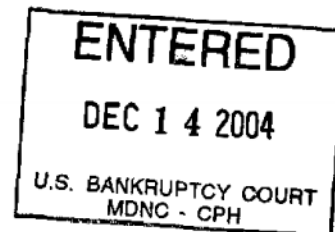


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
) Case Nos. 01-82293 through 01-82299
BuildNet, Inc, *et al.*)
) (Consolidated for Administration)
Debtors)
)

ORDER DENYING MOTION OF TUG LIQUIDATION, LLC TO (1) COMPEL DEBTOR-IN-POSSESSION TO PURSUE REMAINING CLAIMS ON BEHALF OF THE ESTATE, (2) COMPEL EXAMINER TO PURSUE THE REMAINING CLAIMS OR (3) AUTHORIZING TUG TO DERIVATIVELY ASSERT CLAIMS ON BEHALF OF THE ESTATE

This matter came on for hearing before the undersigned Bankruptcy Judge, after due and proper notice, on the Motion of TUG Liquidation, LLC for an Order (1) Compelling Debtor in Possession to Pursue Remaining Claims on behalf of the Estate, (2) Compelling the Examiner to Pursue the Remaining Claims, or (3) Authorizing TUG to Derivatively Assert Claims on behalf of the Estate and the Responses filed by the Debtor in Possession, the Examiner and by the Defendants Abene, Atwood, Brown, Cosby, Drayson, Hall-Tipping, Morton, Neal and Thompson. At the hearing, John A. Northen appeared on behalf of the Debtor in Possession (the "Debtor"), Holmes P. Harden appeared as the Examiner, Jeffrey D. Horst and Michael L. Robinson appeared on behalf of Tug Liquidation, LLC ("TUG"), W. Swain Wood appeared on behalf of Defendants Abene, Atwood, Brown, Cosby, Drayson, Hall-Tipping, Morton, Neal and Thompson and Paul Schwartz appeared on behalf of Defendants Kemp, Koblentz and Smith.

The Court ruled on these motions in open court and this written order is intended to memorialize the earlier ruling.

PROCEDURAL BACKGROUND

The Debtor filed a voluntary petition for relief under Chapter 11 on the 8th day of August, 2001 and these cases were consolidated for administrative purposes only.

On September 4, 2001, TUG filed a motion for relief from stay under Section 362 of the Bankruptcy Code stating that on or about January 18, 2000, the Debtor had executed and delivered a Subordinated Convertible Promissory Note in the amount of \$27 million to TUG. The Note was secured by certain assets of the Debtor subject only to a prior lien in favor of Jack Shaw in the amount of approximately \$600,000.00. On October 5, 2001, the Court entered an Order lifting the automatic stay to permit TUG to liquidate the collateral in which it held a security interest. TUG was also authorized to file a deficiency claim. TUG has filed a deficiency claim in this case for approximately \$21 million.

On October 12, 2001, TUG filed an Emergency Motion for an Order Directing the 2004 Examination of Certain Documents in the Debtor's Possession. An Emergency Consent Order was entered directing that the Debtor preserve all business records during the sale or liquidation of assets and that no records of the Debtor could be sold or destroyed pending the 2004 examination. TUG advised the Debtor that they had information and knowledge that the Debtor's Estate had colorable claims and potential causes of action against certain of the Debtor's former officers and directors.

At the hearing on TUG's Motion for an Emergency 2004 Examination, TUG and the Debtor agreed that the appropriate response would be for the Debtor to request the appointment of an examiner for certain limited purposes, who could then work with TUG in examining records while preserving any needed confidential information or privileges.

Based on that agreement TUG's Motion for an Emergency 2004 Examination was denied and on November 20, 2001, the Debtor filed a Motion for Appointment of Examiner for Limited Purposes. The Debtor stated that all parties would be better served by an independent, disinterested third party discharging the duties necessary to properly investigate and, if warranted, to pursue any claim or causes of action against any present or former officers or directors of the Debtor.

