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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

	Chapter 11
In re:	
	Case No. 17-36103 (CGM)
The Warwick Yard LLC,	
Debtor.	

CROSS-MOTION OF WARWICK VALLEY DLA, L.L.C. FOR THE ENTRY OF AN ORDER APPOINTING A CHAPTER 11 TRUSTEE PURSUANT TO 11 U.S.C. § 1104(a) AND RULE 2007.1 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

TO: HONORABLE CECELIA G. MORRIS
UNITED STATES BANKRUPTCY JUDGE

Warwick Valley DLA, L.L.C. ("DLA" or the "Lender"), by and through its undersigned attorneys, hereby cross-moves for the appointment of a chapter 11 trustee in the chapter 11 bankruptcy case pursuant to section 1104(a) of the Bankruptcy Code (as defined below). In support of this Motion, DLA respectfully represents:

PRELIMINARY STATEMENT

1. Earlier this month, The Warwick Yard LLC, the debtor and debtor-in-possession herein ("Warwick Yard" or the "Debtor") filed a motion for appointment of an examiner, among other things, to investigate fraud, mismanagement and embezzlement by one of its members.

However, absent a change in management of the Debtor's business operations, appointment of an examiner will fall short of the structure and control that the Debtor desperately needs. In addition, in light of testimony by Debtor representatives at the 341 Meeting (as defined herein), it is evident that the Debtor is not fulfilling fiduciary duties to creditors and restructuring options are limited to those that benefit equity. Current management cannot implement the changes necessary to right the Debtor's ship. Accordingly, for the reasons stated above and discussed below, the appointment of a chapter 11 trustee is proper under section 1104(a)(1) of the Bankruptcy Code for "cause" or, alternatively, under section 1104(a)(2) of the Bankruptcy Code, as such appointment would be in the best interests of the Debtor's estate and its creditors.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this Chapter 11 case and this matter pursuant to 28 U.S.C. §§ 157 and 1334. This Motion is a core proceeding under 28 U.S.C. § 157(b)(2).

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicate for the relief requested in this Motion are Section 1104 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code") and Rule 2007.1 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

BACKGROUND

5. On June 28, 2017 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court") [Docket Nos. 1, 2].

6. The Debtor continues to operate as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. No official committee of unsecured creditors has yet been formed.

8. On September 5, 2017, DLA filed the *Motion to Dismiss the Debtor's Bankruptcy Petition Pursuant to 11 U.S.C. § 1112(b), or Alternatively, for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)* [Docket No. 29] (the "Motion to Dismiss"). In the Motion to Dismiss, DLA argued that this bankruptcy case serves no valid reorganizational purpose, is an abuse of the chapter 11 process and is intended solely to frustrate the exercise of Lender's legitimate rights.

9. In response to the Motion to Dismiss, the Debtor argued that, among other reasons, the Debtor filed the bankruptcy case in order to investigate mismanagement by one of its members. *See* Docket No. 32. The Debtor also argued that there was a viable business to reorganize, there was equity in the real property and tournament revenue was sufficient to fund operations.

10. The Motion to Dismiss was initially heard during a September 19, 2017 hearing; the Court reserved its ruling and carried the Motion to Dismiss to October 31, 2017. At this time, the Motion to Dismiss is still pending.[1]

11. In the meantime, on or about October 2, 2017, the Debtor filed *Debtor's Motion for the Appointment of an Examiner Pursuant to 11 U.S.C. § 1104(c)* (the "Examiner Motion") [Docket No. 43]. The Examiner Motion seeks appointment of an examiner to investigate and report on the actions of MAAA LLC ("MAAA"), a member of Ocyard, LLC ("Ocyard"), and Anthony Abbatine, a member of MAAA. Ocyard is the Debtor's sole member. The Examiner Motion alleges that MAAA and Mr. Abbatine have breached fiduciary duties to the Debtor and breached the Debtor and Ocyard's operating agreements, and requests appointment of an examiner to, *inter alia*, "discover causes of action [against MAAA and Mr. Abbatine] for fraud, theft,

[1] In light of the serious allegations made in the Examiner Motion and the testimony at the 341 Meeting, DLA agrees that the Debtor's estate should remain in bankruptcy, with new management and a responsible party in control of the Debtor's business.

embezzlement or other acts of self-dealing and breaches of fiduciary duties owed to the Debtor." Examiner Motion at ¶ 17.

12. The section 341 meeting of creditors (the "341 Meeting") was held on October 3, 2017 at 1:30 p.m. at the Office of the United States Trustee. During the 341 Meeting, Mark Goldstein and Oliver Papraniku – the members of DEMS Partners, LLC, majority member of the Debtor – each testified on behalf of the Debtor. Certification of Frank F. Velocci ("Velocci Cert."), ¶2. Messrs. Goldstein and Papraniku testified to the general chaos in the Debtor's operations, including the following:

- Notwithstanding allegations of fraud and embezzlement, Mr. Abbatine still has full access to the income, revenue and resources of the Debtor;
- Messrs. Goldstein and Papraniku claim to have no access to the Debtor's books and records and no ability to prevent Mr. Abbatine from operating the Debtor or limiting his access to the Debtor's bank accounts;
- Mr. Abbatine is not properly accounting for tournament revenue, the Debtor's primary source of income; and
- Notwithstanding the relief requested in the Examiner Motion, the Debtor is unable to pay for the cost of an examiner.

Velocci Cert., ¶3.

13. After the 341 Meeting, during a conference with counsel to DLA and Alicia Leonhard of the United States Trustee's Office, Mr. Papraniku stated that they will only consider restructuring options and outside offers that preserve the financial investment and equity of Messrs. Goldstein and Papraniku. Velocci Cert., ¶4.

14. On October 24, 2017, DLA (through counsel) received a copy of a Letter of Intent directed to Debtor's counsel by third party Shawshank LLC to purchase the real property for $2 million. Velocci Cert., ¶5 and Exhibit A.

15. To date, the Debtor has not filed operating reports.

LEGAL ARGUMENT

16. DLA seeks the immediate appointment of a chapter 11 trustee pursuant to section 1104 of the Bankruptcy Code with the powers to oversee the Debtors' operations and business affairs and assume the responsibility to negotiate and present an appropriate plan of reorganization that comports with the Bankruptcy Code.

17. Section 1104(a) of the Bankruptcy Code governs the appointment of a chapter 11 trustee. Specifically, Section 1104(a) provides, in pertinent part, that:

> (a) At any time after the commencement of the case but before the confirmation of a plan, on request of a party in interest or the United States Trustee, after notice and a hearing the court shall order the appointment of a trustee
>
> (1) for cause … or
>
> (2) if such appointment is in the interest of creditors ….

11 U.S.C. §1104(a).

18. Under appropriate circumstances, a bankruptcy court may appoint a chapter 11 trustee in order to "preserve the integrity of the bankruptcy process and to insure that the interests of creditors are served." *In re Intercat, Inc.*, 247 B.R. 911, 920 (Bankr. S.D. Ga. 2000). For the reasons set forth more fully below, cause exists for the Court to appoint a chapter 11 trustee to oversee the Debtor's business operations.

19. In this context, bankruptcy courts consider fraud, dishonesty, incompetence, or gross mismanagement, which concepts cover a broad array of conduct. Therefore, courts have

discretion when it comes to determining what constitutes "cause." *See In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989) ("section 1104(a) decisions must be made on a case-by-case basis"); *In re Marvel Entm't Grp*., 140 F.3d 463, 472 (3d Cir. 1989) ("[C]ourts must be given the discretion necessary to determine if the debtor-in-possession's conduct shown rises to a level sufficient to warrant the appointment of a trustee.") (internal quotations omitted).

20. In addition to dishonesty, incompetence, fraud, and gross mismanagement, courts deciding whether to appoint a trustee consider other factors, including (i) the materiality of the misconduct of the debtor's management; (ii) evenhandedness or lack of same in dealings with insiders or affiliated entities vis-à-vis other creditors; (iii) the existence of pre-petition voidable preferences or fraudulent transfers; (iv) unwillingness or inability of management to pursue estate causes of action; (v) conflicts of interests on the part of management interfering with its ability to fulfill fiduciary duties to the debtor; and (vi) self-dealing by management or waste or squandering of corporate assets. *See In re Marvel*, 140 F.3d at 472-73; *In re Sharon Steel*, 871 F2d at 1228.

21. It is axiomatic that a debtor-in-possession is a fiduciary. Like a trustee, a debtor-in-possession's fiduciary duties extend to creditors. *Commodity Futures Trading Comm. v. Weintraub*, 47 U.S. 343, 354-55 (1985). As a fiduciary, the debtor-in-possession must not act in its own interest but must act in the best interest of the creditors of the estate. *In re J.T.T. Corp.*, 958 F2d 602, 604-05 (4th Cir. 1992). The fiduciary duties of a debtor-in-possession include a duty to protect the assets of the estate, a duty of loyalty, and a duty of care. *See In re Bowman*, 181 B.R. 836, 843 (Bankr. D. Md. 1995). "[C]ause may exist pursuant to § 1104(a)(1) for the appointment of a trustee when the debtor in possession breaches this duty." *In re SRJ Enters., Inc.*, 51 B.R. 189, 194-95 (Bankr. N.D. Ill. 1993).

22. Distinct from the "cause" basis is the "interests" test of Section 1104(a)(2) of the Bankruptcy Code. In determining whether the appointment of a trustee is in the best interest of creditors, a bankruptcy court must utilize its broad equity powers. *See In re Hotel Assocs., Inc.*, 3 B.R. 343, 345 (Bankr. E.D. Pa. 1980). Indeed, Courts will typically "eschew rigid absolutes and look to the practical realities and necessities." *In re Alelphia Commc'ns. Corp.*, 336 B.R. 610, 658 (Bankr. S.D.N.Y. 2006). Where current management or persons in control of the debtor have engaged in acts that have caused harm to the debtor's estates and its creditors, the courts often find that appointing a trustee is in the best interest of the creditors, and is the only way to avoid further mismanagement of the debtor's affairs. *In re North Am. Commc'ns., Inc.*, 138 B.R. 175 (Bankr. W.D. Pa. 1992).

23. Appointment of a chapter 11 trustee is appropriate under both sections 1104(a)(1) and (2) of the Bankruptcy Code.

24. First, it is clear that the Debtor lacks control over its own books and records. Mr. Goldstein testified at the 341 Meeting that, notwithstanding the allegations of fraud, mismanagement and embezzlement against Mr. Abbatine, he and Mr. Papraniku have no ability to limit Mr. Abbatine's access to the Debtors books and records and/or bank accounts and Mr. Abbatine has full access to the Debtor's operating funds.[2] In addition, Mr. Goldstein testified that Mr. Abbatine has not properly accounted for tournament revenue, suggesting theft of those funds. Compounding this problem is the claim that the Debtor does not have access to its own books and records, and have therefore not prepared monthly operating reports.

[2] DLA does not take a position regarding the underlying dispute between Messrs. Abbatine, Goldstein and Papraniku and their entities MAAA and DEMS Partners, LLC. Rather, the important point for purposes of this Motion is that there is a breakdown among the Debtor's partners and an utter lack of governance and order. As a result, DLA's collateral – the Debtor's only real asset – is left to waste.

25. Testimony of the Debtor's representative at the 341 Meeting make clear that the Debtor is mismanaged, and Mr. Goldstein has repeatedly made allegations of dishonesty, theft and embezzlement by Mr. Abbatine. Messrs. Goldstein and Papraniku have now conceded an inability to control Mr. Abbatine and/or restrict access to the Debtor's books and records and/or resources, and Mr. Abbatine – the alleged wrongdoer – has unfettered access to all of the Debtor's revenue. For these reasons alone, there are grave doubts about whether the Debtor is being properly managed in the interests of the Debtor's creditors, appointment of a chapter 11 trustee is appropriate "for cause" pursuant to section 1104(a) of the Bankruptcy Code.

26. The admissions of self-interest by the Debtor's majority holders likewise justify appointment of a chapter 11 trustee. Mr. Papraniku stated they are considering only those restructuring options that preserve their investment in the real property and their equity in the Debtor's business. Thus, to date, the Debtor has not developed any real process for reorganization and it is unlikely that offers like those attached to the Velocci Certification as Exhibit A will be seriously considered by the Debtor because it results in an outright sale. This blatant self-interest offers the Court an independent basis for appointment of a chapter 11 trustee under section 1104(a) of the Bankruptcy Code.

27. Finally, there is no confidence that a reorganization is possible with current management in place; real change is needed in order to move forward in this bankruptcy case and realize maximum return for creditors. Particularly now – the time of year that the Debtor has already represented is its busy season – order needs to be restored to this Debtor and control needs to be given to an independent party. As things stand, the Debtor's actions "do[] not instill confidence that "the [Debtor] could fairly negotiate with the creditors to whom [it] owe[s] . . . duties, nor that reorganization will occur effectively." *In re Marvel*, 140 F.3d at 474; *see also In*

re Cardinal Indus., 109 B.R. 755, 765-66 (Bankr. S.D. Ohio 1990) ("The fundamental problem . . . is that there has been a serious and general loss of confidence in the Debtors' management. The alleged loss of confidence does not appear to the Court to be a ploy, but follows good faith efforts by Creditors to permit the Debtors to direct their own reorganizations. The confidence problem has not resulted from one specific problem, but came about because of many events which, when seen in combination, make it appear that the Debtors are not properly in control of their reorganizations and should no longer be permitted to direct the process."). Appointment of an examiner – tasked with investigation but with no control over the Debtor's business – will not solve any of the Debtor's problem. A chapter 11 trustee, who will assume control of the business operations and revenue stream and consider all restructuring options, is needed.

WHEREFORE, for all of the foregoing reasons, Lender respectfully requests that this Court appoint a chapter 11 trustee pursuant to Bankruptcy Code section 1104, and such other relief as the Court determines is appropriate.

Dated: October 24, 2017
New York, NY

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By: */s/ Frank F. Velocci*

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