

Michael Luskin
Richard Stern
Alex Talesnick
LUSKIN, STERN & EISLER LLP
Eleven Times Square
New York, New York 10036
Tel.: (212) 597-8200
Fax: (212) 974-3205

Counsel for the Senior Lenders

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

_____)	Chapter 11
In re:)	
)	
REPUBLIC METALS REFINING)	Case No. 18-13359 (SHL)
CORPORATION, <i>et al.</i> , ¹)	
)	(Jointly Administered)
Debtors.)	
_____)	Related Doc. No. 325

**OBJECTION OF THE SENIOR LENDERS
TO MOTION OF THE UNITED STATES TRUSTEE FOR THE ENTRY OF AN ORDER
DIRECTING THE APPOINTMENT OF A CHAPTER 11 EXAMINER**

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Republic Metals Refining Corporation, 15 West 47th Street, Suites 206 and 209, New York, NY 10036 (3194), Republic Metals Corporation, 12900 NW 38th Avenue, Miami, FL 33054 (4378), Republic Carbon Company, LLC, 5295 Northwest 163rd Street, Miami Gardens, FL 33014 (5833), Republic High Tech Metals, LLC, 13001 NW 38th Avenue, Miami, FL 33054 (6102), RMC Diamonds, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (1507), RMC2, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (4696), J & L Republic LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7604), R & R Metals, LLC, 12900 NW 38th Avenue, Miami, FL 33054 (7848), Republic Metals Trading (Shanghai) Co., Ltd., 276 Ningbo Road, Huangpu District, Shanghai, P.R. 200001 China (1639), and Republic Trans Mexico Metals, S.R.L., Francisco I. Madero No. 55 Piso 5, Local 409, Centro Joyero Edificio Central, Delegación Cuauhtémoc, Mexico DF 6000 (2942).

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 2

 A. The Chapter 11 Cases..... 2

 B. Cash Collateral Orders, Customer Inventory Dispute and Sale Process..... 2

 C. The Motion..... 4

OBJECTION..... 5

 A. The Court Has Discretion To Decline To Appoint an Examiner 5

 B. The Appointment of an Examiner is Not in The Interest of Any Party 7

 (i) The Debtors are Amply Represented by Independent Fiduciaries 8

 (ii) Unnecessary Cost and Delay 8

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

In re Bradlees Stores, Inc.,
209 B.R. 36 (Bankr. S.D.N.Y. 1997)..... 6

In re Dewey & LeBoeuf LLP,
478 B.R. 636 (Bankr. S.D.N.Y. 2012)..... 5, 6, 7, 8

In re Residential Capital, LLC,
474 B.R. 112 (Bankr. S.D.N.Y. 2012)..... 7

In re Spansion, Inc.,
426 B.R. 114 (Bankr. D. Del. 2010)..... 7

In re Terrestar Corporation,
No. 11-10612 (SHL) (Bankr. S.D.N.Y. Sept. 21, 2011)..... 6, 8

Statutes

11 U.S.C. § 1104(c) passim

11 U.S.C. § 1107..... 2

11 U.S.C. § 1108..... 2

11 U.S.C. § 363..... 4

Coöperatieve Rabobank U.A., New York Branch (“Rabobank”), Brown Brothers Harriman & Co. (“BBH”), Bank Hapoalim B.M. (“Hapoalim”), Mitsubishi International Corporation (“Mitsubishi”), ICBC Standard Bank Plc (“ICBCS”), Techemet Metal Trading LLC (“Techemet”), Woodforest National Bank (“Woodforest”) and Bank Leumi USA (“Leumi” and, together with Rabobank, BBH, Hapoalim, Mitsubishi, ICBCS, Techemet and Woodforest, the “Senior Lenders”) hereby submit this objection (this “Objection”) to the *Motion of the United States Trustee for the Entry of an Order Directing the Appointment of a Chapter 11 Examiner* (the “Motion”)² [Docket No. 325], and in support thereof respectfully state as follows:

PRELIMINARY STATEMENT

1. The Senior Lenders understand the U.S. Trustee’s concerns about issues relating to whether inventory held by the Debtors is property of the estates. However, the Senior Lenders respectfully disagree that this issue (which is primarily legal in nature) justifies the extraordinary remedy and expense of an examiner, especially in light of the substantial progress that has been made by all interested parties to establish a practical and workable protocol for the determination of customer claims and property of the estate issues.

