

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

CENVEO, INC., *et al.*,

Debtors.

Chapter 11

Case No. 18-22178 (RDD)

(Jointly Administered)

REPORT OF SUSHEEL KIRPALANI, EXAMINER

QUINN EMANUEL URQUHART & SULLIVAN, LLP

51 Madison Avenue, 22nd Floor
New York, New York 10010

Counsel to Examiner

June 6, 2018

I. APPOINTMENT, SCOPE, AND PERFORMANCE OF DUTIES

On February 12, 2018, a significant creditor of the above-captioned debtors (the “Debtors”) filed a motion requesting the appointment of an examiner to investigate, among other things, potential claims and causes of action against insiders of the Debtors.¹ It was contemplated that the insiders would retain their management positions following the reorganization and there may be releases proposed for such insiders as part of a plan thereby warranting an independent investigation into potential claims. Although the Court acknowledged at the hearing on the Motion² that the United States Bankruptcy Code (the “Bankruptcy Code”) mandates the appointment of an examiner in cases with debts exceeding \$5,000,000, the Court also noted the broad judicial power to restrict the scope of an examination to only what is appropriate under the circumstances. The Court reasoned that unlike cases of historic significance, such as *Enron* and *Lehman Brothers*, there were no allegations of fraud or willful misconduct concerning the Debtors, the parent company of which is publicly traded. Thus, in light of the expectation that the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) would promptly embark on an investigation pursuant to its statutory authority under section 1103(c) of the Bankruptcy Code—and have the ability to seek derivative standing from the Court if valuable claims were uncovered—the Court expressed practical concerns at the Hearing on the utility of an examiner with a broad and largely duplicative mandate. The Court did not prohibit the Debtors from completing an internal investigation that had already been started by the Debtors’ independent director, but did express concerns about the cost of duplicative investigations by the Debtors and the Creditors’ Committee.³

Ultimately, the Court ruled that an examiner should be an experienced bankruptcy litigator who would essentially “look over the shoulder” of the Creditors’ Committee’s counsel and, to the extent the Debtors chose to continue its own internal investigation, over their counsel’s shoulder, too. The Court noted the examiner should not conduct any investigation at all, but would be kept apprised by the Debtors and the Creditors’ Committee “so that he or she can step in if need be.” In further explaining the scope of the examination, the Court asked the Office of the United States Trustee (the “U.S. Trustee”) to consider appointing “someone who understands these issues and is not a professor type and thinks about this as ... ultimately a cost-benefit analysis with no ax to

¹ See *Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* (Dkt. 76) (the “Motion”). The Motion requested that the “examiner be empowered to investigate and report on” a host of additional subjects, including (i) prepetition negotiations regarding the Debtors’ restructuring; (ii) prepetition financial valuations, projections, and analyses; and (iii) the grants of equity, employment agreements, and releases contained within the Restructuring Support Agreement.

² See *Transcript of Hearing Held on 3/6/2018* (Dkt. 367) (the “Hearing” and “Hearing Tr.”) at 86:9-88:9.

³ See *Hearing Tr.* at 89:23-90:10 & 94:15-95:6.

grind.”⁴ On March 15, 2018, the Court entered an order appointing an examiner consistent with its ruling at the Hearing.⁵ Paragraph 4 of the Order Appointing Examiner provided:

The Examiner is authorized to review and to report (as provided in this Order) on Cenveo’s and the Committee’s ongoing and respective investigations and analysis of: (a) any monetary compensation or other form of remuneration, including cash, stock, options, benefits, perquisites, or other forms of consideration received by any members of the Burton family (collectively, the “Burtons”) or other insiders from Cenveo; (b) any transactions, including, but not limited to, payments, leases, supply or distribution agreements, directly or indirectly between (i) Cenveo, the Burtons, and/or their respective affiliates, and (ii) the Burtons, insiders, officers, directors, and/or their respective affiliates; (c) any transfers of value, including, but not limited to, any charitable donations, made by Cenveo or the Burtons and/or their affiliates to any insiders, directors, officers, and/or their respective affiliates or related organizations; and (d) any potential causes of action that Cenveo may have arising out of the foregoing or any related transactions, including, but not limited to, causes of action for breach of fiduciary duty, negligence, waste, avoidance, preference, and/or fraudulent conveyance (collectively, the “Examination Topics”); *provided, however* that the Examiner shall not examine or conduct an independent investigation into the facts or conduct an independent legal analysis of the Examination Topics and shall not conduct an analysis of the merits of any particular cause of action, but, rather, the Examiner shall examine and report (as provided in this Order) on whether (x) the investigations of Cenveo and the Committee into the Examination Topics are being conducted reasonably, independently, and in good faith, (y) the investigations of Cenveo and the Committee have concluded and are complete, and (z) Cenveo’s and the Committee’s respective conclusions are reasonable based on applicable law and the facts and circumstances relevant thereto.

On March 27, 2018, the Office of the United States Trustee (the “U.S. Trustee”) appointed the undersigned (the “Examiner”) to serve in this limited capacity⁶ and this report is filed to satisfy the requirements of the Order Appointing Examiner, as subsequently amended. At the earliest point in the process, the Examiner met with and informed the legal and financial teams conducting the parallel investigations how the Examiner would approach an investigation like this in the most cost-effective way. Put simply, the parties’ investigations should focus on the quantum of potential recoverable value arising from discrete transfers to insiders to the greatest extent possible, and with respect to generalized notions of mistakes that may have led to a company’s beleaguered financial condition, whether those types of potential errors would give rise to liability of insiders or third parties under the current state of the law, even if proven true. In other words, estate

⁴ See Hearing Tr. at 90:11-15, 104:16-105:10 & 109:22-110:6.

⁵ *Order Appointing an Examiner Pursuant To 11 U.S.C. § 1104(C)(2)* (Dkt. 203) (“Order Appointing Examiner”)

⁶ *United States Trustee’s Application Pursuant to Fed. R. Bankr. P. 2007.1(C) For An Order Approving Appointment Of Examiner* (Dkt. 235). The Court permitted the Examiner to retain “one associate” to help fulfill his duties. The Examiner wishes to acknowledge Zach Russell of Quinn Emanuel for his selfless dedication and advice throughout this process.

professionals should not spend substantial resources trying to understand merely what led a company into bankruptcy because we know how the movie ends. Absent a greater public purpose not necessarily implicated in ordinary business failures, the goal should be to find valuable claims that would benefit creditors, not conduct a case study on management or the board. Of course, any transactions with insiders should also be investigated for potential breaches of fiduciary duties, but at all times bearing in mind the amounts at issue, the state of the law, and whether the damages for breach—even if proven—would be duplicative of avoidance action recoveries.

As set forth in the Addendum, numerous witnesses were interviewed or deposed and an exhaustive document review was conducted by two reputable and experienced law firms on behalf of independent clients. The Examiner endeavored to remain informed and assist in resolving disagreements over the best method of questioning witnesses (interviews vs. depositions, sworn or unsworn testimony, etc.) and the scope of document requests (meet and confer, common interest issues, etc.). The final three scheduled examinations of senior-most management were cancelled, after consulting with the Examiner on the propriety of doing so, in light of a settlement reached among the Debtors, the Creditors' Committee, the ad hoc group of first lien creditors, and management, on May 30, 2018.

II. CONCLUSIONS

At all times, the investigations by the Debtors⁷ and the Creditors' Committee were conducted independently and in good faith, and the decision to curtail further investigation was reasonable, prudent, and reached with the consent of the Examiner as an exercise of each of their respective fiduciary duties to stem the continued cost of dual investigations with examiner oversight for little potential benefit. Although three depositions were cancelled in light of a global settlement, in the Examiner's view, conducting additional depositions would not have yielded incremental value to the Debtors' estates and likely would have chilled settlement talks. By the time of the settlement, the investigations were substantially complete, the potential recoverable value was ascertainable, and the parties were well-equipped to negotiate and assess the fairness of the deal relative to the continued cost and risk of litigation. The Examiner has confidentially reviewed the comprehensive draft work product from both the Debtors and the Creditors' Committee pursuant to a common interest agreement and the conclusions reached by both were reasonable even if divergent in certain respects.

All potential claims within the scope of the Examiner Appointment Order were extensively investigated by both the Debtors and the Creditors' Committee. A summary of the most viable potential claims against insiders are as follows:

⁷ References to the Debtors in the context of the internal investigation and settlement of claims against insiders are to the independent director of the Debtors or representatives authorized by him.

| | 11/21/17 Quality Park Bonus | 11/16/17 1st Severance Payment | 11/17/17 2nd Severance Payment | 12/08/17 KERP Bonus | 12/29/17 Bonus Payment | Total Nov-Dec Payments | 01/26/18 KEIP Q1'18 Prepayment | TOTAL |
|-------------------|-----------------------------------|--------------------------------------|--------------------------------------|---------------------------|------------------------------|------------------------------|--------------------------------------|------------------|
| Robert Burton Sr. | 175,000 | - | - | 600,000 | - | 775,000 | 1,125,000 | 1,900,000 |
| Michael Burton | 175,000 | - | - | 544,500 | - | 719,500 | 294,938 | 1,014,438 |
| Robert Burton Jr. | 175,000 | - | - | 544,500 | - | 719,500 | 294,938 | 1,014,438 |
| Joseph Burton | - | 541,099 | 943,485 | - | 3,125 | 1,487,709 | - | 1,487,709 |
| Total | 525,000 | 541,099 | 943,485 | 1,689,000 | 3,125 | 3,701,709 | 1,714,875 | 5,416,584 |

In addition, the Creditors' Committee sharply disagrees with certain aspects of how the Debtors' business was run pre-bankruptcy, including how decisions over compensation were made. This is not surprising since, after all, the Debtors are in bankruptcy and the Debtors' largest creditors have views on how that happened. Not every disagreement with how a company was run, however, will lead to viable causes of action and the Examiner was mindful (as were the Debtors and Creditors' Committee) of the cost-benefit analysis of the continued exploration of whether the law provides redress for such grievances.

* * *

The observations of the parties opposing appointment of an examiner and of the Court at the Hearing are understandable: Examiners are expensive, but they also serve important public functions and, in terms of private function, some have been more useful to debtors and creditors and far less expensive than others.⁸ To address these concerns, the Court adopted a novel use of the examiner statute in these cases. As should be apparent from the above chart, the Examiner was able to fulfill the mandate here because of the relative simplicity of assessing the claims at stake, the most viable of which were readily ascertainable from the Debtors' Statement of Financial Affairs. Not every case will turn out to be as simple as this one, and other methods of maximizing efficiency in bankruptcy investigations and litigation should continue to be explored and improved upon.

First and foremost, examiners typically must put forward a work plan and budget shortly after appointment so the Court, the U.S. Trustee, and parties in interest could understand up front what an examiner's investigation will cost and whether it is worth spending the money. It can also have the salutary effect of imposing restraint on the statutory committee or debtor in possession from conducting a parallel investigation, at least until after the examiner develops and reports on the core facts.⁹ This work plan is not typically required of debtors in possession or creditors'

⁸ For a detailed recent review of the cost-benefit analysis of examiners, please see Jonathan C. Lipson & Christopher F. Marotta, *Examining Success*, 90 AM. BANKR. L.J. 1, at 1-58 (Winter 2016). For an opinion of which examinations have been more cost-effective and beneficial than others, please see Daniel J. Bussel, *Examiners As Inquisitors*, *id.* at 59-127. (The Examiner found this resource for free on Google.)

⁹ In the *SemCrude* bankruptcy (Case. No. 08-11525 (Bankr. D. Del.)), Judge Brendan Shannon appointed an examiner with a scope that was negotiated between counsel for the creditors' committee and the U.S. Trustee (the debtors agreed they would not investigate themselves and would focus on the reorganization or sale effort). In *SemCrude*, where there were serious allegations of fraud and misconduct, the creditors' committee reluctantly agreed to defer

committees prior to conducting an internal investigation—let alone parallel investigations—but filing a work plan could promote transparency and efficiency in future cases. Based on the Examiner’s experience in these cases, knowing the anticipated costs may encourage negotiated solutions of some or all of the potential claims early which could be funded from the cost-savings.

Second, as the Court did here, the Bankruptcy Code unquestionably authorizes courts to divide responsibilities for the sake of efficiency. Section 1104(c) expressly requires an examiner’s investigation of the debtor, but the language is virtually identical to the statutory power granted to creditors’ committees and it is a bedrock bankruptcy principle that duplication of expenses should be avoided, unless there are competing considerations. It also bears noting that while the debtor in possession has all the rights and powers of a trustee, the court has express authority to limit or condition what a debtor in possession does.¹⁰ 11 U.S.C. § 1107(a). In dividing responsibilities, courts may consider that a debtor in possession does not have the express statutory authority to investigate itself the way trustees, examiners, and creditors’ committees do, *compare* 11 U.S.C. § 1107(a), *with id.* §§ 1106(a)(3)-(4), 1104(c), and 1103(c)(2). Whether court approval is required for a debtor in possession to conduct an internal investigation post-bankruptcy may turn on whether it was in the ordinary course of the debtor’s business to perform them pre-bankruptcy. *See id.* § 363(c)(1). Absent a compelling reason, the goal should be to avoid the cost of multiple investigations that could amount to a costly “arm’s race” because no party can risk being at an informational disadvantage as big chapter 11 cases continue to become more and more litigious given the amounts at stake.

Dated: June 6, 2018
New York, New York

Respectfully submitted,

/s/ SUSHEEL KIRPALANI
Examiner

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Zachary Russell
51 Madison Avenue, 22nd Floor
New York, New York 10010

its investigation and not duplicate the work of the examiner in terms of assembling and publishing the core facts obtained from and about insiders. In exchange, the examiner reciprocally (albeit tacitly, through a deadline and budget) agreed not to investigate numerous third parties or expend estate resources researching every conceivable cause of action and affirmative defense that may flow from the core facts unearthed. Further, while it served as no technical limitation on the scope of the examiners, it bears noting that protocols were negotiated in both *Enron* and *Lehman* (again with the involvement of the U.S. Trustee) between the debtors in possession and the creditors’ committees to allocate responsibility for investigating and ultimately bringing claims, if warranted. *See Case No. 01-16034 (Bankr. S.D.N.Y.) & Case No. 08-13555 (Bankr. S.D.N.Y.).*

¹⁰ The Court impliedly referenced its power during the Hearing in stating it would not prohibit the Debtors from completing the investigation already begun by their independent director, *see* Hearing Tr. at 94:15 & 102:20-22, and the short-fuse imposed on both the Debtors and Creditors’ Committee served as a limitation on costs.

ADDENDUM

RECORD OF INTERVIEWS/DEPOSITIONS FOR CENVEO INTERNAL INVESTIGATIONS

Debtor-Only Interviews (Pre-dated Examiner's Appointment)

| Interviewee | Position |
|--------------------|--|
| Ayman Zameli | Chief Restructuring Officer |
| Colin Christ | EVP of Global Supply Chain |
| Frank Coppola | Senior VP of Finance |
| Gina Genuario | Senior VP of HR |
| Kathy Caminiti | VP of Accounting |
| Scott Goodwin | Former CFO |
| Dr. Mark Griffin | Member of the Board |
| Jerry Armstrong | Member of the Board |
| James Fair | Former Senior VP of Financial and Strategic Planning |
| Mike Burton | Chief Operating Officer |
| Rob Burton, Jr. | President |
| Robert Burton, Sr. | CEO and Chairman |

Debtor/UCC Interviews & Depositions (Examiner or His "One Associate" in Attendance)

| Interviewee | Position | Interview Type |
|--------------------|--|-----------------------|
| Kevin Waden | Former Controller | Interview |
| Keith Galante | Internal Auditor (BKD) | Interview |
| Joe Burton | Former President, Quality Park and Wholesale | Deposition |
| Grant Thornton | Former External Auditor | Interview |
| BDO | External Auditor | Interview |
| Colin Christ | EVP of Global Supply Chain | Interview |
| Frank Coppola | Senior VP of Finance | Interview |
| Gina Genuario | Senior VP of HR | Interview |
| Kathy Caminiti | VP of Accounting | Interview |

| | | |
|-----------------|---|-----------|
| Haylee Glad | Former Secretary to the Board | Interview |
| Ian Scheinmann | General Counsel/VP of Legal Affairs | Interview |
| Scott Goodwin | Former CFO | Interview |
| Gina Zambrana | Secretary to the Board/VP of Admin | Interview |
| Dr. Griffin | Member of Board, Chair of Comp. Committee | Interview |
| Jerry Armstrong | Member of Board, Chair of Audit Committee | Interview |

Debtor/UCC Interviews & Depositions Requested But Not Completed at Request of Examiner

| Interviewee | Position | Interview Type |
|--------------------|-------------------------|-----------------------|
| Mike Burton | Chief Operating Officer | Deposition |
| Rob Burton Jr. | President | Deposition |
| Robert Burton Sr. | CEO and Chairman | Deposition |

DOCUMENT DISCOVERY

- Number of Documents Produced: 5,425
- Number of Pages Produced: 99,297
- Number of Productions:
 - Debtor Productions: 42
 - UCC Productions: 1

TIMELINE OF EXAMINER'S INVOLVEMENT IN DEBTORS' AND CREDITORS' COMMITTEE'S INDEPENDENT INVESTIGATIONS

- March 27, 2018: Appointment of Examiner & kick-off call with Debtors' counsel regarding process and coordination issues.
- March 30, 2018: Call with Creditors Committee's counsel regarding overall understanding of company and investigation expectations.
- April 2, 2018: Call with First Liens' Group Counsel regarding background concerning decision to retain existing management team and any investigation or issues to consider.
- April 6, 2018: Joint formal kick-off meeting with legal and financial advisors to the Debtors and Creditors' Committee.

- April 12, 2018: Meet and Confer among Examiner and Debtors/Creditors' Committee's internal investigations legal teams and financial advisors regarding document discovery, ledger systems, and accounting treatment.
- April 19, 2018: Call with counsel to counsel to Movant regarding status of the investigation.
- April 19, 2018: Meet and Confer among Examiner and Debtors/Creditors' Committee's internal investigations and legal teams and financial advisors regarding disputes over Community of Interest Agreement, process-related issues concerning interviews vs. depositions, and extent of document production and additional document requests.
- April 26, 2018: Meet and Confer among Examiner and Debtors/Creditors' Committee's internal investigations and legal teams and financial advisors regarding interviews, redactions, and Community of Interest Agreement.
- May 11, 2018: Call with Creditors' Committee to discuss Examiner's impressions of potential claims and related issues.
- May 14, 2018: Meet and Confer among Examiner and Debtors/Creditors' Committee's internal investigations and legal teams regarding extension of examination period to complete document-related discovery, resolve disputes over redactions/scope issues, and to finalize schedule for interviews/depositions.
- May 15, 2018: Meet and Confer among Examiner and Debtors/Creditors' Committee regarding agreement to extend deadlines to June 4 and 14, and related agreements regarding additional interviews and formal discovery.
- May 15, 2018: Court Conference with Debtors, Creditors' Committee, and Examiner where Court agreed to extension of deadlines.
- May 17, 2018: Call with Debtors' counsel to discuss Examiner's impressions of potential claims and related issues.
- May 18, 2018: Call with independent director to discuss Examiner's impressions of potential claims and related issues.
- May 28, 2018 (Memorial Day): Call with Creditors' Committee's counsel regarding upcoming plan settlement meeting and request for Examiner's attendance.
- May 30, 2018: Settlement meeting among Debtors, Creditors' Committee, Creditors' Committee's legal and financial advisors, first-lien creditors, and legal and financial advisors to the foregoing.

- May 31, 2018: Court Conference with Debtors, Creditors' Committee, Examiner, first-lien creditors, and U.S. Trustee regarding settlement, end of investigation, and process issues.
- June 4, 2018: Debtors and Creditors' Committee provided draft work product summarizing the findings of their respective internal investigations to the Examiner pursuant to Common Interest Agreement.