Flapjacks and Sage Advice: Judges' Panel on Everything!

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Hon. Robert E. Gerber
U.S. Bankruptcy Court (S.D.N.Y.); New York

Hon. Laurel Myerson Isicoff
U.S. Bankruptcy Court (S.D. Fla.); Miami

Hon. Stacey G. C. Jernigan
U.S. Bankruptcy Court (N.D. Tex.); Dallas

Hon. Pamela Pepper
U.S. District Court (E.D. Wis.); Milwaukee

LOCAL RULE 9019-2 OF THE BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Rule 9019-2. Mediation.

(A) Registration of Mediators.

(1) Mediation Register. The clerk shall establish and maintain a register of qualified attorneys and retired federal and state judges who have registered to serve as mediators in adversary proceedings and contested matters in cases pending in the court. Attorneys and retired federal and state judges who meet the qualifications described in subdivision (2) shall be so registered. This subdivision shall not preclude an individual from serving as a mediator if the parties to the dispute agree upon the selection of that mediator. However, a mediator selected by the parties and not registered under this rule nonetheless shall comply with the other provisions of this rule where applicable.

(2) Qualifications of Mediator. To qualify for service as a mediator under this rule, a mediator must:

(a) be an active member of The Florida Bar and qualified to practice in this court or be a retired federal or state judge;

(b) have been admitted to practice in a state or federal court for at least the past 5 years or be a retired federal or state judge;

(c) have completed a minimum of 40 hours in a circuit court mediation training program certified by the Florida Supreme Court or be certified by the Florida Supreme Court as a circuit court mediator; and

(d) agree to accept at least 2 mediation assignments per year in cases where at least one party lacks the ability to compensate the mediator, in which case the mediator's fees shall be reduced accordingly or the mediator shall serve pro bono if no litigant is able to contribute compensation.

(3) Procedures for Registration. Each attorney or retired federal or state judge who wishes to be included on the register must file the Local Form "Verification of Qualification to Act as Mediator".

(4) Removal from Register. The clerk shall remove a mediator from the register of mediators at the mediator's request or at the direction of a majority of the judges of the court in the exercise of their discretion. If removed at the mediator's request, the mediator may later request to be added to the register by submitting a new verification form. Upon receipt of such request, the clerk shall add the qualified mediator to the register.

(5) Mediator's Oath. Every mediator shall take the oath or affirmation prescribed by 28 U.S.C. §453, before serving as a mediator. The oath may be administered by any person authorized to administer oaths, and proof of the oath or affirmation shall be included on the Local Form "Verification of Qualification to Act as Mediator".

(6) Compensation of Mediators. Mediators shall be compensated at the rate set by the U.S. District Court for the Southern District of Florida, and as adopted by this court by local rule or administrative order or at such rate as may be agreed to in writing by the parties and the mediator selected by the parties. Absent agreement of the parties to the contrary, the cost of the mediator's services shall be borne equally by the parties to the mediation conference, but a case trustee's or debtor in possession's share of the cost shall be an expense of the estate.

(B) Referral of Matters to Mediation.

(1) Manner of Referral. The court may order the assignment of a matter or proceeding to mediation at a pretrial conference or other hearing, upon the request of any party in interest or the U.S. Trustee, or upon the court's own motion. The court shall use the Local Form "Order of Referral to Mediation", which shall: (a) designate the trial or hearing date, (b) direct that mediation be conducted not later than 14 days before the scheduled trial or hearing, and (c) require the parties to agree upon a mediator within seven days after the date of the order. The parties shall timely file the Local Form "Notice of Selection of Mediator", failing which the clerk shall designate a mediator from the clerk's register on a random basis within court divisions using the Local Form "Notice of Clerk's Designation of Mediator" and serve this notice on the required parties. Notwithstanding the assignment of a matter or proceeding to mediation, the court shall set such matter or proceeding for trial final hearing, pretrial conference or other proceeding as is appropriate in accordance with the Bankruptcy Rules and these rules.

(2) Disqualification of Mediator for Cause. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. §144, and shall be disqualified in any action in which the mediator would be required to do so if the mediator were a judge governed by 28 U.S.C. §455.

(3) Replacement of Mediator. If any party to the mediation conference, for any reason, objects to the designated mediator, then within three business days from the date of the notice of designation, the objecting party shall file with the clerk, and serve upon the mediator and all other parties to the mediation, a request for an alternate mediator including in the request the name of any alternate mediator already agreed upon by the parties. If the alternate mediator has been agreed upon, the clerk shall designate that mediator. Otherwise, the clerk shall designate a second mediator from the register of mediators on a random basis and shall serve a second notice of designation on all parties to the mediation conference and on the designated mediator. Each party shall be entitled to one challenge to any clerk-designated mediator. A mediator who is unable to serve shall, within seven days from the date of the notice of designation, serve on the clerk and all parties to the mediation a written notice of inability to serve, and the clerk shall designate an alternate mediator in the manner described above.

(4) No Stay. Notwithstanding a matter being referred to mediation, discovery and preparation for trial or final hearing shall not be stayed by mediation.

(5) Types of Cases Subject to Mediation. Any adversary proceeding or contested matter may be referred by the court to mediation.

(C) Mediation Conference.

(1) Notice and Procedures. Upon consultation with the parties and their attorneys, the mediator shall fix a reasonable time and place for the mediation conference, except as otherwise agreed by the parties or by order of the court, and shall give the parties at least 14 days' advance written notice of the conference. The conference shall be set as soon after the entry of the mediation order and as far in advance of the final evidentiary hearing as practicable. In keeping with the goal of prompt dispute resolution, the mediator shall have the duty and authority to establish the time for all mediation activities including a deadline for the parties to act upon a settlement or upon mediated recommendations.

(2) Attendance of Parties Mandatory. An attorney who is responsible for each party's case shall attend the mediation conference. Each individual party and the representatives of each non-individual party shall appear with the full authority to negotiate the amount and issues in dispute without further consultation. The mediator shall determine when the parties are to be present in the conference room. No party can be required to participate in a mediation conference for more than two hours.

(3) Public Entity as Party. If a party to mediation is a public entity, either a federal agency or an entity required to conduct its business pursuant to Chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

(4) Failure to Attend. The mediator shall report to the court willful failure to attend the mediation conference or to participate in the mediation process in good faith, which failure may result in the imposition of sanctions by the court.

(D) Recommendations of Mediator. The mediator shall have no obligation to make any written comments or recommendations other than the report required by subdivision (E). If a written recommendation is prepared, no copy shall be filed with the court.

(E) Post-Mediation Procedures. Within seven days after the mediation conference, the mediator shall file with the court a report showing compliance or non-compliance by the parties with the mediation order and the results of the mediation, using the Local Form "Report of Mediator". In the event there is an impasse, the mediator shall report that there is a lack of agreement, and shall make no further comment or recommendation. If the parties have reached an agreement regarding the disposition of the matter or proceeding, they shall prepare and submit to the court within 14 days after the filing of the mediator's report an appropriate stipulation of settlement and joint motion for its approval. Failure to file such a motion shall be a basis for the court to impose appropriate sanctions. If the mediator's report shows mediation has ended in an impasse, the matter will be tried as scheduled.

(F) Confidentiality. Conduct or statements made in the course of mediation proceedings constitute "conduct or statements made in compromise negotiations" within the meaning of Rule 408 of the Federal Rules of Evidence, and no evidence inadmissible under Rule 408, shall be admitted or otherwise disclosed to the court.

(G) Withdrawal from Mediation. Any action or claim referred to mediation pursuant to this rule may be exempt or withdrawn from mediation by the presiding judge at any time, before or after reference, upon motion of a party and/or a determination for any reason that the case is not suitable for mediation.

(H) Compliance with Bankruptcy Code and Rules. Nothing in this rule shall relieve any debtor, party in interest, or the U.S. Trustee from complying with any other orders of the court, the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or these rules.

392 B.R. 897
United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

In re BLUE STONE REAL ESTATE, CONSTRUCTION & DEVELOPMENT CORPORATION, et al., Debtors.

Nos. 8:08–bk–05299–CPM, 8:08–BK–07228–CPM, 8:08–BK–07230–CPM, 8:08–BK–07229–CPM, 8:08–BK–07231–CPM, 8:08–BK–07227–CPM. | Aug. 9, 2008.

Synopsis
Background: Chapter 11 debtors filed emergency motion for order authorizing retention of certified public accountant as chief restructuring officer in their jointly administered cases, and the United States Trustee (UST) opposed motion.

Holdings: The Bankruptcy Court, Catherine Peek McEwen, J., held that:

[1] debtors would be allowed to retain certified public accountant (CPA) as their chief restructuring officer, in order to review debtors' books and records and ensure that their schedules and statement of financial affairs were accurately prepared, to conduct thorough inventory of debtors' assets, to negotiate with and verify financial viability of all potential purchasers of estate assets, and to oversee and monitor liquidation of these assets, despite objection by the UST that CPA could not perform these duties as effectively as Chapter 11 trustee; and

[2] fact that the UST had previously filed a still-unresolved motion for appointment of Chapter 11 trustee did not preclude grant of debtors' motion as alleged attempt to invade the UST's turf and to "end run" on statutory mandate that only the UST is empowered to select a Chapter 11 trustee.

So ordered.

Attorneys and Law Firms

***899** Edward J. Peterson, III, Susan H. Sharp, Stichter, Riedel, Blain & Prosser, Tampa, FL, for debtors.

Edmund S. Whitson, III, Akerman Senterfitt, Tampa, FL, for related debtor, DDD Ranch, Inc.

Theresa M. Boatner, Cynthia Burnette, Denise Barnett, Patrick Tinker, Office of U.S. Trustee, Tampa, FL, for U.S. Trustee.

