

IT IS SO ORDERED.

Dated: July 25, 2016
02:45:35 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

	*	
	*	
IN RE:	*	CASE NUMBER 16-40675
	*	(Substantively Consolidated)
ALLIED CONSOLIDATED	*	
INDUSTRIES, INC.,	*	CHAPTER 11
	*	
Debtor/Debtor-in-Possession.	*	HONORABLE KAY WOODS
	*	
	*	

MEMORANDUM OPINION REGARDING UNITED STATES STEEL CORPORATION'S
EXPEDITED MOTION TO APPOINT TRUSTEE

Debtors Allied Consolidated Industries, Inc. ("Allied Consolidated"), Allied Erecting & Dismantling Co., Inc. ("AED"), Allied Industrial Scrap, Inc. ("Allied Scrap"), and Allied-Gator, Inc. ("Allied-Gator") (collectively, "Debtors") filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code on April 13, 2016 ("Petition Date"), and these cases were substantively consolidated on July 11, 2016 (see Doc. 123). The

Debtors have been operating their businesses and managing their property as debtors in possession since the Petition Date.

Six days after the Petition Date, on April 19, 2016, United States Steel Corporation ("U.S. Steel") filed Creditor and Interested Party United States Steel Corporation's Expedited Motion to Appoint Trustee ("Motion for Trustee") (Doc. 17), which is presently before the Court. On May 10, 2016, the Debtors filed Response of the Debtors and Debtors-in-Possession in Opposition to the Expedited Motion of United States Steel Corporation to Appoint Trustee ("Response") (Doc. 62). On May 20, 2016, U.S. Steel filed Creditor and Interested Party United States Steel Corporation's Reply in Support of its Motion to Appoint Trustee ("Reply") (Doc. 77).

The Court held an evidentiary hearing on the Motion for Trustee on June 7, 2016, at which appeared (i) Melissa M. Macejko, Esq., Joseph R. Macejko, Esq., and Andrew W. Suhar, Esq. on behalf of the Debtors; (ii) Michael R. Gladman, Esq. and Charles M. Oellermann, Esq. on behalf of U.S. Steel; and (iii) Amy L. Good, Esq. on behalf of Daniel M. McDermott, United States Trustee for Region 9 ("UST"). The Court heard testimony from (i) James Falconi on behalf of U.S. Steel; and (ii) Thomas J. Anness and John K. Lane on behalf of the Debtors. Received into evidence without objection were (i) U.S. Steel's Exhibits A, B, C, D, F, G, J, M,

Q, R, AA, BB, CC, DD, EE, and JJ; and (ii) the Debtors' Exhibits 1, 3, 4, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 21, 22, and 23.

At the conclusion of the hearing, the Court took this matter under advisement because then-pending before the Court were two motions that could impact the Motion for Trustee - *i.e.*, (i) Application to Employ Eckert Seamans Cherin & Mellott, LLC [("Eckert Seamans")] as Special Counsel for the Debtors and Debtors-in-Possession ("Application to Employ") (Doc. 82) filed by the Debtors on May 31, 2016; and (ii) Motion for Substantive Consolidation of the Debtors' Estates ("Substantive Consolidation Motion") (Doc. 87) filed by the Debtors on June 2, 2016. The Court held hearings on the Application to Employ and the Substantive Consolidation Motion on July 6, 2016, at which time the Court approved the Application to Employ, as modified on the record, and granted the Substantive Consolidation Motion. Having resolved the Application to Employ and the Substantive Consolidation Motion, the Court now issues this Memorandum Opinion regarding the Motion for Trustee. For the reasons set forth herein, the Court will deny the Motion for Trustee.

This Court has jurisdiction pursuant to 28 U.S. C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the

Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. BASES FOR THE MOTION FOR TRUSTEE

U.S. Steel relies on 11 U.S.C. § 1104(a) in bringing the Motion for Trustee. This section provides:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 1104(a) (2016). U.S. Steel alleges that relief is appropriate under both subsections of 11 U.S.C. § 1104(a) and relies on the same factual allegations in support of cause in subsection (1) and the interests of creditors and the estate in subsection (2).

