

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
. Case No. 15-12507 (LSS)
NEWBURY COMMON ASSOCIATES, .
LLC, et al, . Courtroom No. 2
. 824 Market Street
Debtors. . Wilmington, Delaware 19801
. Friday, February 12, 2016

TRANSCRIPT OF COURT DECISION RE:
DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE
EMPLOYMENT AND RETENTION OF DECHERT, LLC, AS COUNSEL FOR THE
DEBTORS AND DEBTORS-IN-POSSESSION
NUNC *PRO TUNC* TO THE PETITION DATE;
DEBTORS' APPLICATION FOR ENTRY OF AN ORDER AUTHORIZING THE
RETENTION OF ANCHIN BLOCK & ANCHIN, LLP, AS FORENSIC
ACCOUNTANTS FOR THE DEBTORS AND DEBTORS-IN-POSSESSION
NUNC *PRO TUNC* TO THE PETITION DATE
DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS
TO (I) EMPLOY AND RETAIN BEILINSON ADVISORY GROUP AS
RESTRUCTURING ADVISORS FOR THE DEBTORS
AND (II) DESIGNATE MARC BEILINSON AS CHIEF RESTRUCTURING
OFFICER NUNC *PRO TUNC* TO THE PETITION DATE
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

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ALSO APPEARING VIA TELEPHONE:

Marc Beilinson
Mark Murphy
BEILINSON ADVISORY GROUP

1 (Proceedings commence at 10:34 a.m.)

2 THE COURT: Please be seated.

3 Okay. We're here for my ruling today on the retention
4 issues that were left open on February 5th. As everyone knows,
5 at that hearing, I took under advisement the retention
6 applications of Dechert and Anchin, as well as the debtors'
7 motion to employ Beilinson Advisory Group as restructuring
8 advisors.

9 At the hearing, debtors asked to go forward based on
10 the documentary record and argument. In support of the Dechert
11 application, debtors rely on the declarations found at Docket
12 Numbers 5; 177; 43, Exhibit B and C; 110, Exhibit A; 155,
13 Exhibit A; and 184. In support of the Anchin application,
14 debtors additionally rely on Docket Numbers 44, Exhibit B; 155,
15 Exhibit B. And as to the motion to retain the Beilinson
16 Advisory Group, the debtors additionally rely on Docket Number
17 46, Exhibit B; and 155, Exhibit C.

18 Objections sought to cross-examine the declarants at
19 the hearing. In order to have sufficient time to address the
20 debtors' first-day motions, I determined to go forward, as the
21 debtors requested, subject to a further hearing, if I thought
22 cross-examination was needed.

23 I have reviewed each of the retention applications and
24 the motion, as well as the objections to each, and the replies.
25 And I have considered the declarations in support of each, as

1 outlined by debtors, as well as the arguments of counsel.

2 Based on the record presented, I am denying the
3 debtors' application to retain Dechert. I am approving the
4 debtors' application to employ Beilinson Advisory Group. As
5 far as Anchin, I am not ruling on that application at this
6 time, but will discuss it.

7 I will start with Dechert's retention. Per Dechert's
8 engagement letter, dated December 13th, 2015, Dechert was
9 retained by Seaboard Realty, LLC, and each of the entities that
10 have now filed bankruptcy petitions. Dechert was retained to
11 provide advice in connection with a restructuring of
12 substantially all or a portion of the assets of each entity, or
13 one or more bankruptcy filings. Ultimately, Dechert filed
14 cases for each of its clients.

15 Unlike most corporate cases filed in this
16 jurisdiction, these cases involve debtors that have unique sets
17 of owners. This is not the typical filing of a parent and its
18 wholly owned subsidiaries.

19 Prior to Dechert's retention by the debtors, Dechert
20 was retained by Mr. Merritt and Mr. Kelly in their individual
21 capacities. Per Mr. Greer's supplemental declaration, the work
22 Dechert performed for Mr. Kelly and Mr. Merritt related to the
23 underlying investigation into the assets and liabilities of the
24 original debtors and their then non-debtor affiliates. Dechert
25 ceased its representation of Mr. Merritt and Mr. Kelly no later

1 than December 10th.

2 Mr. Merritt and Mr. Kelly have many roles in these
3 cases. They remain in management, albeit they have ceded
4 decision-making authority to an independent managing member.
5 They are also investors in certain of the debtors, either
6 through their ownership of Seaboard Realty or through
7 individual investments. And they are alleged to have provided
8 guarantees on certain loans, an assertion they have denied.

9 Debtors have also asserted that Mr. Kelly and Mr.
10 Merritt may have indemnification rights against certain of the
11 debtors, so they may also be creditors of one or more estates.
12 Further, certain of the debtors may have claims against Mr.
13 Merritt and Mr. Kelly individually and/or in their capacities
14 as managers of the debtors.

15 Lenders may have claims against them, in connection
16 with the purported guarantees, and investors may have claims,
17 as well. Two investors have already sued two of the debtors,
18 Mr. DiMenna, Mr. Merritt, and Mr. Kelly, in connection with
19 their investments.

20 There is no evidence regarding what advice Dechert
21 provided prepetition to Mr. Merritt and Mr. Kelly, related to
22 any of their roles, the purported guarantees, the restructuring
23 of the debtors, or the assets and liabilities of the debtors,
24 the commingling of the debtors' funds, or otherwise. Any such
25 advised is privileged as to Mr. Kelly and Mr. Merritt.

1 Nonetheless, it is clear that debtors' representation of Mr.
2 Kelly and Mr. Merritt, in their individual capacities, was
3 directly related to the cases now before me.

4 Also, per Dechert's engagement letter, Dechert was
5 provided a retainer from Tag Forest, LLC, in the approximate
6 amount of \$618,000. Tag Forest is different from other debtors
7 in at least two respects: Its commercial property was sold
8 prepetition, and Seaboard Realty did not own any equity in Tag
9 Forest.

10 All of the detail regarding the funds that constituted
11 the retainer that was provided in the engagement letter and Mr.
12 Greer's supplemental declaration, as well as the evidence and
13 representations regarding the retainer at previous hearings,
14 raises questions.

15 Approximately 418,000 of the retainer came from a
16 distribution sent to Mr. Merritt by Tag Forest, and then sent
17 my Mr. Merritt to Dechert, to be held on behalf of Tag Forest.
18 There is no evidence regarding what advice, if any, was given
19 to Mr. Merritt regarding his handling of the funds he received
20 from Tag Forest. Any such advise is privileged as to Mr.
21 Merritt.

22 Regardless, as Mr. Greer argued, the ultimate
23 treatment of the retainer, where the funds came from, and whose
24 property the funds actually are is something that needs to be
25 investigated. Mr. Greer acknowledged that whether his firm

1 should be able to use the retainer or whether it should be part
2 of this estate is something to be determined. At a minimum,
3 the questions surrounding the retainer compounds the issues
4 raised by Dechert's prepetition representation of Mr. Merritt
5 and Mr. Kelly.

6 With respect to Dechert's retention, all parties
7 directed the Court to the Third Circuit's decision in BH&P.
8 This case sets forth the relevant standard:

9 One, Section 327 imposes a per se disqualification of
10 any attorney who has an actual conflict of interest.

11 Two, the Court may, within its discretion, disqualify
12 an attorney who has a potential conflict of interest.

13 And three, the Court may not disqualify an attorney on
14 the appearance of a conflict alone.

15 The standard is easy to state, but not as easy to
16 apply. The term "actual conflict of interest" is not defined
17 in the Bankruptcy Code; rather, it is a determination made on
18 the facts and circumstances of a particular case.

19 In BH&P the Third Circuit stated that factors to be
20 considered, albeit in a concurrent representation scenario,
21 include the nature of the disclosure of the conflict made at
22 the time of the appointment, whether the interests of the
23 related estates are parallel or conflicting, and the nature of
24 the interdebtor claims.

25 As applied here, I look at Dechert's disclosures,

1 whether the interests of the estate and Mr. Kelly and Mr.
2 Merritt are parallel or conflicting, and the nature of those
3 claims, the claims between them.

4 As for the first factor, there is no assertion that
5 Dechert has not made full and fair disclosure. Disclosure is
6 not a factor in this case.

7 As for the second factor, I find that the interests of
8 the debtors and the interests of Mr. Kelly and Mr. Merritt are
9 not entirely parallel. While Mr. Kelly and Mr. Merritt will
10 want to see their equity interests maximized, it appears
11 inevitable that their interests will diverge from those of the
12 estates.

13 Considering the potential claims against Mr. Merritt
14 and Mr. Kelly, their various roles, their potential
15 indemnification claims, the claims on the purported guarantees,
16 and the circumstances surrounding the retainer, a combination
17 of potential, if not actual, conflicts exist between Mr.
18 Merritt and Mr. Kelly and the bankruptcy estates, or certain of
19 the estates' constituents. At the very least, the potential
20 for conflicts between the estate and Dechert's former clients
21 is apparent, even at this very early stage of the case.

22 As mentioned, Dechert represented Mr. Merritt and Mr.
23 Kelly prepetition, in connection with this matter, not an
24 unrelated matter. There is case law to the effect that such
25 constitutes an actual conflict.

1 In In Re Zenith, 214 B.R. 92, Judge Walrath found that
2 there was an actual conflict, precluding retention of a
3 financial advisor, when the financial advisor had previously
4 represented the debtor's majority shareholder and creditor in
5 connection with its investment in the debtor, even though the
6 representation was for five days, over two years prior to the
7 bankruptcy filing.

8 In Zenith, Judge Walrath distinguished Marvel, in
9 which the Third Circuit overruled the Bankruptcy Court and
10 permitted retention of a firm that represented a major creditor
11 of the debtor. In Marvel, the Third Circuit found that the
12 firm in question did not have either a potential or an actual
13 conflict because the firm never represented the creditor on a
14 matter related to the bankruptcy, and severed all
15 attorney/client relations with the creditor in anticipation of
16 its selection as trustee's counsel. As in Zenith, as opposed
17 to Marvel, the prior representation here involves the same
18 matter.

19 As for the third factor, the nature of the claims
20 between the parties, goes to the heart of the disputes, not
21 only between them, but among the various debtors. Given the
22 perpetration commingling of funds; the potential investor claims
23 described as "Ponzi-like;" and the distinct ownership interests
24 of each debtor, Dechert's perpetration representation of Mr.
25 Kelly and Mr. Merritt is concerning, even if it was for a short

1 period of time, and even if Mr. Merritt and Mr. Kelly did not
2 actively participate in any alleged wrongdoing. The
3 investigation that is ongoing is to find out what happened
4 while Dechert's former clients were at the helm.

5 Finally, there is another complicating factor. If the
6 retainer is property of one of the estates, as Dechert concedes
7 is a possibility, or the payment to Dechert should otherwise be
8 avoided, then Dechert will be a creditor of one or more of the
9 estates. In that situation, under Pillowtex, Dechert would
10 have an actual conflict.

11 Under the totality of circumstances of this case,
12 given the confluence of actual and/or potential conflicts, and
13 not based on any single factor, I find it unwise to approve
14 Dechert's retention. To the extent an actual conflict,
15 requiring a per se disqualification does not exist -- and it
16 may -- I exercise my discretion not to approve the retention,
17 given the number of potential conflicts.

18 That being said, let me make several observations,
19 given the sum of the discourse during the hearing. First, I am
20 aware of the disruption that this may cause in the debtors'
21 representation. But I note that the debtors have very
22 competent counsel in the form of Young, Conaway, Stargatt &
23 Taylor.

24 Second, I note that concurrent representation of a
25 parent corporation and one or more subsidiaries is common, if

1 not ubiquitous, in this Court, particularly in large Chapter 11
2 cases, and intercompany claims are common, as well. I do not
3 view that circumstance as requiring disqualification as a
4 matter of course. In fact, the Third Circuit states in BH&P
5 that, given the advantages of joint administration, quote:

6 "-- we are not prepared to say that interdebtor claims
7 mandate disqualification of the trustee in every
8 instance."

9 Neither am I.

10 The Adelphia case was raised. I agree with Judge
11 Gerber's observations in Adelphia, that the presence of
12 intercompany claims between debtors represented by the same
13 counsel does not always warrant disqualification of that
14 counsel. And I agree with Judge Gerber that, given the
15 substantial cost of requiring additional trustees or counsel in
16 cases where individual debtors have claims against each other,
17 a wait-and-see, fact-driven approach is approach.

18 Notwithstanding that general approach, however, Judge
19 Gerber took action, at the appropriate time in his case, to
20 limit debtors' counsel representation. In Adelphia, a party
21 sought to disqualify debtors' counsel more than three years
22 into the case, and likely for tactical reasons. Even in those
23 circumstances, while not disqualifying debtors' counsel, and
24 affirmatively stating that debtors' counsel had not acted in
25 any way wrong, the Court ordered the debtors' counsel to become

1 neutral, such that it could not represent either side of
2 certain intercompany disputes.

3 This is not Adelphia. Here, we are at the beginning
4 of these cases, and parties have brought timely objections,
5 which I do not view as strategic, but based on the facts of
6 these cases. I fear, given the circumstances of these cases,
7 that permitting Dechert to continue to represent the debtors
8 will be worse for the debtors, and quite frankly, for Dechert,
9 as well. As for the intercompany claims, I hope that we will
10 have appropriate parties, who can resolve or litigate those
11 issues at the appropriate time.

12 Third, Dechert asserts that any potential conflict
13 with respect to its previous representation of Mr. Merritt and
14 Mr. Kelly can be solved by conflict counsel. Conflict counsel
15 can work in appropriate situations. The typical situation is
16 when debtors' counsel represents a creditor in a matter
17 unrelated to the bankruptcy case. Again, that is not the case
18 here. And I note that the issues with respect to Mr. Kelly and
19 Mr. Merritt are, at least at his juncture, at the forefront of
20 these cases.

21 Turning to the retention of the Beilinson Advisory
22 Group. That motion is brought under Section 363 of the
23 Bankruptcy Code. No one has suggested that Beilinson or Mr.
24 Beilinson, in particular, is not qualified, or that the debtors
25 did not exercise their business judgment appropriately in

1 seeking to retain Beilinson, and no one has objected to the
2 retention terms.

3 Debtors argue that the retention is in line with the
4 Jay Alix Protocol and should be approved. The United States
5 Trustee's argument is that Beilinson's engagement is not in
6 line with the Jay Alix Protocol because of Beilinson's
7 representation of debtors and non-debtors. This has been
8 resolved by the filing of the second group of debtors. I also
9 find that Beilinson is not in breach of the Jay Alix Protocol.
10 Accordingly, I will approve the debtors' motion.

11 As to Anchin, debtors seek to retain Anchin to provide
12 forensic accounting services. The application states that
13 Anchin is qualified and has become familiar with the debtors'
14 businesses and operations through its participation in the
15 prepetition internal investigation.

16 The application does not appear to suffer from the
17 same deficiency as Dechert's because Anchin's engagement was by
18 Dechert, on behalf of Seaboard Realty, LLC. But the
19 application also discloses that Anchin previously provided
20 income tax preparation services to 12 of the debtors. Further,
21 there is no specific disclosure of whether Anchin does work for
22 Mr. DiMenna or any of his entities.

23 My question to the debtors is whether Anchin is the
24 appropriate forensic accounting firm, given that it provided
25 prepetition income tax preparation services to 12 of the

1 debtors. To be clear, I am not, in any way, suggesting that
2 Anchin's prepetition work for the debtors was deficient or
3 subject to challenge. I just note that it might be appropriate
4 to have a firm with no ties to the debtors, given the type of
5 work being done.

6 That said, I will ask the debtors to have Anchin
7 supplement its disclosures, if debtors determine that they
8 should continue to press the application. I will also ask the
9 debtors to consider whether Anchin's retention is necessary in
10 light of the examiner motion and any position debtors may take
11 on that motion. And that concludes my rulings for today.

12 Are there any questions?

13 MR. BRADY: No questions, Your Honor.

14 THE COURT: Thank you. Stand in recess.

15 (Proceedings concluded at 10:54 a.m.)

16 *****

1

CERTIFICATION

2

I certify that the foregoing is a correct transcript

3

from the electronic sound recording of the proceedings in the

4

above-entitled matter to the best of my knowledge and ability.

5

6

7

/s/ Coleen Rand

February 12, 2016

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Coleen Rand

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Certified Court Transcriptionists

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For Reliable