AMENDED[1] ORDER GRANTING AND MEMORANDUM OPINION ON DEBTORS' EMERGENCY MOTION FOR ORDER AUTHORIZING RETENTION OF A CHIEF RESTRUCTURING OFFICER

CATHERINE PEEK McEWEN, Bankruptcy Judge.

These six administratively consolidated cases[2] came on for hearing on July 22, 2008, at 10:30 a.m. with continued hearings on July 24, 2008, at 9:30 a.m. and 4:00 p.m. (collectively, "the Hearing") upon the Debtors' Emergency Motion for Order Authorizing Retention of Steven S. Oscher and Oscher Consulting, P.A. as Chief Restructuring Officer Pursuant to Sections 105 and 363 of the Bankruptcy Code ("CRO Motion") (Docket Nos. 76 and 78). The CRO Motion presents a core contested matter.

In the CRO Motion, the Debtors request an expedited hearing for the Court to consider the entry of an order approving their retention of Steven S. Oscher, C.P.A., and Oscher Consulting, P.A. ("the firm") as their Chief Restructuring Officer ("CRO") to, *inter alia,* (i) review the Debtors' books and records and conduct the necessary ***900** investigation to ensure that the schedules and statements of financial affairs are accurately prepared and, if not, prepare and file corrected ones, (ii) conduct a thorough inventory of the assets, (iii) negotiate with and verify the financial viability of all potential purchasers of any of the Debtors' assets, and (iv) oversee and monitor the liquidation of the Debtors' assets.

Backdrop—the Trustee Motion
At the time of the Hearing, then pending for trial on August 15, 2008, was the United States Trustee's Emergency Motion to Appoint a Chapter 11 Trustee

Pursuant to 11 U.S.C. Section 1104(a)(1) or (2), or in the Alternative to Appoint an Examiner, pursuant to U.S.C. Section 1104(c)(1) or (2) (Docket No. 51) ("Trustee Motion"). The Trustee Motion seeks relief only in the lead consolidated case, the case filed by Blue Stone Real Estate, Construction & Development Corp. ("Blue Stone"). Some background about the Trustee Motion is necessary to gain an understanding of the record before the Court at the time of the Hearing.

The bases of the Trustee Motion largely relate to alleged acts or omissions of James W. DeMaria, the Debtors' principal, as well as document deficiencies that have plagued the lead case since its inception.[3] The allegations of the Trustee Motion can be summarized as follows: (i) Blue Stone's schedules and statement of financial affairs are incomplete and have been constantly evolving through several amendments (almost like a work in progress), with some amendments having been made only after testimony of Mr. DeMaria at meetings of creditors had been shown to be inaccurate or incomplete; (ii) Mr. DeMaria has not fully accounted for pre-petition use of Blue Stone credit cards and for pre-petition distributions made by Blue Stone to Mr. DeMaria or for his benefit; (iii) a $100,000 deposit that should have been received by Blue Stone for a sale of a gas station has not been fully accounted for; (iv) after several opportunities for compliance, Mr. DeMaria has not provided all documents requested by the United States trustee; and (v) due to the document deficiencies and lack of cooperation, the meeting of creditors has been continued many times and remains pending.

At the preliminary hearing on the Trustee Motion, an additional basis for the Trustee Motion was proffered by the United States trustee: Within two years of the filing of the Blue Stone bankruptcy petition, Blue Stone transferred or attempted to transfer four parcels of property located in Arkansas and one parcel of property located in Missouri. None of these alleged transfers was disclosed in Blue Stone's schedules and statement of financial affairs. Additionally, none of the property, to the extent Blue Stone has an interest in such property, is disclosed in Blue Stone's schedules and statement of financial affairs. An issue of fact exists as to whether the ultimate transferees of the Arkansas and Missouri properties are affiliates of or controlled by, either directly or indirectly, Mr. DeMaria.

Mr. DeMaria's contention is that all of the transfers were made in the ordinary course of business and, thus, did not require disclosure in the statement of financial affairs. Notwithstanding this assertion, however, at the meetings of creditors, Mr. DeMaria failed to disclose the transfers ***901** in response to direct questioning about all transfers of property from Blue Stone (i.e., regardless of their possible characterization as ordinary course transactions). At the time of the Hearing on the CRO Motion, Mr. DeMaria had not had the opportunity to rebut the allegations in the Trustee Motion, explain his conduct, or comment on his responses at the meetings of creditors.

Based on the allegations summarized by the Court above, the Trustee Motion argues that Mr. DeMaria, as "current management" of Blue Stone, "engaged in fraud, dishonesty, gross mismanagement, or is incompetent with regard to managing the affairs of [Blue Stone] both before and after the filing." (Trustee Motion at ¶ 25.) If true, these allegations would require appointment of a Chapter 11 trustee under section 1104(a)(1).[4] The Trustee Motion also claims that Mr. DeMaria's alleged lack of cooperation and his alleged dissipation of assets "have clearly not been in the interest of the creditors of [Blue Stone]." (Trustee Motion at ¶ 25.) If true, these allegations would require appointment of a Chapter 11 trustee under section 1104(a)(2). The Trustee Motion also seeks appointment of an examiner pursuant to section 1104(c) if a Chapter 11 trustee is not warranted.

Opposition to the CRO Motion

A. Objecting parties argue that the proposed CRO is not independent or disinterested and cannot perform as effectively as a Chapter 11 trustee.

[11] During the Hearing on the CRO Motion, the United States trustee and two secured creditors opposed the relief requested by the Debtors. All three parties argued that Mr. Oscher would be controlled or directed by Mr. DeMaria and that Mr. DeMaria would be able to hide assets or documents from Mr. Oscher. However, in open court, Mr. DeMaria agreed to act only as directed by Mr. Oscher and agreed to withdraw from all management functions. Notwithstanding those concessions, the opposing parties insisted that an "independent" and "disinterested" Chapter 11 trustee would be better able to perform the functions that Mr. Oscher would perform as a CRO, including the charge to discover any assets or transfers that remain hidden.

The record made during the Hearing clearly demonstrates that Mr. Oscher and the firm are disinterested, do not hold an interest adverse to the Debtors, and do not represent an interest adverse to the Debtors. Mr. Oscher's engagement was proposed by counsel to the Debtors in the exercise of their fiduciary duty to the Debtors' estates and creditors. Mr. Oscher did not even meet Mr. DeMaria until after the engagement was proposed.

Mr. Oscher's substantial experience with the bankruptcy process, both as a trustee and an authorized professional with various functions or expertise, would be extremely beneficial to these Debtors, especially if the allegations of the Trustee Motion are true. Mr. Oscher is a respected and "well known quantity" to the Court, the United States trustee, and all of the parties in interest represented at the Hearing except for one party represented by out-of-town counsel.[5]

***902** No party in interest was able to articulate any credible difference between the skill set of a Chapter 11 trustee and the skill set that Mr. Oscher would bring to the table as a CRO. No party in interest was able to identify any power possessed by a Chapter 11 trustee that would not be available or could not be made available under section 1107(a)—concerning the rights, powers, and duties of a debtor in possession—to a CRO whose engagement was authorized by an order of this Court to act on behalf of a debtor in possession.

[2] The United States trustee argued that a fundamental difference between a Chapter 11 trustee and a CRO is that by its terms, section 1107(a) limits the ability of a CRO to perform the functions of a Chapter 11 trustee under section 1106(a)(2), (3) and (4). This is a misreading of the statute. The statute states in pertinent part: "Subject ... to such limitations or conditions as the court prescribes, a debtor in possession ... shall perform all the functions and duties [of a Chapter 11 trustee], except the duties described in sections 1106(a)(2), (3), and (4)...." 11 U.S.C. § 1107(a). A proper reading of this statute is that a debtor in possession is not mandated to undertake certain investigative and reporting duties, but the bankruptcy court in its discretion can nonetheless prescribe such action—as well as *other* actions not encompassed within section 1106. *See In re Adelphia Communications Corp.,* 336 B.R. 610, 665 (Bankr.S.D.N.Y.2006) (lengthy discussion of how courts should construe the nature of the limitations and conditions they are permitted to impose pursuant to section 1107(a)). In these cases, the Court is inclined to require Mr. Oscher to undertake the duties specified in sections 1106(a)(2) and (3). He may, but need not absent further order of the Court, undertake the duties specified in section 1106(a)(4).

On whole, the contentions that Mr. Oscher is not or cannot be independent, is not disinterested, and cannot perform as effectively as a Chapter 11 trustee are not credible and border on being frivolous. These arguments are without any basis in fact or law and are rejected by the Court.

B. United States trustee argues that a corporate debtor in possession can act only through a hoard of directors.

[3] Perhaps in part to persuade the Court that Mr. Oscher is compelled to serve at the direction of Mr. DeMaria and, therefore, cannot be free of Mr. DeMaria's control, the United States trustee also disputed the Court's ability to enter an order imposing conditions or limitations under section 1107(a) that would, in effect, leave the Debtors that are corporations without boards of directors.

A debtor in possession operating in Chapter 11 is not conducting "business as usual" during the time between the commencement ***903** of the case and its emergence from bankruptcy as a reorganized debtor (assuming the debtor reorganizes and is not liquidated). The Bankruptcy Code is laden with express requirements of and limitations on business operations of a debtor in possession, not to mention discretionary requirements and limitations that may be imposed by the bankruptcy court where permitted.[6] As touched on above, section 1107(a) specifically contemplates the use of the court's discretion in the context of what a debtor in possession must do or cannot do because it states that "*[s]ubject ... to the limitations or conditions as the court prescribes,* a debtor in possession shall have all the rights ... and powers ... of a trustee serving in a case under this chapter." 11 U.S.C. § 1107(a) (emphasis added). Accordingly, the Bankruptcy Code contemplates that the state law powers of a corporation's board of directors can be altered while the corporation is a debtor in bankruptcy.[7]

This Court concludes that the plain meaning of section 1107(a) permits the Court to alter the powers of the Debtors' boards of directors (and managers, in the cases of the Debtors that are limited liability companies) and impose requirements that will alleviate any concern, however unfounded, of a party in interest that Mr. Oscher as CRO will be some toady or crony of Mr. DeMaria instead of an independent professional with absolute control over the Debtors.

C. United States trustee argues that the proposal to engage a CRO is a disguised selection of a Chapter 11 trustee by the Debtors, invading the province of the United States trustee

[4] It quickly became apparent to all at the Hearing that the real concern of the United States trustee is its own organizational interest in maintaining control when it seeks the appointment of a Chapter 11 trustee, never mind that the Debtors' retention of this particular CRO in these particular cases just might be (and the Court determines it

is, clearly) in the best interest of the Debtors.[8] The United States trustee argued that the CRO Motion is effectively an "end run" on section 1104's mandate that only the United States trustee is empowered to select a Chapter 11 trustee.[9] Therefore, the United States ***904** trustee submits, the Court has no power to authorize the engagement of a CRO that would be the functional equivalent of a Chapter 11 trustee. The United States trustee urges the Court to, instead of granting the CRO Motion, wait for a determination on the Trustee Motion some weeks hence before authorizing a change in management.

In essence, the United States trustee argues that once its office has filed a motion to appoint a Chapter 11 trustee, there are *no* facts or circumstances that would allow a debtor in possession to change management, even if a change in management would obviate the perceived need for a Chapter 11 trustee.[10] Stated alternatively, if a debtor in possession is guided by management that can be proved to be incompetent, or to have engaged in fraud or dishonesty or to have grossly mismanaged the debtor, then the appointment of a Chapter 11 trustee is *fait accompli* and no salutory action can be taken by the debtor to cure that problem.

The United States trustee's argument widely misses the mark because it overlooks two important principles concerning a Chapter 11 debtor in possession. First, the legislative history of section 1107, titled "Rights, powers, and duties of debtor in possession," clearly dictates that the debtor in possession is *already* the functional equivalent of a Chapter 11 trustee:

> *This section places a debtor in possession in the shoes of a trustee in every way.* The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee, and to such other limitations and conditions as the court prescribes....

Senate Report No. 95–989, 95th Cong., 2d Sess. (1978), U.S.Code Cong. & Admin. News 1978 at 5787, 5902 (emphasis added). The natural person or persons who exercise these enumerated powers on behalf of a corporate debtor in possession, therefore, exercise essentially the same powers as a Chapter 11 trustee (or all powers of a Chapter 11 trustee if so ordered by the bankruptcy court). As the Supreme Court has recognized, "it is clear that the [debtor in possession] bears essentially the same fiduciary obligation[s] to the creditors as does the trustee for a debtor out of possession." *Wolf v. Weinstein,* 372 U.S. 633, 649–50, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963). Accordingly, by simply approving a change in management at the request of these debtors in possession, the Court is not changing the inherent nature of the debtors in possession as functional equivalents of a Chapter 11 trustee.

[5] Second, the legislative history of section 1104, which prescribes the grounds for appointment of a Chapter 11 trustee, reflects a decided preference for leaving a debtor in possession in place:

> The court may order appointment [of a Chapter 11 trustee] *only if* the protection afforded by a trustee is needed and expenses of a trustee would not be disproportionately higher than the value of ***905** the protection afforded. The protection afforded by a trustee would be needed, for example, in cases where the *current* management of the debtor has been fraudulent or dishonest, or has grossly mismanaged the company, or where the debtor's management has abandoned the business.

House Report No. 95–595, 95th Cong., 1st Sess. (1977), U.S.Code Cong. & Admin. News 1978, at 5963, 6358 (emphasis added). In these administratively consolidated cases, the protection afforded by a Chapter 11 trustee in containing or overcoming Mr. DeMaria's alleged conduct would not be needed if a CRO with Mr. Oscher's particular talents is authorized to have sole control over the management of the Debtors without interference by Mr. DeMaria. Moreover, case law supports the view that the appointment of a Chapter 11 trustee is an "extraordinary remedy."[11] *In re The 1031 Tax Group, LLC,* 374 B.R. 78, 85 (Bankr.S.D.N.Y.2007).

[6] "Chapter 11 ... is designed to allow the debtor-in-possession to retain management and control of the debtor's business operations ... and there is a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee." *Adelphia,* 336 B.R. at 655 (internal quotation and citation omitted). Furthermore, there is little question that equity holders of a corporate debtor-in-possession may change the debtor's management; there is nothing in the Bankruptcy Code prohibiting equity from doing so.[12] *1031 Tax Group,* 374 B.R. at 89 n. 11. However, if a motion to appoint a trustee has been made, as in these cases, then section 1104(a)(1) does compel the Court to "examine the integrity of the

new management." *Id.* And this Court has done precisely that.

For these reasons, the Court rejects the United States trustee's position that a proposed change of management following the filing of a still pending motion to appoint a Chapter 11 trustee is proscribed by section 1104(a).[13] *See also In the Matter of Gaslight Club, Inc.,* 782 F.2d 767 (7th Cir.1986) (approving replacement of debtor's president and majority shareholder with individual exercising debtor in possession powers, without appointing trustee, but where the individual who had been replaced consented).

A troubling aspect of the United States trustee's argument that authorization of a CRO treads on its domain is that it elevates a parochial policy concern over the potential harm that could come to these Debtors' estates and creditors if the *status quo* continued pending the trial on the Trustee Motion. If the alarming allegations ***906** in the Trustee Motion and the United States trustee's supplemental proffer on the record are true (and the Court must assume the United States trustee believes them to be so), then it is disappointing that the United States trustee has shown more regard for its "turf"—its territorial or organizational interests—than the larger interests of the bankruptcy system it is designed to serve. In other words, the United States trustee has sought to advance its own view of its role in preserving the integrity of the system ahead of the apparently critical need of the Debtors to change management immediately.

As applied to these cases, the United States trustee's view of the facts and the law is short-sighted. It ignores the reality of what the United States trustee accomplished by the very filing of the Trustee Motion—the triggering of a voluntary response that will undoubtedly cure the problems noted in that motion. This reality demonstrates that the United States trustee has effectively functioned to preserve the integrity of the system in these cases, just as it has done in other cases before this Court, time and time again. The United States trustee's view also ignores the reality of what the Debtors require if the Trustee Motion is accurate—an immediate change in management. Yet the Court is prevented from taking immediate action on the Trustee Motion because the contested matter arising from that motion involves disputes of fact that require the parties be given the usual elements of due process, such as discovery and a trial. The CRO Motion presents the perfect opportunity to address the Debtors' problems, as identified by the United States trustee, immediately.

It is the Court's primary obligation to ensure that the Debtors' estates arc operated and administered for the benefit of creditors and equity interest holders consistent with the Bankruptcy Code; that obligation must take precedence over deference to the United States trustee's view of how its own policies are best implemented. Moreover, the Court will consider the Trustee Motion in due course in any event.

Lack of Substantive Consolidation a Complicating Factor

Presently, these Debtors' estates are not substantively consolidated. It is clear from the record that transfers were made by some Debtors to other Debtors, and those transfers may or may not be avoidable. As a consequence, there may be a conflict of interest amongst the Debtors. Management of one of the Debtors cannot be called upon to authorize a lawsuit against another Debtor who is operated by the same management. Substantive consolidation, if appropriate, would remove this complication. The Debtors' counsel has announced that the Debtors have considered seeking substantive consolidation. Under the peculiar procedural posture of these cases, the Court will advance that issue on its own motion by separate order.

Authority Under which the CRO in these Cases Should be Engaged

Mr. Oscher is clearly a "professional" within the meaning of section 327(a) for purposes of these cases. *See In re First Merchants Acceptance Corp.,* 1997 Bankr.LEXIS 2245, 1997 WL 873551, *3 (D.Del.1997) (providing a list of factors to weigh in determining who is a professional for purposes of section 327(a)); *In re Bartley Lindsay Co.,* 120 B.R. 507, 512 (Bankr.D.Minn.1990) (same proposition but different list); *see also In re Marion Carefree Ltd. P'ship,* 171 B.R. 584 (Bankr.N.D.Ohio 1994) and cases cited therein (given the substance of their engagement, turnaround and workout professionals are professionals within the meaning of section 327(a)); *cf. In re Madison Mgmt. Group, Inc.,* 137 B.R. 275 (Bankr.N.D.Ill.1992) (CEO hired to liquidate assets is a professional, even ***907** though this "officer" was employed *pre*-petition).

[7] As a professional, Mr. Oscher's retention or engagement (however it is characterized) should be subject to approval by the Court pursuant to section 327(a).[14] Likewise, his compensation should be subject to review and authorization by the Court.[15]

Summary of Specific Findings
The Court has considered the CRO Motion, the arguments of counsel, together with the record (including the record developed at the preliminary hearing on the Trustee Motion), and for the reasons announced on the record at the Hearing and also those stated herein, finds that the relief requested in the CRO Motion is necessary and appropriate, the CRO Motion is well taken and should be granted in accordance with the terms and conditions set forth herein.

Specifically, at this stage in the case, the Court finds that it would be unquestionably in the best interest of the Debtors' estates, creditors and equity interest holders to authorize the Debtors to retain Mr. Oscher as CRO. The Court further finds: (i) Mr. Oscher is well qualified to perform and assume the duties of CRO in each of these cases; (ii) Mr. Oscher and the firm are independent of the Debtors and have had no prior dealings with the Debtors or their principals; (iii) all creditors present at the Hearing, although not all agreeing to the retention of a CRO, concur that Mr. Oscher is well qualified to assume the responsibilities of CRO; and (iv) the Debtors' principal, Mr. DeMaria, consents to the terms of this order, is prepared to disassociate himself from any and all managerial functions he served at the commencement of the Hearing, and is willing to reasonably cooperate on an as-requested basis without compensation should Mr. Oscher determine that his assistance is warranted.

The Court makes no finding herein concerning Mr. DeMaria's conduct in these cases except as noted in the immediately preceding paragraph.

For the foregoing reasons and the reasons stated orally in open court that shall constitute the decision of the Court, it is

ORDERED that:

1. The CRO Motion is granted, effective at 5:15 p.m. EDT on July 24, 2008.

2. The Debtors are authorized to retain Steven S. Oscher, C.P.A., as Chief Restructuring Officer of the Debtors pursuant ***908** to section 327(a) coupled with section 105(a), and not pursuant to section 363 as requested by the Debtors.

3. Mr. Oscher as CRO shall, on behalf of the Debtors, have and exercise all of the rights, powers, and duties of a debtor in possession pursuant to section 1107(a) of the Bankruptcy Code; he shall, as well, comply with additional conditions prescribed by this Court, which include the performance of the duties specified in sections 1106(a)(2) and (3). At his option, Mr. Oscher may also exercise the duties set forth in section 1106(a)(4).

4. Mr. Oscher shall have sole control over the Debtors' businesses. In addition, Mr. Oscher shall take any and all necessary steps to secure the Debtors' business premises, books and records, and computer systems and prevent access to them except as he deems desirable. In no event shall Mr. Oscher permit Mr. DeMaria hands-on access to the books and records and computer systems of the Debtors absent further order of the Court.

5. Mr. Oscher is further directed to prepare any necessary amendments to the Debtors' schedules and statements of financial affairs by no later than August 15, 2008.

6. The Court will enter a separate order requiring parties in interest to show cause why the Debtors' estates should not be substantively consolidated ("OTSC"). That order will schedule hearing time on August 15, 2008, that is already reserved for a trial on the Trustee Motion. Consequently, the trial on the Trustee Motion is continued to August 19, 2008, at 9:30 a.m.

7. While the OTSC is pending disposition, Mr. Oscher is authorized to pursue fraudulent transfers and preferences against transferees, but not against transferees that are one of the Debtors.

8. Mr. DeMaria's duties and responsibilities are limited to those that Mr. Oscher directs Mr. DeMaria to perform, including, but not limited to, cooperating in Mr. Oscher's investigation into the assets, liabilities, and affairs of the Debtors and advising on marketing and selling property of the estates.

9. Neither Mr. DeMaria, Nick Sisto, an accountant with Woodruff & Company, nor any person affiliated with Woodruff & Company shall enter the business premises of the Debtors without the express authority of Mr. Oscher.

10. Mr. Oscher shall take all necessary steps to become the sole signatory on all debtor in possession ("DIP") bank accounts he discovers, including the following:

a. Blue Stone Real Estate, Construction & Development Corp. Account No. xxxxxxx728 and escrow Account No. xxxxxx0503 at Regions Bank;

b. PDQ Acquisitions, LLC Account No. xxxxxxx546 at Regions Bank;

c. Avalon Investment Corp. of Hernando Account

No. xxxxxxxxx754 at Bank of America;

d. DDD Ranch, Inc. Account No. xxxxxxx619 at Regions Bank;

e. Jet Bead, Inc. Account No. xxxxxxx333 at Regions Bank; and

f. TCB Acquistions, LLC Account No. xxxxxx562 (bank unknown to Court).

11. Regions Bank and Bank of America (and any other bank in which a debtor in possession account has been established for any of these Debtors) shall not otherwise add or delete any additional signatories without further order from this Court. Mr. Oscher is required to provide notice of this provision to all banks holding a DIP account for any of these Debtors.

12. Mr. Oscher is directed to immediately deposit check number 3037 in the amount of $1,250,000 made payable to "Debtor in Possession–Blue Stone Real ***909** Estate Construction and Development" into Blue Stone Real Estate, Construction & Development Corp.'s DIP account at Regions Bank, without prejudice to any party in interest to seek a determination by the Court that the proceeds of such check are assets of the estate of one of the other Debtors.

13. The Court reserves jurisdiction to approve Mr. Oscher's compensation under section 330 upon the filing of an application for compensation, and Mr. Oscher may seek interim compensation not more than once every 120 days unless the Court permits a different procedure upon further motion, notice, and hearing.

14. Nothing in this order precludes the retention by Mr. Oscher of subordinates, including those who may be employed by the firm, in accordance with applicable bankruptcy law, including section 363.

DONE and ORDERED at Tampa, Florida, on August 9, 2008, *nunc pro tunc* to July 24, 2008, at 5:15 p.m.

Parallel Citations

50 Bankr.Ct.Dec. 121, 21 Fla. L. Weekly Fed. B 439

Footnotes

1 This order amends the Court's August 8, 2008, order to correct drafting errors, to provide the names of the other five Debtors in these consolidated cases, to clarify that not all changes in corporate governance require court approval, to make clear that by the order, the Court is not appointing management but rather is authorizing the Debtors to do so, and to include scheduling information.

2 The other five Debtors are: P.D.Q. Acquisitions, LLC (Case No. 8:08–bk–07227–CPM), Avalon Investment Corp. of Hernando (Case No. 8:08–bk–07228–CPM), DDD Ranch, Inc. (8:08–bk–07229–CPM), Jet Bead, Inc. (Case No. 8:08–bk–7230–CPM), and T.C.B. Acquisitions, LLC (Case No. 8:08–bk–07231–CPM).

3 The lead case was slow to get out of the gate, so to speak. Initial counsel never sought approval of its retention. Substitute counsel was engaged two months after the petition date. At that time, the United States trustee had, understandably, already begun showing intense interest and grave concern over the course the case had taken up to that point.

4 All references to a "section" herein are to sections of the Bankruptcy Code, Title 11 of the United States Code.

5 Indeed, the Court takes judicial notice from its own public records that the United States trustee has appointed Mr. Oscher as a Chapter 11 trustee, meaning, the Court infers, that office must have confidence in his abilities and integrity. In this Court alone, he serves or has served as a Chapter 11 trustee in the cases of J.H. Investment Services, Inc., Daniel L. Prewett, Leapfrog Smart Products, Inc., Atlantic International Mortgage Co., Atlantic International Mortgage Holdings, and Construction Compliance, Inc. In addition, the United States trustee has appointed him to be an examiner in the case of Parview, Inc., and the Court appointed him as an independent examiner in the case of Royal Yacht Club, LLC. He has been authorized to be employed as a forensic accountant in the cases of GSR Development LLC, Guerrini Family Limited Partnership, and Hydro Spa Parts and Accessories, Inc. and as a consultant in Scott Wetzel Services, Inc. He has served as a Chapter 7 trustee in the cases of Conduit Healthcare Solutions, Inc., American Mortgage Capital Inc., and United Container LLC. Even the United States trustee's counsel conceded, at the Hearing, "Mr. Oscher's high standing in the community and the high regard in which he is held" and indicated that "a person of Mr. Oscher's expertise would clearly be the type of person we would appoint [as a Chapter 11 trustee]."

6 In addition to section 1107(a), discussed above, see, for example, sections 363(e), 364(a), 1108, 1113, and 1203.

[7] This result is entirely consistent with Florida law. Certain of the Debtors are Florida corporations, while the others are Florida limited liability companies. In Florida, there is an exception to the rule that corporations must have a board of directors. If the corporation's shareholders agree, they may restrict the board's discretion or powers or even totally eliminate the board. Fla. Stat. §§ 607.0801, 607.0732(1)(a) (2008). Additionally, the operating agreement of a limited liability company may restrict the rights of a manager, member, or transferee of a member's distribution interest. Fla. Stat. § 608.423(2)(f) (2008).

[8] Counsel for the United States trustee stated at the hearing: "[B]ecause of the timing in this case ... it is clearly inappropriate to allow the Debtor to come in after the allegations have been made ... and attempt to put their person in place, however well respected he is, and circumvent the process under [section]1104."

[9] This position is obviously based on the proposition that if the Court appoints a disinterested CRO, then the Trustee Motion will be mooted as there will be no facts to support wrongful conduct by "current" management, one of the predicates for the appointment of a Chapter 11 trustee under section 1104(a)(1). It is not unusual for bankruptcy courts to authorize the engagement of CROs as professionals in Chapter 11 cases filed by corporations. See, e.g., *In re Florida Grande Motor Coach Resort, Inc.,* Case no. 8:07–bk–04022–CPM, pending in this Court. To take the United States trustee's argument to its extreme, any time a CRO with pervasive control is appointed, the bankruptcy courts are essentially appointing a Chapter 11 trustee. This Court disagrees with that logic. See discussion *infra.*

[10] This position is borne out by the following statement made by counsel for the United States trustee at the Hearing: "[W]e're not questioning Mr. Oscher's credentials. We are, however, questioning the procedure here. It is inappropriate."

[11] These overarching themes of section 1104 were not displaced by the amendments to that section made by the Bankruptcy Abuse and Consumer Protection Act of 2005, as such amendments did not alter the standard for appointment of a Chapter 11 trustee under section 1104(a)(1) or (2).

[12] This order should not be construed to require court approval of every change in management. The Court's imprimatur would not be required for ordinary-course replacement of officers or directors who would not require court approval as professionals. See discussion *infra.*

[13] This conclusion is buttressed by section 1105, coupled with section 105(a), which would permit the Court, on its own motion, to terminate a Chapter 11 trustee and "restore the debtor to possession and management of the property of the estate and operation of the debtor's business." If the Court can revoke the appointment of a Chapter 11 trustee, then certainly the Court can consider a motion that would eliminate the need for one in the first place.

[14] The two main purposes of section 327 arc to permit the Court to control administrative expenses in the form of professionals' compensation and ensure that the professional is conflict free and impartial. Absent such judicial oversight and the opportunity for continuing party-in-interest scrutiny of both a professional's retention and compensation, these important goals of the Bankruptcy Code cannot be met. The so-called "Jay Alix" protocol that depends upon section 363 for retention of an executive officer does not provide the Court the same ability to meet the twin goals of section 327 when the candidate for employment is also a professional. Indeed, one part of the protocol abdicates to a board of directors the decision to employ executive officers who may be professionals, as Mr. Oscher would be in these cases, as well as the decision to remove professionals. Somewhat surprisingly, this protocol is apparently embraced by the United States trustee's office even in a case where an executive officer would be deemed to be a professional subject to section 327(a) under the *First Merchants and Bartley Lindsay* analyses. This is a failing of the protocol in such cases. *See* http://www.usdoj.go v/ust/r02/docs/chapt11/manhattan_retention/ Jay_Alix_Protocol.doc.

[15] The CRO Motion does not seek authorization for Mr. Oscher's engagement pursuant to section 327, but rather section 363. The Court employs its power under section 105(a) to grant the CRO Motion pursuant to section 327(a).

End of Document

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
www.flsb.uscourts.gov

In re: Debtor. _____/	Case No. Chapter
Plaintiff, vs. Defendant. _____/	Adv. Case No.

ORDER OF REFERRAL TO MEDIATION

Pursuant to Local Rule 9019-2 of this court, [this adversary proceeding] [name of contested matter] between [names of contested matter and parties] is referred to mediation. Accordingly, it is

ORDERED as follows:

1. All parties are required to participate in mediation. The mediation shall be conducted no later than 14 days before the scheduled trial/hearing date, which is set for , at _____.m.

LF-51 (rev. 12/01/09)

2. Plaintiff's [or movant's] counsel, or another attorney agreed upon by all counsel of record and any unrepresented parties, shall be responsible for scheduling the mediation conference. The parties shall agree upon a mediator within seven days of the date of this order, and indicate their selection by the timely filing of the Local Form ANotice of Selection of Mediator@. If there is no agreement, lead counsel shall promptly notify the clerk in writing, and the clerk shall randomly designate a mediator from the AList of Certified Mediators@. The clerk's designation shall be set forth in the Local Form ANotice of Clerk's Designation of Mediator@.

3. If any party to the mediation conference, for any reason, objects to the appointed mediator, then, within three business days from the date of the ANotice of Clerk's Designation of Mediator@, the objecting party shall file with the clerk, and serve upon the mediator and all other parties to the mediation, a request for an alternate mediator -- including in the request the name of any alternate mediator already agreed upon by the parties. If the alternate mediator has been agreed upon, the clerk shall appoint that mediator. Otherwise, the clerk shall appoint a second mediator from the AList of Certified Mediators@ on a random basis and shall serve a second ANotice of Clerk's Designation of Mediator@. Each party shall be entitled to one challenge to any clerk-appointed mediator. If a mediator appointed by the clerk is unable to serve, he or she shall, within seven days from the date of the ANotice of Clerk's Designation of Mediator@, serve on the clerk and all parties to the mediation a written notice of inability to serve, and the clerk shall appoint an alternate mediator in the manner described above.

4. Upon consultation with the parties and their attorneys, the mediator shall fix

a reasonable time and place for the mediation conference, except as otherwise agreed by the parties or by order of the court, and shall give the parties at least 14 days advance written notice of the conference.

5. The appearance of counsel and each party or representatives of each party

with full authority to enter into full and complete compromise and settlement is

mandatory.

6. The mediator shall report to the court willful failure to attend the mediation conference or to participate in the mediation process in good faith, which failure may result in the imposition of sanctions by the court.

7. The mediator shall be compensated in accordance with the current rate established by the U.S. District Court for the Southern District of Florida and adopted by this court. The cost of mediation shall be shared equally by the parties [or indicate that the matter is being mediated pro bono in whole or in part pursuant to Local Rule 9019-2(A)(2)(d), and list parties]. All payments shall be remitted to the mediator within 30 days of the date of the bill. Notice to the mediator of cancellation or settlement prior to the scheduled mediation conference must be given at least two full business days in advance. Failure to do so will result in imposition of a fee for one hour.

8. Within seven days after the mediation conference, the mediator shall file the Local Form AReport of Mediator@ required by Local Rule 9019-2(E). In the event there is an impasse, the mediator shall report that there is a lack of agreement, with no further comment or recommendation, and the matter will be tried as scheduled.

9. If the parties have reached an agreement regarding the disposition of the matter or proceeding, they shall prepare and submit to the court within 14 days after the filing of the AReport of Mediator@ an appropriate stipulation of settlement and joint motion for its approval. Failure to file such a motion shall be a basis for the court to impose appropriate sanctions.

###

Submitted by:

The party submitting the order shall serve a copy of the signed order on all required parties and file a certificate of service as required under Local Rule 2002-1(F).

LF-51 (rev. 12/01/09)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re	Case No.
,	Chapter 7
Debtor. _____/	
,	ADV. CASE NO.
Plaintiff, v.	
Defendants. _____/	

ORDER SETTING PROCEDURES FOR SETTLEMENT CONFERENCE

At the request of the parties, the Court has referred this matter to the Honorable Laurel M. Isicoff to conduct a settlement conference in this case. *[Pursuant to paragraph 8 of the Order Setting Filing and Disclosure Requirements for Pretrial and Trial]*, the Court hereby:

ORDERS AND ADJUDGES that**:**

1. A settlement conference (the "Conference") in this *Adversary Proceeding/Contested Matter* is hereby scheduled for **December 17, 2013 at 9:30 a.m. at 1101**

Brickell Avenue, Suite S-503, Miami, FL 33131. All other matters in this *Adversary Proceeding/Contested Matter* will be heard by the presiding judge.

2. **CONFIDENTIAL CONFERENCE STATEMENT AND RELEVANT MATERIALS:** Each party shall prepare a confidential conference statement setting forth the relevant positions of the parties concerning factual issues, issues of law, damages, and the settlement negotiation history of the case which shall include a recitation of any specific demands and offers that have been conveyed. These confidential statements must be clearly marked as confidential and should not repeat information included in other submitted material. The conference statement may not exceed five (5) pages in length, and will not be made part of the case file. By 11:30 a.m., three (3) business days prior to the Conference, counsel shall provide to Judge Isicoff by email at **lmi_chambers@flsb.uscourts.gov**, or by hand delivery, the conference statements, together with a list of cases and copies of those cases that support the party's position and any other pertinent documentation that the party believes would be helpful to Judge Isicoff in conducting the Conference.

Failure to timely supply Judge Isicoff with requested documents may result in the Conference being canceled. Any party whose failure to comply with this provision results in the cancellation of the Conference will be responsible for any complying parties= attorney=s fees and travel expenses.

3. **ATTENDANCE OF PARTIES REQUIRED. Parties with Ultimate Settlement Authority Must be Present:** Unless excused by order of the Court, clients or client representatives with complete authority to negotiate and consummate a settlement shall be in

attendance at the Conference. This requires the presence of the client or if a corporate, governmental, or other organizational entity, an authorized representative of the client. For a defendant, such representative must have final settlement authority to commit the organization to pay, in the representative=s own discretion, a settlement amount up to the plaintiff=s prayer, or up to the plaintiff=s last demand, whichever is lower. For a plaintiff, such representative must have final authority, in the representative=s own discretion, to authorize dismissal of the case with prejudice, or to accept a settlement amount down to the defendant=s last offer. If board approval is required to authorize settlement, attendance of the entire board is not required. However, the attendance of at least one sitting member of the board (preferably its chairperson) authorized to settle as described above is absolutely required. If a party to the Conference is a public entity, either a federal agency or an entity required to conduct its business pursuant to Chapter 286, Florida Statutes, that party shall be deemed to appear at the Conference by the physical presence of a representative with full authority to settle on behalf of the entity. Any insurance company that is a party or is contractually required to defend or to pay damages, if any, assessed within its policy limits in this case must have a fully authorized settlement representative present. Such representative must have final settlement authority to commit the company to pay, in the representative=s own discretion, an amount within the policy limits, or up to the plaintiff=s last demand, whichever is lower. The purpose of this requirement is to have in attendance a representative who has both the authority to exercise his or her own discretion, and the realistic freedom to exercise such discretion without negative consequences, in order to settle the case during the Conference without consulting someone else who is not present. Having a

party with authority available by telephone is not an acceptable alternative since it is impossible for a party who is not present to appreciate the process and the reasons which may justify a change in one=s perspective towards settlement. In the event counsel for any party is aware of any circumstance which might cast doubt on a client=s compliance with this paragraph, said counsel shall immediately discuss the circumstance with opposing counsel to resolve the issue well before the Conference, and, if such discussion does not resolve the issue, request a conference call with Judge Isicoff and counsel by contacting Noemi Sanabria, Courtroom Deputy, at (305 714-1877)

Counsel appearing at the Conference without their client representatives or insurance company representatives, authorized as described above, may cause the Conference to be canceled or rescheduled. The non-complying party, attorney, or both may be assessed the costs and expenses incurred by other parties and the Court as a result of such cancellation, as well as any additional sanctions deemed appropriate by the Court. Counsel are responsible for timely advising any involved non-party insurance company of the requirements of this order.

Certain electronic devices, including but not limited to cameras, cellular phones, pagers, personal data assistants (PDA), laptop computers, radios, tape-recorders, etc. are not permitted in the courtroom or other environs of this court. These restrictions do not apply to attorneys permitted to practice law within the Southern District of Florida who are members of the Florida Bar with a valid Florida Bar identification card or pro hac vice order, U.S. government or State of Florida law enforcement officers, court licensed court reporters, U.S. Trustee=s Office staff and designated bankruptcy trustees. No one is permitted to bring a camera or laptop computer

into a federal courthouse facility except with a written order signed by a judge and verified by the U.S. Marshal=s Service. Photo identification is required to gain entrance to all federal courthouse buildings. *See* Local Rule 5001-2(C).

4. **STATEMENTS INADMISSABLE:** Notwithstanding the provisions of Federal Rule of Evidence 408, all statements made by the parties relating to the substance or merits of the case, whether written or oral, made for the first time during the Conference shall be deemed to be confidential and shall not be admissible in evidence for any reason in the trial of the case, should the case not settle. Documents submitted will be destroyed at the conclusion of the Conference. This provision does not preclude admissibility in other contexts, such as pertaining to a motion for sanctions regarding the Conference.

5. **ISSUES TO BE DISCUSSED AT THE CONFERENCE:** Parties should be prepared to discuss the following at the Conference:

1. What are your objectives in litigation?

2. What issues (in and outside of the lawsuit) need to be resolved?

3. What legal arguments support your client=s position? What case law can you cite to support your argument?

4. Do you understand the opposing side's view of the case? Do you dispute their factual assertions? What are their legal arguments? What cases support their position?

5. What remedies are available through litigation or otherwise?

6. Are there possibilities for a creative resolution of the dispute?

7. Do you have adequate information to discuss settlement? If not, how will you obtain sufficient information to make a meaningful settlement discussion possible?

8. Are there outstanding liens? Do we need to include a representative of the lienholder?

9. What are the alleged damages and how were they calculated?

10. Is there any relief other than monetary damages either party may be seeking?

11. Are there collectability issues in this case?

7. **INVOLVEMENT OF CLIENTS:** For many clients, this will be the first time they have participated in a court supervised Conference. Therefore, counsel shall provide a copy of this Order to the client and shall discuss the points contained herein with the client prior to the Conference.

8. **DISCOVERY:** Unless ordered otherwise by the Court, discovery and preparation for trial shall not be stayed by virtue of the scheduling of this Conference.

###

Copies Furnished to:

XXXXXXXXXXXXXX
Attorney for Plaintiffs

XXXXXXXXXXXXXXXX
Attorney for Defendant

Attorney _____ shall serve a copy of this order upon all parties in interest and shall file a Certificate of Service of same with the Clerk of the Court.

Updated 06/27/13

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

PROCEDURES GOVERNING MEDIATION OF MATTERS AND THE USE OF EARLY NEUTRAL EVALUATION AND MEDIATION/ VOLUNTARY ARBITRATION IN BANKRUPTCY CASES AND ADVERSARY PROCEEDINGS

The procedures governing the mediation of matters and the use of early neutral evaluation and mediation and voluntary arbitration in bankruptcy cases and adversary proceedings in the United States Bankruptcy Court, Southern District of New York (the "Mediation Procedures") are set forth in the following Rules:

1.0 Assignment of Matters to Mediation.

1.1 By Court Order. The Court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee. The motion by a party in interest must be filed promptly after filing the initial document in the matter. Notwithstanding assignment of a matter or proceeding to mediation, it shall be set for the next appropriate hearing on the Court docket in the normal course of setting required for such a matter.

1.2 Stipulation of Counsel. Any matter may be referred to mediation upon stipulated order submitted by counsel of record or by a party appearing pro se.

1.3 Types of Matters Subject to Mediation. Unless otherwise ordered by the presiding judge, any adversary proceeding, contested matter or other dispute may be referred by the Court to mediation.

1.4 Mediation Procedures. Upon assignment of a matter to mediation, these

Procedures shall become binding on all parties subject to such mediation.

2.0 The Mediator.

2.1 Mediation Register. The Clerk of the United States Bankruptcy Court for the Southern District of New York shall establish and maintain a Register of Persons Qualifying under Rule 2.1.A.

A. Application and Qualification Procedures for Mediation Register. To qualify for the Mediation Register of this Court, a person must apply and meet the following minimum qualifications:

(1) For General Services as a Mediator. A person must have been a member of the bar in any state or the District of Columbia for at least five (5) years; currently a member of the bar in good standing of any state or the District of Columbia; be admitted to practice in the Southern District of New York; and be certified by the Chief Judge to be competent to perform the duties of a mediator. Each person certified as a mediator should take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(2) For Services as a Mediator where the Court Has Determined the Need for Special Skills.

(a) A person must have been authorized to practice for at least four (4) years under the laws of the State of New York as a professional, including but not limited to, an accountant, real estate broker, appraiser, engineer or other professional. Notwithstanding the requirement for authorization to practice under the laws of the State of New York, an investment banker professional who has been practicing for a period of at least four (4) years shall be eligible to serve as a mediator; and

(b) Be an active member in good standing, or if retired,

have been a member in good standing, of any applicable professional organization;

(c) Not have:

(i) Been suspended, or have had a professional license revoked, or have pending any proceeding to suspend or revoke such license; or

(ii) Resigned from applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment or professional license revocation was pending; or

(iii) Have been convicted of a felony.

B. Removal from Mediation Register. A person shall be removed from the Mediation Register either at the person's request or by Court order. If removed from the Register by Court order, the person shall not be returned to the Register absent a Court order obtained upon motion to the Chief Judge and affidavit sufficiently explaining the circumstances of such removal and reasons justifying the return of the person to the Register.

2.2 Appointment of the Mediator.

A. The parties will ordinarily choose a mediator from the Register for appointment by the Court. If the parties cannot agree upon a mediator within seven (7) days of assignment to mediation, the Court shall appoint a mediator and alternate mediator.

B. In the event of a determination by the Court that there are special issues presented which suggest reference to an appropriately experienced mediator other than the mediator chosen by the parties, then the Court shall appoint a mediator and an alternate mediator.

C. If the mediator is unable to serve, the mediator shall file within seven (7) days after receipt of the notice of appointment, a notice of inability to accept appointment and immediately serve a copy upon the appointed alternate mediator. The alternate

mediator shall become the mediator for the matter if such person fails to file a notice of inability to accept appointment within seven (7) days after filing of the original mediator's notice of inability. If neither can serve, the Court will appoint another mediator and alternate mediator.

2.3 Disqualification of a Mediator. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 or if not, disinterested under 11 U.S.C. § 101. Any party selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a justice, judge or magistrate.

3.0 The Mediation.

3.1 Time and Place of Mediation. Upon consultation with all attorneys and pro se parties subject to the mediation, the mediator shall fix a reasonable time and place for the initial mediation conference of the parties with the mediator and promptly shall give the attorneys and pro se parties advance written notice of the conference. The conference shall be set as soon after the entry of the mediation order and as long in advance of the Court's final evidentiary hearing as practicable. To ensure prompt dispute resolution, the mediator shall have the duty and authority to establish the time for all mediation activities, including private meetings between the mediator and parties and the submission of relevant documents. The mediator shall have the authority to establish a deadline for the parties to act upon a proposed settlement or upon a settlement recommendation from the mediator.

3.2 Mediation Conference. A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. The mediator shall control all procedural aspects of the mediation. The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. The mediator shall also determine

when the parties are to be present in the conference room. The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the Court.

3.3 Recommendations of the Mediator. The mediator shall have no obligation to make written comments or recommendations; provided, however, that the mediator may furnish the attorneys for the parties and any pro se party with a written settlement recommendation. Any such recommendation shall not be filed with the Court.

3.4 Post-Mediation Procedures. Promptly upon conclusion of the mediation conference, and in any event no later than 3:00 P.M. two (2) days prior to the date fixed for hearing referred to in Rule 1.1, the mediator shall file a final report showing compliance or noncompliance with the requirements of this General Order by the parties and the mediation results. If in the mediation the parties reach an agreement regarding the disposition of the matter, they shall determine who shall prepare and submit to the Court a stipulated order or judgment, or joint motion for approval of compromise of controversy (as appropriate), within twenty-one (21) days of the conference. Failure to timely file such a stipulated order or judgment or motion when agreement is reached shall be a basis for the Court to impose appropriate sanctions. Absent such a stipulated order or judgment or motion, no party shall be bound by any statement made or action taken during the mediation process. If the mediation ends in an impasse, the matter will be heard or tried as scheduled.

3.5 Termination of Mediation. Upon receipt of the mediator's final report, the mediation will be deemed terminated, and the mediator excused and relieved from further responsibilities in the matter without further Court order.

3.6 Withdrawal from Mediation. Any matter referred pursuant to mediation

may be withdrawn from mediation by the judge assigned to the matter at any time upon determination for any reason the matter is not suitable for mediation. Nothing in these Mediation Procedures shall prohibit or prevent any party in interest, the U.S. Trustee or the mediator from filing a motion to withdraw a matter from mediation for cause.

4.0 Compensation of Mediators. The mediator's compensation shall be on such terms as are satisfactory to the mediator and the parties, and subject to Court approval if the estate is to be charged with such expense. In the event that the mediator and the parties cannot agree on terms of compensation, then the Court shall fix such terms as are reasonable and just.

5.0 Confidentiality.

5.1 Confidentiality as to the Court and Third Parties. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the Court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the Court, unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the Court in connection with the referred matter. Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the Court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.

5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or

introduce as evidence in connection with any arbitral, judicial or other proceeding,including any hearing held by this Court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to:

A. Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;

B. Admissions made by the other party in the course of the mediation proceedings;

C. Proposals made or views expressed by the mediator.

6.0 Immunity. The Mediators shall be immune from claims arising out of acts or omissions incident to their service as Court appointees in this Mediation Program. See Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

7.0 Consensual Modification of Mediation Procedures. Additional rules and procedures for the mediation may be negotiated and agreed upon by the mediator and the parties at any time during the mediation process.

8.0 Compliance With the U.S. Code, Bankruptcy Rules, and Court Rules and Orders.

Nothing in these Procedures shall relieve any debtor, party in interest, or the U.S. Trustee from complying with this Court's orders or Local Rules, U.S. Code, or the Bankruptcy Rules, including times fixed for discovery or preparation for any Court hearing pending on the matter.

9.0 Assignment of Disputes to Mediation/Voluntary Arbitration.

9.1 Stipulation of Parties. The Court may refer a dispute pending before it to mediation, and, upon consent of the parties, to arbitration if and to the extent that the mediation is unsuccessful. At the conclusion of mediation, after the parties have failed to reach agreement and

upon voluntary stipulation of the parties, the mediator, if qualified as an arbitrator, may hear and arbitrate the dispute.

A. Referral to Arbitration pursuant to Bankruptcy Rule 9019 (c). Except as provided in subdivision (B) the Court may authorize the referral of a matter to final and binding arbitration under Bankruptcy Rule 9019 (c) if:

(1) The issue does not arise in an adversary proceeding; or

(2) The issue arises in an adversary proceeding in which the amount in controversy has a dollar value greater than $150,000, the issue is procedural or non- dispositive (such as a discovery dispute), and the Court retains jurisdiction to decide, after presentation of evidence, the adversary proceeding.

B. Referral of Adversary Proceeding to Arbitration pursuant to 28 U.S.C. § 654. With the consent of the parties, under 28 U.S.C. § 654, the Court may authorize the referral to arbitration of an adversary proceeding in which the matter in controversy has a dollar value that does not exceed $150,000, subject to the following provisions:

(1) Determination *De Novo* of Arbitration Awards under 28 U.S.C. § 654.

(a) Time for Filing Demand. Within 30 days after the filing of an arbitration award with the Clerk of Court in an adversary proceeding governed by Rule 9.1(B), any party may file a written demand for a determination *de novo* with the Court.

(b) Action Restored to Court Docket. Upon a demand for a determination *de novo*, the action shall be restored to the docket of the Court and treated for all purposes as if had not been referred to arbitration.

(c) Exclusion of Evidence of Arbitration. The Court shall not admit at the determination *de novo* any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless –

(i) The evidence would otherwise be admissible in the Court under the Federal Rules of Evidence; or

(ii) The parties have otherwise stipulated.

(2) Arbitration awards in a proceeding governed by Rule 9.1(B) shall be entered as the judgment of the Court after the time has expired for requesting a determination *de novo*. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the Court, except that the judgment shall not be subject to review in any other Court by appeal or otherwise.

(a) Filing and Effect of Arbitration Award. The Clerk of the Court shall place under seal the contents of any arbitration award made under Rule 9.1 (B) of this Court Annexed Alternative Dispute Resolution Program and the contents shall not be known to any judge who might be assigned to the matter until the Court has entered a final judgment in the action or the action has otherwise terminated.

C. Safeguards in Consent to Voluntary Arbitration. Matters referred to mediation where the parties do not reach agreement are allowed to proceed to voluntary arbitration under Rule 9.1(A) or Rule 9.1(B) by consent expressly reflected and filed with the Court where –

(1) Consent to arbitration is freely and knowingly obtained; and

(2) No party or attorney is prejudiced for refusing to participate

in arbitration.

10.0 The Arbitrator.

10.1 Powers of Mediator/Arbitrator. A mediator/arbitrator to whom an action is referred shall have the power, after a good faith attempt to mediate, and upon consent of the parties, to –

A. Conduct arbitration hearings consistent with Rule 9.1 above;

B. Administer oaths and affirmations; and

C. Make awards.

10.2 Standards for Certification as an Arbitrator. In addition to fulfilling the requirements found in Rule 2.0 The Mediator, a person qualifying as a Mediator/Arbitrator shall be certified as an arbitrator through a qualifying mediation/ arbitration program which includes an ethics component on how to retain neutrality when changing the process.

10.3 Immunity. All individuals serving as Mediator/Arbitrator in the Court Annexed Alternative Dispute Resolution Program are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

10.4 Subpoenas. The Federal Rules of Civil Procedure and Bankruptcy Procedure apply to subpoenas for the attendance of witnesses and the production of documents at a Voluntary Arbitration hearing.

11.0 Arbitration Award and Judgment.

11.1 An arbitration award made by a Mediator/Arbitrator, along with proof of service of such award on the other party by the prevailing party, shall be filed promptly after the arbitration hearing is concluded with the Clerk of the Court.

12.0 Compensation of Mediator/Arbitrator. The Mediator/Arbitrator's compensation shall be consistent with Rule 4.0 Compensation of Mediator as described above.

12.1 Transportation Allowances. Subject to Court approval, if the estate is to be charged with such expense, the Mediator/Arbitrator may be reimbursed for actual transportation expenses necessarily incurred in the performance of duties.

13.0 Notice of Court Annexed Alternate Dispute Resolution Program. The Court, at the first scheduled pre-trial conference, shall give notice of dispute resolution alternatives substantially in compliance with Form I.

457 B.R. 172
(Cite as: 457 B.R. 172)

United States Bankruptcy Court,
D. Puerto Rico.
In re Carmen G. PEREIRA SANTIAGO, Debtor.

No. 11–00661(ESL).
May 2, 2011.

Background: Following meeting of creditors in Chapter 13 case, in which presiding officer noted lack of face-to-face meeting between debtor and her attorney prior to petition filing, attorney filed informative motion regarding his office procedures. Chapter 13 trustee requested ruling as to whether pre-filing meeting between attorney and debtor was required.

Holding: The Bankruptcy Court, Enrique S. Lamoutte, Chief Judge, held that attorney, as debt relief agency under Bankruptcy Code, must provide face-to-face legal advice to client, as assisted person, prior to filing of client's bankruptcy petition and at every critical stage of bankruptcy proceedings.

Ordered accordingly.

West Headnotes

[1] Attorney and Client 45 32(3)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(3) k. Power and duty to control. Most Cited Cases

Attorney and Client 45 36(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k36 Jurisdiction of Courts
45k36(1) k. In general. Most Cited Cases

Ultimate authority over the legal profession is vested upon the courts.

[2] Courts 106 87

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k87 k. Nature of judicial determination. Most Cited Cases

Courts have a duty to uphold and enhance the image of justice.

[3] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Attorney who provides bankruptcy assistance to an assisted person in return for payment is a "debt relief agency" as defined by the Bankruptcy Code. 11 U.S.C.A. § 101(3, 4A, 12A).

[4] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Under Bankruptcy Code, bankruptcy assistance, including legal representation with respect to a case or proceeding, may be provided only by attorneys. 11 U.S.C.A. § 101(4A).

[5] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Bankruptcy attorney, as a debt relief agency, must provide the client, as an assisted person, with all the protection and rights set forth in provisions of Bankruptcy Code imposing specific prohibitions and responsibilities on the conduct of a consumer bankruptcy attorney, particularly with respect to the services to be provided and the statements to be included in documents filed with the bankruptcy court. 11 U.S.C.A. §§ 526–528.

[6] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

It is necessary that attorney, as debt relief agency, provide services directly to client, as assisted person, given broad and strict requirements imposed by, and serious consequences of failing to comply with, provisions of Bankruptcy Code mandating that consumer bankruptcy attorneys advise clients regarding need to provide truthful, complete, and accurate information in filings with bankruptcy court, of possibility that information provided could be audited, and of possible consequences for failing to comply with disclosure obligations, including criminal sanctions. 11 U.S.C.A. §§ 101(12A), 526(a), 527(a)(2).

[7] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Prepetition counseling is a critical and an integral part of bankruptcy assistance. 11 U.S.C.A. § 101(4A).

[8] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Bankruptcy attorneys must explain the benefits, burdens, and consequences of bankruptcy to their clients to the extent reasonably necessary to permit informed decisions about the case.

[9] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Attorneys providing bankruptcy assistance must conduct a face-to-face meeting with their clients prior to filing a bankruptcy petition, although the time spent by the attorney with a prospective debtor depends on the particular complexities of the case. 11 U.S.C.A. § 101(12A).

[10] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Written contract required, under Bankruptcy Code, to be provided by debt relief agency to assisted person must explain clearly and conspicuously the services to be provided and the fees or charges for such services. 11 U.S.C.A. § 528(a).

[11] Attorney and Client 45 63

45 Attorney and Client
45II Retainer and Authority
45k63 k. The relation in general. Most Cited Cases

Attorney and Client 45 64

45 Attorney and Client
45II Retainer and Authority
45k64 k. What constitutes a retainer. Most Cited Cases

The attorney-client relationship is consensual, as it arises by reason of an agreement between the parties, and is governed by the law of contracts; however, the relationship between an attorney and a client is fiduciary in nature and based on trust, confidence, and good faith.

[12] Attorney and Client 45 137

45 Attorney and Client
45IV Compensation
45k137 k. Retaining fee. Most Cited Cases

Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Retainer agreements in bankruptcy must comply with bankruptcy statute, are held to a higher standard than conventional contracts, and are subject to applicable codes of professional responsibility. 11 U.S.C.A. § 528.

[13] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Attorney, as debt relief agency under Bankruptcy Code, must provide face-to-face legal advice to client, as assisted person, prior to filing of client's bankruptcy petition and at every critical stage of bankruptcy proceedings. 11 U.S.C.A. §§ 101(3, 4A, 12A), 526–528.

***173** Ramon F. Lopez Rivera, Ft. Buchanan, PR, for Debtor.

OPINION AND ORDER

ENRIQUE S. LAMOUTTE, Chief Judge.

This case is before the court upon the Chapter 13 trustee's request to rule on whether or not an attorney filing a bankruptcy petition must meet with the individual prospective debtor before filing the petition and whether the prepetition interview is necessary to establish an attorney-client relationship. The relevant facts are not in controversy and the attorney for the debtor agrees with the trustee's position that a face to face meeting between the attorney and the client before filing the petition is necessary. The attorney before the court has expressly informed that his office practice has been modified to comply with the requirement of personally meeting with the client before filing the petition. The ultimate issue pending is the court's imprimatur of what is the conduct expected of attorneys appearing before it.

FACTUAL AND PROCEDURAL BACKGROUND

On January 31, 2011 the debtor filed a voluntary petition under Chapter 13 of the ***174** Bankruptcy Code. The court scheduled the 341 meeting of creditors for March 8, 2011. The presiding officer at the 341 meeting of creditors questioned the debtor as to whether she had been interviewed by her attorney prior to filing the bankruptcy petition. The debtor answered that she had been legally advised in person by her attorney on February 11, 2011, that is, after the filing of the petition but before the 341 meeting

of creditors. The presiding officer noted that there had not been legal advice prior to filing and informed the attorney of the trustee's position that there should be a face to face meeting between the attorney and the client prior to filing the bankruptcy petition.

On March 21, 2011 the debtor's attorney filed an informative motion accepting with professional candor that "prior to March 8, 2011 during the process before the filing of the petition the process was not done solely by me." The attorney informed on his office procedures, which always included a personal interview before the 341 meeting of creditors but in some cases there was not a personal interview before filing the bankruptcy petition as this was done by his "personally trained and daily supervised paralegal." The critical intervention of paralegals, particularly for solo practitioners, was detailed. The attorney informs that all cases were personally reviewed by him prior to filing.

The Chapter 13 trustee stated his position on the debtor's attorney's informative motion. The trustee highlights several guidelines in the Consumer Bankruptcy Law and Practice Manual which tend to support the office practices conducted by the debtor's attorney in this case. The trustee does not subscribe to practices which, albeit economically efficient, accept supervision by the attorney of work performed by non-attorney legal employees for which the attorney is ultimately responsible, as a substitute to a face to face interview with the client prior to filing the bankruptcy petition. The trustee states that in order to provide competent advice, as required by Rule 1.1 of the Model Rules of Professional Conduct [FN1], an interview with the client should be held as a pre-condition to establishing an attorney-client relationship. Two recent cases are cited in support of the trustee's position: *In re Tran,* 447 B.R. 268 (9th Cir. BAP 2011) and *In re Harps,* 2011 WL 309059 (Bankr.S.D.Ill. Jan. 28, 2011).

> FN1. Local Rule 83.5(a) of the Local Rules of the United States District Court for the District of Puerto Rico establishes that the Model Rules of Professional Conduct (Model Rules) adopted by the American Bar Association, as amended from time to time, will govern the conduct of attorneys appearing before said court and the U.S. Bankruptcy Court for the District of Puerto Rico.

The attorney replied distinguishing the decisions in *In re Tran* and *In re Harps* to the facts of this case. The attorney further states that the face to face interview should not be required prior to the client submitting all the documentation necessary to filing the bankruptcy petition.

DISCUSSION

[1][2] The legal profession is largely self-governing. *See* Preamble to Model Rules. Such autonomy carries special responsibilities. However, ultimate authority over the legal profession is vested upon the courts. Courts have a duty to uphold and enhance the image of justice. Such authority and responsibility are the basis for the court's inherent power to oversee the conduct of attorneys appearing before them. *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *In re Nguyen,* 447 B.R. 268, 280 (9th Cir. BAP 2011). The enforcement of ethics is necessary to preserve the decorum***175** of the court and the respectability of the legal profession. *Ex parte Burr,* 22 U.S. 529, 9 Wheat. 529, 530, 6 L.Ed. 152 (1824).

Consumer bankruptcies generally involve debtors whose estates are small. Thus, the economics of handling the same is critical to providing access to the benefits afforded by the Bankruptcy Code. The use of paralegals is an essential element to providing cost efficient bankruptcy services to the community. 3 *Legal Malpractice* § 25:4 (2011 ed.). The problem rises when a nonlawyer provides the legal services directly.

[3][4] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) introduced strict measures on the conduct of consumer debtors' attorneys as "debt relief agencies." *See* 11 U.S.C.A. § 101(3), (4A), and (12A). Attorneys who provide bankruptcy assistance [FN2] to an assisted person [FN3] in return for payment are a debt relief agency within the meaning of section 101(12A) of the Bankruptcy Code [FN4]. *Milavetz, Gallop & Milavetz, P.A., et al., v. United States,* —— U.S. ——, 130 S.Ct. 1324, 1332, 176 L.Ed.2d 79 (2010). Bankruptcy assistance, including the legal representation with respect to a case or proceeding, "may be provided only by attorneys." *Milavetz, Gallop & Milavetz, P.A., et al., v. United States,* 130

S.Ct. at 1332.

FN2. The term "bankruptcy assistance" is defined by § 101(4A) as "any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title."

FN3. An assisted person is defined by § 101(3) as "any person whose debts consist primarily of consumer debts and the value of whose non-exempt property is less than $175,750."

FN4. A debt relief agency is defined by § 101(12A) as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110."

[5] The bankruptcy attorney as a debt relief agency must provide the client, as an assisted person, with all the protection and rights set forth in 11 U.S.C.A. §§ 526 to 528. Section 526(a) and 527(a) provide specific prohibitions and responsibilities on the conduct of a consumer bankruptcy attorney, particularly with respect to the services to be provided and the statements to be included in documents filed with the bankruptcy court. 1 *Bankruptcy Desk Guide* § 2:55.

[6] Section 526(a) prohibits attorneys meeting the definition of a debt relief agency from advising any assisted person or prospective assisted person from providing untrue and misleading statements. Such services may not be delegated to nonlawyers. Section 527(a)(2) requires that a debt relief agency (attorney) advises the assisted person (debtor or prospective debtor) of certain filing and disclosure requirements. These requirements are: (A) advise an assisted person that all required information mandated to be provided with the petition and thereafter must be complete, accurate and truthful; (B) advise an assisted person that all assets and liabilities must be completely and accurately disclosed in the documents filed to commence a bankruptcy case; (C) advise an assisted person that current monthly income, the amounts specified in section 707(b)(2) and disposable income in a chapter 13 case as determined in accordance with section 707(b)(2) must be stated after reasonable inquiry; and (D) advise an assisted person that information provided during the case may be audited and that failure to provide such information can ***176** result in dismissal or other sanctions, including criminal sanctions. Considering the broad and strict requirements in sections 526(a) and 527(a), as well as the serious consequences of failing to comply with the same, it is necessary that the attorney provides the services directly to the client as an assisted person. The direct provision of legal assistance by the attorney does not preclude the support from nonlawyers. However, nonlawyers may not provide directly to the assisted person the services outlined above.

[7][8][9] Prepetition counseling is a critical and an integral part of bankruptcy assistance. "Attorneys must explain the benefits, burdens, and consequences of bankruptcy to their clients to the extent reasonably necessary to permit informed decisions about the case." 9 William L. Norton Jr., *Bankr. L. & Prac.* 3d § 172.25. Clearly, such a legal advice may only be provided by an attorney. Therefore, attorneys providing bankruptcy assistance must conduct a face to face meeting with their clients prior to filing a bankruptcy petition. The time spent by the attorney with a prospective debtor depends on the particular complexities of the case. *See In re Nguyen,* at 280, wherein the court required the attorney to meet for at least one hour.

[10] Section 528 of the Bankruptcy Code imposes several duties on debt relief agencies with respect to retainer agreements. Section 528(a) provides that a debt relief agency shall provide an assisted person a written contract within five days after the first date any bankruptcy assistance services are provided and prior to the filing of the petition. The written contract must explain clearly and conspicuously the services to be provided and the fees or charges for such services. Allan N. Resnick & Henry J. Sommer, 4 *Collier on Bankruptcy,* ¶ 528.01 (16th ed. 2010). Since the contract must describe the

services to be provided and fees to be charged, and must be provided prior to the filing of the petition, it follows that the contracting parties (attorney and prospective debtor) must meet and agree to the terms of the contract prior to the filing of the petition.

[11][12] The provisions in § 528 concerning retainer agreements are statutory. As such, they are mandatory, albeit complimentary to any contractual or ethical obligation. The attorney-client relationship is consensual as it arises by reason of an agreement between the parties, and is governed by the law of contracts. However, the relationship between an attorney and a client is fiduciary in nature and based on trust, confidence and good faith. 23 *Willinston on Contracts* § 62:1 (4th ed.). The attorney and client relationship in Puerto Rico is a *sui generis* nature and is inextricably related to the canons of professional ethics. *Dominguez Wolff v. Badillo Rivera,* 2006 WL 2385434, (P.R. Ct.App. June 28, 2006). The court finds that retainer agreements in bankruptcy must comply with section 528, are held to a higher standard than conventional contracts, and are subject to applicable codes of professional responsibility.

CONCLUSION

[13] This court concludes and finds that an attorney, as a debt relief agency, must provide face to face legal advice to a client, as an assisted person, prior to the filing of the petition and at every critical stage of the bankruptcy proceedings. The court declines to state or prescribe how attorneys may structure their respective offices and practices to provide such services. Generally, ethics is a matter of choices. Attorneys are responsible for their actions. However, their actions must comply with all ethical and statutory responsibilities.

***177** The decision in this case is meant to coerce future compliance and not to sanction or compensate for damages suffered by the client or assisted person.

SO ORDERED.

Bkrtcy.D.Puerto Rico,2011.
In re Pereira Santiago
457 B.R. 172

END OF DOCUMENT

"What We Have Here is a Failure to Communicate": Avoiding *Ex Parte* Communications with Judges

ABI Annual Spring Meeting
Sunday April 19, 2015
Flapjacks and Sage Advice: Judges' Panel on Everything!
9:00 to 10:00 a.m.

Pamela Pepper
United States District Court, Eastern District of Wisconsin

I. Definition of "Ex Parte"

Black's Law Dictionary:

"**ex parte**, *adj.* Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, usu. for temporary or emergency relief <an ex parte hearing> <an ex parte injunction>."

"**communication.** . . . . ***ex parte communication.*** A communication between counsel and the court when opposing counsel is not present. ***** Such communications are ordinarily prohibited."

II. ABA Model Code of Judicial Conduct

Rule 2.9: Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

III. Code of Conduct for United States Judges

Canon 3(A)(4)

A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may: