

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Savannah Division

In the matter of: )

CAP'N SAM'S CRUISES, INC. )  
(Chapter 11 Case 90-40149) )

Debtor )

CAP'N SAM'S CRUISES, INC. )

Plaintiff )

v. )

COLONIAL OIL INDUSTRIES, INC., )  
& THE UNITED STATES MARSHAL'S )  
SERVICE BEING AN AGENCY OF )  
THE DEPARTMENT OF JUSTICE OF )  
THE UNITED STATES OF AMERICA )

Defendants )

Adversary Proceeding

Number 90-4015

**FILED**

at 5 O'clock & 22 min. P.M

Date 2/2/90

MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia PCB

MEMORANDUM AND ORDER

An emergency hearing was conducted on February 2, 1990, to consider the granting of interlocutory relief in the above-captioned case. After an evidentiary hearing the Court makes the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1) Plaintiff filed a Chapter 11 case on January 25, 1990. As of the date of filing the Plaintiff owned three vessels known as the M/V Cap'n Sam, U.S.C.G. Official Number 635158, the M/V Waving Girl, U.S.C.G. Official Number 294423, and the M/V Goldenrod, U.S.C.G. Official Number 677554. Defendant Colonial Oil Industries, Inc. ("Colonial") had previously commenced an action to foreclose a preferred ship's mortgage which it holds relating to the three said vessels and an interlocutory sale had been scheduled to be conducted by the United States Marshal for the Southern District of Georgia. However, the sale was not conducted as the result of the filing of the Debtor's Chapter 11 case, in adherence to the automatic stay provisions of 11 U.S.C. Section 362.

2) Notice of the Debtor's Chapter 11 filing was filed in the foreclosure proceeding pending in the United States District Court for the Southern District of Georgia and an order vacating the interlocutory sale was entered by the Honorable Anthony A. Alaimo, Chief Judge, United States District Court, on January 29, 1990. Thereafter, by order dated January 30, 1990, the Honorable B. Avant Edenfield, Judge, United States District Court, referred Civil Action Number CV-489-246 to this Court for further adjudication

under the authority of Coastal Production Credit Ass'n v. Oil Screw Santee, 51 B.R. 1018 (S.D.Ga. 1985). In that case, Judge Alaimo examined what he described as the "fundamental conflicts" between a district court presiding over an admiralty in rem foreclosure proceeding and a bankruptcy court presiding over a Chapter 11 reorganization. Drawing a distinction between Chapter 11 and Chapter 7 liquidation cases, Judge Alaimo recognized that in a Chapter 11 case the Court is presiding over a reorganization process and seeks to marshal any assets of the business which are necessary to its rehabilitation. In contrast, the admiralty court seeks a speedy disposition of assets through interlocutory sale. Given the inherent conflict in the two proceedings, Judge Alaimo adopted the rationale of Fifth Circuit cases, which constitute binding precedent in this Circuit, and held that the in rem foreclosure proceeding in District Court should be stayed. He also concluded that it was unnecessary for the District Court to rule on other issues raised by the creditors in that case as to whether the Ship Mortgage Act constitutes an exception to the automatic stay provisions of Section 362 and stated "that question, as well as any request to lift the stay and allow sale of the O/S Santee is left to the Bankruptcy Court for resolution". Id. at 1021. Based on that decision and the orders entered referring the matter to this Court for adjudication, but mindful of the fact that if this Chapter 11 were converted to Chapter 7 the rationale for bankruptcy taking precedence over

admiralty would be lacking, I conclude that nothing in this order should be construed as vacating the District Court exercise of in rem jurisdiction over the vessels. On the other hand, it is clear that the Debtor may have rights in and to the vessels which are cognizable in this Court requiring an order of this Court which in effect modifies the terms and conditions of Judge Edenfield's October 20, 1989, order appointing Colonial Oil Industries, Inc., as substitute custodian.

3) Colonial alleges that as of the date of filing this case, Debtor was obligated to Colonial in an amount in excess of \$584,000.00 and in addition, that Colonial has expended in excess of \$30,000.00 during the pendency of the District Court foreclosure action. Apparently, expenses for Colonial's services as substitute custodian continue to accrue at a rate of at least \$3,000.00 per month. Colonial has had a survey done on all of the vessels in issue which indicate an aggregate value of \$477,000.00 and thus asserts in this Court that it has the status of an undersecured creditor pursuant to 11 U.S.C. Section 506.

4) The Debtor is before the Court asserting that the vessels remain property of the estate pursuant to 11 U.S.C. Section 541 and that Debtor is entitled to have turnover of those assets ordered pursuant to 11 U.S.C. Section 542 and 543. Colonial raises

objections to this proceeding on grounds relating to adequacy of notice and adequacy of service. I find that the relief sought by the Debtor in this proceeding, while not denominated as such, is in the nature of a temporary restraining order in aid of the Section 362 automatic stay and thus is relief which can appropriately be granted to a party without notice to the adverse parties. Therefore, I conclude that the notice which has been provided in this case, which consists of notice to counsel for the parties against whom relief is sought and an opportunity to participate in the evidentiary hearing, is sufficient, and for the purposes of this hearing, I overrule those objections.

5) Debtor produced testimony of its general manager, Mr. Darryl Holder, who has been active in the management of the Debtor's business in various capacities for a period of four years. Mr. Holder presented uncontradicted testimony that the Coast Guard certificate of inspection of the "Cap'n Sam" has expired and that the vessel cannot be operated without being hauled out for cleaning of the hull, inspection by the Coast Guard, and other repairs which may be mandated by the Coast Guard or deemed necessary and desirable by the Debtor. This process is expected to take four to five weeks to complete. The Debtor has been informed that the vessel can be hauled out at a local dry dock facility but only if the same can be accomplished prior to February 9, 1990, due to other commitments

for hauling which that dry dock facility has made. Debtor has also established that approximately 10% of the annual revenues which can be derived by operating the crew's vessels in and about the Savannah Port can be generated over the days surrounding the Saint Patrick's Day festivities in Savannah which will occur in approximately six weeks. Debtor has stated with the assistance of a Mr. Ed Jones, that it has the funds necessary to complete the repairs, to fully insure the vessels, and to pay other expenses in connection with the obtaining of a current certificate of inspection so that the vessels can be operated. It appears, however, that the availability of those funds is contingent upon certain conditions which I cannot approve. See Exhibit P-2 and 11 U.S.C. §364. Debtor also asserts that the value of the vessel greatly exceeds the debt owed to Colonial. Debtor believes that its operations have been profitable in the past and can be in the future so long as profits from this operation are not diverted to other business interests of the Debtor's shareholder, Sam Stevens. Indeed, the Debtor has booked 52 charters for future customers which would bring in gross revenues of over \$100,000.00 and estimates if allowed to operate as in the past, substantial "walk-in" cruise business can be generated to fund a plan. The costs to obtain a Coast Guard Certificate of Inspection would not exceed \$15,000.00.

CONCLUSIONS OF LAW

I find that the provisions of 11 U.S.C. Section 542 and 543 require that Defendant Colonial Oil Industries, Inc., turnover property of the estate to the Debtor. I further conclude that the vessels in issue constitute property of the estate inasmuch as Debtor's title to those vessels had not been finally disposed of in any legal or equitable proceeding, by consent or as a matter of law, prior to the filing of the within Chapter 11 case. Although it is not entirely clear from reading Sections 542 and 543, I conclude that the requirements of 11 U.S.C. Section 363 require that any turnover of property to the Debtor be conditioned on Debtor providing adequate protection of the interest of the creditor in said collateral. See 11 U.S.C. Section 363(e). Adequate protection is nonexclusively defined in 11 U.S.C. Section 361. It may include requiring payments by the trustee, or in this case the debtor-in-possession, to the affected creditor to the extent the Debtor's use of the property causes a diminution in the value of the creditor's interest in the debtor's property i.e., through depreciation. It also may require periodic cash payments to compensate a creditor for accruing interest on his loan, but only in the case of an over-secured creditor. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). With respect to an undersecured creditor, adequate

protection does not include such periodic interest payments so long as there is a reasonable prospect of reorganization in a reasonable time. For the purposes of this Order only, I conclude that as contended by Colonial, it is an undersecured creditor and therefore is entitled to protection against depreciation in the value of its collateral but is not entitled to receive any interest factor. I further find that the hauling, cleaning and repainting of the bottom and other repairs which the Debtor proposes to accomplish with respect to the vessels will enhance the value of the vessel upon which the work is accomplished and that there is, in the shortrun at least, no danger of any further depreciation in said vessel. It is further clear that to the extent the expenses of insuring, caring for the vessel, repairing and securing the same is transferred from Colonial to the debtor-in-possession, Colonial's claim against the Debtor will cease to accrue at the current rate of \$3,000.00 per month and those expenses will be paid on a current basis by the Debtor. This is obviously of benefit not only to Colonial but to other creditors in the case. The Debtor at this time does not propose to use the vessel "Goldenrod" but wishes to market it for sale in a manner better calculated than a Marshal's sale to achieve the highest and best price available. The vessel "Waving Girl" can be reconditioned in a much shorter time frame and at less expense than the "Cap'n Sam" and does not suffer from the lack of a current Coast Guard inspection certificate.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT pending further order of Court, that Debtor is substituted for Colonial Oil Industries, Inc., as substitute custodian, and may take possession of the vessels "Cap'n Sam", the "Waving Girl" and the "Goldenrod" upon debtor-in-possession accomplishing the following:

- 1) Providing proof of adequate insurance, in a form acceptable to Colonial and to B & L Management Corporation, d/b/a Stamford Landing, with minimal coverage for the subject vessels, as follows:

<u>Vessel</u>	<u>Hull, etc.</u>	<u>Protection and Indemnity</u>
Cap'n Sam	\$1,000,000.00	\$1,000,000.00
Waving Girl	\$ 200,000.00	\$1,000,000.00
Goldenrod	\$ 200,000.00	\$1,000,000.00
	(port risk only)	

Said insurance shall contain Breach of Warranty coverage in the amount hull, machinery and equipment coverage, shall waive any exclusion for vandalism and shall reflect the interests of Colonial and B & L Management Corporation. Debtor is required to proceed with the hauling of the "Cap'n Sam" as scheduled on

or before February 9, 1990, and to immediately commence the necessary repairs in order to obtain a current Coast Guard certificate of inspection within a period of thirty (30) days after the vessel is hauled.

- 2) Debtor is required to pay all expenses for material and labor, all accrued tax obligations and other necessary expenses as and when incurred. In that connection, Debtor is not authorized to haul the vessel or commence work until it has unrestricted access to a minimum of \$25,000.00 in hand with which to pay all expenses which are incurred on a current basis. The source of said funds will not be mandated by this Order. However, it is obvious that Ed Jones is the only known source of funding for Debtor. To the extent that funds are advanced by Ed Jones or by any investor, said funds shall be deemed capital contributions only.
- 3) Only after all necessary work is completed on the "Cap'n Sam" is Debtor authorized to commence any work on the "Waving Girl" or "Goldenrod". However, Debtor may immediately undertake reasonable marketing efforts to sell the "Goldenrod".
- 4) Pursuant to the authority granted me in Bankruptcy Rule 3016(c), Debtor's Disclosure Statement shall be filed in

accordance with the provisions of this Court's Order on Disclosure Statement dated January 31, 1990, except that said Disclosure Statement shall be filed with the plan and not later than April 16, 1990.

- 5) At all times during the Debtor's possession of the vessels as permitted by this Order, Debtor shall make said vessels available for inspection at any time on reasonable notice from the Office of the United States Trustee, Colonial Oil Industries, Inc., B & L Management Corporation, d/b/a Stamford Landing, or any party in interest including surveyors, or other agents or professionals employed by any of the above.
  
- 6) On surrender of possession of said vessels to the debtor-in-possession, Colonial, the substitute custodian heretofore appointed by the United States District Court for the Southern District of Georgia shall be discharged from its duties and responsibilities for the safekeeping of said vessels and held harmless from any and all claims arising from whatever source after the date possession is transferred to the debtor-in-possession which shall be deemed bound by the terms and conditions of substitute custodianship previously imposed on Colonial, except as modified herein.

7) This Order is in the nature of interim, emergency relief only. A further hearing to consider additional relief sought by Debtor in this matter, as it may hereafter be amended, shall be assigned within thirty (30) days and notice provided all parties in interest.



---

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 2<sup>nd</sup> day of February, 1990.