U.S. Steel first argues that the Debtors have "taken drastically inconsistent positions before two federal tribunals regarding the state of their finances . . . , [which] can only be explained by dishonesty, fraud, or gross mismanagement resulting

in the sudden loss of millions of dollars in assets.” (Mot. for Trustee at 4.) U.S. Steel’s second argument is as follows:

[T]he United States District Court for the Northern District of Ohio [(“District Court”)] recently entered an opinion in the U.S. Steel Litigation¹ raising serious concerns about the honesty and competence of the Debtors’ management, finding that millions of dollars in assets were transferred from AED to its corporate affiliates for little or no value, and questioning the Debtor’s creation of a purported security interest in favor of legal and accounting professionals with whom it has an over thirty-year relationship.

(*Id.* at 4-5 (n.3 omitted).)

II. BURDEN OF PROOF

As the moving party, U.S. Steel bears the burden of proof to obtain the relief it seeks. The Sixth Circuit Court of Appeals has not addressed the evidentiary burden that is required to be met for the appointment of a trustee under 11 U.S.C. § 1104(a); however, the majority of courts, including the Third Circuit Court of Appeals, have held that the evidentiary standard is clear and convincing evidence. *Official Comm. of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.)*, 385 F.3d 313, 317-18 (3d Cir. 2004) (quoting *In re Marvel Ent. Group*, 140 F.3d 463 (3d Cir. 1998) (“The party moving for appointment of a trustee . . .

¹ U.S. Steel defines “U.S. Steel Litigation” as *Allied Erecting and Dismantling Co., Inc. v. United States Steel Corporation*, Case No. 4:12-cv-1390 (N.D. Ohio), which definition the Court will utilize. (Mot. for Trustee at 1.) Exhibit F to the Motion for Trustee is Memorandum Opinion and Order (Including Findings of Fact and Conclusions of Law) [Nunc Pro Tunc to Correct Amended Judgment Amount in Paragraph 3] (“District Court Opinion”) (Doc. 371) entered in the U.S. Steel Litigation on March 21, 2016. The District Court Opinion includes the findings of fact to which U.S. Steel refers in its Motion for Trustee.

must prove the need for a trustee under either subsection by clear and convincing evidence."); *contra Keeley & Grabanski Land P'ship v. Keeley (In re Keeley & Grabanski Land P'Ship)*, 455 B.R. 153, 162-63 (B.A.P. 8th Cir. 2011) (n. 15-17 omitted) ("While the majority of courts have concluded that the movant must meet its burden with clear and convincing evidence, . . . we conclude that the proper standard for a party seeking the appointment of a Chapter 11 trustee is preponderance of the evidence.")

Although there is no decision by the Sixth Circuit Court of Appeals on this issue, courts within the Sixth Circuit have generally utilized the clear and convincing evidence standard. *See In re Nartron Corp.*, 330 B.R. 573 (Bankr. W.D. Mich. 2005); *In re Platinum Power Co.*, 105 B.R. 381 (Bankr. N.D. Ohio 1989); *In re Microwave Prods. of America, Inc.*, 102 B.R. 666 (Bankr. W.D. Tenn. 1989); *In re William A. Smith Constr. Co.*, 77 B.R. 124 (Bankr. N.D. Ohio 1987); *In re Fisher & Son, Inc.*, 70 B.R. 7 (Bankr. S.D. Ohio 1986). Accordingly, this Court finds that the appropriate standard for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a) is clear and convincing evidence; however, under either the clear and convincing evidence standard or the preponderance of the evidence standard, U.S. Steel has failed to meet its burden of proof.

