UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO

In re:	:	Chapter 11 – Jointly Administered
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TRIAD RESOURCES, INC., *et al*	:	Case No. 08-62733
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Debtors.	:	Judge C. Kathryn Preston

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION OF DEBTORS AND DEBTORS-IN-POSSESSION FOR AN ORDER PURSUANT TO SECTION 1121(d) OF THE BANKRUPTCY CODE EXTENDING THE PERIOD DURING WHICH DEBTORS HAVE THE EXCLUSIVE RIGHT TO FILE A PLAN OF REORGANIZATION AND SOLICIT ACCEPTANCES THEREOF

NOW COMES the duly appointed Official Committee of Unsecured Creditors (the "Committee"), by the undersigned counsel, and hereby files its objection ("Objection") to the Motion of Debtors and Debtors-In-Possession for an Order Pursuant to Section 1121(d) of the Bankruptcy Code Extending the Period During Which Debtors Have the Exclusive Right to File a Plan of Reorganization and Solicit Acceptances Thereof (the "Motion") [Dkt. No. 233]. In support of this Objection, the Committee represents as follows:

I. PRELIMINARY STATEMENT

1. The Motion seeks the entry of an order extending the exclusive period for the Debtors to file a plan of reorganization and to solicit acceptances thereof each by 120 days, to August 31, 2009 and October 31, 2009, respectively. The Motion, however, fails to establish cause for the requested extension. Debtors' assert that they have been unable to focus on formulating a plan of reorganization due to the time spent on other necessary matters, including, the preparation of schedules and statements of financial affairs, the retention of professionals to assist in the sale of

assets, obtaining use of cash collateral and obtaining secured post-petition financing. Further, Debtors state that much of their time has been focused on implementation of the process by which Debtors intend to sell substantially all of their assets. Finally, Debtors maintain that their focus must continue to be on the sale process rather than the formulation of a plan of reorganization. The Committee does not question whether Debtors have spent substantial time on the areas noted above. However, the Committee does not believe that such activities have or will prohibit Debtors from preparing a plan of reorganization.

2. In addition, as the schedules and statements of financial affairs filed herein establish, there are significant intercompany claims between and among the various Debtors. Likewise, there are numerous transactions between the Debtors and insiders. The existence of these overlapping financial relationships emphasizes the need for the plan process to be opened to third parties. If the Motion is granted, the development of a plan will be unnecessarily delayed.

II. JURISDICTION

3. The Court has jurisdiction to consider this Objection pursuant to 28 U.S.C. §§157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. §157(b). Venue is proper in this district pursuant to 28 U.S.C. §§1408 and 1409.

III. BACKGROUND

4. Each of the Debtors filed their voluntary petitions under Chapter 11 of the Bankruptcy Code on December 31, 2008 (the "Petition Date"). Since the Petition Date, Debtors have continued in possession of their property and to operate their businesses.

5. On January 14, 2009, pursuant to §1102 of the Bankruptcy Code, the United States Trustee for Region IX appointed the Committee.

6. Shortly after the Petition Date, Debtors advised the Court and parties in interest that they would seek to sell substantially all of their assets pursuant to §363 of the Bankruptcy Code. In fact, the sale of Debtors' assets was mandated by Capital One, National Association, Allied Irish Banks, P.L.C. and Citibank, N.A. (collectively, the "Senior Lenders"). The Final Agreed Order Authorizing Limited Use of Cash Collateral and Granting Adequate Protection to Existing Lienholders [Dkt. No. 178], the Final Agreed Order Authorizing Credit Secured By Senior Liens and Granting Adequate Protection to Existing Lienholders [Dkt. No. 216] and the Second Agreed Order Authorizing Credit Secured By Senior Liens and Granting Adequate Protection to Existing Lienholders [Dkt. No. 268] each contain deadlines requiring Debtors (with the exception of Alpha Drilling Ltd) to complete the asset sale by May 29, 2009 (subject to certain grace periods).

7. The Debtors' exclusive periods to file a plan of reorganization and solicit acceptances of a plan, will expire on April 30, 2009 and June 29, 2009, respectively.

8. Debtors' contend that these cases are procedurally in their early stages. Debtors also state that they have been developing an exit strategy involving the sale of substantially all of their assets. The accelerated nature of that sale process, according to Debtors, requires that Debtors focus all of their attention on the sale, to the exclusion of developing a plan of reorganization.

9. The Committee is aware of the deadlines imposed by the Senior Lenders—essentially tying continued financing to a quick sale of Debtors' assets. However, that this would be a "sale case" as opposed to a true reorganization was clear to Debtors from the outset. Accordingly, any plan of reorganization would be a liquidating plan with in all likelihood a litigation trust.

Debtors' focus on the sale process that it has known about from the outset of these cases does not constitute cause for extension of exclusivity. The Motion must be denied.

IV. OBJECTION

10. Section 1121 of the Bankruptcy Code limits the amount of time that a debtor has the exclusive right to file a plan of reorganization and solicit the acceptances thereof to 120 and 180 days, respectively. 11 U.S.C. §1121(b) and (c). The debtor may only extend these periods upon a showing of "cause". 11 U.S.C. §1121(d).

11. These congressional restrictions on a debtor's exclusive periods exist for good reason. *See, e.g., In re Timbers of Inwood Forest Assocs., Ltd.,* 808 F.2d 363,372 (5th Cir. 1987) (the limitations imposed under section 1121 "represent [] a congressional acknowledgement that creditors, whose money is invested in the enterprise no less than the debtor's, have a right to a say in the future of that enterprise"), *aff'd, United Savings. Association v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).[1]

A. The Debtors Have Not Established That Cause Exists to Grant the Motion

12. A debtor seeking to extend exclusivity bears the burden of proving that there is cause for such extension. *See In re Wash.-St. Tamany Elec. Coop., Inc.*, 97 B.R. 852, 854 (E.D. La. 1989); *In re Cent. Jersey Airport Servs., LLC*, 282 B.R. 176, 184 (Bankr. D.N.J. 2002); I*n re Service Merchandise. Co., Inc.*, 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000); *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987). "[M]ere recitation of allegations deemed by a debtor to constitute cause for an extension of the exclusive period [is] insufficient" to allow such an extension because section 1121(d) "requires an affirmative showing of cause, supported

[1] *See also In re Lake in the Woods*, 10 B.R. 338, 344 E.D. Mich. 1981) ("The legislative history of Section 1121 reflects congressional concern with…the unfair leverage enjoyed by either debtors or creditors."); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 231 (1977) (stating that the previous Bankruptcy Act

by evidence, be made by the party seeking the extension." *In re Ravenna Indus.*, 20 B.R. 886, 890 (Bankr. N.D. Ohio 1982); *see also In re Parker Street Florist & Garden Ctr., Inc.*, 31 B.R. 206, 207 (Bankr. D. Mass. 1983).

13. Bankruptcy courts use several factors to guide their inquiry regarding cause with respect to the continuation or extension of exclusivity, including: (a) the size and complexity of the debtor's case; (b) the existence of good faith progress towards developing a plan of reorganization; (c) whether the debtor is seeking to extend exclusivity to pressure creditors; (d) whether unresolved contingencies exist; (e) whether the debtor is paying its bills as they come due; (f) the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information; (g) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (h) whether the debtor has made progress in negotiations with its creditors; and (i) the amount of time which has elapsed in the case. *Bunch. V. Hoffinger Indus., Inc.* (*In re Hoffinger Indus., Inc.*), 292 B.R. 639, 643-44 (8th Cir. B.A.P. 2003); *In re R.G. Pharmacy, Inc.*, 374 B.R. 484, 485 (Bankr. D. Conn. 2007); *In re Adelphia Communications. Corp.*, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006); *In re Landmark Park Plaza Ltd. Partnership*, 167 B.R. 752, 754 (Bankr. D. Conn. 1994); *In re Public Service Company of New Hampshire*, 88 B.R. 521, 537 (Bankr. D. N.H. 1988); *In re Texaco, Inc.*, 76 B.R. 322, 326-27 (Bankr. S.D.N.Y. 1987); *In re McLean Industries, Inc.*, 87 B.R. at 834 ("[W]here a debtor is wasting its opportunity, or is incapable of forming a plan, exclusivity will be shortened"). In the instant case, Debtors have not established cause to extend exclusivity; and, accordingly, the Motion must be denied.

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gave "the debtor undue bargaining leverage, because by delay, [the debtor] can force a settlement out of otherwise unwilling creditors").

14. Debtors assert that efforts to sell substantially all of their assets within the time frame mandated by Senior Lenders should be the sole focus of their attention. In fact, Debtors believe that "as responsible stewards of their estates' assets [Debtors] should not, expend substantial time or efforts to address the formulation of a chapter 11 plan in the immediate future." (See Motion at Para. 16). The Committee strongly disagrees.

15. It is clear that Debtors intend to file a plan of liquidation. While the anticipated sale of assets may be complex, from a bankruptcy standpoint, Debtors' plan will be fairly simple. It will be nothing more than a liquidating plan.

16. Debtors have failed to adequately explain why a liquidating plan of reorganization cannot be prepared while sale efforts are ongoing. Such a plan could take into account the potential outcome of the asset sale, create a litigation trust to resolve claims and/or potential litigation against third parties, and distribute Debtors' assets based on the priorities established by the Bankruptcy Code.

17. Because Debtors have not moved the plan formulation process forward, it is imperative that the plan process be opened to third parties as quickly as possible so that a viable plan of reorganization can be presented to the Court as quickly as possible.

B. Intercompany Claims and Insider Transfers

18. The existence of significant intercompany claims also supports the termination of exclusivity. Based upon information provided by the Debtors and disclosed in the Schedules and Statements of Financial Affairs filed by Debtors, intercompany claims between the Triad entities due and outstanding as of the Petition Date, exceed $27,000,000.

19. In addition, transfers by Triad to or on behalf of insiders exceed $5,800,000.

20. Finally, the Committee is still investigating distributions made to insiders on account of royalty interests for which adequate consideration may not have been paid and despite the fact that some insiders are obligated to Debtors' estate.

21. The existence of significant intercompany claims and transfers to insiders highlight the need for the plan process to be opened to third parties.

C. Allowing the Exclusive Period to Lapse Will Not Prejudice Debtors

22. Courts have rejected the notion that exclusivity should be extended solely to give debtors time to file a plan.[2] The risk that another party may file a plan while the debtors are developing their plan is a risk that Congress intended. *See, e.g., In re All Seasons Industries, Inc.*, 121 B.R. 1002, 1005 (N.D. Ind. 1990) ("The risk is, of course, that while it is developing its plan, another party in interest will file a plan. However, that is as Congress intended.") (citations omitted); *In re Southwest Oil Co.*, 84 B.R. at 454. If the Motion is granted, creditors of Debtors are harmed by the continued delay in a plan being formulated and filed. On the other hand, Debtors will not be harmed if exclusivity lapses.

23. Debtors are not prejudiced if third parties are given the right to propose a plan. In fact, Debtors may benefit from the negotiations that may occur if the exclusive period is terminated and a third party proposes a plan.

[2] *See, e.g., In re R.G. Pharmacy, Inc.*, 374 B.R. 484, 488 (Bankr. D. Conn. 2007) ("The fact that the debtor no longer has the exclusive right to file a plan does not affect its concurrent right to file a plan. Denying the motion only affords creditors their right to file a plan; there is no negative affect upon the debtor's coexisting right to file its plan.") (citations omitted) (emphasis original); *In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993) (holding that termination of exclusivity is not prejudicial to the debtor).

V. WAIVER OF MEMORANDUM OF LAW

24. The Committee requests that the Court waive the requirement of Rule 9013-1(a) of the Local Bankruptcy Rules that any motion filed shall have an accompanying memorandum of law. This Objection does not present a novel issue of law.

WHEREFORE, the Committee respectfully requests that the Motion be denied and that Debtors' exclusive right to file a plan of reorganization expire on April 30, 2009.

Dated: April 13, 2009

Respectfully submitted,

/s/Reginald W. Jackson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the preceding Objection of Official Committee of Unsecured Creditors to Motion of Debtors and Debtors-In-Possession for and Order Pursuant to Section 1121(d) of the Bankruptcy Code Extending the Period During Which Debtors Have the Exclusive Right to File a Plan of Reorganization and Solicit Acceptances Thereof was electronically filed through the Court's ECF system, served by hand delivery upon Daniel A. DeMarco, Hahn Loeser & Parks LLP, 65 East State Street, Suite 1400, Columbus, Ohio; served by hand delivery upon Larry Hackett, U.S. Trustee, Region 9, 170 N. High Street, Suite 200, Columbus, Ohio 43215; served by electronic mail service upon Daniel DeMarco at dademarco@hahnlaw.com, William Wallender at bwallander@velaw.com and Clayton T. Hufft at chufft@velaw.com; and served by first class U.S. Mail, postage prepaid upon the persons listed on the attached service lists this 13th day of April 2009.

/s/Reginald W. Jackson
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