On December 10, 2001, this Court entered an Order Appointing Holmes Harden as Examiner for Limited Purposes. Counsel for the Debtor and TUG requested that Harden be appointed Examiner. Harden was directed to investigate any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the affairs of the Debtor as well as any causes of action available to the Estate with respect to any present or former officer or director of the Debtor, and the Examiner was directed to file a report setting forth the results of the investigation.

The time records filed by the Examiner show that an extensive amount of time was put into this investigation. On April 9, 2002, the Examiner filed a Preliminary Report. The report details the steps undertaken in the investigation and set forth his preliminary analysis of both the factual and legal basis of various potential claims. The Examiner concluded that some but not all claims were supported by fact and law.

The Debtor reviewed the Examiner's report and recommendations and concluded that while there were some specific claims against individual officers and directors, that there was no basis for general claims against officers and directors for fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the affairs of the Debtor.

TUG was disappointed with the conclusions reached by the Examiner and Debtor and on July 23, 2002, TUG filed a Motion to Compel Debtors in Possession to Dispose of Property of the Estate, or in the Alternative, for Authorization to Assert Claims on behalf of Debtors. TUG requested that they be permitted to pursue those claims not pursued by the Examiner or the Debtor (the "Remaining Claims"). Alternatively, TUG sought an order from the Court compelling Debtors to sell the Remaining Claims to TUG or, in the alternative, to enter an order authorizing TUG to pursue the Remaining Claims on behalf of the Estate.

A hearing on TUG's motion was held on August 20, 2002 . At that hearing the Debtor and the Examiner stated that it would be in the best interest of the estate to convey to TUG all Remaining Claims and that a fair and reasonable price for the claims was \$15,000. This Court entered an Order on September 2, 2004 authorizing the transfer of the Remaining Claims and the payment of \$15,000 but made no representation or warranty to TUG with respect to the nature, extent, or validity of the assignment of the claims.

Based upon this Court's September 4, 2004, Order, TUG filed a complaint against the Debtor's former officers and directors, asserting both individual and assigned claims in state court in Georgia. That litigation was removed to the Federal District Court in Georgia. The litigation was subsequently transferred to the Federal District Court for the Middle District of North Carolina and then referred back to this Court.

The officers and directors who were named as Defendants in the TUG lawsuit filed motions to dismiss certain claims in the complaint, contending that the assignment of tort claims was improper. On June 16, 2004, this Court entered an order holding that the assignment of personal tort claims was in violation of public policy in North Carolina and the assignment was

void. Subsequent to the entry of the June 16, 2004 Order, TUG made a request to the Debtor and the Examiner that they pursue the dismissed claims. Both parties declined the request. In response to the Court's ruling of June 16, 2004 and the refusal by the Debtor and the Examiner to pursue such claims, TUG filed the Motion now under consideration.¹

JURISDICTION

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157 (b)(2)(A), which this Court may hear and determine except for any matters that should be certified to the district court pursuant to 11 U.S.C. § 110 (i) (1).

LEGAL ANALYSIS

Section 1107 of the Code gives the debtor in possession the right and powers of a Chapter 11 trustee and also imposes on the debtor in possession most of the obligations of a trustee. Those obligations as set forth in Section 1104 make a debtor in possession a fiduciary for the estate and its creditors. In re United Healthcare Sys. Inc., 200 F.3d. 170, 177 (3rd Cir. 1999), cert. denied, 530 U.S. 1204, 120 S. Ct. 2199 (2000); Dunes Hotel Assocs. v. Hyatt Corp., 245 B.R. 492, 506 (D. S.C. 2000). As fiduciaries, they have an obligation to maximize the value of the estate. In re Commercial Financial Services, Inc., 247 B.R. 828, 845 (Bankr. N.D. Okla. 2000); In re Big River Electric Corp., 233 B.R. 726, 734-35 (Bankr.W.D. Ky. 1998).