2. The Debtors’ chapter 11 petitions indicate that the Debtors have no fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider. Accordingly, Section 1104(c)(2) of the Bankruptcy Code does not support appointment of an examiner. Likewise, Section 1104(c)(1) of the Bankruptcy Code, which allows the Court to appoint an examiner in its discretion if “such appointment is in the interests of creditors, any equity security holders, and other interests of the estate,” does not justify the appointment of an examiner. Here, an examiner would provide no tangible benefit to the Debtors’ estates, would

² All capitalized terms used but not defined herein have the meaning ascribed to such terms in the Motion.

waste limited resources, and could jeopardize the substantial progress being made toward moving these cases forward through the consensual efforts of the Debtors, the Senior Lenders, the Committee and the Debtors' customers.

3. Under these circumstances, appointment of an examiner is unnecessary and not in the best interests of the Debtors' estates or creditors. The Motion should therefore be denied.

BACKGROUND

A. The Chapter 11 Cases

4. Each of the above-captioned debtors and debtors in possession (collectively, the "Debtors") filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code") on November 2, 2018 (the "Petition Date") or November 21, 2018.

5. The Debtors are continuing to operate and manage their properties and assets as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the chapter 11 cases.

6. On November 19, 2018, the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors in these cases (the "Committee") [Docket No. 113].

7. The factual background relating to the commencement of these cases is set forth in detail in the *Declaration of Scott Avila, as Chief Restructuring Officer, in Support of Chapter 11 Petitions and First Day Motions* (the "Avila Declaration") [Docket No. 3].

B. Cash Collateral Orders, Customer Inventory Dispute and Sale Process

8. To finance the Debtors' chapter 11 cases, the wind down of their operations and the liquidation of their assets, the Debtors required the use of the Senior Lenders' cash collateral.

The Court has entered three interim cash collateral orders [Docket Nos. 54, 277 and 373] and the parties are negotiating the terms of a consensual final order.

9. Many of the Debtors' customers have asserted that certain precious metals delivered or transferred to the Debtors on or before the Petition Date and the proceeds thereof are not property of the Debtors' estates. The Debtors and the Senior Lenders dispute the customers' claims and maintain that all such precious metals and proceeds are property of the Debtors' estates and subject to the Senior Lenders' prepetition and adequate protection liens. At the Court's direction, the Debtors, the Senior Lenders, the Committee and an ad hoc group of customers engaged in extensive negotiations on the terms of a protocol governing this dispute (the "541 Protocol").

10. The 541 Protocol sets forth detailed procedures and schedules governing, among other things, the statement of claims and defenses, discovery by all parties, status reports to the Court and a mechanism to group like claims together and resolve them jointly, by dispositive motion or trial. The Court approved the 541 Protocol on the record at a hearing held on December 14, 2018 and entered an order approving the 541 Protocol on January 11, 2019 [Docket No. 395]. Not a single party (including the U.S. Trustee) objected to the entry of the 541 Protocol or has raised any issues with the procedures and schedule established thereby.

11. Under the 541 Protocol, customer statements of claim are due January 18, 2019; responses by the Debtors and the Senior Lenders are due February 18, 2019; and customer replies are due February 28, 2019. Meanwhile, documents are to be produced on a rolling basis until February 28, 2019, with fact discovery to be closed by April 18, 2019 and expert discovery to be closed by May 10, 2019. The Court has reserved May 20, 2019 and May 21, 2019 for evidentiary hearings on the merits, as needed. See Docket No. 395.

