

a preliminary examination of the Debtor by the Interim Trustee and the BA, the BA was advised by Mr. Goldstein that he was calling for an election of a permanent trustee pursuant to 11 U.S.C. § 702. After it was determined that he held proxies of unsecured claimants in an amount sufficient to call for a trustee election,¹ Mr. Goldstein nominated “Alvarez & Marsal” to act as the permanent trustee in this case. Mr. Hogewood then nominated the Interim Trustee, Ms. Conti. There were no other nominees. Mr. Goldstein voted all of the proxies he held, totaling \$1,261,286.99, in favor of the firm of Alvarez & Marsal, while Mr. Hogewood voted all of the proxies he held, totaling \$1,263,913.15, in favor of Ms. Conti, Interim Trustee. Of the \$1,263,915.15 voted in favor of Sara Conti, \$1,000,000.00 represents the unsecured portion of the Zeemans’ claim which is the subject of an objection by the Committee.

DISCUSSION

Section 702(b) sets out the process of electing a permanent trustee in a chapter 7 bankruptcy case and provides as follows:

At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by the creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

11 U.S.C. § 702. Subsection (a)(1) of section 702 provides that a creditor is eligible to vote for a candidate for trustee only if such creditor “holds an allowable, undisputed, fixed, liquidated,

¹ If creditors holding at least 20% of all allowable, undisputed, fixed, liquidated, unsecured claims of a type entitled to distribution call for a trustee election at a 341 meeting, then a trustee election will be held at the 341 meeting. 11 U.S.C. § 702(b). The BA determined that the total amount of claims eligible to call for and vote in a permanent trustee election was \$3.5 million. Harley Goldstein held proxies for creditors eligible to vote in excess of \$700,000.00, which is 20% of \$3.5 million. Therefore, the decision to hold a trustee election at the 341 Meeting was proper.

unsecured claim of a kind entitled to distribution” 11 U.S.C. § 702(a)(1).² As discussed above, there is no dispute over whether Mr. Goldstein was entitled to call for an election of a permanent trustee pursuant to section 702 and there is also no dispute as to the eligibility of the \$1,261,286.99 in votes Mr. Goldstein cast in favor of the firm of Alvarez & Marsal. However, there is a dispute regarding the \$1,263,913.15 in votes cast by Mr. Hogewood in favor of Ms. Conti. The vast majority of the vote cast in favor of Ms. Conti consists of the \$1,000,000.00 claim of the Zeemans. Section 702(a)(1) requires that, as of the time a creditor’s vote is cast, a creditor must be the holder of an undisputed claim. The Committee filed an objection to the Zeeman claim well before the 341 Meeting. Therefore, as the objection is not invalid on its face, the Zeeman claim is not undisputed and the Zeemans were not eligible to participate in the election of the trustee. As a result, the final tally of eligible votes cast in the election is \$1,261,286.99 in favor of the firm of Alvarez & Marsal and \$263,913.15 in favor of Ms. Conti. Thus, Alvarez & Marsal received a majority of the votes that were cast.

Although the firm of Alvarez & Marsal received a majority of the votes cast, this is not the end of the matter as there are issues relating to the eligibility of the firm of Alvarez & Marsal to serve as trustee pursuant to section 321 that must be addressed. The first issue is determining what entity Mr. Goldstein nominated. The transcript of the 341 Meeting indicates that he nominated the firm of Alvarez & Marsal, but this is an ambiguous term as Alvarez & Marsal is actually a trade name under which numerous related entities conduct business. However, through filings subsequent to the 341 Meeting, the Movants have cleared up the confusion regarding the entity that was intended to be nominated at the 341 Meeting. According to the affidavit filed by

²Subsection (a)(2) and (a)(3) provide further requirements before a creditor is eligible to vote for a candidate for trustee, but no issue has been raised with regard to these requirements.

the Movants, Alvarez & Marsal, LLC is now known as Alvarez & Marsal North America, LLC, which is the entity that Mr. Goldstein intended to nominate at the 341 Meeting. Therefore, the court will examine the eligibility of Alvarez & Marsal North America, LLC to serve as trustee.

In order to show that Alvarez & Marsal North America, LLC is eligible to be trustee there must be evidence in the record sufficient to establish that Alvarez & Marsal North America, LLC is authorized by its charter or bylaws to act as a bankruptcy trustee and that it has an office that meets the requirements of section 321(a)(2) in the judicial district where the case is pending, i.e., the middle district of North Carolina, or in an adjacent judicial district to be eligible to serve as trustee, i.e. anywhere in North Carolina. 11 U.S.C. § 321(a)(2). The only evidence submitted by the Movants that goes to these eligibility requirements is the June 11, 2008, affidavit of Paul Rundell, a Senior Director at Alvarez & Marsal North America, LLC. According to the affidavit, Alvarez & Marsal North America, LLC is authorized under its Limited Liability Company Agreement to act as trustee and that as of the date of the affidavit Alvarez & Marsal North America, LLC had an office at 227 West Trade Street, Suite 1600, Charlotte, North Carolina 28202. This court does not question the fact that the limited liability agreement provides that Alvarez & Marsal North America, LLC may act as trustee. However, further consideration is required regarding whether there is sufficient evidence to find that Alvarez & Marsal North America, LLC has an office in North Carolina that satisfies the requirements of section 321(a)(2).

The evidence did not show that Alvarez & Marsal North America, LLC had an office located in North Carolina on April 15, 2008, the date on which the 341 Meeting and the election were held. Movants' affidavit which is dated June 11, 2008, states only that Alvarez & Marsal North America, LLC "has" an office in Charlotte and does not address when such office was

obtained or whether Alvarez & Marsal North America, LLC had an office in North Carolina on April 15, 2008. The record strongly suggests that no such office existed on the date of the election. The North Carolina Secretary of State website, which this court took judicial notice of at the hearing on the Motion, reflects that Alvarez & Marsal North America, LLC was not registered to do business in North Carolina until May 28, 2008. The North Carolina General Statutes require that an entity register with the North Carolina Secretary of State before conducting business in the state. The court will assume that Alvarez & Marsal North America, LLC complied with North Carolina law and did not engage in business or have an office in North Carolina before it qualified to engage in business in North Carolina on May 28, 2008. Therefore, the court finds that Alvarez & Marsal North America, LLC did not have an office in North Carolina prior to May 28, 2008, when it registered with the North Carolina Secretary of State. Because the evidence did not show that Alvarez & Marsal North America, LLC had an office in North Carolina as of the 341 Meeting and election held on April 15, 2008, Alvarez & Marsal North America, LLC was not eligible to serve as trustee on the date of the election and therefore was not validly elected as trustee.

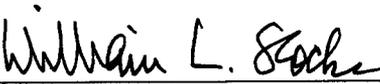
In fact, the evidence failed to show even that on the date of the hearing, Alvarez & Marsal North America, LLC had an office in North Carolina within the meaning of section 321(a)(2). Section 321(a) requires a corporate trustee to have an office located in the district in which the case is pending or in an adjacent district. This requirement is meant to assure that trustees have a presence in or near the district in which they serve and so that they will be available on a regular basis for consultation and advice. J.P. Morgan Inv. Mgmt., Inc. (In re Martech USA, Inc.), 188 B.R. 847, 851 (9th Cir. BAP 1995). The requirement under section 321(a)(2) of an “office”

requires evidence of more than just having access to office space; it also requires some showing regarding the staffing and resources that will be available and be utilized in the office so that the court can evaluate the extent to which the trustee will be present and available to deal with and effectively perform the duties required of a trustee. See id. at 852 (holding that candidate not eligible to serve as trustee where the evidence showed that candidate “visited his office for the first time on the morning of the trustee election, and as of the date of the bankruptcy court’s hearing had hired no staff for that office”). In this case, the only evidence offered by the Movants that speaks to this issue is the affidavit of Paul Rundell. Such evidence consisted solely of a conclusory statement in the affidavit that Alvarez & Marsal North America, LLC has an office at an address in Charlotte, North Carolina, which, standing alone, was insufficient to show that Alvarez & Marsal North America, LLC has an office in North Carolina that meets the requirements of section 321(a)(2).

Based upon the foregoing findings and conclusions, the court adjudges that Alvarez & Marsal North America, LLC was not eligible to be trustee in this case and therefore was not validity elected as trustee at the election held at the section 341 meeting on April 15, 2008, and that pursuant to section 702(d), the Interim Trustee, Sara A. Conti, shall serve as trustee in this case.

IT IS SO ORDERED.

This 18th day of June 2008.



WILLIAM L. STOCKS
United States Bankruptcy Judge

PARTIES IN INTEREST

A. Lee Hogewood, III, Esq.
4350 Lassiter & N. Hills Ave.
Suite 300
Raleigh, NC 27609

James E Morgan, Esq.
Harley J. Goldstein, Esq.
70 West Madison Street, Suite 3100
Chicago, IL 60602

Terri L. Gardner, Esq.
P.O. Box 10096
Raleigh, NC 27605

John A. Northen, Esq.
Stephanie Osborne-Rodgers, Esq.
P.O. Box 2208
Chapel Hill, NC 27517

Sara A. Conti, Esq.
P.O. Box 939
Carrboro, NC 27510

Stephani W. Humrickhouse, Esq.
P.O. Box 18237
Raleigh, NC 27619

Michael D. West, Bankruptcy Administrator