One of the assets of any estate is potential litigation. In this case, the Debtor and the Examiner had a duty to investigate potential litigation as a source of funds for the estate. It is also

¹ At the time the motion was filed, the Debtor had declined TUG's request but the Examiner had not yet responded. The Examiner declined the request after the motion was filed.

the duty of these parties to analyze whether the litigation is in the best interest of the creditors. The relevant factors to be considered include a realistic assessment of the probability of success, the potential net benefit to the estate, and the litigation burden on the estate in terms of time and cost. Surf and Sun Apts, Inc.v. Dempsey, 253 B.R. 490 (M.D. Fla. 1999).

The Debtor and the Examiner undertook an investigation into possible actions against certain officers and directors. Several adversary proceedings were filed. The Debtor and the Examiner then entered into negotiations with TUG to assign to TUG certain Remaining Claims. The parties negotiated a price of \$15,000 and the Court approved the settlement. The settlement was approved after the Court considered the costs and expenses of going forward with the lengthy litigation and the uncertainty of the results of such litigation. The Court also considered that the settlement as presented was the result of arm's length negotiations, that the proponents of the settlement have counsel experienced in this type of litigation, and that there has been sufficient disclosure of facts to enable counsel to fully and intelligently reach a fair settlement. Additionally, it was clear that the issues could not be resolved without further litigation. The nature of the litigation in this matter is complex. Continuing the litigation would be time consuming, expensive, and could delay the distribution under a Chapter 11 Plan. All parties acknowledged that the estate would incur substantial administrative costs and expenses in undertaking the litigation and that, if the litigation were undertaken, there was no guarantee that the estate would recognize any funds beyond that which would be necessary to pay the expenses of litigation. This Court found in approving the initial settlement of \$15,000 that the settlement met the standards of reasonableness under the circumstances as presented, that approval of the settlement was financially prudent for the estate, and that the settlement was fair and reasonable

to all creditors of the estate.

TUG now contends that the dismissed causes of action previously asserted by TUG, as the assignee of Buildnet's claims, represent a valuable asset of the Estate and that the Debtor or the Examiner should be compelled to pursue the litigation. The Debtor and the Examiner have stated that they are unaware of any new facts that would cause them to change the analysis that they made in accepting a settlement sum of \$15,000. The business judgment that they exercised in accepting \$15,000 is the same business judgment they are applying in opposing the Motion to Compel the Debtor and the Examiner to pursue certain claims on behalf of the estate. Accordingly, the Motions to Compel the Debtor or the Examiner to pursue these claims is denied.

TUG has requested that if the Court does not compel the Debtor in Possession or the Examiner to bring these actions, TUG be permitted to derivatively assert these claims. The Court is not reaching the issue of whether an individual creditor has standing to bring a these claim on behalf of the Debtor, but, for the purposes of this hearing, the Court will assume TUG has standing. All parties agree that there is a four prong test to determine whether to grant derivative standing in cases such as this. The test is: (1) that the creditor demand that the trustee for debtor assert the claim; (2) that the party declined to do so; (3) that the claim is colorable; and (4) that the trustee or debtor's refusal to pursue the claim is unjustified. In re iPCS, Inc., 297 B.R. 283, 290-91 (Bankr. N.D. Ga. 2003), In re G-I Holdings Inc., 313 B.R. 612, 629 (Bankr. D.N.J. 2004).²

² All parties agree that parts one and two of the test have been met. The parties disagree as to parts three and four. In as much as the Court finds that part four has not been met, the Court will not discuss part three.

To find that the Debtor and the Examiner were unjustified in failing to bring the actions, the Court would have to make a finding that the inaction on the part of the authorized parties was an abuse of discretion. The Court finds that the Debtor and the Examiner have exercised their sound business judgment in deciding not to pursue these actions. It was their experienced opinion that these actions had little merit, which is why they sought and obtained an order finding that the assignment of the claims for the small net benefit of \$15,000 was fair and reasonable. The court finds that there has been no showing of an abuse of discretion and accordingly, the Court cannot grant derivative standing to TUG.

Based on the foregoing, IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Compel Debtor or the Examiner to pursue remaining claims is DENIED, and IT IS FURTHER ORDERED that the Motion to Authorize TUG to Derivatively Assert Claims on Behalf of the Estate is DENIED.

This the 13 day of December, 2004.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge