

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Medley LLC,¹

Debtor.

Chapter 11

Case No. 21-10526 (KBO)

Re: Docket No. 83

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
TO DEBTOR’S PROPOSED PAYMENT TO MEDLEY CAPITAL LLC FOR
DEFERRED COMPENSATION PURSUANT TO THE FINAL ORDER (I)
AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO CONTINUE AND
MAINTAIN ITS EXISTING CASH MANAGEMENT SYSTEM, BANK ACCOUNT AND
BUSINESS FORMS, (II) AUTHORIZING THE CONTINUATION OF ORDINARY-
COURSE INTERCOMPANY TRANSACTIONS, AND (III) GRANTING RELATED
RELIEF**

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the chapter 11 case of the above-captioned debtor and debtor in possession (the “Debtor”), by and through its undersigned counsel, hereby files this objection (the “Objection”), to the Debtor’s proposed intercompany transfer to Medley Capital LLC (“Medley Capital”) for the purpose of making certain deferred compensation payments, pursuant to *The Final Order (I) Authorizing, but Not Directing, the Debtor to Continue and Maintain its Existing Cash Management System, Bank Account and Business Forms, (II) Authorizing the Continuation of Ordinary-Course Intercompany Transactions, and (III) Granting Related Relief* (the “Cash Management Order”).² In support of the Objection, the Committee respectfully represents as follows:

¹ The last four digits of the Debtor’s taxpayer identification number are 7343. The Debtor’s principal executive office is located at 280 Park Avenue, 6th Floor East, New York, New York 10017.

² Docket No. 83.



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BACKGROUND

1. On March 7, 2021 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”). Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor continues to operate its business and manage its property as a debtor in possession. No trustee or examiner has been appointed in this chapter 11 case.

2. On April 22, 2021, the Office of the United States Trustee for the District of Delaware (the “U.S. Trustee”) appointed the Official Committee of Unsecured Creditors (the “Committee”), consisting of the following four members: (i) U.S. Bank National Association, as Indenture Trustee (“U.S. Bank”); (ii) Mr. Glenn Gardipee; (iii) Mr. James MacAyeal; and (iv) Mr. Carl Wegerer, III.³

3. On April 26, 2021, the Committee selected Kelley Drye & Warren LLP (“Kelley Drye”), as its counsel and FTI Consulting, Inc. (“FTI”) as its financial advisor. On April 27, 2021 the Committee selected Potter Anderson & Corroon, LLP as its Delaware counsel.

4. A detailed description of the facts and circumstances leading to this case is set forth in the *Declaration of Richard T. Allorto, Jr. in Support of Chapter 11 Petition and First Day Pleadings* (the “First Day Declaration”).⁴

5. On the Petition Date, the Debtor filed its *Debtor’s Motion for Entry of Interim and Final Orders (I) Authorizing, but Not Directing, the Debtor to Continue and Maintain its Existing Cash Management System, Bank Account and Business Forms, (II) Authorizing the Continuation of Ordinary-Course Intercompany Transactions, and (III) Granting Related Relief* (the “Cash

³ Docket No. 110.

⁴ Docket No. 5.

Management Motion”).⁵ The Cash Management Motion was approved on an interim basis pursuant to an order entered on March 11, 2021.⁶ On April 1, 2021, following extensive negotiations between the Debtor and U.S. Bank, the Court entered the Cash Management Order on a consensual basis, authorizing the Debtor to, *inter alia*, perform Intercompany Transactions in the ordinary course of business, subject to certain limitations added by the Debtor in response to U.S. Bank’s concerns.⁷

6. As explained in greater detail in the First Day Declaration, and the Cash Management Motion, the Debtor has no operations or employees and conducts all of its business through its consolidated, non-debtor subsidiaries, including Medley Capital (collectively with the Debtor, the “Company”).

7. Also, at the outset of this case, the Debtor filed its *Chapter 11 Plan of Reorganization for Medley LLC* (the “Plan”)⁸ pursuant to which it intended to reorganize and continue conducting business through its non-debtor subsidiaries following its emergence from chapter 11. However, U.S. Bank communicated to the Debtor its dissatisfaction with the Plan and, following numerous discussions between the Debtor and U.S. Bank, the Debtor filed its *Notice of Withdrawal of Chapter 11 Plan of Reorganization for Medley LLC*.⁹ Following a public announcement by its largest client, Sierra Income Corporation (“SIC”), that SIC was conducting a “formal review process to evaluate strategic alternatives[,]”¹⁰ the Debtor subsequently announced its intention to wind down the operations of the Company and liquidate.

⁵ Docket No. 3.

⁶ Docket No. 47.

⁷ Cash Management Order, ¶ 9.

⁸ Docket No. 7.

⁹ Docket No. 146.

¹⁰ Sierra Income Corporation Form 8-K, May 27, 2021.

8. Pursuant to the Cash Management Order, prior to making any Intercompany Transactions in excess of \$200,000, the Debtor is required to provide three business days prior notice of such transaction, in which it must provide certain detail with respect to the purpose and amount of the transaction to certain parties, including the U.S. Trustee, counsel to U.S. Bank,¹¹ and Strategic Capital Advisory Services, LLC, and the Cash Management Order allows for emergency relief to be sought from the Court with respect such Intercompany Transactions. *Id.*

9. The Debtor has informed the Committee that it is now seeking to make an approximately \$662,000 Intercompany Transaction to Medley Capital for the purpose of allowing Medley Capital to make deferred compensation payments to certain of its employees relating to work done prepetition (the “Deferred Compensation Payments”). To be certain that these payments are beneficial to the Debtor’s estate and its creditors, the Committee has requested that they be made contingent on the implementation of reasonable measures to ensure that the Medley Capital employees remain with Medley Capital through the wind-down and liquidation process of the Company. As of the filing of this Objection, the Debtor has refused this request.

OBJECTION

10. The Committee acknowledges that to preserve a debtor’s value, it may at times be appropriate to pay certain employees on account of their pre-petition claims in order to retain those employees to allow the debtor (and its affiliates) to continue operating in the ordinary course. However, such payments, whether by a debtor, or by a non-debtor affiliate using funds transferred from such debtor, should only be made when they provide actual value to a debtor’s estate. Indeed,

¹¹ The U.S. Bank is a member of the Committee. Kelley Drye represented the U.S. Bank prior to its representation of the Committee. Since the formation of the Committee, the Debtor has provided Kelley Drye and FTI, as Committee professionals, with notice of Intercompany Transactions in accordance with the Cash Management Order.

this is what is required by section 503 of the Bankruptcy Code, which allows for the payment of administrative expenses that are “actual, necessary costs and expenses of preserving the estate.”¹²

11. The terms of the Cash Management Order permit Intercompany Transactions to maximize the value of the Debtor’s estate while providing the Debtor’s creditors with certain important protections with respect thereto. Based on the Debtor’s representations, the Committee is willing to allow funds to be transferred from the Debtor to Medley Capital to, among other things, pay employees to ensure a smooth wind-down of the business operations of the Company. Accordingly, to ensure that such employees provide this benefit, the Committee proposed that the Deferred Compensation Payments not be made unless such payments are subject to disgorgement in the event that an employee does not remain with the Company for such time as the recipient employee is needed to help facilitate an orderly wind-down of the Company’s business.

12. In response, the Debtor contends that Medley Capital is not a debtor, and that the Deferred Compensation Payments, therefore, do not need to meet the requirements of an administrative claim. The Debtor also claims that making the Deferred Compensation Payments subject to potential disgorgement will affect morale and lead to employee departures.

13. The Committee does not believe that potential disgorgement, a reasonable and customary safeguard to help preserve the value of the Debtor’s estate, will cause a mass exodus or otherwise affect employee morale. Indeed, the Committee supports the proposed Deferred Compensation Payments and structured its request to avoid that risk by allowing the Deferred Compensation Payments to be made at this time. Allowing for potential disgorgement merely

¹² Section 503(b)(1)(A) of the Bankruptcy Code provides in pertinent part “After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including— (1) (A)the actual, necessary costs and expenses of preserving the estate” 11 U.S.C. § 503(b)(1)(A).

ensures that the Debtor's estate and its creditors receive a benefit from payment of prepetition claims that the Debtor would otherwise have no authority to make.

14. Unfortunately, the rejection of the Committee's request exemplifies an emerging pattern in this chapter 11 case. The Debtor is utilizing the relevant sections of the Bankruptcy Code to its advantage with respect to basic protections such as the automatic stay and plan exclusivity, but seeks to avoid its strictures with respect to the remainder of the Company by arguing that Medley Capital and its other subsidiaries, through which the Debtor conducts its business, are non-debtors. The Committee believes that if it countenances this behavior now by inaction, the Debtor will continue to interpret the Cash Management Order to avoid the Committee's and this Court's oversight.

15. The Debtor may not pick and choose when to apply the Bankruptcy Code. The Debtor should only be permitted to obtain the benefits of the Bankruptcy Code if it accepts the requisite burdens and obligations. Intercompany Transactions pursuant to the Cash Management Order that permit Medley Capital and other non-debtor subsidiaries to make postpetition payments should only be permitted to the extent that they could, if made by the Debtor, satisfy the standards necessary to qualify as administrative expenses claims. Here, that means demonstrating that the Deferred Compensation Payments are actually necessary to preserve the value of the Debtor's estate.

16. Making prepetition wage payments will not benefit the Debtor's estate if the employees to whom they are made do not remain with the Company throughout the wind-down and liquidation process. Accordingly, the Intercompany Transaction to Medley Capital for the purpose of making the Deferred Compensation Payments should only be permitted if subject to disgorgement in the event that a recipient employee leaves the Company prior to the conclusion

of such employee's required contributions with respect to the wind-down and liquidation process. This will ensure that the Deferred Compensation Payments will confer a concrete benefit to the Debtor's estate by making certain that the Company will have the staff it needs to liquidate efficiently and effectively.

WHEREFORE, the Committee respectfully requests that the Court (i) prohibit the proposed Deferred Compensation Payments, and (ii) grant such other and further relief as the Court deems just and proper.

Dated: June 28, 2021
Wilmington, Delaware

Respectfully submitted,

/s/ D. Ryan Slaugh

Christopher M. Samis (No. 4909)

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*Counsel for the Official Committee of Unsecured
Creditors*

CERTIFICATE OF SERVICE

I, D. Ryan Slaugh, do hereby certify that on June 28, 2021, a copy of the foregoing **Objection of the Official Committee of Unsecured Creditors to Debtor's Proposed Payment to Medley Capital LLC for Deferred Compensation Pursuant to the Final Order (I) Authorizing, but not Directing, the Debtor to Continue and Maintain Its Existing Cash Management System, Bank Account and Business Forms, (II) Authorizing the Continuation of Ordinary Course Intercompany Transactions, and (III) Granting Related Relief** was served on the parties listed on the attached service list in manners indicated.

/s/ D. Ryan Slaugh

D. Ryan Slaugh (No. 6325)

SERVICE LIST

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| <p><u>VIA EMAIL</u> Eric J. Monzo, Esq. Brya M. Keilson, Esq. MORRIS JAMES LLP 500 Delaware Avenue, Suite 1500 Wilmington, Delaware 19801 Email: emonzo@morrisjames.com bkeilson@morrisjames.com</p> | <p><u>VIA EMAIL</u> Robert M. Hirsh, Esq. Eric Chafetz, Esq. Michael A. Kaplan, Esq. Phillip Khezri, Esq. LOWENSTEIN SANDLER LLP 1251 Avenue of the Americas New York, NY 10020 Email: rhirsh@lowenstein.com echafetz@lowenstein.com mkaplan@lowenstein.com pkhezri@lowenstein.com</p> |
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