

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

In re:	§	Case No. 12-51127
	§	
Piccadilly Restaurants, LLC, et al.,	§	(Joint Administration)¹
	§	
Debtors	§	Chapter 11
	§	
	§	Judge Robert Summerhays

OBJECTION OF ATALAYA ADMINISTRATIVE LLC TO APPLICATION OF THE DEBTORS FOR AN ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION OF FTI CONSULTING, INC. AS FINANCIAL ADVISOR TO THE DEBTORS²

Atalaya Administrative LLC, in its capacity as administrative agent (“Agent”) for Atalaya Special Opportunities Fund IV LP (Tranche B), (collectively, with all other lenders signatory to the DIP Stipulation (as defined below) the “DIP Lenders”),³ the post-petition lenders to Piccadilly Restaurants, LLC (“Piccadilly”), Piccadilly Food Service, LLC (“PFS”) and Piccadilly Investments, LLC (“Investments” and collectively, with Piccadilly and PFS, the “Debtors”), files this objection to the Debtors’ application for employment and retention of FTI Consulting, Inc. (“FTI”) [Docket #468].

INTRODUCTION

1. The Debtors’ application to retain FTI is the latest chapter in the efforts of Yucaipa Corporate Initiatives Fund I, L.P. (“Yucaipa”), a California based private equity firm, to control this case for its own benefit. From the beginning of the case, the Debtors have effectively admitted that equity is “out of the money.” Of course, that did not stop Yucaipa from

¹ Jointly administered with *In re Piccadilly Food Service, LLC*, 12-51128 (Bankr. W.D. La. 2010), and *In re Piccadilly Investments, LLC*, 12-51129 (Bankr. W.D. La. 2010).

² The Debtors extended Atalaya’s deadline to object to the FTI retention application to February 20, 2013.

³ Agent together with Lenders shall be referred to herein collectively as “Atalaya.”

attempting to control the case through an unprecedented priming debtor-in-possession financing motion. After that motion failed, Yucaipa swiftly replaced the Debtors' bankruptcy counsel - - sending a clear message to the Debtors' management and its professionals. It is no wonder that Debtors' management now has "selected" FTI as its financial advisor at the direction of Yucaipa.

2. Yucaipa hand-picked FTI and instructed the Debtors' management to retain the firm because Yucaipa and FTI have a strong relationship that includes numerous engagements where FTI represents either Yucaipa or a Yucaipa controlled company. Upper management at FTI even sits on the board of directors of a Yucaipa owned company. If Yucaipa intends to utilize FTI to craft a plan that will seek to cram-down Atalaya, then it should retain FTI on its own dime, and not waste estate assets (and Atalaya's collateral) in a feckless attempt to salvage its ownership interest in these Debtors.

3. The Debtors seek to retain FTI under Section 328(a) of the Bankruptcy Code. Retention of a professional under Section 328(a) requires heightened scrutiny because of the limited ability of the court to review the engagement terms in the future. The Debtors have the burden to establish that the engagement meets the applicable standards for retention under Section 328(a). But the Debtors cannot meet their burden here because:

- FTI's engagement does not reflect normal business terms for a case of this size;
- Given Yucaipa's influence, the parties did not have equal bargaining power, and therefore the FTI engagement was not negotiated at arms-length;
- The proposed retention is not in the best interest of the estates, as the engagement is meant to serve Yucaipa's needs, is duplicative of work to be performed by other retained professionals, and there are no funds to pay for FTI's fees in any event; and
- Atalaya, the Debtors' largest creditor, opposes the FTI retention.

Accordingly, as explained in detail below, the Debtors' application to retain FTI should be denied.

BACKGROUND

4. On September 11, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). On October 23, 2012, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") in these proceedings.

5. Shortly after the commencement of these bankruptcy cases, the Debtors filed a motion seeking authority to obtain post-petition financing pursuant to 11 U.S.C. §§ 364(c) and 364(d) (such financing, "DIP Financing"). The Debtors' DIP Financing was originally sought on a priming basis, to be provided by Yucaipa. At the initial hearing on the DIP Financing, the Debtors stated that they were in no position to "put on a case for equity" and therefore could offer no adequate protection to Atalaya to support the priming DIP Financing. As a settlement, and in order to provide financing to the Debtors, Atalaya agreed to provide the DIP Financing on the same terms and using the same form document as the Debtors had proposed.

6. On September 18, 2012, the Court entered an interim order approving the Debtors' request to obtain DIP Financing (the "Interim DIP Order," ECF No. 84), through which the Court approved, on an interim basis, the Stipulation and Order (A) Authorizing Post-Petition Financing, (B) Authorizing Use of Cash Collateral, (C) Granting Superpriority Security Interests and Administrative Claims Pursuant to 11 U.S.C. §§ 364, (D) Granting Adequate Protection to Pre-Petition Lenders; (E) Granting Limited Relief from the Automatic Stay; and (F) Granting Related Relief (the "DIP Stipulation"). On December 19, 2012, the DIP Stipulation was approved on a final basis when the Court entered a final order approving the DIP Financing (the "Final Order" ECF No. 418).

7. On January 29, 2013, the Debtors filed their request to retain FTI. Thereafter, Atalaya conducted discovery regarding the FTI retention application by requesting certain documents and taking depositions of David Beckman of FTI and Thomas Sandeman, the Debtors' CEO. Through that discovery⁴ it became clear that:

- The decision to retain FTI was initiated by Yucaipa, not the Debtors' management;
- The Debtors' management was pressured to proceed with FTI's retention despite lower cost alternatives;⁵
- FTI has a strong relationship with Yucaipa, representing Yucaipa and/or Yucaipa controlled entities in numerous matters;⁶
- Yucaipa has dictated not only that FTI be retained by the Debtors, but also the scope of the engagement;⁷ and
- Mr. Sandeman, concerned with losing his job, distanced himself from the FTI engagement, allegedly delegating the duty to select a financial advisor to Jeffrey Cornish - - himself only a consultant for the Debtors, and a former CEO of a Yucaipa owned company.⁸

Atalaya's limited discovery related to the FTI retention application raised many questions regarding these Debtors and Yucaipa's undeniable influence and control over the day to day

⁴ Because of the short time frame for discovery, the parties have not yet received final transcripts of deposition testimony. Accordingly, references to deposition testimony will be supplemented at or prior to the hearing on the FTI retention application.

⁵ The Debtors received one other proposal from an entity known as Qorval for services very similar to those FTI seeks to provide. Qorval's proposed monthly fee was less than \$50,000 per month for three months, and then reduced to \$20,000 per month thereafter.

⁶ Mr. Beckman of FTI testified that he has personally worked on four other engagements with Yucaipa, including Performance Transportation Services, Allied Systems Holdings, Inc., Jack Cooper Transportation, and AFA Foods. David Bannister, Executive Vice President and Chairman (North America) of FTI is actually a member of the board of directors of Allied Systems Holdings, Inc., a Yucaipa owned company.

⁷ Documents produced by the Debtors demonstrate that Yucaipa was heavily involved in determining the scope of the FTI engagement.

⁸ Mr. Cornish is formerly the CEO of Performance Transportation Services, a company that was majority owned by Yucaipa.

operations of the Debtors. While the hearing on the FTI retention application is not yet a forum for resolution of these troubling issues, approval of the FTI retention application will only further Yucaipa's strangle-hold on Debtors' management and will undoubtedly lead to costly future litigation.

OBJECTION

8. The Debtors seek to employ FTI pursuant to Section 328(a) of the Bankruptcy Code. Because an application to retain a professional under Section 328(a) limits a court and creditor's subsequent review of the terms the engagement and amount of fees originally approved, courts apply a heightened standard in assessing the proposed engagement. *See In re High Voltage Eng's Corp.*, 311 B.R. 320, 332 (Bankr.D.Mass.2004) ("Once a fee arrangement is approved under § 328, the ability of the bankruptcy court, as well as creditors and parties in interest, to review the amount of compensation payable to the professional is circumscribed. Thus, a Court must persuade itself that the terms and conditions of the proposed employment . . . are reasonable in view of developments capable of anticipation This act of foresight, of course, is much more difficult than the hindsight employed in precluding reexamination of the reasonableness of the fees because of developments later determined to have been capable of anticipation."). A debtor has the burden to "establish that the terms and conditions of employment are reasonable, and evidence, not conclusory statements, is required to satisfy that burden." *Id.*

9. Courts have established a non-exhaustive list of factors that should be considered in determining whether a debtor has met its burden to employ a professional under Section 328(a). Those factors include:

- (1) whether the terms of the engagement reflect normal business terms in the marketplace;
- (2) the relationship between the Debtor and the professionals, i.e., whether the parties involved are sophisticated business entities with equal bargaining power who engaged in an

arms-length negotiation; (3) whether the retention, as proposed, is in the best interest of the estate; [and] (4) whether there is creditor opposition to the retention

Id.(quoting *In re Insilco Techs., Inc.*, 291 B.R. 628, 633 (Bankr.D.Del.2003)); *see also In re Energy Partners*, 409 B.R. 211, 224-31 (Bankr.S.D.Tex.2009)(applying the *Insilco* factors, court denied a committees' application to retain investment banker under Section 328(a), where committee failed to present evidence that engagement was market or negotiations were at arms-length).

FTI's engagement does not reflect normal business terms for a case this size

10. The Debtors seek to retain FTI on a flat fee basis of \$75,000 per month. The engagement has no end date, and the fees never reduce below \$75,000 per month, regardless of the amount of services that FTI is actually providing the Debtors. Because the Debtors were forced to retain FTI by Yucaipa, the Debtors did not conduct a proper evaluation of market terms by seeking bids from financial advisory firms serving middle to small market companies like the Debtors.

11. Even the Debtors' half-hearted attempt to seek competing offers reveals that the FTI engagement is not market. The Debtors received a proposal from Qorval with fees at less than \$50,000 per month for the first three months, reducing to \$20,000 per month thereafter. Over a five month period, the FTI engagement would cost the estates \$375,000, as compared to Qorval's proposal which would cost the estates less than \$190,000 for that same period - - roughly half the cost of FTI. The Debtors only explanation as to why they did not select Qorval was that "Yucaipa was not familiar with the firm" -- meaning Yucaipa had no influence over Qorval and could not dictate the scope, terms or ultimate outcome of the engagement.

12. The Debtors not only request open-ended payment of a \$75,000 monthly fee, but also request that FTI be exempted from filing monthly fee statements under the Debtors'

professional fee compensation order. Instead, like clockwork, the Debtors intend to pay FTI without any oversight as to the amount of actual services FTI is providing to the Debtors. Even under the limited review provided for by Section 328(a), there is no legitimate reason to exempt FTI from a requirement to file monthly fee statements.

The parties did not have equal bargaining power in the negotiation

13. Any negotiation regarding FTI's engagement cannot be viewed as an arms-length negotiation because the Debtors were solely under the influence of Yucaipa, who has a deeply intertwined pre-existing relationship with Yucaipa. Accordingly, the real scope and terms of FTI's engagement is not reflected in the engagement letter, but instead exists in the relationship between FTI and Yucaipa.

14. When Mr. Sandeman, the Debtors' CEO, first broached the topic of retaining FTI with Atalaya, he stated in no uncertain terms that he did not want to hire FTI and that Yucaipa was forcing him to do so. Faced with losing his job, he had no choice but to retain FTI as Yucaipa demanded. When questioned under oath regarding his prior statements to Atalaya, he stated that he did not recall this conversation with Atalaya. Further, Mr. Sandeman testified that he delegated the duty to retain a financial advisor to Jeff Cornish, an alleged "turnaround" consultant himself, and also a former employee of a Yucaipa controlled company. Mr. Sandeman's initial hostility toward the FTI engagement, coupled with his subsequent amnesia and distancing from the entire FTI engagement process, demonstrates that the Debtors' management has ceded control to Yucaipa.

15. Yucaipa's control will extend to FTI. FTI represents Yucaipa in numerous matters. Mr. Beckman of FTI admitted that he speaks to Yucaipa representatives on a regular basis on other matters. It is clear that Yucaipa is a long standing client of FTI. As a result, FTI is

not likely to take any position that is adverse to Yucaipa. To the contrary, FTI is incentivized to work for Yucaipa's benefit, as opposed to the benefit of the estates.

16. As a result of Yucaipa's control over the Debtors and FTI, and management's fear regarding repercussions associated with failure to retain FTI, the negotiation with FTI was never at arms-length.

The proposed retention is not in the best interest of the estates

17. In order to demonstrate that retention of a professional is in the best interest of the estate, the debtor must establish that retention of the professional "will provide a tangible, identifiable, and material benefit to the estate." *In re Energy Partners, Ltd.*, 409 B.R. at 230. Here, retention of FTI does not meet the applicable standard.

18. First, as set forth above, Yucaipa's control over these Debtors and relationship with FTI raises substantial concerns related to FTI's engagement by the Debtors. The Debtors have effectively conceded that there is little prospect of any equity value in these estates. If the purpose of retaining FTI is to now engage in a valuation fight with Atalaya as to whether Yucaipa has any remaining equity value in the Debtors, utilizing estate assets (and Atalaya's collateral) for this purpose would be both futile and wasteful. While Atalaya recognizes that this case may end in a valuation contest, Yucaipa should foot the bill for its own advisor, rather than leveraging estate assets for that purpose.

19. Second, retention of FTI is duplicative of the Debtors' prior retention of Jeffrey Cornish as a turnaround consultant. Mr. Cornish's contract provides that he is engaged to provide:

advice, analysis, and recommendations with respect to operations, marketing, labor scheduling, real property lease negotiations, restructurings and asset sales.

Application to Employ Jeffrey Cornish as Consultant, Exhibit A [Docket #127]. These duties are very similar to the scope of the FTI engagement. Mr. Cornish is paid \$4,000 per week for his services (or approximately \$20,000 per month), which means the Debtors are already paying a consultant roughly the same amount as the Committee's financial advisor is being paid per month. One of the primary reasons that Atalaya did not object to Mr. Cornish's application was that he was viewed as substitute for a financial advisory firm or chief restructuring officer. Layering on yet another financial advisor is duplicative and does not benefit these estates.

20. Finally, there is no provision for payment of FTI's fees. The monthly fee of \$75,000 has not been included in an approved budget under the DIP Stipulation, and therefore cannot be paid absent Atalaya's consent. Given the strong connections between FTI and Yucaipa, Atalaya is unwilling to provide funding or allow use of cash collateral to pay the FTI monthly fee. It is certainly not in the best interest of the estate to engage a professional with no means to pay that professional.

The Debtors' largest creditor opposes the application

21. The fourth factor courts consider in weighing an application under Section 328(a) is whether there is creditor opposition to the application. Here, as is clear from this objection, Atalaya opposes the FTI retention application. Accordingly, this factor weighs against approval of the FTI retention application.

PRAYER

WHEREFORE, Atalaya respectfully requests that this Court deny the Debtors' application to retain FTI, and grant Atalaya such other and further relief to which it may be entitled.

Dated: February 20, 2013

Respectfully submitted,

By: /s/ Brent R. McIlwain
PATTON BOGGS, LLP
Robert W. Jones
(Texas State Bar No. 10951200)
Brent R. McIlwain
(Texas State Bar No. 24013140)
2000 McKinney, Suite 1700
Dallas, Texas 75201-8001
Direct: 214-758-1500
Fax: 214-758-1550

And

David F. Waguespack, T.A. (#21121)
CARVER, DARDEN, KORETZKY, TESSIER,
FINN, BLOSSMAN & AREAUX, L. L. C.
1100 Poydras Street, Suite 3100
New Orleans, LA 70163
Telephone: (504) 585-3800
Telecopier: (504) 585-3801

*Attorneys for Atalaya Administrative LLC,
Atalaya Funding II, LP, Atalaya Special
Opportunities Fund IV LP (Tranche B), and
Atalaya Special Opportunities Fund (Cayman) IV
LP (Tranche B)*

CERTIFICATE OF SERVICE

This is to certify that service of this document has been made on the 20th day of February, 2013 by electronic service through the Court's transmission facilities upon those persons listed as recipients of electronic notice on the Notice of Electronic Filing document generated by the Court's ECF System at the time of the filing of this document.

/s/ Brian Smith
Brian Smith