

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: : **CHAPTER 11**
:
COOPER-BOOTH WHOLESALE : **BANKRUPTCY NO. 13-14519 (MDC)**
COMPANY, L.P., et al.1, :
:
Debtors. : **Jointly Administered**
:
:

PNC BANK, : **ADV. PRO. NO. 13-_____ (MDC)**
NATIONAL ASSOCIATION, :
:
and :
:
PNC EQUIPMENT FINANCE, LLC, :
:
Plaintiffs, :
:
:

v. :
:
COOPER-BOOTH WHOLESALE :
COMPANY, L.P., :
:
COOPER-BOOTH :
TRANSPORTATION COMPANY, L.P., :
:
COOPER-BOOTH MANAGEMENT :
COMPANY, INC., :
:
AMERICAN GUARANTEE AND :
LIABILITY INSURANCE COMPANY, :
:
ZURICH AMERICAN INSURANCE :
COMPANY, :
:
and :
:
UNITED STATES OF :
AMERICA, :

1 The debtors in these chapter 11 cases are Cooper-Booth Wholesale Company, L.P., Cooper-Booth Transportation Company, L.P., and Cooper-Booth Management Company, Inc.

Defendants. :
 :
 :
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COMPLAINT FOR DECLARATORY JUDGMENT

PNC Bank, National Association (“PNC”), and PNC Equipment Finance, LLC (“PNCEF” and, together with PNC, the “Plaintiffs”), by and through their undersigned counsel, pursuant to Rule 8 of the Federal Rules of Civil Procedure, as made applicable herein by Rules 7001 and 7008 of the Federal Rules of Bankruptcy Procedure, file this Complaint for Declaratory Judgment (the “Complaint”) against Cooper-Booth Wholesale Company, L.P. (“Cooper-Booth Wholesale”), Cooper-Booth Transportation Company, L.P. (“Cooper-Booth Transportation”), Cooper-Booth Management Company, Inc. (“Cooper-Booth Management” and, together with Cooper-Booth Wholesale and Cooper-Booth Transportation, the “Debtors”), American Guarantee and Liability Insurance Company (“American Guarantee”), Zurich American Insurance Company (“Zurich” and, together with American Guarantee, the “Bonding Companies”), and the United States of America, acting by and through the Department of Homeland Security and/or its duly authorized officers or contractors (the “Department of Homeland Security” and, together with the Debtors and Bonding Companies, the “Defendants”), and allege as follows:

INTRODUCTION

1. The Plaintiffs have filed this Complaint to ensure that the Plaintiffs comply with their legal requirements under both (a) Section 362 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”); and (b) Sections 981(a)(1)(A), 981(a)(1)(A), 981(a)(1)(C) of title 18 of the United States Code and/or Section 5317(c)(2) of title 31 of the United States Code (collectively, the “Forfeiture Laws”). At issue are monies on deposit in a deposit account of

Cooper-Booth Wholesale maintained at PNC, Account No. 5005101217 (the “PNC Account”). Such monies and deposit account are subject to first priority, valid, and perfected liens and security interests in favor of PNC, securing various pre-petition loans made by the Plaintiffs to Cooper-Booth Wholesale (the “Pre-Petition PNC Liens”). Therefore, the Plaintiffs aver and believe that such monies and deposit account are both property of Cooper-Booth Wholesale’s bankruptcy estate under § 541 of the Bankruptcy Code and cash collateral under § 363(a) of the Bankruptcy Code. As such, pursuant to § 362 of the Bankruptcy Code, PNC is stayed from, among other things, exercising any control over the PNC Account and/or the monies therein.

2. On or about May 15, 2013, PNC received a Seizure Warrant from the Department of Homeland Security with respect to the PNC Account, which Seizure Warrant was issued in the Eastern District of New York and signed by United States Magistrate Judge Marilyn Dolan Go (the “Seizure Warrant”). In response to its receipt of the Seizure Warrant, PNC administratively froze the PNC Account. As of the May 21, 2013 (the “Petition Date”), there was \$7,298,942.91 on deposit in the PNC Account, which account remains administratively frozen.

3. The Department of Homeland Security, through Assistant United States Attorney Armeet Kabrawala, has asserted that, pursuant to the Seizure Warrant and applicable Forfeiture Laws, PNC will be required to turn over all monies on deposit in the PNC Account to the Department of Homeland Security. The Seizure Warrant, which was issued on May 14, 2013, provides that the PNC Account be seized within 14 days. On May 24, 2013, the Department of Homeland Security, through Special Agent Maria L. Marzan, made formal demand of PNC to turn over to the Department of Homeland Security any monies on deposit in the PNC Account.

4. In response to such demand, the Plaintiffs have filed this Complaint seeking a determination by this Court of whether PNC is barred by the automatic stay from turning over any monies on deposit in the PNC Account to the Department of Homeland Security or must comply with the turn over demand issued by the Department of Homeland Security with respect to the PNC Account, pursuant to the Seizure Warrant and applicable Forfeiture Laws.

5. The Plaintiffs have joined the Bonding Companies as defendants in this Adversary Proceeding because the Bonding Companies have asserted an interest in some or all of the monies on deposit in the PNC Account and have informed the Plaintiffs that they believe that some of the monies on deposit in the PNC Account constitute trust funds. The Plaintiffs dispute that the Bonding Companies have any interest in the monies on deposit in the PNC Account and, even if the Bonding Companies had such an interest, the Plaintiffs maintain that such interest is subject and subordinate in priority to the first priority, valid, and perfected Pre-Petition PNC Lien. The Plaintiffs further dispute that any of the monies on deposit in the PNC Account constitute trust funds. Nevertheless, in an abundance of caution, the Plaintiffs have joined the Bonding Companies as defendants hereto because they have put the Plaintiffs on notice that they claim to have a stake in the outcome of any determination regarding the disposition of the monies in the PNC Account.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The statutory predicates for the relief sought herein are 28 U.S.C. § 2201 and 11 U.S.C. §§ 362, 363 and 541.

7. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1409. This adversary proceeding is a core matter under 28 U.S.C. § 157(b)(2)(A), (B), (E), (G), (M), and (O).

PARTIES

8. Plaintiff PNC is a national banking association with an office located at 1600 Market Street - 28th floor, Philadelphia, PA 19103.

9. Plaintiff PNCEF is a limited liability company with an office located at 1600 Market Street - 28th floor, Philadelphia, PA 19103.

10. Defendant Cooper-Booth Wholesale is a limited partnership organized under the laws of the Commonwealth of Pennsylvania and is a debtor in these chapter 11 cases (collectively, the "Bankruptcy Cases").

11. Defendant Cooper-Booth Transportation is a limited partnership organized under the laws of the Commonwealth of Pennsylvania and is a debtor in these Bankruptcy Cases.

12. Defendant Cooper-Booth Management is a corporation organized under the laws of the Commonwealth of Pennsylvania, is a debtor in these Bankruptcy Cases, and is the corporate general partner of Cooper-Booth Wholesale and Cooper-Booth Transportation.

13. The Debtors' principal place of business is located at 200 Lincoln West Drive, Mountville, Pennsylvania.

14. Upon information and belief, American Guarantee is a corporate entity with an office located at One Liberty Plaza, 30th Floor, New York, New York 10006.

15. Upon information and belief, Zurich is a corporate entity with an office located at One Liberty Plaza, 30th Floor, New York, New York 10006.

16. The Department of Homeland Security is the federal government of the United States of America and/or an instrumentality thereof.

CHAPTER 11 CASES

17. The Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code on the Petition Date in the United States Bankruptcy Court for the Eastern District of Pennsylvania (this "Court").

18. Since the Petition Date, the Debtors have remained in possession of their assets and are operating their businesses as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

19. This Court is jointly administering the Bankruptcy Cases pursuant to its Order Directing the Joint Administration of Debtors' Chapter 11 Cases Pursuant to Fed R. Bank. P. 1015(b) and Granting Other Related Relief entered on May 22, 2013 at Bankr. Docket No. 25.

20. No statutorily authorized creditors' committee has yet been appointed by the United States Trustee in these Bankruptcy Cases.

PRE-PETITION AGREEMENTS AND COLLATERAL

21. Prior to the Petition Date, PNC made various loans, advances, and/or extensions of credit (collectively, the "Pre-Petition Line of Credit Loans") to or for the benefit of Cooper-Booth Wholesale, pursuant to, among other things, that certain letter agreement, dated August 30, 2011, entered into by and between Cooper-Booth Wholesale and PNC, as amended by that certain First Amendment to Loan Documents, dated December 22, 2011, that certain Second Amendment to Loan Documents, dated September 5, 2012, and that certain Third Amendment to Loan Documents, dated December 6, 2012 (as so amended and as further amended or otherwise modified, the "Pre-Petition Line of Credit Agreement"), pursuant to which PNC made a committed line of credit facility available to Cooper-Booth Wholesale in the present maximum principal amount of \$10,000,000, which Pre-Petition Line of Credit Loans are further evidenced

by that certain Second Amended and Restated Committed Line of Credit Note (Daily LIBOR), dated December 6, 2012, executed by Cooper-Booth Wholesale in favor of PNC (together with that certain Working Cash®, Line of Credit, Investment Sweep Rider (Single Option), dated August 30, 2011, entered into by and between Cooper-Booth Wholesale and PNC and as amended or otherwise modified, the “Pre-Petition Line of Credit Note”), that certain Reimbursement Agreement for Standby Letter(s) of Credit, dated August 30, 2011, entered into by and between Cooper-Booth Wholesale and PNC (as amended or otherwise modified, the “Pre-Petition First Reimbursement Agreement”), and that certain Reimbursement Agreement for Commercial Letter(s) of Credit, dated August 30, 2011, entered into by and between Cooper-Booth Wholesale and PNC (as amended or otherwise modified, the “Pre-Petition Second Reimbursement Agreement” and, together with the Pre-Petition Line of Credit Agreement, Pre-Petition Line of Credit Note, Pre-Petition First Reimbursement Agreement, Pre-Petition PNC Security Agreement (as defined hereinafter), and all agreements, instruments, documents, certificates, and statements related to any of the foregoing, the “Pre-Petition Line of Credit Loan Documents”).

22. Prior to the Petition Date, PNC also made various loans, advances, and/or extensions of credit (collectively, the “Pre-Petition ActivePay® Loans”) to or for the benefit of Cooper-Booth Wholesale, pursuant to, among other things, that certain Visa Commercial Credit Card Agreement (Payables), dated September 2, 2011, entered into by and between Cooper-Booth Wholesale and PNC (as amended or otherwise modified, the “Pre-Petition ActivePay® Agreement” and, together with all agreements, instruments, documents, certificates, and statements related thereto, the “Pre-Petition ActivePay® Documents”), pursuant to which PNC established an ActivePay® Payables Card program with Cooper-Booth Wholesale whereby PNC

made a line of credit facility available to Cooper-Booth Wholesale in the present maximum principal amount of \$1,000,000 in connection with 10 or more VISA Cards to be used by Cooper-Booth Wholesale solely for business purposes.

23. Prior to the Petition Date, PNC also made various loans, advances, and/or extensions of credit (collectively, the “Other Pre-Petition Loans” and, together with the Pre-Petition Line of Credit Loans and Pre-Petition ActivePay® Loans, the “Pre-Petition PNC Loans”) to or for the benefit of Cooper-Booth Wholesale, pursuant to, among other things, that certain Treasury Management Services Comprehensive Agreement ©2009, dated August 22, 2011, entered into by and between Cooper-Booth Wholesale and PNC (as amended or otherwise modified, the “Pre-Petition Treasury Agreement” and, together with all agreements, instruments, documents, certificates, and statements related thereto, the “Pre-Petition Treasury Documents”), pursuant to which PNC agreed to provide certain Treasury Management Services to Cooper-Booth Wholesale.

24. Prior to the Petition Date, PNCEF made various loans, advances, and/or extensions of credit (the “Pre-Petition Equipment Loans”) to or for the benefit of Cooper-Booth Wholesale and Cooper-Booth Transportation for purposes of Cooper-Booth Wholesale and Cooper-Booth Transportation purchasing personal property, pursuant to, among other things, (a) that certain Loan and Security Agreement, dated December 20, 2012, entered into by and among Cooper-Booth Wholesale, Cooper-Booth Transportation, and PNCEF (as amended or otherwise modified, the “Pre-Petition Equipment Loan Agreement”), (b) that certain Request for Advance (Indexed LIBOR), dated December 20, 2012, entered into by and among Cooper-Booth Wholesale, Cooper-Booth Transportation, and PNCEF in the amount of \$1,078,444.00 (as amended or otherwise modified, the “Pre-Petition Equipment Advance #1”), (c) that certain

Request for Staged Advance, dated April 10, 2013, entered into by and among Cooper-Booth Wholesale, Cooper-Booth Transportation, and PNCEF in the amount of \$353,460.00 (as amended or otherwise modified, the “Pre-Petition Equipment Advance #2”), and (d) that certain Request for Staged Advance, dated May 13, 2013, entered into by and among Cooper-Booth Wholesale, Cooper-Booth Transportation, and PNCEF in the amount of \$1,468,700.00 (as amended or otherwise modified, the “Pre-Petition Equipment Advance #3” and, together with the Pre-Petition Equipment Loan Agreement, Pre-Petition Equipment Advance #1, Pre-Petition Equipment Advance #2, and all agreements, instruments, documents, certificates, and statements related to any of the foregoing, the “Pre-Petition PNCEF Financing Documents”).

25. Prior to the Petition Date, as security for the Pre-Petition PNC Loans, Pre-Petition Equipment Loans, and all other obligations of Cooper-Booth Wholesale (collectively, the “Pre-Petition PNC Obligations”) under the Pre-Petition Line of Credit Loan Documents, Pre-Petition ActivePay® Documents, Pre-Petition Treasury Documents, and Pre-Petition PNCEF Financing Documents (collectively, the “Pre-Petition PNC Financing Documents”), Cooper-Booth Wholesale and PNC entered into that certain Security Agreement, dated August 30, 2011 (as amended or otherwise modified, the “Pre-Petition PNC Security Agreement”), pursuant to which Cooper-Booth Wholesale granted to PNC first priority, valid, and perfected liens on and security interests in all of Cooper-Booth Wholesale’s personal property, including, without limitation, all tangible and intangible assets and rights of every kind and nature, wherever located, whether then owned or thereafter acquired or arising, and all cash and noncash proceeds thereof, products thereof, additions and accessions thereto, substitutions therefor, and replacements thereof, including, without limitation, the PNC Account and all monies on deposit in the PNC Account (collectively, the “Pre-Petition PNC Collateral”).

26. Prior to the Petition Date, on September 14, 2011, PNC filed a UCC-1 financing statement with the Secretary of the Commonwealth of Pennsylvania, file number 2011091505763, naming Cooper-Booth Wholesale, as the debtor, and PNC, as the secured party, and describing the Pre-Petition PNC Collateral.

27. The Pre-Petition PNC Financing Documents are legal, valid, and binding obligations of Cooper-Booth Wholesale and are enforceable against Cooper-Booth Wholesale in accordance with their respective terms.

28. PNC has duly perfected, valid, first priority liens on and security interests in the Pre-Petition PNC Collateral, including, without limitation, the PNC Account and all monies on deposit therein, to secure the Pre-Petition PNC Obligations.

29. The outstanding principal and accrued and unpaid interest amounts due to the Plaintiffs under the Pre-Petition PNC Financing Documents as of the Petition Date were as follows:

(a) with respect to the Pre-Petition Line of Credit Loans, principal in the amount of \$7,721,731.48 and interest in the amount of \$4,756.96;

(b) with respect to the Pre-Petition ActivePay® Loans, principal in the amount of \$166,173.90, plus accrued and unpaid interest;

(c) with respect to the Pre-Petition Equipment Loans under Pre-Petition Equipment Advance #1, principal in the amount of \$1,006,547.72 and interest in the amount of \$1,634.13;

(d) with respect to the Pre-Petition Equipment Loans under Pre-Petition Equipment Advance #2 and Pre-Petition Equipment Advance #3, principal in the amount of \$1,822,170.00 and interest in the amount of \$2,818.46; and

(e) with respect to the Pre-Petition Treasury Documents, accrued and unpaid fees in the amount of \$3,770.61.

30. All such amounts are in addition to fees, costs, expenses, attorneys' fees and costs, and all other sums recoverable by the Plaintiffs under the Pre-Petition PNC Financing Documents.

PNC ACCOUNT, SEIZURE & EVENT OF DEFAULT

31. Prior to the Petition Date, Cooper-Booth Wholesale used the PNC Account as its primary operating account.

32. On or about May 15, 2013, PNC received by facsimile the Seizure Warrant from the Department of Homeland Security with respect to the PNC Account.

33. The Seizure Warrant references a seizure of "All funds on deposit in Account No. 5005101217 held in the name and/or for the benefit of Cooper-Booth Wholesale Co. Concentration and/or Cooper-Booth Wholesale Co. at PNC Bank at 340 Madison Avenue, New York, New York 10173, and all proceeds traceable thereto."

34. Submitted in support of the Department of Homeland Security's application for the Seizure Warrant was a sealed affidavit of Special Agent Maria Marzan of the U.S. Department of Homeland Security.

35. The Seizure Warrant states that Magistrate Judge Go was satisfied that Agent Marzan's affidavit established probable cause to believe that the monies on deposit in the PNC Account are subject to forfeiture pursuant to (a) 18 U.S.C. § 981(a)(1)(A), based on such monies alleged involvement in violations of 18 U.S.C. § 1956 (relating to the laundering of monetary instruments) and 18 U.S.C. § 1957 (relating to engaging in monetary transactions in property

derived from specified unlawful activity); (b) 18 U.S.C. §981(a)(1)(C), based on such monies allegedly representing or being derived from proceeds traceable to violations of 18 U.S.C. § 2341-46 (relating to trafficking in contraband cigarettes); and/or (c) 31 U.S.C. § 5317(c)(2), based on such monies alleged involvement in violations of 31 U.S.C. § 5324 (relating to the evasion of reporting of certain currency transactions).

36. In response to receipt of the Seizure Warrant, PNC administratively froze the PNC Account.

37. As of the Petition Date, there was \$7,298,942.91 on deposit in the PNC Account, which remains administratively frozen.

38. On or about May 17, 2013, the Plaintiffs sent a letter to Cooper-Booth Wholesale and Cooper-Booth Transportation notifying Cooper-Booth Wholesale and Cooper-Booth Transportation that the seizure of the PNC Account was an “Event of Default” under and as defined in the Pre-Petition PNC Financing Documents.

39. The Plaintiffs further notified Cooper-Booth Wholesale and Cooper-Booth Transportation that, by reason of the occurrence and continuance of such Event of Default, the committed line of credit facility, ActivePay® Payables Card program, and equipment loan facility established with Cooper-Booth Wholesale and/or Wholesale and Cooper-Booth Transportation pursuant to the Pre-Petition PNC Financing Documents were permanently terminated effective as of May 17, 2013, and PNC had no further obligation to make any loans, advances, and/or extensions of credit thereunder or with respect thereto.

40. The Plaintiffs further notified Cooper-Booth Wholesale and Cooper-Booth Transportation that the Plaintiffs had accelerated and were demanding immediate payment in full of all outstanding Pre-Petition PNC Obligations.

POST-PETITION EVENTS

41. The Department of Homeland Security, through Assistant United States Attorney Ameet Kabrawala, has advised PNC that, pursuant to the Seizure Warrant and applicable Forfeiture Laws, PNC will be required to turn over all monies on deposit in the PNC Account to the Department of Homeland Security upon formal demand made by the Department of Homeland Security.