12. In addition to the 541 Protocol, the Debtors have worked with the Senior Lenders and the Committee to establish procedures to address particular “buckets” of claims. To this end, the Debtors filed standalone motions to deal with over \$13.5 million of prepaid inventory claims [Docket Nos. 219 and 286], 44 reclamation demand claims [Docket No. 303] and claims by certain Mexican customers [Docket No. 307]. The Court has entered orders approving settlement procedures with prepaid customers [Docket No. 372] and Mexican customers [Docket No. 371] and a settlement with a prepaid customer facing financial hardship [Docket No. 324]. The Debtors, the Senior Lenders and the Committee also are currently in negotiations with certain of the Debtors’ carbon customers, and anticipate filing motions seeking approval of settlements regarding over \$5 million of carbon inventory in the near future.

13. Concurrently with the cash collateral and customer claim negotiations, the Debtors filed a motion on December 21, 2018 (the “Sale Motion”) [Docket No. 358] seeking authority to sell substantially all of their remaining assets pursuant to Section 363 of the Bankruptcy Code. The auction contemplated by the bid procedures approved by the Court [Docket No. 399] is scheduled for January 31, 2019, with a sale hearing following on February 13, 2019.

14. In short, significant progress has been made through the cooperation of the Debtors’ major constituencies towards a speedy, efficient and consensual resolution of these cases, including the resolution of customer claims and property of the estate issues.

C. The Motion

15. On December 18, 2018, the U.S. Trustee filed the Motion, requesting that the Court appoint an examiner pursuant to Section 1104(c) of the Bankruptcy Code to “investigate and report on the issues presented regarding the ownership of the property in the Debtors’

possession, including the raw materials, processed precious metals, and potentially segregated items that may have been identified for shipment back to their respective owners.” Motion, at p. 3.

16. It appears that the U.S. Trustee seeks the appointment of an examiner to investigate and report on the same legal issue addressed by the 541 Protocol: namely, whether precious metals and proceeds held by the Debtors are property of the estates.

OBJECTION

A. The Court Has Discretion To Decline To Appoint an Examiner

17. The appointment of an examiner is governed by Section 1104(c) of the Bankruptcy Code. Section 1104(c) provides, in pertinent part, that:

on request of a party in interest . . . the 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—

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor’s fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed \$5,000,000.

11 U.S.C. § 1104(c) (emphasis added).

18. The moving party has the burden to prove that an examiner should be appointed. In re Dewey & LeBoeuf LLP, 478 B.R. 636, 640 (Bankr. S.D.N.Y. 2012).

19. As a preliminary matter, the Motion does not and cannot establish that the Debtors have fixed, liquidated, unsecured debts, other than debts for goods, services or taxes, or owing to an insider, that exceed \$5,000,000. The consolidated list of 30 largest unsecured claims annexed to the Debtors’ voluntary chapter 11 petitions does not schedule a single fixed or liquidated claim or a single claim unrelated to the provision of goods or services. See Official

Form 204, List of Creditors Who Have the 30 Largest Unsecured Claims and Are Not Insiders, on a Consolidated Basis, at 1-2 [Docket No. 1].³ The Motion relies on the Avila Declaration for the proposition that the Debtors' alleged \$86 million of outstanding customer claims fulfill the requirement in Section 1104(c)(2). However, the claims held by the customers are contingent and unliquidated claims for the sale of goods or services (i.e., the sale of precious metals or the refining of metals) and are wholly dependent on the outcome of the litigation governed by the 541 Protocol. Therefore, these claims cannot be considered for purposes of meeting the threshold in Section 1104(c)(2). See, e.g., Dewey, 478 B.R. at 638 (denying examiner appointment under Section 1104(c)(2) where movants failed to meet their burden to prove that the debtor had fixed, liquidated, unsecured debts in excess of \$5 million other than debts for goods, services or taxes); In re Terrestar Corporation, No. 11-10612 (SHL) (Bankr. S.D.N.Y. Sept. 21, 2011), Tr. 12-14 (same).⁴

20. Accordingly, Section 1104(c)(2) is not applicable and Section 1104(c)(1), which permits appointment of an examiner only if "such appointment is in the interests of creditors, any equity security holders, and other interests of the estate," controls. The Court clearly has the discretion to decline to appoint an examiner under Section 1104(c)(1). See, e.g., Dewey, 478 B.R. at 640 (declining, in the court's discretion, to appoint an examiner under Section 1104(c)(1); Terrestar, No. 11-10612, Tr. 8-12 (same); In re Bradlees Stores, Inc., 209 B.R. 36 (Bankr. S.D.N.Y. 1997) (same).

21. Even if the Court were to conclude that the requirements of Section 1104(c)(2) were met, the Court could still decline to appoint an examiner. Although there is no controlling

³ All 30 claims listed are described as unliquidated claims for "trade debt". Id.

⁴ A copy of the transcript is attached to this Objection as Exhibit A.

authority in the Second Circuit on whether Section 1104(c) should be construed as mandatory or permissive, courts in this and other Districts have interpreted Bankruptcy Code Section 1104(c) as permissive, not mandatory, focusing on the modifier “as is appropriate.” See, e.g., Dewey, 478 B.R. at 640 (holding that the court “retains the discretion to deny a motion for appointment of an examiner” even where the debtor had fixed, liquidated, unsecured debts in excess of \$5 million); In re Residential Capital, LLC, 474 B.R. 112, 121 (Bankr. S.D.N.Y 2012) (holding that “[w]hile Section 1104(c) expresses a Congressional preference for appointment of an independent examiner to conduct a necessary investigation, the facts and circumstances of the case may permit a bankruptcy court to deny the request for appointment of an examiner even in cases with more than \$5 million in fixed debts”); In re Spansion, Inc., 426 B.R. 114, 127 (Bankr. D. Del. 2010) (despite the debt threshold having been met, court “[found] no sound purpose in appointing an examiner, only to significantly limit the examiner’s role when there exists insufficient basis for an investigation. To appoint an examiner with no meaningful duties strikes me as a wasteful exercise, a result that could not have been intended by Congress.”).

B. The Appointment of an Examiner is Not in The Interest of Any Party

22. The Motion fails to establish any practical basis for the appointment of an examiner. The Debtors and interested parties are in the process of investigating and settling substantial customer claims that would presumably fall under the proposed examiner’s purview, and the just-implemented 541 Protocol will resolve virtually all the rest. Accordingly, the investigation the U.S. Trustee suggests would be a duplicative waste of estate resources resulting only in unnecessary cost and delay. There is simply no further investigation to perform with respect to customer claims. The appointment of an examiner is therefore not in the interest of the Debtors’ estates or creditors under the facts and circumstances of these cases.

(i) The Debtors are Amply Represented by Independent Fiduciaries

23. The appointment of an examiner may be “appropriate” under Section 1104(c) if there are “allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor.” 11 U.S.C. § 1104(c). Here, the Motion makes no allegation (factual or otherwise) of wrongdoing with respect to the prepetition customer claims at issue, or to any post-petition misconduct by the Debtors.

24. The Debtors have retained independent bankruptcy counsel, Akerman LLP [Docket No. 278], financial advisors, Paladin Management Group, LLC [Docket No. 245], and a chief restructuring officer, Scott Avila [Docket No. 245], who has been in place since July 2018. See Docket No. 58, p. 15. Accordingly, the Debtors’ affairs are being managed by an independent fiduciary with the advice and assistance of experienced bankruptcy professionals.

25. Moreover, to the extent that the U.S. Trustee is concerned about the Debtors’ prepetition inventory discrepancy (and it is not clear from the Motion that it is), any wrongful conduct would have taken place prior to the Debtors’ appointment of Mr. Avila and is already being investigated by the Committee pursuant to its court-approved 2004 investigation. See Docket No. 353. A second concurrent, overlapping investigation is not warranted.

(ii) Unnecessary Cost and Delay

26. In determining whether the examiner’s investigation would be appropriate and in the interests of the Debtors’ estates and creditors, the Court should also consider whether the benefit (if any) of an examiner would be outweighed by the costs and delay associated with an investigation. Dewey, 478 B.R. at 640 (denying examiner appointment because “it would only add needless expense and delays”); Terrestar, No. 11-10612, Tr. 9:12-15 (noting the court must

“weigh the allegations presented in the request for an examiner, as well as the cost of an examiner to the estate, both monetarily and in terms of delay”).

27. Here, the appointment of an examiner would impose unnecessary administrative expenses on the Debtors’ estates and would delay the resolution of these cases. The very investigation that the U.S. Trustee seeks is wholly duplicative of the investigation and claim resolution process governed by the 541 Protocol, a process that the Debtors and their extremely active creditor base spent considerable time, effort and expense negotiating, without any objection by the U.S. Trustee. Substantial customer claims have already been negotiated and resolved consensually. Discovery and briefing under the 541 Protocol to resolve all the remaining customer claims has commenced. Deadlines for the statement of claims and defenses, fact and expert discovery, status reports to the Court and dispositive motions and trial dates have been set. The Debtors, the Senior Lenders, the Committee and the Debtors’ customers are represented by sophisticated professionals and are fully capable of litigating the property dispute to its conclusion, with the Court as the arbiter of the merits of the underlying legal arguments.

28. Moreover, an examiner could only investigate claims, not negotiate settlements or litigate claims that cannot be settled. Substantial involvement by the interested parties would therefore still be required if an examiner were appointed. As a result, an examiner would not streamline or expedite the existing process or resolve the disputed issues.

29. The Senior Lenders respectfully submit that the 541 Protocol adequately addresses the U.S. Trustee’s concerns, rendering the appointment of an examiner wasteful and unnecessary. In these circumstances, appointing an examiner solely to duplicate the investigative efforts that have already been undertaken by capable parties would serve no

purpose other than to waste estate resources. For these reasons, the appointment of an examiner is not necessary, appropriate or in the interests of the Debtors' estates or creditors.

[Remainder of page intentionally left blank.]

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Senior Lenders respectfully request that the Court (i) deny the Motion in its entirety and (ii) grant such other and further relief as is just and proper.

Dated: New York, New York
January 16, 2019

Respectfully submitted,

LUSKIN, STERN & EISLER LLP

/s/ Michael Luskin

Michael Luskin

Richard Stern

Alex Talesnick

Eleven Times Square

New York, New York 10036

Telephone: (212) 597-8200

Facsimile: (212) 974-3205

E-Mail: luskin@lsellp.com

E-Mail: stern@lsellp.com

E-Mail: talesnick@lsellp.com

Counsel for the Senior Lenders

EXHIBIT A

In re Terrestar Corporation, No. 11-10612 (SHL) (Bankr. S.D.N.Y. Sept. 21, 2011)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 11-10612 (SHL)

- - - - -x

In the Matter of:

TERRESTAR CORPORATION, et al.,

Debtors.

- - - - -x

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

September 21, 2011
3:06 PM

B E F O R E:
HON. SEAN H. LANE
U.S. BANKRUPTCY JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Telephone Conference on the Record: Decision Re: Doc. #190 & 179 Scheduling Order Signed on 9/7/11, Re: Valuation Objections of Jeffrey Swarts In Response to the TSC Debtors First Plan of Reorganization Disclosures Exhibits D & F and Reconsideration Request for an Examiner and/or Official Equity Committee.

Transcribed by: Sharon Meyer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

AKIN, GUMP, STRAUSS, HAUER & FELD, LLP

Attorneys for Debtors

One Bryant Park

New York, NY 10036

BY: ASHLEY R. BEANE, ESQ. (TELEPHONICALLY)

AKIN, GUMP, STRAUSS, HAUER & FELD, LLP

Attorneys for Debtors

1700 Pacific Avenue

Suite 4100

Dallas, TX 75201

BY: SARAH LINK SCHULTZ, ESQ. (TELEPHONICALLY)

OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.

Attorneys for TSN Official Creditors' Committee

230 Park Avenue

New York, NY 10169

BY: DAVID POSNER, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WACHTELL, LIPTON, ROSEN & KATZ

Attorneys for Highland Capital Management LP

And It's Affiliated and Managed Funds

51 West 52nd Street

New York, NY 10103

BY: SCOTT CHARLES, ESQ. (TELEPHONICALLY)

WEIL GOTSHAL & MANGES LLP

Attorneys for Harbinger Capital Partners LLC

767 Fifth Avenue

New York, NY 10153

BY: FRANK GRESE, ESQ. (TELEPHONICALLY)

QUINN, EMANUEL, URQUHART & SULLIVAN

Attorneys for Solus

51 Madison Avenue

New York, NY 10010

BY: SCOTT C. SHELLEY, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SULLIVAN AND WORCESTER LLP

Attorneys for Sullivan and Worcester LLP

One Post Office Square

Boston, MA 02109

BY: PAMELA HOLLEMAN, ESQ. (TELEPHONICALLY)

ALSO:

JEFFREY M. SWARTS, PRO PER (TELEPHONICALLY)

MARK TAUB, MOHAWK CAPITAL, LLC (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: Good afternoon, and those of you present, Ms. Golden, please be seated, and all the rest of you wherever you are, please feel free to be seated.

As I stated at the hearing on Monday, it was my intention to take the matter under advisement and then issue a ruling which given the need to move things in this courthouse, this case along, and as well as just things in the courthouse generally along, I wanted to do that in an oral fashion, rather than writing it out, which always adds an extra layer of time, and I think in the interest of all the parties, that that was not a beneficial thing to do, when I think I can just lay my reasoning out orally.

So my intention is to issue my ruling now. Argument has occurred, I've taken under advisement, under consideration all of what everyone said at the hearing on Monday, so I'm not expecting that there's anything else to do other than to listen to what I say what the ruling is, and then I'll ask the appropriate party to submit an order.

So with that said, let me begin. Before me are requests of several parties, Jeffrey Swarts dated August 28th, 2011, as well as a joinder by Mohawk Capital LLC and a letter a by Aldo Perez & Associates dated September 13th, 2011. And all of these request an appointment of an examiner, and as discussed at the hearing on Monday, I've reviewed all of the

1 materials submitted to me by all the parties, but for the
2 reasons that I explained at the hearing, I have excluded one
3 document from my consideration, which is Exhibit I that was
4 provided by Mr. Swarts, which was a transcript from a criminal
5 jury trial.

6 So with that, the standard here for appointment of an
7 examiner is covered by Section 1104(c) of the Bankruptcy Code.
8 That section provides in relevant part "that on request of a
9 party in interest, the Court shall order the appointment of an
10 examiner to conduct such an investigation of the debtor, as is
11 appropriate, including an investigation of any allegations of
12 fraud, dishonesty, incompetence, misconduct, mismanagement, or
13 irregularity in the management of the affairs of the debtor, of
14 or by current or former management of the debtor if (1), such
15 appointment is in the interest of creditors, any equity
16 security holders, and other interests of the estate, or (2) the
17 debtors fixed liquidated unsecured debts other than debts for
18 goods, services, or taxes, or owing to an insider exceed five
19 million dollars." And that again is 11 USC 1104(c).

20 Applying the statutory criteria to the facts before
21 me, I conclude that the appointment of an examiner is not
22 appropriate in this instance, and I will explain my rationale
23 for the ruling in more detail in a minute. But before I do
24 that, I'd like to take this opportunity to say that I thought
25 Mr. Swarts, as a pro se litigant, did a very able job of

1 presenting his arguments, and that I appreciate the quality of
2 his presentation.

3 It appears that he lost a significant amount of money
4 as an investor in the common stock of TSC and sadly, that is
5 not an uncommon situation here in bankruptcy court, where
6 creditors end up seeking recourse only because things have
7 taken a terrible turn. And that -- but that doesn't make the
8 situation any less unfortunate in each case, and so I do
9 sympathize with Mr. Swarts, and of course, I have to keep that
10 sympathy separate from my job, which is to apply the Bankruptcy
11 Code as drafted by Congress to the facts of a given situation.

12 So turning to the details of my ruling, I conclude
13 that appointment is not appropriate under Section (c)(1) which
14 requires the Court to look at the interest of all creditors and
15 the estate. There are a few cases that shed some light about
16 (c)(1).

17 For example, in James Phillip Sletteland, S-l-e-t-t-e-
18 l-a-n-d, a Chapter 11 case here in the Southern District of New
19 York, 260 Bankruptcy Reporter 657, in front of Judge Gropper,
20 it notes that under the relevant statute, that a particular
21 group of creditors, a creditor group, even if dominant, can't
22 justify the appointment of a trustee or examiner simply by
23 alleging it would be in its interest. It must show the
24 appointment is in the interest of all who has a stake in the
25 case, including the debtor.