III. ANALYSIS

A. Representations Regarding Financial Condition

The Court will first address U.S. Steel's argument regarding the Debtors' representations concerning their financial condition. AED is the only Debtor that was a party to the U.S. Steel Litigation and the only Debtor against which the judgment, based on U.S. Steel's counterclaim ("District Court Judgment"), was entered.² AED moved the District Court to stay execution of the District Court Judgment and waive the requirement for AED to post a supersedeas bond while AED appealed to the Sixth Circuit Court of Appeals. In lieu of a supersedeas bond, AED sought the District Court's "approval of 'alternative security' in the form of a security interest in some of its dismantling equipment, attachment inventory, and/or structural steel."³ (Mot. for Trustee at 6 (citing Mot. for Stay at 12).) U.S. Steel states that AED "represented to the District Court that it **'owns property and equipment with a cost value of \$96,106,197 and a net book value of \$55,603,366** – all of which has been conservatively valued at a

² U.S. Steel argues, "All the Allied Debtors are under the same management, and the companies' misconduct and the [District Court]'s findings apply equally to each of them." (Mot. for Trustee at 5 n.3 (citations omitted).) Although the Debtors' cases have since been substantively consolidated, U.S. Steel moved for the appointment of one trustee for all four Debtors without any analysis regarding whether one trustee could fulfill the fiduciary duties required for separate bankruptcy estates.

³ Exhibit B to the Motion for Trustee is Memorandum in Support of Expedited Motion for Temporary Stay and Motion for Stay of Execution and Approval of Alternative Security ("Motion for Stay") filed by AED in the District Court Litigation on October 9, 2015.

total of \$30,400,338.'" (*Id.* (quoting Mot. for Stay at 8).) U.S. Steel further states that AED also represented that it had a significant "off balance sheet" asset in the approximate amount of \$7,100,000.00 in salvaged structural steel. Additionally, U.S. Steel states that, less than six months prior to the Petition Date, AED filed a reply memorandum in support of its Motion for Stay in which AED asserted that its resources significantly exceeded its liabilities.

Based on the Debtors' representations in their petitions that each of their estimated assets totaled no more than \$50,000.00, U.S. Steel argues, "AED's sudden about-face regarding the state of its financial affairs is impossible to explain absent dishonesty, fraud, or gross mismanagement, any one of which is sufficient to necessitate the appointment of a trustee for cause." (*Id.* at 6-7.)

U.S. Steel argues that the Debtors' alleged misrepresentations about their finances support the appointment of a trustee under both 11 U.S.C. § 1104(a)(1) and (2). The Court will first address whether such conduct constitutes cause for the appointment of a trustee under 11 U.S.C. § 1104(a)(1).

U.S. Steel filed the Motion for Trustee a mere six days after the Petition Date and well within the 14-day grace period following

the Petition Date for filing schedules and other required documents.⁴ The Debtors argue:

[T]he petitions were filed on an emergency basis due to an attempted bank account attachment and writs of execution taken by U.S. Steel. Therefore, the Debtors did not have time to complete the schedules of assets when seeking relief under the Code. Only the petition and a few other necessary documents were filed. The statistical and administration information section of the emergency petitions is automatically calculated by the software based upon the values of assets and liabilities entered. Since no assets were listed at that point, there were no estimated values to calculate and the system defaulted to the \$0 - \$50,000 range. Since then, the schedules and statements have been filed in the cases and petitions amended to update the statistical and administration section, which show assets with an estimated value: . . . \$10,000,001 - \$50 million for Allied Erecting & Dismantling Co., Inc., Further there was ample testimony given at the initial hearing regarding the going-concern of the businesses and the preliminary values of many of the assets. It is surprising that U.S. Steel has not withdrawn that argument from its Expedited Motion and it would be misleading on the part of U.S. Steel to pursue those disproved allegations.

(Resp. at 16.) AED's petition was amended (Case No. 16-40672, Doc. 5) on April 29, 2016 to reflect estimated assets of "\$10,000,001 - \$50 million" and estimated liabilities in the same amount.⁵ (*Id.* at 3.) U.S. Steel counters that AED signed the

⁴ Federal Rule of Bankruptcy Procedure 1007(c) states, "In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided" FED. R. BANKR. P. 1007(c) (2016).

⁵ "A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." FED. R. BANKR. P. 1009(a) (2016). Each of the Debtors filed an amended petition on April 29, 2016.

petition under penalty of perjury and thus asserts that the original petition still indicates dishonesty. (Reply at 15.)

This Court, however, is aware that debtors often file bankruptcy petitions on an emergency basis without any accompanying schedules, which are subsequently filed. U.S. Steel presented no evidence to contradict the Debtors' statement that the software it used to complete the bankruptcy petitions defaulted to the 0 - \$50,000.00 range for assets. Thus, contrary to U.S. Steel's assertion that it "is impossible to explain [the inconsistent statements] absent dishonesty, fraud or gross mismanagement[,]" the Court finds the Debtors' explanation regarding the emergency filing and the software defaults to be credible. As a consequence, the Court finds that the alleged inconsistent statements do not evidence dishonesty, fraud, incompetence, or gross mismanagement. Accordingly, the Court finds that U.S. Steel has not met its burden of presenting evidence under either the clear and convincing evidence standard or the preponderance of the evidence standard to establish that the Debtors' alleged "drastically inconsistent" statements regarding their finances constitute cause for the appointment of a trustee.

U.S. Steel also relies on the Debtors' alleged inconsistent statements about their finances to support the appointment of a trustee as being in the interests of creditors and the estate. As set forth above, the Debtors have adequately explained the

inconsistencies alleged by U.S. Steel. Under either evidentiary standard, U.S. Steel has failed to carry its burden of proof that the Debtors' inconsistent statements concerning their finances support the appointment of a trustee as being in the interests of creditors and the estate.

Thus, to the extent the Motion for Trustee is premised upon the Debtors' alleged inconsistent statements about their finances, the Court will deny the Motion for Trustee under 11 U.S.C. § 1104(a)(1) and (2).

B. District Court Findings

Next, U.S. Steel contends that findings by District Court Judge Sara Lioi are sufficient to constitute cause for the appointment of a trustee.⁶ U.S. Steel states that the District Court found there are "serious concerns about the honesty and competence of the Debtors' management[.]" (Mot. for Trustee at 4-5.) Specifically, the District Court found, "[AED] has engaged in several post-verdict and post-judgment asset transfers

⁶ U.S. Steel states that "Judge Lioi's findings are 'binding in this proceeding.'" (Mot. for Trustee at 5 (quoting *In re Nartron Corp.*, 330 B.R. 573, 583 (Bankr. W.D. Mich. 2005)).) The issue decided by the District Court (whether to waive the requirement for a supersedeas bond) is different from the issue before this Court (whether a chapter 11 trustee should be appointed). Even though the parties to the two proceedings are identical, because the issues before the two courts are different, the District Court's findings are neither res judicata nor do they collaterally estop this Court. This Court has the highest regard for Judge Lioi, but notes that the findings of fact were made in a context that differs from the matter before this Court. Thus, the District Court findings are not determinative of whether the Debtors' pre-petition conduct warrants the appointment of a trustee under 11 U.S.C. § 1104(a).

that lead the Court to question [AED]'s representations that it will secure its assets for U.S. Steel's eventual execution post-appeal." (Mot. for Trustee at 8 (quoting Dist. Ct. Op. ¶ 74).)

This Court notes that AED bore the burden of proof in the Motion for Stay that generated the findings in the District Court Opinion upon which U.S. Steel relies.⁷ The issue before the District Court was whether AED had sufficient assets and/or income to support alternative security in lieu of posting a supersedeas bond. The District Court held that AED did not carry this burden. The District Court concluded, "While [AED] asserts that it currently has sufficient assets to satisfy the judgment, the Court concludes that it is unlikely to maintain its current financial status into the future and during the appeal of this matter. Accordingly, the Court finds that U.S. Steel's ability to recover on the judgment is likely to be hampered by a stay of execution if [AED] does not post a full bond." (Dist. Ct. Op. ¶ 129.) Whether U.S. Steel would be able to collect on its District Court Judgment in the absence of AED posting a supersedeas bond is an issue entirely different from the issue before this Court, which concerns whether to appoint a trustee.

⁷ "District Court Opinion" is defined *supra* at 5 n.1.

The appointment of a trustee is an extraordinary remedy and U.S. Steel bears the burden to prove that cause for the appointment of a trustee exists.

Chapter 11 of the Code is designed to allow the debtor-in-possession to retain management and control of the debtor's business operations unless a party in interest can prove that the appointment of a trustee is warranted. *In re General Oil Distributors, Inc.*, 42 B.R. 402, 409 (Bankr. E.D.N.Y. 1984); *In re BAJ Corp.*, 42 B.R. 595, 597 (Bankr. D. Conn. 1984); *In re La Sherene, Inc.*, 3 B.R. 169, 174 (Bankr. N.D. Ga. 1980). The appointment of a trustee in a chapter 11 case is an extraordinary remedy. *In re William A. Smith Constr. Co., Inc.*, 77 B.R. 124, 126 (Bankr. N.D. Ohio 1987); *In re Parker Grande Development, Inc.*, 64 B.R. 557, 560 (Bankr. S.D. Ind. 1986); *In re Anchorage Boat Sales, Inc.*, 4 B.R. 635 (Bankr. E.D. N.Y. 1980). 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. *Committee of Dalkon Shield Claimants v. A.H. Robbins Co., Inc.*, 828 F.2d 239, 241 (4th Cir. 1987); *In re Evans*, 48 B.R. 46, 47 (Bankr. W.D. Tex. 1985); *In re Eichorn*, 5 B.R. 755, 757 (Bankr. D. Mass. 1980).

In re Ionosphere Clubs, Inc., 113 BR. 164, 167 (Bankr. S.D.N.Y. 1990).

U.S. Steel argues that cause exists to appoint a trustee because the District Court Opinion "[found] that millions of dollars in assets were transferred from AED to its corporate affiliates for little or no value, and question[ed] the Debtor's creation of a purported security interest in favor of legal and accounting professionals with whom it has an over thirty-year relationship." (Mot. for Trustee at 5 (n.3 omitted).) Regarding the transfer of \$8.6 million worth of equipment from AED to Allied-

Gator five days after the of issuance of the District Court Judgment, the District Court: (i) found that AED's financials were not consistent with AED's explanation that it was simply an accounting mistake and not a transfer of assets (Dist. Ct. Op. ¶¶ 77, 81-83); and (ii) concluded that it was not credible that a multi-million-dollar mistake would go unnoticed for nearly a decade and be discovered and corrected five days after the District Court Judgment was entered (*id.* ¶ 84). Regarding the creation of a security interest in favor of AED's legal counsel and accountant ("Professionals' Security Interests"), the District Court stated that the timing "raise[d] suspicion as to the propriety of [AED]'s behavior with respect to U.S. Steel's collection efforts." (*Id.* ¶ 98.)

In addition to the findings in the District Court Opinion, U.S. Steel offered the expert testimony of Mr. Falconi, a CPA and forensic accountant, in support of the Motion for Trustee. Mr. Falconi testified concerning the transfer of equipment from AED to Allied-Gator, which occurred five days after the issuance of the District Court Judgment, resulting in an intercompany payable in the amount of \$8.6 million from Allied-Gator to AED. Mr. Falconi testified that he did not believe that Allied-Gator was capable of repaying this intercompany payable.

Mr. Falconi further testified concerning transfers between Allied Scrap and AED, which have resulted in an intercompany

payable from AED to Allied Scrap in the amount of more than \$21 million for scrap that AED itself produced. He testified that this type of accounting was counter-intuitive; because AED spent money to generate the scrap, it did not make sense for the scrap to become AED's liability. He stated that he had never seen this type of transaction and the only reasons that it would be done would be for tax purposes or to limit liability. He noted, however, that because the Debtors historically filed consolidated tax returns, there did not appear to be a tax benefit from the AED and Allied Scrap transactions. He also testified about the accounting practices in which the Debtors shift expenses to AED that should be borne by other entities. Mr. Falconi offered no testimony concerning the Professionals' Security Interests.

Mr. Falconi also offered his opinions and conclusions concerning whether the Debtors can be considered going concern businesses. He concluded: (i) AED is not a going concern and AED's financial condition impacts the other Debtor affiliates because AED historically was the "cash cow" upon which the other Debtors relied; (ii) Allied Scrap will operate only so long as it has scrap to process and will cease operations after the current scrap is sold unless it acquires additional scrap; (iii) Allied Consolidated has no business activity and is merely a holding company; and (iv) although Allied-Gator has been profitable at

times over the years and there is some demand for its products, it has too much inventory.

Based on Mr. Falconi's conclusions concerning the viability of each Debtor as a going concern, it is unclear what purpose would be served by the appointment of a chapter 11 trustee; his testimony indicates that a chapter 11 trustee would simply liquidate the Debtors' assets. Liquidation would be better accomplished by a chapter 7 trustee, but U.S. Steel has not moved to convert this case to chapter 7. Furthermore, because U.S. Steel generally argues that the Debtors' intercompany transfers should be independently investigated, the Debtors might have different and contrary interests in whether an intercompany transfer should be recognized as valid. As a consequence, it is not at all clear that one trustee would be able to fulfill the fiduciary obligations of each of the Debtors. It would be unduly expensive if more than one trustee were required in these bankruptcy cases.

Although Mr. Falconi offered credible expert testimony concerning the Debtors' finances, significantly, he did not offer any opinion about whether any of the Debtors' intercompany transfers were fraudulent or improper. With the exception of the transfer of \$8.6 million of equipment from AED to Allied-Gator, the practices that Mr. Falconi described were long-standing and not a consequence of or in reaction to the entry of the District Court Judgment. The Debtors' historical practices involving

transfers between AED and Allied Scrap and the allocation of expenses to AED had been going on for a number of years, even during periods of time when AED was profitable. Thus, neither of these practices supports a finding of fraud, dishonesty, incompetence, or gross mismanagement under 11 U.S.C. § 1104(a)(1).

Moreover, Mr. Falconi acknowledged that (i) the Debtors' current management has expertise in the industry; (ii) filing bankruptcy would be one alternative he would consider if he were advising the Debtors; and (iii) the Debtors might benefit from downsizing and/or entering into joint ventures while in bankruptcy. Despite alleging that some of AED's accounting practices did not meet Generally Accepted Accounting Principles, U.S. Steel presented insufficient evidence of fraud, dishonesty, incompetence, or gross mismanagement regarding the Debtors' general management or the intercompany transfers. Although the explanation for the \$8.6 million transfer from AED to Allied-Gator may not be credible and the timing of the transfer may be suspect, U.S. Steel did not present sufficient evidence to establish that this transaction, alone, constitutes cause for the appointment of a trustee. The Court finds that the evidentiary standard was not met under either the clear and convincing evidence standard or the preponderance of the evidence standard.

Accordingly, the Court will deny the Motion for Trustee to the extent it is based on cause pursuant to 11 U.S.C. § 1104(a)(1).

The three main reasons U.S. Steel advances for the appointment of a trustee are: (i) to independently investigate intercompany transfers; (ii) to determine if the Professionals' Security Interests are avoidable; and (iii) to objectively evaluate whether AED should continue the appeal of the U.S. Steel Litigation and/or pursue additional claims against U.S. Steel, which the Debtors have represented could bring in millions of dollars for the benefit of creditors and the estate. U.S. Steel argues that the Debtors' current management is not in a position to (i) evaluate or challenge any intercompany transfers or the Professionals' Security Interests; or (ii) dispassionately evaluate whether continued litigation against U.S. Steel is in the interests of creditors and the estate.

As previously indicated, since the hearing on the Motion for Trustee, this Court has granted the Substantive Consolidation Motion and approved the Application to Employ. Substantive consolidation resulted in (i) combining all assets and liabilities of the Debtors as if they are a single entity; and (ii) the elimination of all intercompany payables and receivables. Thus, to the extent U.S. Steel contends that a trustee is required to evaluate the propriety and enforceability of intercompany transfers, there is no longer a need to appoint a trustee for this purpose.

Nor is there a requirement for a trustee to evaluate the propriety and enforceability of the Professionals' Security Interests or the benefit of continued litigation with U.S. Steel. Subsequent to U.S. Steel's filing of the Motion for Trustee, the UST appointed an official committee of unsecured creditors ("Creditors' Committee") (see Docs. 60, 75), which, with the approval of the Court, retained Frederic P. Schweig, Esq. as legal counsel (see Doc. 117). On June 30, 2016, the Creditors' Committee filed Response of Official Committee of Unsecured Creditors to Application to Employ Eckert Seamans Cherin & Mellott, LLC as Special Counsel for the Debtors and Debtors-in-Possession ("Committee Response") (Doc. 116), in which the Creditors' Committee stated that approval of the Application to Employ was in the best interests of creditors and the estate so long as such retention preserved the ability of the Creditors' Committee and other parties in interest to avoid the Professionals' Security Interests. (Comm. Resp. ¶¶ 1-2.) At the hearing on the Application to Employ, Mr. Schweig, on behalf of the Creditors' Committee, represented to the Court that the Creditors' Committee would not rely only on the Debtors' judgment concerning pursuit of litigation against U.S. Steel, but that it would be involved with the ongoing evaluation of the cost benefit of continuing such litigation. Moreover, the order approving the Application to Employ specifically preserves the "right of the [Creditors']

Committee or any other party in interest with the requisite standing to object to, or challenge the validity, extent, perfection or priority, or to seek the avoidance of, the alleged mortgage, security interest and liens held by [Eckert Seamans].” (Doc. 126 ¶ 4.)

As a consequence, the interests of creditors are being protected by the Creditors’ Committee, which has assumed the watchdog role that U.S. Steel envisioned a trustee would be required to perform concerning evaluation of continued litigation against U.S. Steel and the validity and enforceability of the Professionals’ Security Interests. Accordingly, the Court finds that, under either evidentiary standard, U.S. Steel has not carried its burden of proof that the appointment of a trustee would be in the interests of creditors and the estate. Thus, the Court will deny the Motion for Trustee to the extent it is based on 11 U.S.C. § 1104(a)(2).

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: July 25, 2016
02:45:47 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
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Debtor/Debtor-in-Possession.	*	HONORABLE KAY WOODS
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ORDER DENYING UNITED STATES STEEL CORPORATION'S EXPEDITED MOTION
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For the reasons set forth in the Court's Memorandum Opinion Regarding United States Steel Corporation's Expedited Motion to Appoint Trustee entered on this date, the Court hereby:

1. Finds that the appropriate standard for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a) is clear and convincing evidence;
2. Finds that U.S. Steel did not present sufficient evidence under either the clear and convincing evidence standard or the preponderance of the evidence standard to establish that the Debtors' alleged inconsistent statements regarding their finances constitute cause for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a)(1);
3. Finds that U.S. Steel did not present sufficient evidence under either the clear and convincing evidence standard or the preponderance of the evidence standard to establish that the Debtors' alleged inconsistent statements regarding their finances support the appointment of a trustee as being in the interests of creditors and the estate pursuant to 11 U.S.C. § 1104(a)(2);
4. Finds that U.S. Steel did not present sufficient evidence under either the clear and convincing evidence standard or the preponderance of the evidence standard to establish that the \$8.6 million transfer from AED to Allied-Gator

constitutes cause for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a)(1);

5. Finds that U.S. Steel did not present sufficient evidence under either the clear and convincing evidence standard or the preponderance of the evidence standard to establish that the \$8.6 million transfer from AED to Allied-Gator supports the appointment of a trustee as being in the interests of creditors and the estate pursuant to 11 U.S.C. § 1104(a)(2);
6. Finds that, following substantive consolidation, a trustee is not required to evaluate the propriety and enforceability of intercompany transfers;
7. Finds that the interests of creditors are being protected by the Creditors' Committee, which has assumed the watchdog role that U.S. Steel envisioned a trustee would be required to perform concerning evaluation of continued litigation against U.S. Steel and the validity and enforceability of the Professionals' Security Interests;
8. Finds that U.S. Steel did not present sufficient evidence under either the clear and convincing evidence standard or the preponderance of the evidence standard to establish that cause exists for the appointment of a trustee pursuant to 11 U.S.C. § 1104(a)(1); and
9. Finds that U.S. Steel did not present sufficient evidence under either the clear and convincing evidence standard or

the preponderance of the evidence standard to establish that the appointment of a trustee would be in the interests of creditors and the estate pursuant to 11 U.S.C. § 1104(a)(2).

As a consequence, the Court hereby denies the Motion for Trustee.

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