Docket #1092 Date Filed: 03/05/2019

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: March 14, 2019
Hearing Time: 11:00 a.m.

In re	:	Chapter 11
TOISA LIMITED et al.,	:	Case No. 17-10184 (SCC)
Debtors.	:	

OBJECTION OF THE UNITED STATES TRUSTEE TO THE SOLICTAION VERSON OF THE SEOCND AMENDED JOINT PLAN OF LIQUIDATION FOR TOISA LIMITED AND CERTAIN OF ITS AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

TO: THE HONORABLE SHELLEY C. CHAPMAN, UNITED STATES BANKRUPTCY JUDGE:

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), through counsel, respectfully submits this objection (the "Objection") to confirmation of the Debtors' Solicitation Version of the Second Amended Joint Plan of Liquidation for Toisa Limited and Certain of its Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan"). ECF No. 1028. In support of this objection the United States Trustee respectfully states as follows:

SUMMARY STATEMENT

The United States Trustee objects to confirmation of the Plan to the extent certain provisions do not comply with the Bankruptcy Code and applicable case law. Specifically, the Court should not approve payment of the professional fees for the informal committee of secured creditors (the "Informal Committee") because these payments are not authorized under section 503(b) of the Bankruptcy Code. Additionally, the Plan improperly imposes deemed

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consent upon creditors to third party releases.[1] Finally, the United States Trustee notes that as of the date hereof, the Debtor has not paid its quarterly fees for the 4th quarter of 2018 in the amount of $580,718.43. Payment of quarterly fees are a statutory requirement for confirmation. 11 U.S.C. § 1129(a)(12).

BACKGROUND

General Background

1. On January 29, 2016 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. ECF Doc. No. 1.

2. The Debtors cases are jointly administered. ECF No. 13

3. The Debtors are in the shipping business. Declaration of Robert Hennerbry at ¶ 7, ECF No. 3.

4. The Debtors operates and manages their affairs as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

5. Prior to the Petition Date, the Informal Committee was formed. The Informal Committee consists of certain secured lenders of the Debtors. See Notice of Appearance by Cadwalader, Wickersham & Taft, LLP, ECF No. 151.

6. On May 18, 2017, the United States Trustee appointed an official committee of unsecured creditors. ECF No. 161. On June 12, 2017 and August 8, 2017, the United States Trustee filed amended notices of committee appointments. ECF Nos. 199 & 272.

7. On January 24, 2019, the Court approved the Debtors' Disclosure Statement and

[1] The United States Trustee recognizes that on February 25, 2019, the Court overruled the United States Trustee's objections regarding third-party releases similar to the ones set forth

set March 14, 2019 as the date for the confirmation hearing for the Plan. ECF No. 1027.

Payment of Informal Committee Professionals

8. According to Section 2.5 of the Plan, each Informal Committee professional shall be paid out of available cash, as agreed by the Debtors and the members of the Informal Committee, without need for further order by the Bankruptcy Court. Plan at 27.

Third-Party Releases

9. The Plan includes third-party releases.

10. Releasing Parties are defined under section 1.161 of the Plan as each holder of a claim or interest that is (a) unimpaired, (b) votes to accept the Plan, (c) does not vote to accept or reject the plan, (d) deemed to reject the Plan, or votes to reject the Plan and does not opt out of the release, (e) the Creditors Committee, and (e) with respect to each person referred to in (a) – (e), such person's current and former subsidiaries, affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity holders, representatives, and other professionals, in each case, only in their capacity as such. Plan at 22.

11. Released Parties are defined under section 1.160 of the Plan to include (a) the Debtors, (b) the Reconstituted Toisa Board, (c) the Informal Committee, (d) the Creditors' Committee, (e) Secured Creditors, and (f) with respect to each party referred to in (c) and (d), such person's current and former subsidiaries, affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity holders, representatives, and other

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herein in Nine West Holdings, Inc., 18-10947 (SCC).

professionals, in each case, only in their capacity as such. Plan at 22.

12. The Released Parties also include entities managing the Debtors operations, which are defined under the Plan as the Management Companies Released Parties. Plan at 18 and 56.

13. The Released Parties and the Management Companies Released Parties are release from, among other things, all claims relating to the Debtors, provided, however, that the release does not release (a) any party from gross negligence, intentional fraud, willful misconduct or criminal conduct, (b) any Released Party from a cause of action held by a governmental entity based upon (i) the Internal Revenue Code or other domestic state, city or municipal tax code, (ii) environmental laws, (iii) criminal laws, (iv) the Securities Exchange Act of 1934, the Securities Act or other Securities laws, (v) the Employee Retirement Income Security Act of 1974, and (vi) the laws and regulations of the Bureau of Customs and Border Protection of the United States Department of Homeland Securities. Plan at 56-57.

Quarterly Fees

14. As of the date hereof, the Debtor has not paid its quarterly fees for the 4th quarter of 2018 in the amount of $580,718.43.

ARGUMENT

A. Confirmation Standards and Statutory Framework

There are two relevant statutes pertinent to the issues herein governing chapter 11 plan provisions and confirmation. Section 1123(b)(6) allows plan proponents to include terms that are "not inconsistent with the applicable provisions" of the Code. 11 U.S.C. § 1123(b)(6). Section 1129 of the Bankruptcy Code authorizes the bankruptcy court to confirm a plan only

when it "complies with the applicable provisions of the Code." 11 U.S.C. 1129. The plan proponent bears the burden of establishing compliance with section 1129. In re Charter Commc'ns, 419 B.R. 221, 243-44 (Bankr. S.D.N.Y. 2009) (citing Heartland Fed. Savs. & Loan, Ass'n v. Briscoe Enters. (In re Briscoe Enters.), 994 F.2d 1160, 1165 (5th Cir. 2993) (stating that "[t]he combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under §1129(a) and in a cramdown")); In re Worldcom, Inc., No. 02-13533 (AJG), 2003 WL 23861928, at *46 (Bankr. S.D.N.Y. Oct. 31, 2003) (citing In re Briscoe Enters.).

B. The Court Should Not Approve The Payment of Professional Fees For the Informal Committee Because they Are Not Authorized under Section 503(b) of the Bankruptcy Code

Section 503(b) of the Bankruptcy Code governs administrative expenses. Section 503(b)(2) grants administrative expense priority to professionals who have been retained under the Bankruptcy Code. Section 503(b)(4) specifically addresses reimbursement of an unofficial committee's professional fees and is the exclusive avenue for the payment of these type of administrative expenses. See In re Lehman Bros. Holdings, Inc., 508 B.R. 283, 289 (S.D.N.Y. 2014). To the extent a plan provision seeks to circumvent section 503(b), the broader business judgment rule for the approval of such provision does not apply. Id. citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) ("RadLAX") ([N]either the need for flexibility. . . can justify a plan provision that is merely a backdoor to administrative expenses . . . . [T]he federal scheme cannot remain comprehensive if interested parties . . . in each case are free to tweak the law to fit their preferences").

In the instant case, the Plan requires the Debtors to pay the professional fees of the Informal Committee. Plan at Section 2.5. The Plan treats the claims of the un-retained professionals of the Informal Committee as an administrative expenses without any of these professionals having to meet their evidentiary burden under section 503(b). Id. Under the Plan, the Court is to have no say as to whether the fees and expenses of this privileged group of professionals are to be paid. The total amount of fees and expenses at issue are unknown and the Debtors have inappropriately delegated to themselves and the Informal Committee the sole right to review these undisclosed fees and expenses. In so doing they seek to usurp the Court's authority to review and approve the fee requests under the appropriate statutory standards.

The plain meaning of the Bankruptcy Code's text is clear and determinative. The "general language of a [Bankruptcy Code] statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." RadLAX, 132 S. Ct. at 2071 (internal quotation, citation, and modification omitted). This rule "is particularly true where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." Id. (internal quotation and citation omitted). Here, the payment provision of the Plan conflicts with the statutory standards and procedures for payment of administrative expenses.

Accordingly, these professional fees and expenses cannot be approved unless and until the un-retained professionals file applications with the Court and demonstrate to the Court's satisfaction that they made a "substantial contribution" in the case pursuant to section 503(b)(3)(D). See generally, Lehman. To the degree that "substantial contribution" is proven, then the standards as set forth in section 330 of the Bankruptcy Code will apply in determining

the extent the fees and expenses of a professional are reimbursable under section 503(b)(4). See e.g., In re Wind N'Wave, 509 F.3d 938, 944 (9th Cir. 2007); In re Celotex Corp., 227 F.3d 1336, 1341 (11th Cir. 2000).

C. The Plan Improperly Deems Consent to Third-Party Releases

The Plan improperly deems that the Released Parties and the Management Companies Released Parties are released by, among others, each holder of a claim or interest that is unimpaired, does not vote to accept or reject the plan, and is deemed to reject the Plan, or votes to reject the Plan and does not opt out of the release. Plan at Section 1.161.

The Court in In re SunEdison, Inc., 576 B.R. 45, 13-14 (Bankr. S.D.N.Y. 2017) ruled that creditors who did not affirmatively vote could not be deemed to consent to the releases in the plan. The Court in SunEdison cited to the following language in In re Chassix Holdings, 533 B.R. 54, 81 (Bankr. S.D.N.Y. 2015) ("Chassix"):

> Charging all inactive creditors with full knowledge of the scope and implications of the Proposed third party *releases*, and implying a "consent" to the third party *releases* based on the creditors' inaction, is simply not realistic or fair, and would stretch the meaning of "consent" beyond the breaking point.

Emphasis in original.

Further, the SunEdison Court held that the debtors have failed to sustain their burden of proving that the Court had subject matter jurisdiction to approve the third party releases. In re SunEdison, Inc., 576 B.R. 453 (Bankr. S.D.N.Y. 2017). In that case, the non-voting releasors did not consent to the release, the creditors were not being paid in full, and the third party claims would have been extinguished rather than channeled to a fund for payment. Id. What's more, the debtors did not identify which third party claims would directly impact their reorganization and

given the scope of the release, the Court determined that it is likely that many of the claims would not impact the reorganization. Id. Thus, the Court granted the debtors leave to propose a modified form of release under the condition that they must specify the release by name or readily identifiable group and the claims to be released, demonstrate how the outcome of the claims to be released might have a conceivable effect on the debtors' estates and show that this is one of the rare cases involving unique circumstances in which the release of the claims is appropriate under Metromedia. Id.

The Chassix Court also made clear its opposition to requiring creditors to opt out of the releases. The Court required the debtors to revise the definition of "Consenting Creditors" in the plan and did not permit an opt-out procedure for creditors who abstained from voting, voted to reject the plan, or were deemed to accept or reject the plan. Chassix, 533 B.R. at 80-82.

Accordingly, creditors or parties in interest that are unimpaired, do not vote to accept or reject the plan, are deemed to reject the Plan, or votes to reject the Plan and do not opt out of the release should not be deemed to have consented to the third-party releases in the Plan.

Moreover, the Plan, if confirmed, will provide releases to a wide range of third parties. Specifically, third-party releases include the Management Companies Released Parties as well as the Released Parties' current and former subsidiaries, affiliates, members, directors, officers, principals, agents, financial advisors, restructuring advisors, restructuring advisors, accountants, investment bankers, consultants, attorneys, employees, partners, equity holders, representatives, and other professionals, in each case, only in their capacity as such. Plan at 22. The Debtors have not met their burden to prove that the Court has subject matter jurisdiction to release this multitude of persons who qualify as Released Parties from claims of the creditors who do not

opt out of the third-party releases. See In re SunEdison, Inc., 576 B.R. at 463; see also In the Matter of Aegean marine Petroleum Network, Inc., 18-13374, transcript of hearing on February 14, 2019 at 20 - 21 (Court questioning the legal basis to conclude that third party releases for affiliates, subsidiaries, management companies as well as professionals of released parties are consensual). A copy of the transcript is annexed hereto.

D. The Debtor Must Pay Its Quarterly Fees To Confirm the Plan

Finally, as noted above, the Debtor has not paid its quarterly fees for the 4th quarter of 2018 in the amount of $580,718.43. Payment of quarterly fees are a statutory requirement for confirmation. 11 U.S.C. § 1129(a)(12).

CONCLUSION

WHEREFORE, the United States Trustee respectfully submits that the Court sustain the Objection of the United States Trustee and grant such other relief as is just.

Dated: New York, New York
March 5, 2019

Respectfully submitted,

WILLIAM K HARRINGTON
UNITED STATES TRUSTEE, Region 2

By: /s/ *Paul Schwartzberg*
Paul Schwartzberg
Trial Attorney
201 Varick Street, Room 1006
New York, New York 10014
Tel. No. (212) 510-0500