Entered on Docket
December 03, 2014
EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

The following constitutes
the order of the court. Signed December 3, 2014

Stephen L. Johnson
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
for the Northern District of California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re: TECHNOLOGY PROPERTIES LIMITED, LLC, Debtor.	Case No. 13-51589 Ch. 11

ORDER DENYING MOTION TO APPOINT CHAPTER 11 TRUSTEE

Creditor Charles H. Moore filed his Motion to Appoint Chapter 11 Trustee and to Remove Debtor-In-Possesion ("Motion") on September 3, 2014. Both Debtor Technology Properties Limited ("Debtor") and the Official Committee of Unsecured Creditors ("Committee") opposed the Motion. The matter came on for hearing on October 2, 2014, and for continued hearing on November 12, 2014. For the reasons noted, the court will deny the motion.

I. BACKGROUND[1]

A. Debtor's Business

Debtor's business and this case are described in detail in the two competing disclosure statements that have been filed by Debtor and the Committee, on one hand, and Charles H. Moore ("Moore"), on the other. To summarize, Debtor is an entity that works to commercialize intellectual property. Put another way, it determines whether companies are using intellectual property that Debtor controls. If they are, it asks those companies to pay for that use through a license. If that fails, it brings suit to force those companies to pay for the unauthorized use.

To say that Debtor's business practices are controversial would be an understatement. The lengthy disclosure statements on file in this case are a testament to this controversy. Among other things, there are contests about whether (1) the intellectual property that Debtor works to represent is valid, (2) Debtor has the right to assert the claims it has brought in courts, and (3) the challenged companies have used that technology inappropriately. Setting aside Debtor's business practices generally, both the Committee—earlier in the case—and Moore now, contend that Debtor's operations are conducted so as to enrich Debtor's former principal, Daniel Leckrone, his family members, and close associates.

Debtor is supposed to represent the interests of the owners of three different intellectual property portfolios: the MMP Portfolio, the CORE Flash Portfolio, and the Fast Logic Portfolio. Each of these portfolios is owned by someone else: In the case of the MMP Portfolio, the owner of the intellectual property is a stand-alone company called Phoenix Digital Solutions, LLC ("PDS"). The MMP Portfolio is composed of intellectual property that Moore and others created. PDS owns the MMP Portfolio because dispute arose between TPL, Moore, and a co-owner of the technology, Patriot Data Systems. PDS's board is composed of three members. Patriot appoints one member, Debtor a second, and a third is appointed by jointly.

[1] In making these findings, the court considered the declarations and materials submitted by the movant. No evidentiary hearing was requested by the moving party. The debtor made a number of evidentiary objections. However, a ruling on these objections is inappropriate given the result of this order.

The CORE Flash Portfolio is composed of intellectual property that Arockiyaswamy Venkidu ("Swamy Venkidu") created, and it is owned by MCM, LLC. The Fast Logic Portfolio consists of technology created by Thunderbird Technologies, Inc, and is owned by HSM Portfolio, LLC. Daniel Leckrone has a controlling interest in both MCM and HSM.

TPL and its related company Alliacense Limited, LLC ("Alliacence") are responsible for all parts of the commercialization strategy for the CORE Flash and Fast Logic portfolios. PDS is responsible for licensing the MMP Portfolio. For the MMP Portfolio, Alliacense is only responsible for litigation. Debtor has engaged in some development of technology on its own behalf but it has not done so actively during this case and those operations appear more or less immaterial to the estate at this stage.

Much has changed in this case since its commencement. At the time of the bankruptcy filing, Debtor had a complement of officers and directors, and worked through a number of related companies. Since the date of the filing, it has shed all of its employees. Only Daniel Leckrone, who is the sole member of Debtor, remains on the payroll.

B. Events during the Case and Joint Plan

The Committee initially took an antagonistic attitude toward Debtor. After a yearlong period of litigation and the filing of competing plans of reorganization, Debtor and the Committee came to an agreement over the contours of a plan. After a long series of delays, Debtor and the Committee filed their Joint Plan on September 17, 2014. The Joint Plan provides for a complete reorganization of Debtor's business.

Among other things, under the Joint Plan TPL is required to replace both its management and its board with Committee-selected individuals. The new CEO will work with the TPL Board to ensure the plan terms are met. Only when creditors have been paid all that is promised under the Joint Plan will prior management be entitled to return to control TPL. The changes proposed in the Joint Plan have already been made to the company's management. Swamy Venkidu has both replaced Daniel Leckrone on the PDS Board and been appointed as the new CEO by the Committee's board. These changes would be made permanent through confirmation of the Joint Plan. Future commercialization of the CORE Flash and Fast Logic

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portfolios will be undertaken with Committee oversight. The MMP Portfolio will continue to be overseen by PDS.

C. Alliacense

It is appropriate to insert a few words about Alliacense, even if they are inadequate to describe the frustrations the parties have had with that company. According to Debtor, Alliacense formerly was a division of TPL. It is now a company independently owned by Daniel Leckrone. TPL once had a range of employees but the employees did not, apparently, do the licensing work necessary for the CORE Flash and Fast Logic portfolios. Instead, they appear to have administered TPL while Alliacense did licensing as well as litigation.

As discussed, TPL was supposed to license and litigate to generate royalties for the three portfolios (MMP, CORE Flash, Fast Logic). In practice, it delegated much of the work to Alliacense. When royalties were received, TPL would pay Alliacense for its work. Then, TPL would pay its costs and employees. Whatever was left should have been paid to the parties who invented or owned the technology. The common complaint is that Alliacense took too much of the revenue to cover its expenses. This left TPL short of resources. In addition, TPL paid high wages to overpaid, underworked employees. The nickel version, as they say, is owners got very little in payment.

The Committee made a motion for the appointment of a chapter 11 trustee in 2013 premised on these sort of complaints, but appears to have settled that issue with its Joint Plan. As noted, the Joint Plan effectively hands control of TPL over to its creditors, who can make their own decisions about how to commercialize in the future, and which company to use.

D. Moore's Motion for the Appointment of a Chapter 11 Trustee

Moore Motion raises a range of issues. In short, he wants to remove Daniel Leckrone from Debtor's operations, eliminate entirely the role of Alliacense, and have the court order the appointment of a chapter 11 trustee. Moore makes a number of allegations, some of which have been addressed by later activity in the case and the passage of time.

Moore is unhappy that despite "repeated assurances" from Debtor that a plan has not been filed. He also complains that Daniel Leckrone has done a poor job managing the MMP

Portfolio. He asserts that, with the filing of the Joint Plan, Debtor is effectively leaderless as Daniel Leckrone has stepped away from the company.

Moore also argues that Debtor's effort to monetize the MMP Portfolio has been unproductive. No new licenses (or few) have been signed since Debtor filed this case. Debtor has had several litigation reverses, including cases before the International Trade Commission and in the District Court for the Northern District of California. He worries that Debtor is viewed as a "patent troll" which has negative connotations in the technology industry.

Moore contends there is clear and convincing evidence of fraud in this case because Daniel Leckrone has been misappropriating licensing proceeds. He offers no specific proof of this point.

Finally, he asserts that Swamy Venkidu cannot run TPL because he's the largest secured creditor and has conflict and "unsecured creditors cannot have confidence" that Swamy Venkidu can manage the company.

II. DISCUSSION

A. Standard for Appointment of Trustee

Bankruptcy Code § 1104 provides that a trustee may be appointed

> (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
>
> > (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
> >
> > (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C.A. § 1104. Section 1104 states that a "party in interest" may move for trustee. Moore, as a contingent creditor, qualifies.

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Section 1104(a)(1) mandates appointment of a trustee when the bankruptcy court finds cause. According to caselaw, "a determination of cause ... is within the discretion of the court," *Committee of Dalkon Shield Claimants v. A.H. Robins Co., Inc.,* 828 F.2d 239, 242 (4th Cir.1987). Section 1104(a)(2) also creates a flexible standard, instructing the court to appoint a trustee when doing so addresses "the interests of the creditors, equity security holders, and other interests of the estate." 11 U.S.C. § 1104(a)(2). To summarize, "[S]ection 1104(a) decisions must be made on a case-by-case basis. Subsection (a)(1) requires the bankruptcy court, upon motion, to appoint a trustee when the movant has proved 'cause,' which the statute defines to include incompetence and gross mismanagement. Subsection (a)(2) emphasizes the court's discretion, allowing it to appoint a trustee when to do so would serve the parties' and estate's interests." *In re Sharon Steel Corp*., 871 F.2d 1217, 1226 (3d Cir. 1989).

It is generally thought that the appointment of a trustee in a chapter 11 case is an extraordinary remedy. Indeed, in the absence of evidence of fraud, dishonesty, incompetence, gross mismanagement, or similar grounds, there is a presumption against the appointment of a chapter 11 trustee. 7 Collier on Bankruptcy ¶ 1104.02[3][b][i] (Alan N. Resnick and Henry J. Sommer eds., 16th ed.) at 1104-9. As the Third Circuit stated, "It is settled that appointment of a trustee should be the exception, rather than the rule." *In re Sharon Steel Corp*., 871 F.2d at 1225.

The burden of proof for the appointment of a trustee is high. "The [moving party] must prove the need for a trustee by clear and convincing evidence. *See In re Sharon Steel Corp.*, 871 F.2d at 1226.

B. Courts Have Considered Post-petition Management Changes in Deciding Trustee Motions

Several cases have considered whether prepetition misconduct or fraud can remain grounds for the appointment of a trustee when the debtor has secured new management or implemented strategies to cure such problems. *See In re Sharon Steel Corp*., 871 F.2d at 1225. *In re Gen. Oil Distributors, Inc.*, 42 B.R. 402 (Bankr. E.D.N.Y. 1984) is one such case. Prior to the bankruptcy filing, the debtor's insiders borrowed money from the company and used that

money to speculate in financial markets, used debtor assets, such as luxury vehicles, without reimbursement, and caused the loss of significant real estate assets. After the bankruptcy filing, the debtor removed prior owners and managers from controlling the company and replaced them with a professional manager selected by creditors. The manager was given the powers of a chapter 11 trustee by the creditors and the company. Despite management's misconduct pre-petition, the court declined to appoint a trustee. It reasoned that the company's effort to replace management, favorable results post-petition, and the high cost and disruption attending the appointment of a chapter 11 trustee in a specialized industry argued in favor of allowing management to continue the reorganization process. *Id.* at 410.

C. Appointment of a Chapter 11 Trustee is not Warranted

1. § 1104(a)(1) – "for cause"

There is no proven cause to appoint a chapter 11 trustee in this case. While Moore argues that Debtor's management has acted to enrich itself or related companies, no evidence of that has been presented. Instead, Moore relies on inferences of misconduct based on the close ownership and management control between Daniel Leckrone, Alliacense, and Debtor. Among other things, Alliacense is alleged to have soaked up revenue due to TPL (or the other intellectual property owners) by overcharging for its services. Yet, Moore offers no proof that Alliacense is overcharging. Moore makes no effort to benchmark the cost of the services Alliacense provides based on comparable market-based costs.

Moore also argues that Daniel Leckrone has pilfered the company. The court understands this to mean that he has taken money or property from the company that is not rightfully his. Because Daniel Leckrone is the owner of TPL and was its principal officer, the allegation is obviously serious and, in theory, plausible. However, because Moore has not offered any specific transaction as being suspect, or shown a range of activity that is clearly outside the range of acceptable business practices, the court cannot find cause on this ground.

2. § 1104(a)(2) – "in the interests of creditors"

Likewise, the court cannot find that appointing a trustee in this case makes sense from the vantage point of creditors. The Committee and Debtor have had a fractious relationship over

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1 the course of this case and the Committee itself sought the appointment of a chapter 11 trustee.
2 Later, the Committee and Debtor offered competing plans of reorganization. After considerable
3 effort, the Committee and Debtor negotiated the Joint Plan. That document displaces Daniel
4 Leckrone from management, replaces him with Swamy Venkidu. It also displaces the entire
5 TPL board, replacing it with Committee-sponsored members.

6 Even if there were cause to appoint a trustee, the mechanism the Committee and Debtor
7 have employed to deal with this case vitiate that cause. Whatever transgressions or failings
8 Moore attributes to Daniel Leckrone, TPL, and Alliacense, are ameliorated by the appointment
9 of Swamy Venkidu to act as CEO. Swamy Venkidu will answer to a TPL board that is
10 composed of members selected by the Committee itself. His job is to run TPL in a business-like
11 way to ensure that creditors are paid what has been promised under the Joint Plan. The TPL
12 board is authorized to remove Swamy Venkidu if he does not perform adequately. In the court's
13 view, this procedure—which has been vetted and approved by creditors—is far preferable to the
14 appointment of a chapter 11 trustee. Such an appointment would cause disruption, additional
15 cost, and delay, as a trustee would need to be brought up to speed on the complexities of the
16 case. The new management of TPL already knows how the company functions, the challenges it
17 faces, and its realistic prospects for reorganization. Given the complexity of the Joint Plan,
18 Swamy Venkidu's oversight by the Committee, and the delays already inherent in this case,
19 granting the Motion would be a singularly poor idea.

20 Finally, Moore is wrong to complain that Debtor has failed in its obligation to monetize
21 the MMP Portfolio. According to the contingent proof of claim Moore filed, Moore contracted
22 with TPL to monetize that portfolio. His co-inventor also sought to monetize that portfolio. Due
23 to the conflicting claims, Moore, TPL, and Patriot settled their differences by creating PDS.
24 Thus, it is PDS that is responsible for monetizing the MMP Portfolio, not TPL. Alliacense,
25 admittedly, is responsible for overseeing litigation in connection with that portfolio, but it
26 should do so under instruction from PDS, not TPL. To the extent Moore has complaints about
27 the MMP Portfolio monetization, he should address them to PDS.
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1 **III. CONCLUSION**
2 For the reasons indicated, the Motion is denied.
3 IT IS SO ORDERED.
4 ***** END OF ORDER *****
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