Trustee's fraudulent conveyance claim.

²⁰ ECF No. 104.

²¹ ECF No. 1.

²² ECF No. 99.

Page 10

Debtor: Higher Education Management Group, Inc.

Case No.: 15-28724 (JKS)

Caption of Order: **Decision and Order Regarding Motion for Relief from Stay**

7. Thus, though it appears that the claims of HOTT and Mr. Van Liew are secured by a valid lien against the AGI stock that was granted before the petition date, the Trustee is seeking to avoid the lien as a fraudulent conveyance. If HOTT and Mr. Van Liew are granted stay relief now, they could liquidate the AGI stock and use the proceeds as they see fit. This would diminish the ability of the Trustee to recover funds from HOTT and Mr. Van Liew for the benefit of the bankruptcy estate if the Trustee's claims are valid. And, to the extent that the liens are subject to avoidance by the Trustee, section 502(d) of the Bankruptcy Code provides that the secured claims of HOTT and Mr. Van Liew should be disallowed. Also, based on the current value of the stock (over \$1.7 million), it would appear that the security interests of HOTT and Mr. Van Liew are adequately protected for the time being. To the extent that the parties want to guard against fluctuation of the stock's value, they can liquidate the stock and hold the proceeds in escrow until the issues are resolved.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The motion for relief from the automatic stay filed by HOTT and Mr. Van Liew is denied without prejudice pending the outcome of the Trustee's fraudulent conveyance proceeding. The Court will entertain requests by any party to expedite discovery, dispositive motions and trial in the adversary proceeding.
2. The Trustee, HOTT and Mr. Van Liew may consider liquidation of the AGI stock upon unanimous consent and in their discretion with proceeds being held in trust pending further order of the Court.