UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 10-13800-scc
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In the Matter of:

INNKEEPERS USA TRUST, et al.,

Debtors.

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U.S. Bankruptcy Court
One Bowling Green
New York, New York

September 30, 2010
10:05 AM

B E F O R E:
HON. SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

25 to 4:00, I think I'd like to try to give you a ruling today, in the interest of allowing this case to move forward.

So I'm going to want to take a break, but before I take a break, and before we get to a ruling and the Jefferies' application, I'd like to speak to some of you in chambers. And I'd like to limit it to, you know, the usual suspects without clients, counsel, Mr. Schwartzberg, I think you know who you are. So if we could -- it's 25 to 4:00, let's do this and then let's say we're going to come back at 4:30. All right. Thank you.

(Recessed at 3:34 p.m.; reconvened at 4:34 p.m.)

THE COURT: Okay. All right. Let me give you my ruling on the examiner and once again, I'm moving quickly in the interest of getting a decision to you, and if there needs to be an appeal, reserving my right to write a more fulsome opinion.

Section 1104(c) of Title XI of the United States Code provides two independent grounds upon which a party-in-interest may move for the appointment of an examiner. Specifically, the statute provides that quote, the Court shall order the appointment of an examiner to conduct such an investigation of the debtor, as is appropriate if either one, the Court in its discretion decides that such appointment is in the interests of the estate, and all of its stakeholders; or two, the debtor's fixed liquidated unsecured debts, other than for goods,

services, taxes, or owing to an insider, exceed five million dollars.

Authorities have been submitted to me and arguments made in the various papers filed by the ad hoc committee and the objectors, on the question of whether an appointment of an examiner is mandatory upon the five million dollar threshold being exceeded.

In this district, of course, there is the Loral decision which so held in 2004. The Sixth Circuit came to a similar conclusion in Refco, as did the Court in UAL.

A growing number of courts have attempted to reconcile the mandatory language of the statute, that is the word shall, with the words that follow shortly thereafter, quote, to conduct such examination as is appropriate, end quote, and have appointed examiners with extremely limited or in some instances, no duties in cases in which the five million dollar threshold is met.

And a number of courts have entirely declined to find that an appointment in such instances is mandatory, and denied requests to appoint examiners.

As the request for the appointment of an examiner, has increasingly been used as a litigation tactic by parties unhappy with the status or conduct of a case, and unhappy at the prospect of continuing to fund the prosecution of their particular issues, courts have quite understandably and

properly, I believe, pushed back and declined to appoint an examiner to join an otherwise crowded fray, in which the many combatants are well armed and highly motivated.

Based on the record before me, I find that there is no basis to appoint an examiner under either 1104(c)(1) or 1104(c)(2). And thus, I need not reach the question of whether and to what extent Section 1104(c) is mandatory in nature.

First, with respect to 1104(c)(1), Section 1104(c)(1) of the Code provides that a bankruptcy court shall order the appointment of an examiner, to conduct such an investigation of the debtor, as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor if such appointment is in the interest of creditors, any equity security holders, and other interest of the estate.

As a result of Section 1104(c)(1)’s use of the word and, an examiner should only be appointed under that subsection, if doing so would serve the interest of all the debtor’s stakeholders.

Because all of the requested examination topics either, one, have been addressed in the litigation surrounding the motion to approve the PSA, or two, will be addressed by multiple layers of interested parties, including without limitation, as part of the committee’s investigation, or in the

plan process, it is not in the best interests of all of the debtor’s stakeholders to appoint, and have the estate pay for a third party to duplicate the efforts of others.

Even a cursory examination of the topics listed in the ad hoc committee’s motion, which list was not substantially revised, post PSA, reveals that one or more parties has each and every one of these topics on its dance card. And the ad hoc preferreds will have access to discovery in these cases, as they proceed, and thus will have the ability to uncover and martial additional facts on the issues of concern to the preferreds.

These same issues are, of course, of tremendous concern to the stakeholders throughout the capital structure of the debtors and to the Court. It is certainly my expectation that at some point, the fruits of the committee’s investigation will be shared with the parties and the Court.

Second, with respect to Section 1104(c)(2), under the plain language of the statute, the party moving for the appointment of an examiner must at a minimum, aggregate the fixed and liquidated unsecured debts, other than for goods, services, taxes, or owing to an insider, and demonstrate that the sum thereof is greater than five million dollars.

As the United States Trustee noted in her objection, although the ad hoc committee declares that it is quote, reasonable to assume, end quote, that the five million dollar

threshold is met. Additional evidence is needed in order to make a determination of the issue.

The only evidence in the record is the uncontroverted statement in the declaration of the debtor's CFO, Nathan Cook at paragraph four that quote, the debtor's fixed liquidated unsecured debts other than debts for good, services, or taxes do not exceed five million dollars.

In reply, the ad hoc committee adduces no evidence, but instead points to the secured lenders' alleged deficiency claims or the fact that when issued, the mortgage debt was fixed and liquidated. But neither characterization of such debt works for purposes of the statute.

Deficiency claims, while definition unsecured, are not fixed and liquidated in this case at this juncture, for the purposes of this statute. I find the language of the statute clear and unambiguous on this point.

Accordingly, I am denying the motion of the ad hoc committee for the appointment of an examiner, but I will deny it without prejudice. If the ad hocs at some point, and what is shaping up to be a highly contentious process uncover evidence of five million dollars of fixed liquidated unsecured debt, they can take another run at it.

Moreover, as the plan process unfolds, if there develop facts and circumstances that warrant a second look at whether an appointment of an examiner under 1104(c)(1) is

warranted, nothing will preclude the filing of an appropriate motion.

Okay. As I said, if a more fulsome written opinion is needed, I'll be happy to provide one.

With that, I think we're left with Jefferies.

MR. MARINUZZI: Thank you, Your Honor. For the record again, Lorenzo Marinuzzi from Morrison & Foerster.

Your Honor, the last item on the agenda is the committee's application to retain Jefferies as their financial advisor and investment banker in this bankruptcy case.

I assume that the Court has read the papers, read the objections --

THE COURT: Yes.

MR. MARINUZZI: -- read our supplemental submissions. I did want to bring to the Court's attention that there have been some changes proposed for the retention of Jefferies.

In particular, under the terms of their current engagement letter that was filed with the application, they were seeking a monthly fee of 125,000 dollars, plus a success fee of 750,000 dollars.

They have decided that they will not today seek a success fee. That will not be part of the retention that we'd ask the Court to approve today. What they would like to do, and what the order, assuming Your Honor is okay with this retention, would provide is that Jefferies and the committee