42. The Seizure Warrant, which was issued on May 14, 2013, provides that the Account be seized within 14 days.

43. On May 24, 2013, the Department of Homeland Security, through Special Agent Maria L. Marzan, made formal demand of PNC to turn over to the Department of Homeland Security any amounts on deposit in the PNC Account.

44. Upon turn over of monies on deposit in the PNC Account to the Department of Homeland Security, such monies would remain in the Department of Homeland Security's possession pending resolution of the forfeiture proceedings involving Cooper-Booth Wholesale.

45. The Bonding Companies have asserted an interest in some or all of the monies on deposit in the PNC Account and/or that some of the monies on deposit in the PNC Account constitute trust funds.

46. The Plaintiffs dispute that the Bonding Companies have any interest in the monies on deposit in the PNC Account and, even if the Bonding Companies had such an interest, the Plaintiffs maintain that such interest is subject and subordinate in priority to the first priority, valid, and perfected Pre-Petition PNC Lien.

47. The Plaintiffs further dispute that any of the monies on deposit in the PNC Account constitute trust funds.

48. The Plaintiffs further maintain that, should the Department of Homeland Security bring any future forfeiture proceedings against the contents of the PNC Account, the first priority, valid, and perfected Pre-Petition PNC Lien in the PNC Account and all monies on deposit therein will be determined to be superior to the Department of Homeland Security's interest in such account and monies.

49. Each Plaintiff is an "innocent owner" (and/or a bona fide purchaser) of the monies in the PNC Account pursuant to 18 U.S.C. § 983(d)(3)(A). 18 U.S.C. § 983(d) states that "an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."

50. Each Plaintiff is a bona fide purchaser of the Pre-Petition PNC Lien in the PNC Account and all monies on deposit therein and, at the time it acquired that interest, did not know and was reasonably without cause to believe that the monies in the PNC Account were subject to forfeiture.

51. In any event, the Plaintiffs aver and believe that the PNC Account and all monies on deposit therein are both property of Cooper-Booth Wholesale's bankruptcy estate under § 541 of the Bankruptcy Code and cash collateral under § 363(a) of the Bankruptcy Code.

52. As such, pursuant to § 362 of the Bankruptcy Code, PNC is stayed from, among other things, exercising any control over the PNC Account and/or the monies therein.

53. Therefore, PNC is stayed from complying with the demand made by the Department of Homeland Security, absent a determination by this Court to the contrary or that the requirements to lift such stay have been satisfied and such lift of stay is ordered by this Court.

COUNT I

(Declaratory Judgment Regarding Disposition of Monies in PNC Account)

54. The Plaintiffs incorporate the allegations contained in paragraphs 1 through 53 as if fully set forth herein.

55. Section 2201 of Title 28 of the United States Code provides, in pertinent part, “[i]n a case of actual controversy ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

56. There exists an actual controversy between the Plaintiffs and Defendants, the outcome of which will affect the rights of the parties. Specifically, the Department of Homeland Security asserts that PNC should turn over the monies in the PNC Account to the Department of Homeland Security pursuant to the Seizure Warrant and applicable Forfeiture Laws. PNC avers and believes that it is stayed from doing so pursuant to § 362 of the Bankruptcy Code. The Debtors are entitled to enforce such stay against PNC, absent a determination by this Court that either any turn over of such monies is not in violation of such stay or that the requirements to lift such stay have been satisfied and lift of stay is ordered by this Court. The Bonding Companies allege that they have a stake in the outcome of any determination regarding the disposition of the monies in the PNC Account. The Plaintiffs, however, dispute such claim and maintain that their interests in the PNC Account and monies therein are superior to the other parties’ interests, if any.

57. Plaintiffs seek a declaration from this Court determining whether PNC is barred by the automatic stay from turning over any monies on deposit in the PNC Account to the Department of Homeland Security or must comply with any turn over demand issued by the