1 That similar proposition is cited in Gliateck, Inc.,
2 G-l-i-a-t-e-c-k, which is a Chapter 11 case in the Northern
3 District of Ohio from 2004, 305 Bankruptcy Reporter 832 at page
4 -- I guess it's star 7 and 8.

5 Relatedly, in looking at this provision, the Court
6 must keep in mind that the benefit to the estate and the
7 attendant protections of the examiner's investigation must
8 outweigh the expenses, and that is -- observation is in In Re:
9 Gilman, G-i-l-m-a-n, Services, Inc. a bankruptcy case from the
10 District of Massachusetts from 1985, found at 46 Bankruptcy
11 Reporter 322.

12 So looking at this precedent, I'm asked to weigh the
13 allegations presented in the request for an examiner, as well
14 as the cost of an examiner to the estate, both monetarily and
15 in terms of delay, because as was stated at the hearing, and we
16 all know, it is expensive for a debtor company to be in Chapter
17 11.

18 So first I note that there's only -- there's very
19 little in the way of facts presented to support allegations of
20 fraud or misconduct. There's a lot of the use term "may".
21 What is the allegations at least in Mr. Swarts' pleading are
22 primarily concern valuation of the estate assets, either value
23 of the spectrum, or what Mr. Swarts characterizes as a below
24 market lease.

25 And an issue of valuation, of course, is the subject

1 of any plan and plan hearing, and therefore, objections to the
2 plan provided forum for all parties to challenge the valuation
3 assigned by the debtors to the estate assets.

4 Here, Mr. Swarts has pointed to one specific valuation
5 previously assigned to debtor assets four years prior to the
6 filing of this bankruptcy, namely a 2008 SEC filing, and he
7 also points to valuation of spectra in other bankruptcy cases,
8 which he views as similar to the spectra -- spectrum at issue
9 in this case.

10 As a threshold matter, I note that assets in question
11 are all held not by TSC, the debtor, but rather by a non-debtor
12 second level subsidiary which is not in bankruptcy, but TSC
13 indirectly holds equity in that entity.

14 At the hearing, the debtors noted that they dispute
15 the characterization of the leases below market, although I
16 don't need to decide that issue here today, because at the
17 hearing, as I said, it's not about -- we're not deciding any
18 valuation at this point, that's for later in the proceeding.
19 But certainly the debtors also noted the Court's inability to
20 alleviate the non-debtor from its obligations under that lease,
21 even if it is below market.

22 But addressing the SEC filing, I certainly assumed
23 that the historical valuation of these assets is a likely
24 subject for any plan confirmation hearing, and I'll consider
25 any arguments on valuation at that time, but as the Spansion,

1 S-p-a-n-s-i-o-n, Inc. case at 426 Bankruptcy Reporter 114, it's
2 a Delaware bankruptcy case noted that there's a distinction
3 between 1104(c)'s inquiry into fraud, mismanagement,
4 irregularities from straight valuation questions. Certainly
5 valuation is something that might be looked at in connection
6 with fraud, mismanagement or irregularities, but the statute
7 really is not addressed to sheer valuation as a stand alone
8 issue.

9 But putting aside the SEC filing, I note that Mr.
10 Swarts has referenced other cases and other valuations, and I
11 have to note the valuation in each case is a unique inquiry and
12 it's the result of the facts and circumstances that result in a
13 determination of the worth of an asset at a particular time.

14 So as a result, valuations from other cases are of a
15 limited utility to me, and that's just something that the
16 parties should be aware of.

17 I also note that given the proposed disclosure
18 statement and plan before me, common shareholders appear to be
19 out of money in this case by at least several hundred thousand
20 dollars. And that means in practical terms that several
21 hundred thousands of dollars of value would have to be found in
22 this case before common stockholders would recover anything.

23 In that connection, I have taken into account the
24 views of other parties who either filed objections or appeared
25 at the hearing to let their views be known, and note those

1 include the unsecured creditor Elektrobit as well as creditors
2 who hold either or both preferred and common shares, such as
3 Solus, Harbinger and Highland. These creditors would stand to
4 gain if additional recovery was available in these cases.
5 Elektrobit and these other creditors oppose the request for an
6 examiner here, because of concerns about the costs of such an
7 examiner, both in terms of professional fees and delay in this
8 case.

9 And this is the case, even though as Elektrobit's
10 counsel stated in her presentation, those creditors will be
11 paying close attention to valuation issues as this case moves
12 forward to the disclosure statement and the plan. The views of
13 those parties obviously are relevant in my determination of
14 whether appointment of an examiner is appropriate for the
15 benefit of all parties.

16 So given all these facts, I'm not persuaded that
17 there's a sufficient basis under (c) (1) to merit the
18 appointment of an examiner as in the interest of all creditors.

19 Turning to Section (c) (2), I conclude that quote,
20 "Debtor's fixed liquidated unsecured debts, other than debts
21 for goods, services, or taxes are owing to an insider," end
22 quote, do not exceed five million dollars.

23 In reaching this conclusion, I have reviewed the
24 schedules of assets and liabilities, the claims register, and
25 the summary chart of those claims provided at the hearing by

1 debtors, the title of which was breakdown of claims Re:
2 Section 1104(c) (2) debt threshold, which I'm taking essentially
3 as merely a summary of facts that are in the case, and so I was
4 just using it as a summary chart.

5 And so of all the claims filed in these cases, 874
6 million of the 905 million total are unsecured claims for goods
7 and services, and notably this includes the claim of
8 Elektrobit, which I had specifically inquired about at the
9 hearing. I had inquired because that claim worth between
10 twenty-five million and twenty-seven million dollars, depending
11 upon which documents in this case you reviewed. That claim was
12 listed on debtor's Schedule F of unsecured claims, and I had
13 asked because the status of that claim on that schedule did not
14 list it as unliquidated, and it was unclear whether it fell
15 into the category in (c) (2) that would necessitate the
16 appointment of an examiner, and so whether it counted against
17 the five million dollar ceiling.

18 At argument, counsel for both Elektrobit and the
19 debtor explained that the Elektrobit claim was, in fact, for
20 goods or services, and also was unliquidated, because it is the
21 subject of a pending state court action that has not yet
22 reached a resolution. So accordingly, the existence of that
23 claim doesn't require the appointment of an examiner.

24 I also didn't see any other claims that either alone
25 or combined in all these cases would require the appointment of

1 an examiner, by virtue of triggering the five million dollar
2 cap set forth in Section (c) (2) and contemplated by the Loral
3 case found at 2004 West Law 297, 985.

4 So for all those reasons, I am going to deny the
5 motion of the appointment of an examiner. I appreciate the
6 arguments of the parties, and I thought they were very useful
7 in illuminating the issues, and I would ask that since debtor
8 is the prevailing party here, that they submit a proposed order
9 to resolve the motion.

10 So with that business of the court being concluded,
11 that's my ruling, there's nothing else scheduled to be
12 discussed today. I will see you all at the next appropriate
13 time when these cases are on the calendar.

14 Actually, if debtors would do me a favor as to
15 essentially settle the order, so that folks have seen it before
16 I get it. If not, obviously, it's my ruling. So if people
17 can't agree, I'll enter my own order. But I would imagine you
18 should be able to settle something.

19 Thank you and have a good day.

20 (Whereupon these proceedings were concluded at 3:21 PM)

21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

RULINGS

	Page	Line
Motion For Examiner - Denied	14	4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharon Meyer, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sharon Meyer

Digitally signed by Sharon Meyer
DN: cn=Sharon Meyer, o=Veritext,
ou, email, c=US
Date: 2011.10.21 15:35:49 -04'00'

SHARON MEYER

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2019, I caused a true and correct copy of the foregoing *Objection of the Senior Lenders to Motion of the United States Trustee for the Entry of an Order Directing the Appointment of a Chapter 11 Examiner* to be filed and served through ECF notification upon all parties who receive notice in this matter pursuant to the Court's ECF filing system.

/s/ Michael Luskin

Michael Luskin