

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

:

In re

: Chapter 11

COMMERCECONNECT MEDIA HOLDINGS, : Case Number 09-12765 (BLS)
INC., et al., : (Jointly Administered)

:

Debtors.

Hearing Date: Sept. 8, 2009 @ 1:00 p.m.

: Obj. Deadline: Sept. 3, 2009 @ 12:00 p.m.

(extended for the U.S. Trustee)

**OBJECTION OF THE UNITED STATES TRUSTEE TO
APPLICATION BY THE DEBTORS FOR ENTRY OF AN ORDER
AUTHORIZING (I) EMPLOYMENT AND RETENTION OF MILLER BUCKFIRE
& CO., LLC AS FINANCIAL ADVISOR AND INVESTMENT BANKER AND (II)
WAIVER OF CERTAIN INFORMATION REQUIREMENTS OF LOCAL RULE 2016-2**

In support of her objection to the Debtors' application pursuant to 11 U.S.C. §§ 327(a) and 328(a) for authority to retain Miller Buckfire & Co., LLC ("Miller Buckfire") as investment banker and financial advisor to the Debtors (the "Application"), Roberta A. DeAngelis, Acting United States Trustee for Region 3, through her counsel, states:

INTRODUCTION

1. This Court has jurisdiction to consider the Application under 28 U.S.C. §§ 157(a) and 1334.

2. Under 28 U.S.C. § 586(a)(3), the United States Trustee is charged with monitoring applications filed under 11 U.S.C. § 327 "and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications." 28 U.S.C. § 586(a)(3). This duty is part of the United States Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994)

(noting that United States Trustee has “public interest standing” under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the United States Trustee as a “watchdog”).

3. The United States Trustee has standing to be heard with regard to the Application under 11 U.S.C. § 307.

GROUND/BASIS FOR THE OBJECTION

4. The United States Trustee objects to the Application for two reasons. First, Miller Buckfire makes certain disclosures in its supporting declaration that create more issues than they resolve, raising the specter that Miller Buckfire and/or its personnel working on the Debtors’ bankruptcy cases indirectly have economic interests in the Debtors’ financial performance, via a Miller Buckfire-related investment fund holding securities of the Debtors and/or claims as a creditor of the Debtors. Second, Miller Buckfire seeks advance approval of fees under 11 U.S.C. 328, not only for a successful prepack reorganization (assuming the pre-negotiated debt-for-equity plan is confirmed), but also should that prepack fail; Miller Buckfire has not presented a factual basis for its assertion that such fees are reasonable.

BACKGROUND

5. The Debtors filed for chapter 11 relief on August 7, 2009. The Debtors conducted a pre-petition solicitation of their Chapter 11 plan, and the Court will consider confirmation of the “prepack” on September 8, 2009. A secured creditor, Genesis CLO 2007-2 Ltd., has objected to confirmation. D.I. 79.

6. The Debtors retained Miller Buckfire pre-petition, in September 2008. Initially, Miller Buckfire attempted to sell the Debtors' assets. Application, at 7. Like previous efforts by other investment banks, however, Miller Buckfire's efforts at selling the Debtors' business were unsuccessful. *Id.* at 6-7. Miller Buckfire therefore concentrated its efforts on negotiating an out-of-court restructuring. *Id.* at 7-8. When one of the secured creditors (Genesis or the "Leichtman Fund") refused to consent to the out-of-court restructuring, the Debtors with their professionals proceeded with a prepackaged chapter 11 plan instead, with a debt-for-equity restructuring to be accomplished under the Bankruptcy Code. *Id.* at 9.

7. The Application is accompanied by an affidavit which states:

"An affiliate of Miller Buckfire serves as manager of an investment fund (the "Managed Fund"). The Managed Fund is intended principally for investments by third parties unrelated to Miller Buckfire. However, such investors also may include financial institutions (some of which may be parties in interest in the Chapter 11 Cases) or affiliates of Miller Buckfire and various of its officers and employees (some of which may include Miller Buckfire employees providing services in connection with the Chapter 11 Cases). The Managed Fund may invest from time to time in claims or securities of or relating to the Debtors or parties in interest in the Chapter 11 cases. However, Miller Buckfire employees working in connection with the Debtors' Chapter 11 Cases have no control over or involvement in investment decisions or business decisions made for the Managed Fund. The fund managers of the Managed Fund maintain investment control over investment decisions. In addition, no confidential information concerning the Debtors is permitted to be communicated to any persons working for the manager of the Managed Fund. Miller Buckfire does not believe that the relationships outlined above constitute adverse interests or render Miller Buckfire not disinterested in the Chapter 11 Cases."

Affidavit, at 7.

8. The Application sets forth the following the following compensation terms:

- (a) a monthly advisory fee of \$150,000/month;
- (b) a restructuring transaction fee of \$1.6 million;
- (c) a sale transaction fee of \$1.6 million;

Id. at 15-16. The Application further provides that a portion of the monthly advisory fees will be

credited against the restructuring transaction fee or sale transaction fee. *Id.* Prior to the filing of these cases, Miller Buckfire received \$1.5 million in monthly advisory fees, plus reimbursement of certain expenses. *Id.* at 24.

OBJECTION

The Disclosure Issue

9. Section 327(a) provides that in order to be employed by a debtor, a professional may not “hold or represent an interest adverse to the estate” and must be a “disinterested person.” 11 U.S.C. § 327(a). “The requirements of section 327 ... ‘serve the important policy of ensuring that all professionals . . . tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.’ “ *In re Leslie Fay Cos.*, 175 B.R. at 532 (quoting *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir.1994)). If the professional has been employed and the court subsequently learns that the requirements of Section 327(a) were not satisfied, the court can deny compensation. *See* 11 U.S.C. § 328(c).

10. Bankruptcy Rule 2014(a) requires that the retention application set forth “any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest....” “The application shall be accompanied by a verified statement . . . setting forth the person's connections with the debtor, creditors, or any other party in interest....” *Id.* Professionals “‘must disclose all facts that bear on [their] disinterestedness and cannot usurp the court's function by choosing . . . which connections impact disinterestedness and which do not. The existence of an arguable conflict must be disclosed if only to be explained away....’ “ *In re C & C Demo, Inc.*, 273 B.R. 502, 507 (Bankr. E.D. Tex.2001) (quoting *In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr.S.D.N.Y.1998)). The

purpose of these documents is “to provide the court (and the United States Trustee) with information necessary to determine whether the professional's employment meets the broad tests of being in the best interest of the estate...” 9 L. King, *Collier on Bankruptcy* ¶ 2014.03 (15th ed. rev.2007). Inquiry notice is not sufficient. See *In re Matco Electronics Group, Inc.*, No. 02-60835, 2008 WL 141908, at *5 (Bankr. N.D.N.Y. Jan. 11, 2008) (Rule 2014 “is not intended to condone a game of cat and mouse where the professional seeking appointment provides only enough disclosure to whet the appetite”)

11. Without impugning Miller Buckfire’s intentions at all, the United States Trustee submits that the above-quoted disclosures in the affidavit are insufficient. Miller Buckfire does not disclose the name of the affiliate, the nature of the affiliate relationship, the name of the investment fund that may hold securities or claims of the Debtors, the actual extent or nature of any information barriers between the fund manager and Miller Buckfire and its employees (with respect to information traveling in both directions), or the extent to which persons working on this bankruptcy engagement may actually have an economic interest, via the investment fund, in the Debtors’ financial condition. Compare Exhibit A, affidavit of Mesirow Financial Consulting, LLC, p.2 ff. (offered for illustrative purposes only).

The Section 328 Issue

12. The United States Trustee does not oppose compensation of Miller Buckfire under the terms set forth in the application *to the extent that* the Debtors’ prepack successfully confirms. The United States Trustee objects to the fee structure set forth in the Application because a complete, blanket approval of Miller Buckfire’s fee structure under Section 328 is inappropriate in this case and probably unnecessary.

13. Section 328(a) of the Bankruptcy Code provides, in pertinent part:

The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. §328(a). The Court's subsequent review of compensation on grounds of "improvidence" would be extraordinarily limited.

14. The requested fee structure would provide for payment of significant fees to Miller Buckfire even if the prepack were to fail, e.g. if the assets later have to be sold using efforts of someone other than Miller Buckfire (whose sale efforts were unsuccessful). Because the fee structure includes the payment of fees where Miller Buckfire's efforts may fail, i.e. if the "prepack" is not confirmed and successful, the United States Trustee opposes Section 328(a) retention to that limited extent. If the prepack should fail, then review should be permitted under Section 330 at such time.

CONCLUSION

WHEREFORE the United States Trustee requests that this Court issue an order denying the Application or grant other relief consistent with this objection.

Respectfully submitted,

ROBERTA A. DEANGELIS
ACTING UNITED STATES TRUSTEE

BY: /s/ T. Patrick Tinker
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Trial Attorney
FL Bar No. 0064874

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Date: September 3, 2009

(the "Application")² of the Official Committee of Unsecured Creditors (the "Committee") appointed in the Chapter 11 cases of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors") for entry of an Order, pursuant to sections 327, 328(a), 1103 of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016 and Local Rule 2014-1, authorizing the retention and employment of MFC as financial advisors to the Committee *nunc pro tunc* to April 27, 2007. Except as otherwise indicated, I have personal knowledge of the matters set forth herein and, if called as a witness, would testify competently thereto.³

2. I am submitting this Supplemental Affidavit, pursuant to the request of the United States Trustee for the District of Delaware, for additional information supplemental to the Affidavit of Leon Szlezinger in Support of the Application relating to steps taken by MFC and its affiliated companies to prevent (i) the trading personnel and the investment advisory personnel who are employed by certain of MFC's affiliated companies from receiving any non-public information concerning the Debtors' chapter 11 cases through MFC's personnel, representatives or agents ("MFC Personnel") performing activities related to the Committee, and (ii) MFC Personnel from receiving information regarding trading in Securities⁴ of the Debtors by MFC affiliates in advance of trading.

3. As noted in the Order authorizing MFC's retention in these cases, the Mesirow BD/IA Subsidiaries will not trade, on their own behalf, in the Securities of the Debtors during the pendency of these cases. The Mesirow BD/IA Subsidiaries, however, are authorized to

² Capitalized terms used herein but not otherwise defined shall have those meanings set forth in the Application.

³ Certain of the disclosures herein relate to matters within the knowledge of other professionals at MFC.

⁴ The term "Securities" is used as such term is defined in Section 2(a)(1) of the Securities Act of 1933, including the following, but only to the extent they constitute securities thereunder: stocks; notes; bonds; debentures; participations in, or derivatives based upon or relating to, any of the Debtors' debt obligations or equity interests.

trade, on behalf of their clients, in the Debtors' Securities during the pendency of these cases. Under the applicable provisions of the securities laws and regulations, including the Investment Advisors Act of 1940 and various rules and regulations promulgated by the Securities and Exchange Commission as well as applicable self regulatory organizations (e.g., National Association of Securities Dealers and New York Stock Exchange), the Mesirow BD/IA Subsidiaries owe certain duties to their clients including a duty of good faith and fair dealing and, for investment advisory clients, a fiduciary duty to act solely in a client's best interests. The Mesirow BD/IA Subsidiaries have specific obligations, *inter alia*, to have a reasonable, independent basis for its advice; to obtain the best execution for clients' securities transactions; to ensure that its investment advice is suitable to the client's objectives, needs, and circumstances; to refrain from effecting personal securities transactions inconsistent with client interests and be loyal to clients.

4. Accordingly, pursuant to these obligations, clients of the Mesirow BD/IA Subsidiaries may receive information and advice, as well as execution of trades in the Debtors' securities from the BD/IA Subsidiaries' employees. It is the view of Mesirow that the proper exercise of these fiduciary and other obligations require that the Mesirow BD/IA Subsidiary employees fully and fairly respond to inquiries from their clients regarding the Debtors' Securities, and that any limitation in their ability to do so could result in a breach of these obligations. Consistent with the fiduciary and other obligations of the Mesirow BD/IA Subsidiaries, their employees are subject to the provisions of the Trading Wall and will have no access to confidential information obtained by the MFC Personnel working on this engagement; similarly the MFC Personnel working on this engagement will have no knowledge of information, advice or securities executions provided by the Mesirow BD/IA Subsidiaries to any

client.

5. Mesirow Financial has implemented certain Trading Wall procedures that preclude the flow of information concerning transactions by the Mesirow BD/IA Subsidiaries in the Debtors' Securities, as well as other Securities transactions by the Mesirow BD/IA Subsidiaries, to MFC Personnel. These Trading Wall procedures also permit the Mesirow BD/IA Subsidiaries to fulfill their fiduciary or other duties owed to their clients in accordance with the securities laws.

6. In conjunction with the Trading Wall procedures, MFC has also established the following internal procedures:

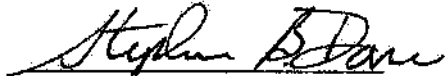
- a. Subject to Paragraph 7 hereof, MFC Personnel will not directly or indirectly share any non-public information generated by, received from or relating to Committee activities (the "Information") with any other employees, representatives or agents of the Mesirow BD/IA Subsidiaries, including the Mesirow BD/IA Subsidiaries' investments advisory personnel;⁵
 - b. MFC Personnel will not receive any information regarding any trade made by the Mesirow BD/IA Subsidiaries in the Debtors' Securities;
 - c. Mesirow BD/IA Subsidiaries' compliance personnel shall review Mesirow BD/IA Subsidiaries' trades of the Debtors' Securities to determine if there is any reason to believe that such trades were not made in compliance with the information blocking procedures and shall keep records of such review; and
 - d. MFC shall take those steps necessary to restrict the exchange of Information through electronic means between MFC Personnel and all other Mesirow BD/IA Subsidiaries' personnel in a manner consistent with the foregoing procedures.
7. Notwithstanding anything herein, MFC Personnel may share Information with:
- a. senior management of MFC who, due to their duties and responsibilities, have a legitimate need to know such Information provided that such

⁵ A good faith communication of publicly available information shall not be presumed to be a breach of the obligations of MFC or the Mesirow BD/IA Subsidiaries or their respective personnel

individuals otherwise comply with the procedures herein and use such Information only in connection with their senior managerial responsibilities;

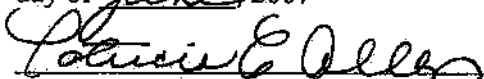
- b. regulators, auditors, designated legal and compliance personnel for the purpose of rendering legal advice to MFC or providing surveillance;
- c. MFC administrative personnel who service and maintain internal computer systems, and to the extent that such information is available to such personnel, such personnel agree not to share Information with other employees; and
- d. other MFC employees, representatives and agents who are not involved with trading or investment advisory activities with respect to the Debtors' Securities upon the execution of a confidentiality letter.

8. I have read the Application, and, to the best of my knowledge, information and belief, the contents of said Application are true and correct.



Stephen B. Darr
Senior Managing Director and
Risk Management Officer
Mesirow Financial Consulting, LLC
99 High Street
Boston, MA 02110

Sworn to and subscribed before me this 20
day of June 2007


Notary Public
State of Massachusetts Patricia



County of ~~Suffolk~~ Cook