

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:

**FiberMark, Inc.,
FiberMark North America, Inc., and
FiberMark International Holdings, LLC,
Debtors.**



**Chapter 11 Cases
Jointly Administered
04-10463**

ORDER

**DENYING COMMITTEE'S APPLICATION FOR AN ORDER AUTHORIZING AND APPROVING THE
RETENTION *NUNC PRO TUNC* OF KLEE, TUCHIN, BOGDANOFF & STERN, LLP
AS SPECIAL COUNSEL TO THE COMMITTEE**

On March 29, 2005, the Official Committee of Unsecured Creditors (the "Committee") filed an Application to retain Klee, Tuchin, Bogdanoff & Stern, LLP, *Nunc Pro Tunc*, as Special Counsel to the Committee (doc. # 1352) (the "Klee Application"). In the Klee Application, the Committee states that its counsel has a conflict of interest with regard to the dispute among members of the Committee and therefore needs to retain special counsel to assist the Committee in investigating various allegations of Committee members including possible violations of this Court's Order Approving Specified Information Blocking Procedures and Permitting Trading in Securities of the Debtors Upon Establishment of a Screening Wall (doc. # 684) (the "Trading Order") and breaches of fiduciary duties as members of the Committee (the "Allegations"). In the Klee Application, the Committee asserts it has the statutory right and obligation to conduct such an investigation notwithstanding the fact that the Allegations involve primarily the conduct of Committee members. The Committee relies upon the Trading Order as an additional source of authority for it to investigate the Allegations (doc. # 1352 at pp. 3-4).

Since the Court has set forth at length the factual circumstances and procedural history of this matter in the Order Denying Debtors' Motion for an Order Establishing Expedited Procedures for, and Safeguarding Estate Resources Sought to be Used in Connection with, Resolving Claims Trading Issues that have Aggravated Intercreditor Dispute and Halted Plan Confirmation Process issued of even date (doc. # 1403) (the "Procedure Order"), it will not reiterate that here.

As stated in the Committee's Response to the Court's Order to Show Cause (doc. # 1396), by unanimous vote, the Committee has no objection to the appointment of an examiner in these cases. However, the Committee claims that the Klee Application should be granted to allow the Committee to supplement any examiner's investigation. The Committee argues that it has a duty to commence an investigation under the Trading Order and that it should not be precluded from meaningfully participating

in any investigation, regardless of who conducts the investigation (doc. # 1396, p. 3). The Committee correctly makes note of the fact that the creditor constituencies represented by the Committee have an economic interest in the outcome of an investigation of the Allegations (id. at p. 4). The Committee asserts that it has demonstrated that Klee Tuchin is free of any conflict of interest and “is in a position to participate fully in any investigation involving any of the members of the Committee.” (id. at p. 4). Nonetheless, the Klee Application seeks authority for the Committee to retain counsel at the expense of the Debtors and acknowledges that Klee Tuchin would consult with Committee counsel on a regular basis (doc. # 1352, p. 8).¹ AIG and Post have gone so far as to conclude that the Committee is “entitled to” legal counsel to conduct the investigation and if the Klee Application were to be denied, the Court would effectively be denying the Committee this “right” (doc. # 1395, p. 2).

The UST has filed a response in opposition to the Klee Application (doc. # 1392) and the Court finds the rationale for the UST’s opposition to be sound. The Debtors and Silver Point have also recently filed oppositions to the Klee Application (see docs. ## 1400, 1401).

Additionally, Alex Kwader, the current CEO of the Debtors, has filed a limited response to the Klee Application (doc. # 1399) (the “Kwader Response”). Silver Point acquired Mr. Kwader’s claim and the Committee alleges that the acquisition of Mr. Kwader and other employee’s claims was improper. The Committee asserts that in doing so, Silver Point gained improper influence over the Debtors’ employees and infers misconduct on behalf of the employees, the Debtors, and Silver Point in the resolution of the contested matter involving these same SERP claims (doc. # 1378). By the nature of the Allegations, the Court finds Mr. Kwader is an interested party and should to be afforded an opportunity to be heard. The Kwader Response supports the appointment of an independent examiner and opposes the Klee Application on the basis that appointment of special counsel may have “significant and permanent adverse effects upon the Debtors and their respective efforts to achieve a consensual plan in the foreseeable future” (doc. # 1399, p. 9).

RULING

The Court finds that the Committee does not have a right or an obligation to conduct a separate investigation of the Allegations either under the Bankruptcy Code or the Trading Order. The plain language of 11 U.S.C. § 1103(c) states that the Committee may investigate certain matters but does not dictate that the Committee shall investigate certain matters. Furthermore, it is important to note that the Committee does not appear to be in compliance with the Trading Order. That order placed upon the Committee an obligation to file a “Notice of Suspected Violation” promptly if it had any suspicion of a

¹ For clarification, the Court is not specifically finding that Klee Tuchin is not a disinterested person as defined under the Bankruptcy Code. Rather, as counsel to the Committee, its fiduciary obligations would run to the Committee, which, as a whole, is far from disinterested under the Allegations asserted. Three of the four members of the Committee have an interest in the outcome of an investigation into the Allegations. Wilmington Trust Company is the only “disinterested” member of the current Committee.

violation of the Trading Order. Certain members of the Committee clearly have, for some time, had a suspicion that a violation has occurred. Yet, the Committee has not filed a notice with the Court. Moreover, the Trading Order did not obligate or direct the Committee to conduct an investigation of any suspected violations.


The Court further finds that the Committee is not entitled to legal counsel to conduct an investigation or that if the Klee Application were denied, that the Committee would be denied any right. Based upon the record before the Court, the Court is not persuaded that allowing the Committee to conduct an investigation and to retain special counsel to conduct or participate in such an investigation is in the best interests of the creditors or the Debtors' estates. The Court finds no legitimate purpose would be served by allowing the Committee to retain special counsel to conduct an investigation under the circumstances of this case. If the Court appoints an examiner, the Committee and its members will be expected and directed to participate and cooperate fully in any investigation. To allow a Committee investigation to proceed in tandem with an examiner investigation would be potentially duplicative as well as administratively and financially burdensome to all involved.

In sum, the Court is persuaded that allowing the Committee to retain special counsel to conduct or participate in an investigation of the Allegations would not be as effective, expeditious or comprehensive as an investigation by an independent third party appointed by the Court. For this reason, as well as the reasons set forth in the Procedures Order,

IT IS HEREBY ORDERED that the Klee Application is DENIED.

SO ORDERED.

April 13, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge