

Hearing Date: June 29, 2005
Time: 1:00 a.m.
Place: Portland
Objection Deadline: June 20, 2005
Time: 4:00 p.m.
(as extended)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	:	Chapter 11
	:	
PEGASUS SATELLITE TELEVISION, INC., et al.,	:	Case No. 04-20878
	:	
	:	(Jointly Administered)
Debtors.	:	

**OBJECTION OF THE REORGANIZED DEBTORS AND
THE LIQUIDATING TRUSTEE TO APPLICATION OF GARCEL, INC.
D/B/A THE GREAT AMERICAN GROUP FOR
ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE**

Pegasus Satellite Television, Inc. and its subsidiaries and certain of its affiliates, each a Reorganized Debtor herein (collectively, the “Reorganized Debtors”), and the Liquidating Trustee of The PSC Liquidating Trust (the “Liquidating Trustee”),¹ hereby file this objection (the “Objection”) to the Application for Allowance and Payment of Administrative Expense (Docket No. 1401) (the “Application”) filed by Garcel, Inc. d/b/a The Great American Group (“Great American”) and state as follows:

BACKGROUND

1. On June 2, 2004 (the “Petition Date”), the Reorganized Debtors filed petitions for relief under chapter 11 of the Bankruptcy Court in the United States Bankruptcy

¹ The Reorganized Debtors are: Argos Support Services Company, Bride Communications, Inc., B.T. Satellite, Inc., Carr Rural TV, Inc., DBS Tele-Venture, Inc., Digital Television Services of Indiana, LLC, DTS Management, LLC Golden Sky DBS, Inc., Golden Sky Holdings, Inc., Golden Sky Systems, Inc., Henry Country MRTV, Inc., HMW, Inc., Pegasus Broadcast Associates, L.P., Pegasus Broadcast Television, Inc., Pegasus Broadcast Towers, Inc., Pegasus Media & Communications, Inc., Pegasus Satellite Communications, Inc., Pegasus Satellite Television of Illinois, Inc., Pegasus Satellite Television, Inc., Portland Broadcasting, Inc., Primewatch, Inc., PST Holdings, Inc., South Plains DBS, LP., Telecast of Florida, Inc., WDSI License Corp., WILF, Inc., WOLF License Corp., and WTLH License Corp.

Court for the District of Maine (the “Court”). On June 4, 2004, the Court entered an order directing joint administration of the Reorganized Debtors’ cases for procedural purposes only.

2. The Reorganized Debtors continued in possession of their respective property and continued to operate their businesses as debtors in possession pursuant to sections 1107(a) and 1108 of title 11 of the United States Code (the “Bankruptcy Code”) throughout their chapter 11 cases.

3. On January 31, 2005, the Reorganized Debtors filed their First Amended Joint Plan of Reorganization (the “Plan”) and Disclosure Statement in connection with the solicitation of acceptances of the Plan. On February 9, 2005, this Court entered an order approving the Disclosure Statement, as modified on the record. On April 15, 2005, the Court entered an order (“Confirmation Order”) confirming the Plan, as modified by the Confirmation Order. The Plan became effective on May 5, 2005 (the “Effective Date”).

4. Section 13.1 of the Plan and paragraph 26 of the Confirmation Order expressly provide that the Bankruptcy Court shall retain jurisdiction over, among other things, motions to determine the allowability or estimation of the administrative expenses of the Reorganized Debtors, and the validity, extent, priority, and nonavailability of consensual and nonconsensual liens and other encumbrances.

The Debtors’ Retention of Great American

5. Reorganized Debtor Pegasus Satellite Television, Inc. (“PST”) retained Great American to sell certain of the Reorganized Debtors’ assets outside of the ordinary course of business pursuant to the order of this Court on November 10, 2004 (Docket No. 722) (the “Retention Order”, attached hereto as Exhibit A), approving a consulting agreement entered into by PST and Great American on November 5, 2004 (the “Consulting Agreement”, attached hereto as Exhibit B). The Retention Order authorized the Reorganized Debtors to compensate Great American “upon the terms set forth in the Motion and the Consulting Agreement without the

need for filing any fee application with this Court.” Exhibit A, at ¶ 3. Pursuant to Retention Order, the Court retained jurisdiction to interpret, enforce and implement the Consulting Agreement including “any waivers and consents thereunder, any agreements executed in connection therewith, and any transactions entered into in connection therewith in all respects...” *Id.* at ¶ 10.

6. The Consulting Agreement provided that upon conclusion of the Sale² of PST’s assets, the proceeds of the Sale would be allocated as follows: (i) the first \$700,000 of sale proceeds would be paid to Great American to reimburse it for the Guaranteed Amount paid to PST under the Consulting Agreement; (ii) “the next \$135,000, if any, shall be paid to [Great American] for reimbursement of the Sale Expenses (but only to the extent such Sale Expenses [were] incurred by [Great American]”; and (iii) sale proceeds in excess of \$835,000, if any, were to be split with 85% to PST and 15% to Great American. *See Exhibit B*, at § 4.2. Great American was also entitled to retain a 10% buyer’s premium to be collected from any purchaser of PST’s assets. *See id.* at § 2.6.

7. Among the assets to be auctioned by Great American were assets located at a facility leased by PST in Marlborough, Massachusetts (the “Marlborough Facility”). On November 15, 2004, prior to the auction of the assets located at the Marlborough Facility, the owner of the Marlborough Facility, Felton Street Associates Limited Partnership (“Felton Street”), sought an emergency hearing on a motion for reconsideration of the Retention Order (Docket Nos. 739 & 740). The motion for reconsideration alleged, *inter alia*, that that Felton Street had an interest in certain items affixed to, built into, or attached to the premises at the Marlborough Facility.

8. On November 17, 2004, the Court held an emergency telephonic hearing

² As used herein, defined terms shall have the same meanings as set forth in the Consulting Agreement attached hereto as Exhibit A.

on Felton Street's motion for reconsideration, a transcript of which is attached hereto as Exhibit C and at Docket No. 1176. Great American was represented by counsel at the hearing. *See Exhibit C*, at 3 & 16. At the hearing, the parties agreed to resolve Felton Street's motion by allowing Felton Street to make a bulk bid to purchase the assets in question while retaining their right to claim that certain assets were the property of Felton Street or that they had an interest in the proceeds of the Sale of such assets. *See id.* at 17-18. After questioning all of the parties involved, including Great American, whether the arrangement was agreed to by the parties, the Court ordered that the auction of the assets at the Marlborough Facility would proceed as so agreed. *See id.* at 18 & 20-23.

9. As noted in the Application, Great American conducted the auctions of PST's assets, including the auction of the assets at the Marlborough Facility. Upon information and belief, Great American has retained all proceeds from the Sale to date.

GREAT AMERICAN'S CLAIM FOR ADMINISTRATIVE EXPENSE

10. On May 23, 2005 Great American filed its Application for the allowance and payment of an administrative expense. Great American bases its claim for an administrative expense on two alleged breaches of the Consulting Agreement: (i) PST's removal of certain equipment that was to have been made available for sale at the auction; and (ii) PST's entry into an agreement with Felton Street to allow Felton Street to make a bulk bid at the end of the auction of the Marlborough Facility assets. Application, at ¶ 3. The Application fails to explain how the alleged removal of assets or the allowance of a bulk bid constituted breaches of the Consulting Agreement. Additionally, while Great American alleges that it was damaged in an amount not less than \$200,000, because the purported breaches reduced the amount of assets available for sale and chilled the bidding process, *see id.* at ¶ 4, Great American provides no evidence regarding or calculation of Great American's damages. The Application does not indicate what assets were alleged removed, the value of such assets, or any basis for determining

such value. Moreover, the Application does not provide any calculation of its damages due to an alleged “chill” of the bidding process or evidence that such a chill occurred as a result of the allowance of a bulk bid.

ARGUMENT

11. Section 503(b)(1)(A) provides that the bankruptcy court shall permit as an administrative expense “the actual, necessary costs and expenses of preserving the estate.” *In re Malden Mills Indus., Inc.*, 303 B.R. 688, 706 (1st Cir. B.A.P. 2004). The First Circuit Court of Appeals has stated that “[i]n general, for a claim to qualify as an administrative expense under subsection 503(b)(1)(A), (1) it must have arisen from a transaction with the trustee or debtor in possession, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the claim must have benefited the estate in some demonstrable way.” *Mason v. Official Comm. of Unsecured (In re FBI Distrib. Corp.)*, 330 F.3d 36, 42 (1st Cir. 2003) (citing *Woburn Assocs. v. Kahn (In re Hemingway Transp., Inc.)*, 954 F.2d 1, 5 (1st Cir. 1992); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976)). Creditors have the burden of establishing their entitlement to administrative expenses under Section 503(b), and such applications are carefully examined for the protection of other creditors. *See In re Petit*, 291 B.R. 582, 591 (Bankr. D.Me. 2003). *See also Malden Mills Indus.*, 303 B.R. at 706-707 (“The burden of proving entitlement to priority payment as an administrative expense rests with the party requesting it as the traditional presumption favoring ratable distribution among all unsecured creditors requires strict construction of provisions governing requests for priority payment of administrative expenses.”); *FBI Distrib. Corp.*, 330 F.3d at 42 (“thus, statutory priorities are narrowly construed, and the burden of proving entitlement rests with the party seeking it”); *Hemingway Transp.*, 954 F.2d at 4-5.

12. Great American fails to meet its burden of proving entitlement to an administrative expense because it does not set forth any basis for the payment of the additional

amounts it seeks in the Application. Under the Consulting Agreement, Great American was not entitled any amounts beyond the amounts it has already received pursuant to the Sale. Accordingly, Great American has been paid in full under the Consulting Agreement. Great American does not and cannot identify any provision in the Consulting Agreement that guaranteed Great American a certain recovery as a result of the Sale. In fact, the Agreement explicitly disclaims the existence of guaranteed recovery by Great American by providing that Great American would recover Sale Expenses from the proceeds of the Sale that were in excess of \$700,000, “if any”, and would receive a split of the sale proceeds greater than \$835,000, “if any”. See Exhibit B, at § 4.2.

13. Great American alleges that it is entitled to recover an administrative expense because the Debtors removed certain equipment that was to have been made available for the Sale. The Application does not contain sufficient information to allow the Court or the Reorganized Debtors and the Liquidating Trustee to determine whether equipment was in fact removed in contravention of the Consulting Agreement or the nature and valuation of the equipment allegedly removed by the Debtors. Absent a manner in which one can determine whether the Debtors are liable as a result of such removal or what amounts, if any, are consequently owed to Great American, the Reorganized Debtors and the Liquidating Trustee submit the allowance and payment of an administrative expense is unwarranted because Great American has shown no entitlement to such an expense.

14. Similarly, to the extent that the Application seeks to recover Sale Expenses, allowance of Great American’s administrative expense claim is unsupported. The Consulting Agreement specifically provides that Great American is entitled to recover Sale Expenses “only to the extent such Sale Expenses are incurred... .” See Exhibit B, at § 4.2. Great American must show that the Sale Expenses were actually incurred in order to support an administrative expense. See *e.g.*, *In re Servisense.com, Inc.*, 382 F.3d 68, 72-73 (1st Cir. 2004) (“When the claim is based upon a contract between the debtor and the claimant, the case law

teaches that a creditor's right to payment will be afforded first priority only to the extent that the consideration supporting the claimant's right to payment was both *supplied to* and beneficial to the debtor-in-possession in the operation of the business after the bankruptcy petition was filed.”) (emphasis added); *Mammoth Mart*, 536 F.2d at 954. The Application is devoid of any calculation of or proof regarding the providing of Sale Expenses.

15. Great American’s contentions regarding the agreement to allow Felton Street to make a bulk bid at the conclusion of the Marlborough Facility auction are also insufficient to support a finding that it is entitled to an administrative expense. The Application does not include any calculation of damages resulting from the bulk bid arrangement. Moreover, Great American cannot claim that it was damaged by the agreement to allow a bulk bid because it was a party to negotiations leading to the agreement and, while counsel for Great American raised concerns about the bulk bid process, Great American consented to the bulk bid arrangement:

THE COURT: All right. Mr. Naughton?

MR. NAUGHTON: Yes, sir?

THE COURT: Do you think you can work with the parties to go through with that arrangement as modified?

MR. NAUGHTON: Yes, your Honor. Obviously we have to define what those assets are and then we'll have to figure out what the valuation for them--

Exhibit C, at 20. To the extent that Great American did have any claims with respect to the bulk bid arrangement, and the Reorganized Debtors and the Liquidating Trustee maintain that it did not, Great American waived all claims as a result of the arrangement when it agreed to the procedure set forth on the record at the hearing.

16. Furthermore, Great American fails to explain how it can be entitled to damages when the Reorganized Debtors were acting pursuant to the Court’s order. The

agreement to allow a bulk bid was so ordered by this Court on the record and the Court, as part of the Retention Order, explicitly retained jurisdiction to interpret, enforce and implement the Consulting Agreement including “any waivers and consents thereunder, any agreements executed in connection therewith, and any transactions entered into in connection therewith in all respects... .” Exhibit A, at ¶ 10. As a result, the Reorganized Debtors did not breach the Consulting Agreement by participating in the bulk bid arrangement and Great American is not entitled to an administrative expense for such breach.

CONCLUSION

For the reasons stated above, the Reorganized Debtors and the Liquidating Trustee respectfully request the entry of an order (i) denying the Application of Great American for the allowance and payment of an administrative expense and (ii) granting such other relief as may be just and proper.

Dated: June 20, 2005

Respectfully submitted,

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-and-

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CERTIFICATE OF SERVICE

Service of the above Objection to the Application for Allowance and Payment of Administrative Expense filed by Garcel, Inc. d/b/a The Great American Group has been made through the Court's ECF system on all those registered to receive ECF service, and, by United States Mail, first class, postage prepaid, on:

Jay S. Geller, Esq.
One Monument Way, Suite 200
Portland, ME 04101-4078

date: June 20, 2005

/s/John P. McVeigh