IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	)	**Chapter 11**
	)	
SMALL LOANS, INC., *et al.*[1]	)	**Case No.: 11-12254 (WRS)**
	)	
	)	
Debtor.	)	
	)	

DEBTORS' MOTION TO DISMISS AND RESPONSE OF THE DEBTORS IN OPPOSITION TO THE COMMITTEE'S MOTION TO APPOINT A CHAPTER 11 TRUSTEE

The above captioned Debtors and Debtors in Possession (the "Debtors") file the following Motion to Dismiss and Response in Opposition to the Committee's Motion to Appoint Chapter 11 Trustee (the "Response" and the "Trustee Motion"). In support of its Response, the Debtors state as follows:

I. Jurisdiction and Notice

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (M) and (O).

2. Venue of this chapter 11 case in this District is proper under 28 U.S.C. §§ 1408 and 1409.

II. Background

3. On December 16, 2011, (the "Petition Date"), the Debtors filed for relief under chapter 11 of the Bankruptcy Code. The Debtors intend to continue to operate their businesses

[1] The related Debtors along with the last four digits of each Debtors' federal tax identification number and respective case numbers are Small Loans, Inc. (3224) Case No. 11-12254, The Money Tree Inc. (1386) Case No. 11-12255, The Money Tree of Georgia Inc. (9228) Case No. 11-12258, The Money Tree of Florida Inc. (5315) Case No. 11-12257, and The Money Tree of Louisiana, Inc. (2592) Case No. 11-12256. Case information and the Debtors' respective addresses can be found at the dedicated website for these cases: http://www.kccllc.net/SmallLoansInc.

and manage their properties as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. The Debtors' chapter 11 cases are jointly administered and consolidated for procedural purposes only.

5. On February 27, 2012, just over two months into the case, the Official Committee of Unsecured Creditors of The Money Tree Inc. (the "Committee") filed the Trustee Motion (Doc. # 195).

III. Brief Summary of the Debtors' Response

In brief, the Committee's allegations are that the Debtors and Debtors management have conflicts of interest, are incompetent, and are or were operating a Ponzi scheme. However, these allegations are not plead with sufficient particularity and these allegations and the facts do not support appointment of a trustee. Furthermore, the actions of the Debtors and Debtors' management demonstrate that the Debtors and Debtors' management are acting without conflict of interest and with competence.

The Debtors and their management have demonstrated that they are not influenced by conflicts of interest by, among other things:

- Agreeing to proceed with a plan or a sale that would cancel or sell 100% of current equity;
- Agreeing to a plan that would terminate the agreement between the Debtors and the Interstate Motor Club owned and controlled by the equity owners of the Debtors;
- Actively negotiating the termination of all sublease agreements with the Martin family entities without penalty to the Debtors.;
- Agreeing to the appointment of a Chief Restructuring Officer that would have the power to replace existing management.

The Debtors and Debtors' management have demonstrated their competence by, among other things:

- Implementing a Restructuring Plan that cut operating costs by up to $800,000 per month;
- Implementing a Restructuring Plan that consolidated operations and allowed the closure of 45 locations and the reduction of operating costs resulting therefrom;
- Pursuing numerous alternatives to obtain maximum benefit for creditors through either a plan or sale of assets, which has included discussions with more than ten potential purchasers or financers to date; and
- Operating the Debtors in a manner to avoid the necessity of obtaining debtor-in-possession financing.

Because the Committee's allegations do not warrant the appointment of a trustee and the Debtors and Debtors' management have demonstrated they are acting without conflict and with competence, the motion to appoint trustee should be denied.

IV. The Debtors' Restructuring Plan

Contrary to the allegations in the Committee's Motion, the Debtors have had a Restructuring Plan in place since September 2011, as further detailed below. Further, the Debtors have or will file a motion to appoint a Chief Restructuring Officer ("CRO") contemporaneously with the filing of this Response to assist the Debtors in obtaining the maximum return for creditors. Further, the Debtors' Plan demonstrated through proposing cancellation of the current equity holders' interests, that the Debtors' current management is committed to realizing the highest return for creditors. The path the Debtors now propose is consistent with the Debtors' global Restructuring Plan, which is described in detail below.

A. Formulation of the Restructuring Plan

Prior to filing for bankruptcy, the Debtors faced a challenging financial environment. As a result, the Debtors created a lengthy and detailed plan for restructuring their businesses in order to maximize the return for creditors (the "Restructuring Plan"), which the Debtors attached to their Disclosure Statement as Exhibit C. Essential to the Restructuring Plan was a lengthy report prepared by Warren Averett, LLC analyzing past business operations and performance on a branch by branch basis for all 92 locations and recommending operational restructuring and cost reductions to conform with the size of the Debtors' loan portfolio. Among other things, the Restructuring Plan proposed:

- Detailed recommendations for branch consolidation;
- Significant recommendations for reductions in operating expenses;
- Detailed analyses of the anticipated results of branch consolidation;
- Detailed financial projections of the Debtors performance for the next five years; and
- Recommendations for additional capital infusions and expected results after infusion of capital.

B. Implementation of the Restructuring Plan Prepetition

The Debtors began implementation of the Restructuring Plan in September of 2011. Implementation of phase one of the Restructuring Plan resulted in significant improvement in performance by early December 2011, as evidenced by the following results:

- decreasing the number of branches from 91 to 46;
- decreasing the number of employees from 300 to 150;
- decreasing operating expenses by about $800,000 per month; and
- decreasing operating losses from approximately $1.4 million per month on a combined basis to approximately to $0.8 million per month (this number includes estimated restructuring costs of $400,000 per month).

These operational efficiencies and cost reductions were implemented at the direction of the Debtors' current management. Had they not streamlined operations prior to filing for bankruptcy protection, the Debtors would have been incurring an additional $800,000 per month in administrative expenses, which would have created a fire sale environment for the Debtors that would likely have curtailed the ability of the Debtors to maximize return for creditors.

C. The Debtors' Performance and Operations Postpetition

After implementing the first phase of the Restructuring Plan, the Debtors determined on December 15, 2011 that in order for the Debtors to finalize the remainder of the Restructuring Plan, it would be necessary to file for bankruptcy protection. A rushed sale of the Debtors' assets will provide little benefit to creditors, and the cost saving measures implemented under the Restructuring Plan have allowed the Debtors to seek outside capital or set up an orderly transfer of the Debtors' businesses as a going concern instead.

The Debtors began searching for financing or a potential purchaser prior to filing for bankruptcy. These efforts intensified after the Petition Date. In order to facilitate its search, the Debtors directed Warren Averett to prepare historical performance data and detailed projections of future performance. The Debtors have used these financial projections in discussions with numerous interested parties. The Debtors and their professionals have had significant contacts with at least a dozen parties about potential financing or a potential sale of the company and have provided financial information and other data about the Debtors to at least six (6) entities or individuals conducting due diligence with respect to the Debtors operations. The Committee has been regularly updated on the progress of these efforts. Although the Debtors have determined that to proceed with the current Investor is not in the best interests of the Estates, the Debtors continue to search for the highest and best offer so that the Debtors can obtain a substantial return to creditors.

In addition to the information provided above, the Debtors have also completed or initiated the following tasks:

- The Debtors have or will send out demand letters to most recipients of potential preferences so that after confirmation or a sale the case can be efficiently and expeditiously resolved and closed;
- The Debtors negotiated the termination without penalty of all subleases with the Martin family that allowed the Debtors to assume the main lease and reduce costs by eliminating any spread;
- The Debtors, through Burr & Forman, have initiated an investigation of the transactions with the Martin family real estate entities, including an investigation of all subleases (terminated prepetition) and all direct leases;
- The Debtors are in the process of drafting a request for information and a demand letter to one or more of the Martin entities related to the subleases and other matters;
- The Debtors have thoroughly marketed the companies to more than ten (10) independent entities to seek financing or a purchaser;
- The Debtors have diligently and timely filed operating reports and quarterly reports.

Finally, the clearest example of the Debtors' management's commitment to obtaining the best result for creditors is the fact that are willing to voluntarily relinquish control to a CRO and have are willing to pursue a plan that cancels 100% of the current equity. The Debtors understand that the Committee and its counsel have lost faith in management's current leadership; however, the Debtors believe that the retention of a CRO to exercise full operational control over the Debtors, including, without limitation, the authority to terminate existing management, provides a workable resolution of the Trustee Motion by providing the independent oversight the Committee wants while still allowing the Debtors to control their own destiny, all without the added expense of another layer of supervisory authority in the form of a chapter 11 trustee. However, if the Committee does not agree that such a reasonable resolution is fair, the

Debtors nonetheless assert that the Committee's Motion should be denied as both unnecessary (due to the Debtors' commitment to retain a CRO) and as unsupportable in fact and law.

V. Opposition

A. The Committee's Motion Should Be Denied Because It Has Failed to Satisfy Minimum Pleading Standards in its Motion

1. The Committee has failed to follow the *Twombly* standard in pleading breach of fiduciary duty

In two recent cases, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court established a plausibility standard for pleading, which has been applied to motions in bankruptcy court contested matters by the United States Bankruptcy Court for the Northern District of Alabama in *In re Weatherford*, 434 B.R. 644 (Bankr. N.D. Ala. 2010). The court in *Weatherford* adopted "the *Twombly* pleading standards for contested matters by virtue of the provisions in Bankruptcy Rule 9013 requiring motions to state with **particularity** the grounds for the relief sought." *Weatherford*, 434 B.R. at 649 (emphasis in original). *Iqbal* identified a two-pronged approach to use in evaluating a pleading:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 679. Based on this two-pronged approach, the Committee's Motion should be denied with respect to Section IV.A. because the Committee has failed to satisfy the *Twombly* standard in asserting breach of fiduciary duty against the Debtors and their management.

The issue of pleading breach of fiduciary duty as defined by Georgia law was addressed by the Eleventh Circuit in *Lubin v. Skow*, 382 Fed. Appx. 866 (11th Cir. 2010). According to *Lubin*, "To state a claim for breach of fiduciary duty against officers of a Georgia corporation, the complaint must sufficiently plead: '(1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.'" *Lubin*, 382 Fed. Appx. at 872 (quoting *Wilchombe v. TeeVee Toons, Inc.*, 555 F. 3d 949, 958-59 (11th Cir. 2009)). In *Lubin*, the debtor holding company's bankruptcy trustee asserted derivative claims against the officers and directors of the holding company and its subsidiary bank for breach of fiduciary duty. *Lubin*, 382 Fed. Appx. at 868. In affirming the district court's dismissal of the case, the court of appeals stated, "While the losses of the Bank are staggering, a simple recitation of those amounts together with generalized statements of blame do not state a legal claim for breach of fiduciary duties to the Holding Company. . . . Because the Complaint fails to plead sufficient facts connecting any act or omission by the defendants with a harm to the Holding Company . . . the Complaint states no claim for which the Trustee may recover." *Id.* at 873.

In stating its claim of breach of fiduciary duty, the Committee relies on the conclusory allegation that Mr. Bellville has breached his fiduciary duties to creditors by having an "inflated salary" and by profiting from his ownership of the Interstate Motor Club. The Committee leaves the Court to infer exactly why Mr. Bellville's salary is inflated and how his salary results in a conflict of interest that prevents him from acting in the best interests of creditors. The Committee likewise leaves the Court to infer exactly how Mr. Bellville's modest compensation from the Interstate Motor Club, a business that generates significant revenue for the Debtors, also creates a conflict of interest that prevents him from acting in the best interests of creditors. While not specifically mentioned in Section IV.A., the Committee also alleges in Paragraph 9 of the Motion in conclusory fashion that the Debtors are leasing property from former and present equity owners, again leaving the Court to infer that by doing so the Debtors have breached fiduciary duties to creditors.[2]

The Committee has, therefore, done nothing more than plead "labels and conclusions" and "naked assertions" in an "unadorned, the-defendant-unlawfully-harmed-me" manner rejected by *Iqbal*. *Iqbal*, 556 U.S. at 678. Accordingly, the Court should strike the Committee's allegations in Section IV.A. of the Motion and deny the Motion with respect to allegations of breach of fiduciary duty.

2. <u>The Committee has failed to plead fraud with particularity</u>

In its Motion, the Committee relies in large part on the Debtors' alleged fraud. In order to survive denial of these portions of its Motion, the Committee must comply with Rule 9(b) of the Federal Rules of Civil Procedure (the "Federal Rules"). Rule 9(b) of the Federal Rules, which is applicable in this proceeding,[3] requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see also In re Weatherford*, 434 B.R. 644 (Bankr. N.D. Ala. 2010) (discussing pleading with particularity in contested matters). Section IV.C. of the Committee's Motion discusses two types of alleged fraud by the Debtors: first, in Paragraphs 26 through 29 of the Motion, that the Debtors were operating a Ponzi scheme; second, in Paragraph 30 of the Motion, that the Debtors made misstatements of fact to creditors. The Committee has pleaded neither of these allegations with

[2] The Debtors have requested discovery from the Committee to determine what facts and documents the Committee believes supports its allegations, and even the Committee's discovery responses would fail to meet the pleading standards. See Committee's discovery responses attached hereto as Exhibit A.

[3] Rule 2007.1(a) of the Bankruptcy Rules requires motions to appoint chapter 11 trustees to be made in accordance with Rule 9014. Rule 9014(c) of the Bankruptcy Rules specifically makes applicable Rule 7009 of the Bankruptcy Rules in contested matters, which in turn makes applicable Rule 9 of the Federal Rules of Civil Procedure.

particularity; accordingly, the Court should strike Section IV.C. from the Motion or in the alternative, simply deny the Motion with respect to Section IV.C.

To fulfill heightened pleading standard for fraud, the Committee's motion must allege:

> (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud.

American Dental Assocs. v. Cigna Corp., 605 F. 3d 1283, 1291 (11th Cir. 2010) (internal citations and quotations omitted); *see also Sampson v. Wash. Mut. Bank*, 453 Fed. Appx. 863, 866, 2011 WL 4584780, at *3 (11th Cir. 2011). In other words, when pleading fraud, "Plaintiffs must assert the who, what, when, and where of the purported fraud." *Cox-Tanner v. Taylor, Bean & Whitaker Mortgage Corp. (In re Taylor, Bean & Whitaker Mortgage Corp.)*, Bankr. No. 3:09-bk-7047-JAF, Adv. No. 3:11-ap-326-JAF, 2011 WL 5245420, at *5 (Bankr. M.D. Fla. Oct. 24, 2011). Parties are required to plead fraud with particularity because "[t]he particularity rule alerts defendants of 'the precise misconduct with which they are charged and protect[s] defendants against spurious charges of immoral and fraudulent behavior.'" *Sampson*, 453 Fed. Appx. at 866, 2011 WL 4584780, at *3 (quoting *Ziemba v. Cascade Int'l, Inc.*, 256 F. 3d 1194, 1202 (11th Cir. 2001)).[4]

[4] Similarly, to the extent the Committee is attempting to allege a securities fraud violation, any such allegations fall far short of the requisite particularity requirements. To state a claim for securities fraud a plaintiff must allege six elements: (1) a material misrepresentation or omission; (2) made with scienter; (3) a connection with the purchase or sale of a security; (4) reliance on a misstatement or omission; (5) economic loss; and (6) a causal connection between the material misrepresentation or omission and the loss, commonly called “loss causation.” *See Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1352 (11th Cir. 2008) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005)). In assessing allegations of securities fraud, a court must apply the pleading standard articulated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), discussed <u>*supra*; however, because such a claim sounds in fraud the heightened standard of Rule 9(b) must be met</u>. *See Venezia Amos, LLC v. Favret*, No. 3:07cv146/MCR, 2008 WL 410163, at *9 (N.D. Fla. Feb 12, 2008). In addition, The Private Securities Litigation Reform Act of 1995 (“PSLRA”) heightened Rule 9(b)’s particularity requirement by mandating that a securities fraud claim “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.” *Kadel*

The allegations in Paragraph 30 of the Committee's Motion are comparable to the allegations of the plaintiffs in *Sampson*. In that case, the court affirmed the district court's grant of a motion to dismiss. The plaintiff in the case alleged "without any specific dates, meetings, conversations, or other circumstances, that the defendants fraudulently provided 'materially false property value and payment disclosures' to him and 'made material misrepresentations by representing that property values on the mortgage market were much greater than they actually were.'" *Sampson*, 453 Fed. Appx. at 866, 2011 WL 4584780, at *2 (quoting the plaintiff's complaint). The court concluded "That is not enough to sufficiently allege fraud." *Id.*

The Committee has alleged in Paragraph 30 that "Members of the Debtors' management assured creditors that the Debtors' finances were steady, despite the Debtors' massive losses over the past several years. These misrepresentations, which were fraudulent in nature, form the basis for the appointment of a chapter 11 trustee." This statement forms the sole basis of the Committee's allegations related to "misrepresentations." As noted above, the Committee did not identify any specific person who made such misrepresentations, did not provide any specific dates when such misrepresentations were made, did not reveal to whom these misrepresentations were made or how they were harmed, and did not even state the specific content of those misrepresentations—the very type of pleading that Federal Rule 9(b) was meant to prevent.

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v. Flood, 427 Fed. Appx. 778, 779 (11th Cir. 2011) (citing 15 U.S.C. § 78u-4(b)(1)(B); *see also Skubella v. Checkfree Corp.*, No. 1:07-CV-796-TWT, 2008 WL 19202118, at *2 (N.D. Ga. Apr. 25, 2008) (noting that in addition to Rule 9(b)'s heightened pleading requirements, the PSLRA requires plaintiffs to plead securities fraud with an "added layer of exacting particularity."). Moreover, the PSLRA also imposes a heightened standard for pleading scienter, and in the Eleventh Circuit it "require[s] a showing of either an intent to deceive, manipulate, or defraud, or severe recklessness." *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 634 (11th Cir.2010) (quotation marks omitted). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-22 (2006) (requiring a "strong inference" for scienter). Here, even a cursory review of the Committee's motion reveals that it has failed to allege any of the foregoing elements with the particularly required to support an allegation of securities fraud.

The Committee has further failed to plead with particularity the facts related to their allegation that "The Debtors' Operations are Tantamount to a Ponzi Scheme." As discussed in further detail below, under Eleventh Circuit law, the Committee must satisfy four elements to demonstrate that the Debtors are running a Ponzi scheme: (1) deposits were made by investors; (2) the debtors conducted little or no legitimate business operations as represented to investors; (3) the purported business operations of the debtors produced little or no profits or earnings; and (4) the source of payments to investors was from cash infused by new investors. *Kapila v. TD Bank, N.A. (In re Pearlman)*, 440 B.R. 900, 904 (Bankr. M.D. Fla. 2010).

The Committee has only alleged facts with respect to (1), (3) and (4) of the elements above. The Committee has not even addressed whether the Debtors supposedly have little or no legitimate business operations because the Debtors' sole purpose is to run a legitimate business—making consumer loans—and not to perpetuate an investing fraud. The Committee likewise has not plead sufficient facts to fulfill the 11th Circuit's definition of a Ponzi scheme: "a Ponzi scheme is a **<u>phony</u>** investment plan in which money paid by later investors are used to pay artificially high returns to the initial investors, **<u>with the goal of attracting more investors</u>**." *United States v. Silvestri*, 409 F. 3d 1311, 1317 n.6 (11th Cir. 2005) (emphasis added). The Committee has not alleged any intent on the part of the Debtors to create or perpetuate a phony plan to ensnare more and more unwitting investors. Because the Motion wholly fails to allege facts related to a lack of legitimate business operations, the Committee has failed to follow the pleading guidelines of Rule 9(b). Accordingly, the Court should strike Section IV.C. of the Motion and deny the Motion with respect to these allegations.

B. The Motion Should Be Denied Because the Committee Cannot Demonstrate by Clear and Convincing Evidence that It Is Entitled to Relief

The appointment of a trustee in chapter 11 is an extraordinary remedy; accordingly, there "is a strong presumption . . . that the debtor-in-possession should be permitted to remain in control of the corporation absent a showing of need for the appointment of a trustee." *In re Intercat, Inc.*, 247 B.R. 911, 920 (Bankr. S.D. Ga. 2000); *see also In re Suncruz Casinos, LLC*, 298 B.R. 821, 828 (Bankr. S.D. Fla. 2003). The presumption that a debtor-in-possession should remain in place is only overcome by a showing of "clear and convincing evidence that the appointment of a Trustee is warranted." *In re Royster Company et al.*, 145 B.R. 88, 90 (Bankr. M.D. Fla. 1992) (quoting *In re Clinton Centrifuge, Inc.*, 85 B.R. 980, 984 (Bankr. E.D. Pa. 1988)). The Eleventh Circuit has held that the "clear and convincing evidence standard is more exacting than the preponderance of the evidence standard but, unlike criminal contempt, does not require proof beyond a reasonable doubt." *Jove Engineering, Inc. v. IRS*, 92 F.3d 1539, 1545-1546 (11th Cir. 1996). In other words, the "clear and convincing evidence" is a heavy evidentiary burden that requires precise and persuasive proof in order to be satisfied.

Section 1104(a) of the Bankruptcy Code states that "[a]t any time after the commencement of the case but before confirmation of a plan, on request of a party in interest . . . 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 . . . ; (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. §§ 1104(a)(1) and (2). Section 1104 thus creates two potential paths to the appointment of a trustee.

Under § 1104(a)(1), a court is required to appoint a trustee if it finds that "cause" exists to appoint one; further, "it is within the court's discretion, on a case-by-case basis, 'to determine whether conduct rises to the level of 'cause.'" *In re Sundale*, 400 B.R. 890, 900 (Bankr. S.D. Fla.

2009) (quoting *Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 242 (4th Cir. 1987)). In determining whether "cause" exists, courts in the Eleventh Circuit consider the following:

1. Materiality of the misconduct;

2. Evenhandedness or lack of same in dealings with insiders or affiliated entities vis-à-vis other creditors or customers;

3. The existence of pre-petition voidable preferences or fraudulent transfers;

4. Unwillingness or inability of management to pursue estate causes of action;

5. Conflicts of interest on the part of management interfering with its ability to fulfill fiduciary duties to the debtor;

6. Self-dealing by management or waste or squandering of corporate assets.

In re Intercat, Inc., 247 B.R. 911, 920-921 (Bankr. S.D. Ga. 2000) (citing *Committee of Dalkon Shield Claimants v. A.H. Robins Company, Inc.*, 828 F.2d 239 (4th Cir. 1987)).

Additionally, courts stress that "poor management alone does not warrant appointment of a trustee." *Sundale*, 400 B.R. at 907 (citing *In re St. Louis Globe-Democrat, Inc.*, 63 B.R. 131 (Bankr. E.D. Mo. 1985); *see also In re La Sherene, Inc.*, 3 B.R. 169 (Bankr. N.D. Ga. 1980)). "After all, it is reasonable to assume that the majority of businesses that arrive in chapter 11 have exercised a certain degree of incompetence or mismanagement." *Id.* Therefore, courts hold that, in order for mismanagement to rise to the level of "gross mismanagement" (and, therefore, "cause") it must constitute "extreme ineptitude on the part of management" and "often include[s] elements that hint at fraud, in addition to negligence." *Id.* (quoting *In re Mako, Inc.*, 102 B.R. 809, 812 (Bankr. E.D. Okla. 1988) and *In re Microwave Prod. of Am., Inc.*, 102 B.R. 666, 676 (Bankr. W.D. Tenn. 1989)).

Under § 1104(a)(2) a court is empowered to appoint a trustee, in its discretion, if such appointment is "in the interests of creditors." 11 U.S.C. § 1104(a)(2). Courts look to whether the "totality of the circumstances warrants the appointment of a trustee under section 1104(a)(2)." *Sundale*, 400 B.R. at 908. The burden of proof remains the same under subsection (a)(2) as it did under subsection (a)(1): a "party seeking the appointment of a trustee must show by clear and convincing evidence that the appointment of a Trustee is warranted." *Royster*, 145 B.R. at 90.

In the Trustee Motion, the Committee asserts both that cause exists for appointment of a trustee and that such appointment would be in the best interest of creditors because (i) management has breached its fiduciary duties to creditors, (ii) management is not competent to continue to manage the Debtors' affairs, and (iii) "the Debtors' operations are tantamount to a Ponzi scheme." Each of these grounds is based upon unsupported or conclusory allegations or based upon facts that do satisfy the clear and convincing evidence burden needed to justify appointment of a trustee; accordingly, the Court should deny the Committee's Motion.

1. Management's Conduct Both Prepetition and Postpetition Demonstrates That It Is Not Acting Out of Self-Interest or Affected By Alleged Conflicts

The Committee alleges that a trustee is required based on the conflicts of interest created by Mr. Bellville's compensation and by the Debtors' leases of property from former and current equity owners. The Committee cites several cases for the proposition that a conflict of interest warrants appointment of a chapter 11 trustee; however, all of these cases recognize that the existence of a potential conflict does not necessarily warrant appointment of a trustee. *See In re Suncruz Casinos*, 298 B.R. 821, 832 (Bankr. S.D. Fla. 2003) (stating that the "mere fact that a party occupies dual roles as an owner and a creditor in a bankruptcy case is clearly insufficient to establish cause for the appointment of a trustee."); *see also In re Marvel Entm't Group, Inc.*, 140

F. 3d 463, 473 (3d Cir. 1998) (finding that trustee is warranted where "an unhealthy conflict of interest was manifest in the 'deep-seeded conflict and animosity'" between debtors and creditors, but by no means is there a "per se rule" in such cases); *In re Cajun Elec. Power Coop.*, 74 F. 3d 599 (5th Cir. 1996) (finding that trustee was warranted because the "conflicts present in this case go beyond the "'inherent' conflicts under which all healthy cooperatives operate").[5] The facts in this case are distinguishable from the cases cited by the Committee.

The alleged conflicts of interest on which the Committee relies do not rise to the level described in the above cases for appointment of a Trustee. In fact, the facts on which the Committee relies are similar to those in *In re Klein/Ray Broadcasting*, 100 B.R. 509 (9th Cir. B.A.P. 1987). In that case, a creditor, by way of unsubstantiated allegations from counsel, argued that a trustee should be appointed as a result of conflicts of interest due to existing management's potential claims against the estate and compensation as employees of the debtor. *Id.* at 510-511. The court found that these allegations did not demonstrate a conflict of interest but instead "merely raises a question as to a possible conflict of interest." *Id.* at 511. The court further found that the creditor provided no evidence that present management's compensation was excessive. *Id.* at 511. *In re Justus Hospitality Props., Ltd.*, 86 B.R. 261 (Bankr. M.D. Fla. 1988) is also applicable here. In that case, the bankruptcy court denied a motion to appoint a chapter 11 trustee and found unconvincing a creditor's argument that a trustee should be appointed where "the loyalty of present management is put into question by many competing business interests and the potential for inter-company dealings favoring those companies owned by present management." *Id.* at 266.

[5] The Committee also cites *In re RJ Mfg. Inc.*, 2004 WL 764669 (Bankr. N.D. Iowa 2004). The Court in a fact recitation stated that it previously appointed a limited purpose chapter 11 trustee to monitor litigation, but the opinion itself does not stand for the proposition the Committee asserts; instead, it solely deals with the approval of the compensation for the debtor's attorney.

Moreover, the actual facts here reveal that the Debtors' management in this case have taken substantial steps to maximize the value of the Debtors to be returned to creditors with no regard as to the effect of those actions on equity. Many of the Committee's allegations are simply unsubstantiated charges that Mr. Bellville is acting only to protect his own job and financial interests rather than seeking to maximize return for creditors. However, the Debtors have repeatedly informed the Committee of their efforts to seek financing or a sale of the companies. Further, the transaction contemplated by the Plan on file would sell the companies to an unrelated third party, terminate the Interstate Motor Club agreement and cancel all equity interests of current holders, which demonstrates current management's commitment to put creditors before themselves and equity, as does the decision to seek to retain a CRO.

The Committee also alleges that the Debtors are liquidating their assets and paying the proceeds to insiders. However, any payments to insiders are the result of salaries and contractual obligations. Bellville's current salary is the same salary he received prepetition and is disclosed, and the Debtors also make contractually required lease payments to the Martin Family Real Estate Trust for real estate that includes the headquarters and numerous branch locations (the Martin Family interests own approximately two-thirds of the Debtors' equity). Moreover, the CRO that the Debtors intend to retain will have full authority to review and terminate these obligations and the Debtors have already initiated investigations of those transactions as discussed below.

With regard to the leases and subleases with the Martin Family, at the first meeting between the Debtors and the Committee on February 6, 2012, the Debtors informed the Committee that prior to the Petition Date, Martin Family Sublease, after a request from the Debtors, agreed to terminate the subleases with no penalty to the Debtors. The Debtors also informed the Committee that it had begun inquiring into the relationship between the various Martin entities and the Debtors and that the Debtors are conducting a complete investigation of all transactions between the Debtors and any Martin family insiders.

The actions of the Debtors to negotiate the termination of the subleases and to investigate all prior dealings with the Martin family were known to the Committee when they included the statements in the Trustee Motion concerning these leases. The negotiation of the release from all subleases and the investigation of all transactions with the Martin real estate entities are certainly not consistent with the Committee's allegations. Instead, the Debtors conduct in dealing with the Martin Family demonstrate the independence of the Debtors' management and their competency and determination to actively seek to lower costs and seek recoveries for the Estates.

As evidenced by the facts discussed above, the Debtors' management has worked tirelessly since before the bankruptcy petitions were filed to chart a course for the Debtors that would create the highest possible return to creditors. The Committee's allegations do nothing more than "raise a question as to a possible conflict of interest." *Klein/Ray*, 100 B.R. at 511. The actual facts belie any assertion that an actual conflict of interest exists.

2. Management's Conduct Demonstrates That It Is Competent To Maximize the Value of the Estates and the Return for Creditors

The Debtors' management has demonstrated through its actions related to the implementation of the Restructuring Plan that it is competent and focused on minimizing costs and ensuring the highest return to creditors. The Committee's assertion that Debtors' management is incompetent is based largely upon unsubstantiated allegations, distortions, and in at least one instance, describing conduct that resulted in a significant cost saving as an incompetent act.

a) The Committee's Allegations of Incompetence and Mismanagement Do Not Rise to the Level Necessary to Appoint a Trustee

The Committee relies heavily in the Motion on the alleged "incompetence" and "gross mismanagement" of the Debtors' management; however, the Debtors' purported incompetence and mismanagement as alleged do not rise to the level required to appoint a trustee. As explained above, courts are reluctant to appoint a trustee based on bad management decisions. *See Sundale*, 400 B.R. at 907; *see also Schuster v. Dragone*, 266 B.R. 268, 272 (D. Conn. 2001) (affirming denial of trustee motion); *In re 4 C Solutions, Inc.*, 289 B.R. 354, 370-71 (Bankr. C.D. Ill. 2003); *In re Sletteland*, 260 B.R. 657, 671-72 (Bankr. S.D.N.Y. 2001) (debtor's past poor judgment in allowing adverse judgment of $3 million to be entered against him is not gross mismanagement that justifies appointment of trustee); *In re Mako, Inc.*, 102 B.R. 809, 811 (Bankr. E.D. Okla. 1988) (practice of making insider loans to management did not constitute cause to appoint trustee); *In re Stein & Day, Inc.*, 87 B.R. 290, (Bankr. S.D.N.Y. 1988).

This case is very similar to *Sundale*, in which the court denied a motion to appoint a chapter 11 trustee. In *Sundale*, the debtors were related entities owned and controlled by a single person, Phillip Scutieri ("Scutieri"), who also owned land adjacent to the debtors' hotel that he leased to the hotel to use for tennis courts. *In re Sundale*, 400 B.R. at 895-896. The creditors argued that "cause" existed for the appointment of a trustee under § 1104(a)(1) because, among other reasons, (1) the debtor entities failed to observe corporate formalities in their dealings, (2) the debtors did not pay certain taxes in the months leading up to their bankruptcy, (3) Scutieri allegedly took money out of the hotel, (4) the debtors failed to renew the hotel's liquor license, resulting in a significant loss of revenue, (5) the debtors consistently filed inaccurate schedules and amended schedules; (6) the debtors did not install required fire extinguishers in the hotel, and (7) the debtors engaged in "gross mismanagement" of the hotel. *Id.* at 902-908.

Broadly, the court recognized that "[t]here is no question that the Debtors' finances could have been better managed pre-petition." *Id.* at 906. With respect to the debtor's failure to observe corporate formalities, the court stated that "[t]here is no question that, pre-petition, Mr. Scutieri operated his various corporations and partnerships more like separate bank accounts than separate legal entities." *Id.* at 902. Yet, despite the abysmal state of the debtors' corporate and financial affairs, the court found that there was no evidence "that the manner in which Mr. Scutieri operated his entities' cash pre-petition defrauded any creditors." *Id.* at 903. As a result, the court held that a complete disregard for corporate formalities, while irresponsible as a business matter, did not rise to the level of "cause." *Id*. Similarly, the court held that, regardless whether Scutieri took any money out of the hotel, "the movants have failed to demonstrate that the flow of money in and out of the Debtors was designed to, or in fact did, cheat or defraud creditors." *In re Sundale*, 400 B.R. at 906. Therefore, despite horrible business decisions and terrible financial management, the court held that the Scutieri's actions did not rise to the level of "cause". Finally, the court rejected the creditors' claim of gross mismanagement, citing the standards discussed above. *Id.* at 908.

The Committee's allegations in its Motion do not even rise to the level present in *Sundale*. The supposed incompetence and gross mismanagement outlined by the Committee revolve around conclusory allegations unsupported by any facts or case law. Of the four grounds asserted by the Committee, two are not supportable at this stage—the Debtors do have a plan to restructure that has been in place since September 2011. The Debtors further have demonstrated their willingness to pursue options that include cancellation of current equity and appointment of a CRO, thereby eliminating any "conflict of interest" argument. Further, as described below, the Debtors' treatment of Best Buy Autos is a sign of competence, not incompetence, and is an exercise of sound business judgment that does not support appointment of a trustee. Similarly, as described in detail below, the Committee's allegations that the Debtors were paying exorbitant bonuses to management is false since nearly all of the bonuses paid by the Debtors went to their normal employees (and the Debtors have discontinued even that practice). The Committee is therefore left with its claim that the Debtors lack internal financial controls. According to the above-cited cases, this allegation does not provide cause for appointment of a trustee.

The Committee's argument that the Debtors' substantial losses warrant appointment of a trustee would require the appointment of a trustee in nearly all bankruptcy cases. However, the policy, best articulated by the Fourth Circuit Court of Appeals in approving of the district court's order denying appointment of a trustee in *Committee of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, 828 F. 2d 239 (4th Cir. 1987), that a debtor-in-possession should have a chance to reorganize its debts runs directly contra to the Committee's position. In *A.H. Robins Co.*, the circuit court quoted with approval the district court's opinion that

> the concepts of incompetence, dishonesty, gross mismanagement and even fraud all cover a wide spectrum of conduct. While under 1104(a)(1) the Court is not directly called upon to weigh the cost and benefits of appointing a trustee, it nevertheless cannot ignore competing benefit and harm that such appointment may place upon the estate. Coupled with those concerns is the overriding philosophy of Chapter 11, which is to give the debtor a second chance. Consistent with such a philosophy is this court's finding that current management should be permitted to identify and correct its past mistakes.

Id. at 240-41. The circuit court went on to affirm the district court's denial of the committee's motion based on the district court's finding that while civil contempt sanctions were warranted against the debtor's principal for violating a court order against paying pre-petition debts without prior court approval, the district court nonetheless "found the present management capable and amenable to a fair and expeditious plan to compensate claimants." *Id.* at 240, 241. As further discussed below, the Debtors' management have amply demonstrated that they are committed "to a fair and expeditions plan to compensate claimants."

In short, the Committee's allegations in its Motion simply do not rise to a level that would constitute cause to appoint a trustee. As further described below, most of the Committee's allegations are not supportable by the facts. Even so, just because the Debtors lost money, have an alleged (but not proven) conflict of interest, "lack internal financial controls" or have failed to place subsidiaries in bankruptcy does not mean that the Committee has demonstrated by clear and convincing evidence that cause exists to appoint a trustee, particularly when the Debtors' management has demonstrated that they are willing to cancel current equity holders' equity and appoint a CRO. Accordingly, the Committee's Motion should be denied.

b) The sale of assets by Best Buy and the decision not to file bankruptcy for Best Buy Resulted in a substantial benefit to the Debtors, their estates, and creditors.

The Committee asserts in paragraph 24 that the Debtors exhibited incompetence by failing to file a bankruptcy petition for Best Buy Autos of Bainbridge Inc., a subsidiary of The Money Tree of Georgia Inc. However, this alleged act of incompetence was not only a display of sound business judgment, but also resulted in the conservation of a significant amount of estate resources. Best Buy has essentially two major creditors, the floor plan financer and the intercompany claim owed by Best Buy to The Money Tree of Georgia Inc. Neither of these debts is in default, and thus there is no legal, strategic, or business reason to place Best Buy into bankruptcy.

Additionally, the Debtors have historically sold loans created by Best Buy sales to third parties. Prior to the Petition Date, Best Buy sold approximately $4 million of its loan portfolio to a third party purchaser at non-distressed pricing on terms substantially identical to normal sales. The proceeds of this sale were then used to partially pay down the intercompany debt owed by

Best Buy to The Money Tree of Georgia. This payment to The Money Tree of Georgia created in excess of $3 million in liquidity for The Money Tree of Georgia, the Debtor entity with the largest operations and the largest operating costs.

As a result of this liquidity, The Money Tree of Georgia Inc. and the Debtors as a group were able to avoid obtaining debtor-in-possession financing and thereby save the Debtors the significant costs associated with DIP financing (including interest expenses, facility fees, and other financing fees, professional fees of both the DIP Lender and the Debtors in formalizing the terms of the financing agreement and seeking court approval of the financing, and other related fees). Moreover, avoiding DIP financing allowed the Debtors flexibility to seek a sale or restructure creating a secured lender with priority over unsecured creditors. That the Committee considers these decisions signs of incompetence is astounding.

c) The Payment of Bonuses to Employees and Salespeople Was Part of the Historical Compensation Structure of the Debtors Which Was Modified as Part of the Restructuring Plan

The Committee's assertions regarding the Debtors bonuses to employees are both factually incomplete and inaccurate. First, the Debtors ceased making any discretionary bonuses on a significant level in 2011 as part of the Restructuring Plan and have not continued them in 2012 (so there is no need to appoint a trustee to stop the Debtors from paying bonuses). Second, only about $25,000 of the approximately $2 million in annual bonuses paid by the Debtors were paid to management and executives. Third, a portion of the bonuses listed relate to bonuses paid to car salespersons at the various car sales subsidiaries of the Debtors according to standard practice in the automobile industry. The remaining bonuses, while discretionary, were part of the historical compensation for the Debtors' employees that these employees had come to expect for many years. Prior to the bankruptcy filing, the Debtors employed more than three hundred workers at low salaries or low hourly rates, with a significant portion of these workers' compensation structured around performance-based discretionary bonuses. As part of the Restructuring Plan, the Debtors reduced or eliminated these bonuses. In short, the Committee's allegations with respect to bonuses to management is at best a mischaracterization and does not support appointment of a trustee.

d) The Committee's Assertions "upon information and belief" Regarding the Debtors' Motivations and Plans to Reorganize Are Contradicted by the Information the Debtors' Have Repeatedly Provided to the Committee.

The Committee alleges in Paragraph 5 that the Debtors, after having been in bankruptcy for two months, "have articulated no discernible strategy for reorganizing or liquidating their assets" and are using their stay in bankruptcy to "liquidate their assets and pay insiders the proceeds." Trustee Motion at ¶5. However, the Debtors repeatedly informed the Committee of its plans to seek outside financing or a potential purchaser at an in person meeting and through regular contact by phone and email, regularly updated the Committee on its progress, filed the Disclosure Statement within the initial exclusivity period, and only paid insiders ordinary course salaries and contractual obligations.

The Debtors met with the Committee to discuss its status and strategy immediately after the Committee chose counsel. At this meeting, the Debtors displayed a power point presentation demonstrating the Debtors' proposed strategy, which included using the Debtors' financial consultants and the Debtors' contacts within the consumer lending industry to market financing or purchase opportunities. The meeting lasted for several hours, at which time the Committee and their counsel were allowed to question the Debtors' President and CFO.

The Debtors have repeatedly stressed to the Committee since this first meeting that the Debtors would actively pursue all opportunities to recover the highest and best return to creditors, including a sale of the company or a plan of reorganization. In addition to these repeated assurances, the Debtors have repeatedly and regularly advised the Committee of the status of its marketing with detailed accounts of its marketing efforts. The Debtors have informed the Committee that they have had discussions with not less **than ten (10) separate independent third parties** about potential financing or a sale of the company. Further, the Debtors have openly sought assistance from the Committee in locating other potential interested parties. These actions do not support the Committee's assertions that the Debtors and their management have no plan to exit bankruptcy

e) The Committee's Assertion That a Restatement of Its Public Filings With the SEC Warrants Appointment of a Trustee and That the Debtors Cannot Promise That They Can Make Accurate Statements Going Forward is Not True.

The Committee's Assertion that the "Debtors cannot even promise that they can make accurate statements going forward" is patently untrue. The language in the companies' SEC filings is tied to their former public debt registrations, which were cancelled prior to the filing of the petition, and thus are no longer valid. The Debtors affirmed that the schedules filed in this case are accurate, and are required to affirm that the monthly operating reports filed in the case are accurate and complete as well. The Debtors have responded to voluminous requests for information by the Committee by producing tens of thousands if not hundreds of thousands of pages of documents to the Committee for their review. Further, the Committee's financial consultants spent 9 days at the Debtors' headquarters reviewing hundreds of thousands of documents available for review. Despite extremely broad, vague, and unduly burdensome requests, the Debtors have not sought court intervention to limit discovery, but have instead sought to produce as much information as possible to the Committee at significant cost to the Estates. The Debtors have shown this cooperation from beginning to end, contrary to the impression the Committee sought to leave with the Court. These actions refute any notion that the Debtors have not cooperated with the Committee and belie any assertion that the Debtors' management has no control over the Debtors or their finances; instead, the Debtors have been extremely forthright in providing evidence of the Debtors' operations to the Committee.

3. The Committee's Unsupported and Conclusory Allegations that the Debtors Are or Were Operating a Ponzi Scheme Are Reckless and Demonstrably False

The Committee's reliance on an alleged Ponzi scheme theory to demonstrate fraud fails because the Debtors are not a Ponzi scheme. Courts in the Eleventh Circuit have described a Ponzi scheme as a "phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." *Kapila v. TD Bank, N.A. (In re Pearlman)*, 440 B.R. 900, 904 (Bankr. M.D. Fla. 2010) (quoting *United States v. Silvestri*, 409 F.3d 1311, 1317 n. 6 (11th Cir. 2005)). Under Eleventh Circuit jurisprudence, proof of a Ponzi scheme leads to an inference of fraudulent intent, rendering the more difficult fraudulent intent analysis unnecessary. *See id.* at 904. To prove a Ponzi scheme in the Eleventh Circuit, the following elements must be satisfied:

> (1) deposits were made by investors; (2) the debtors conducted little or no legitimate business operations as represented to investors; (3) the purported business operations of the debtors produced little or no profits or earnings; and (4) the source of payments to investors was from cash infused by new investors.

Id. (citing *Wiand v. Waxenburg*, 611 F. Supp. 2d 1299, 1312 (M.D. Fla. 2009).

The Debtors' investment program is clearly not a Ponzi scheme under this test because the Debtors were and are conducting an entirely legitimate business operation. This fact alone distinguishes *In re Vaughan*, 429 B.R. 14 (Bankr. D.N.M. 2010), which the Committee cites, because *Vaughan* involved a bona fide Ponzi scheme in which the debtor had no business operations and had misrepresented how he would use the funds received from investors.

Vaughan did not involve a conclusory allegation of a Ponzi scheme unsupported by the facts or the law. Instead, this case is more like that of *In re Marroquin*, 441 B.R. 586, 599 (Bankr. N.D. Ohio 2010), in which the court found:

> Typically, a Ponzi business will have little or no legitimate business purpose. However, in this case, the Defendants' business, R & E Exports, performed a legitimate function: that of buying and selling chattels. There is no reason to surmise that this business was a facade or a sham, with the Plaintiff acknowledging that the Defendants conducted extensive business activity. For example, the Plaintiff acknowledges that he saw his property and other property at the Defendants' place of business, thus showing that the Defendants were engaged in commerce. The Defendants' business also realized considerable sales over a number of years, an outcome not likely to occur in a business having no legitimate purpose. The ultimate demise of the Defendants' business, thus, cannot be said to have been inevitable.

Id. See also In re S. Indus. Banking Corp., 87 B.R. 524, 525 (Bankr. E.D. Tenn. 1988) (stating that the fact of debtor's insolvency and principals' malfeasance did not automatically convert debtor from legitimate business enterprise to Ponzi scheme).

The Debtors' sole purpose is to run a legitimate business—making consumer loans—and not to perpetuate an investing fraud. There was never any intent to create or perpetuate a phony plan to ensnare more and more unwitting investors; in fact, the Debtors disclosed in each prospectus that accompanied the debt issuances that the proceeds would be used to refinance existing debt. Instead, the Debtors were borrowing funds to support legitimate business operations that they expected to rehabilitate. These legitimate business operations employed 300 people in 2011 (and 150 currently), operated out of 90 branches in 2012 (and 46 branches currently), and generated $15 million in net revenue for the twelve months ending in September 2011 (and $20 million in net revenue for the twelve months ending in September 2010). Moreover, in its prospectus to investors, the Debtors wholly and completely described its business model and the use of funds to refinance debt, and warned putative investors of the risks inherent in investing with their company. The Debtors' business has made a substantial amount of money over the years and has only recently, with the downturn in the economy, had financial difficulties. Finally, because the Debtors' normal business operations continue to generate substantial revenue, it is not possible for the Committee to prove that the source of payments to investors was from cash infused by new investors. In short, the Debtors' investment program falls well short of the Eleventh Circuit's Ponzi scheme definition and the elements outlined in *Kapila*. Because the Committee's allegations of fraud have no basis at all in law or fact, the Court should deny the Trustee Motion.

4. Appointment of a Trustee is Not in the Best Interests of Creditors

Finally, appointment of a trustee at this stage of the bankruptcy proceeding would not be in the best interests of creditors. In assessing whether appointment of a trustee is in the best interests of creditors, courts consider the following factors:

> (1) the trustworthiness of the debtor;
>
> (2) the debtor in possession's past and present performance and prospects for the debtor's rehabilitation;
>
> (3) the confidence—or lack thereof—of the business community and of creditors in the present management; and
>
> (4) the benefits derived by the appointment of a trustee, balanced against the cost of appointment.

In re Euro-Am. Lodging Corp. 365 B.R. 421, 427 (Bankr. S.D.N.Y. 2007) (quoting *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990). Each of these factors weighs heavily against the appointment of a trustee in the Debtors' cases.

The Committee apparently asserts that where a Debtor has not filed a plan or set an auction date within two months of the filing of a bankruptcy case the appointment of a trustee is warranted. The Debtors began implementation of its Restructuring Plan prior to the filing of the bankruptcy petition, and continued marketing of the company to potential purchasers and financers immediately after the filing of the petition. Further, the Committee was aware of the Debtors' efforts, as the Debtors informed the Committee through counsel on numerous occasions of the Debtors efforts, including at the first meeting of the Debtors and the Committee in February 2012 and subsequent regular updates.

While the Debtors have lost money in the past, they have proven a willingness to cancel or sell current equity interests or sell the company or assets. The Debtors have further proposed to retain a CRO with authority to carry out the restructuring and decide whether to retain all or none of current management. These actions cause factors 2-4 above to weigh against appointment of a trustee. *See In re PMH Corp.*, 116 B.R. 644, 645 (Bankr. N.D. Ind. 1989) ("Courts . . . have been reluctant to appoint a trustee until a debtor has had a reasonable opportunity to seek confirmation of a plan of reorganization and make a fresh start as Congress intended."); *In re Coral Springs Medical Ctr. Assocs., Ltd.*, 99 B.R. 112, 113 (Bankr. S.D. Fla. 1989) (where debtor had filed plan 9 months into bankruptcy case and plan would be tested by confirmation, court saw "no reason at this juncture to saddle [the estate] with the expense of a trustee (between 5% and 10% of gross receipts)" because of alleged mismanagement of debtors). Similarly here, there is no need to appoint a trustee at this time. Accordingly, the Committee's Motion should be denied.

VI. Conclusion

WHEREFORE, the Debtors respectfully request that the Court deny the Committee's Motion and refuse to appoint a chapter 11 trustee. The Debtors request such further and different relief to which they may be entitled.

Dated this the 24th day of April, 2012.

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