

UNITED STATES BANKRUPTCY COURT
DISTRICT OF RHODE ISLAND

)		
In re)		Chapter 11
)		
UTGR, INC. d/b/a TWIN RIVER <i>et al.</i> ,)		Case No. 09-12418 (ANV)
)		
Debtors.)		Jointly Administered
)		

**OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO DEBTORS’ MOTION FOR ENTRY
OF AN ORDER APPROVING TRANSITION AGREEMENT**

The Official Committee of Unsecured Creditors (the “Committee”) of UTGR, Inc. d/b/a Twin River, BLB Management Services, Inc. and BLB Worldwide Holdings, Inc. (collectively, the “Debtors”) hereby objects (this “Objection”) to the *Debtors’ Motion for Entry of an Order Approving Transition Agreement* [Docket No. 330] (the “Motion”), pursuant to which the Debtors seek this Court’s approval of the *Transition and Release Agreement* (the “Agreement”) submitted with the Motion as Exhibit B. As is discussed in detail herein, the Committee objects to the Motion to the extent that it seeks authority to grant to, among others, the Sponsor Representatives, the First Lien Agent, the Second Lien Agent and the Lenders, and to their respective officers, directors, equity holders, affiliates, agents, attorneys, direct and indirect owners, predecessors, successors and assigns, past or present, broad releases from any and all claims and causes of action that the Debtors’ estates have or may have against any one or more of those parties.¹

In support of this Objection, the Committee respectfully states as follows:

¹ Capitalized terms used but not defined in this Objection shall have the meanings ascribed to them in the Motion or the Agreement.

Pertinent Procedural History

1. On June 23, 2009 (the “Petition Date”), each of the Debtors filed a *Voluntary Petition* for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”). Subsequent to that date, the Debtors have continued in the possession of their assets and in the operation of their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. Also on the Petition Date, the Debtors filed several “first day” motions, including the *Debtors’ Motion for Entry of Interim and Final Orders (A) Authorizing the Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Scheduling a Final Hearing* [Docket No. 6] (the “Financing Motion”).

3. At a hearing held on the Petition Date, the Court entered an oral bridge order which, amongst other things, granted to the Debtors certain of the relief requested in the Financing Motion on an interim basis.

4. On June 30, 2009, the United States Trustee for the District of Rhode Island appointed the Committee [Docket No. 85] to represent the interests of all unsecured creditors of the Debtors.

5. After further hearings with regard to the Financing Motion, (i) on July 2, 2009, the Court entered the *Interim Order (A) Authorizing Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Scheduling a Final Hearing* [Docket No. 99], (ii) on August 6, 2009, the Court entered the *Second Interim Order (A) Authorizing Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Scheduling a Final Hearing* [Docket No. 206], and (iii) on August 31, 2009, the

Court entered the *Third Interim Order (A) Authorizing Use of Cash Collateral, (B) Granting Adequate Protection to Prepetition Secured Parties, and (C) Scheduling a Final Hearing* [Docket No. 272]. Each of the foregoing granted the Committee certain rights in recognition of, amongst other things, the powers granted to it by Section 1103(c) of the Bankruptcy Code.²

6. On September 22, 2009, the Court held a hearing to consider entry of a final order with respect to the Financing Motion (the “Final Financing Order”). As of the date of this Objection, the Court has not yet entered the Final Financing Order. By agreement of the parties and as contemplated by Paragraph 16 of the Final Financing Order, *inter alia*, the Committee shall have until October 16, 2009 to investigate and present to the Court any challenge in respect of “the priority, extent (including valuation of collateral), validity, perfection, enforceability and unavailability” of the pre-petition liens, security interests and claims which the First Lien Lenders assert against the Debtors’ assets, and to put forth any other claims, causes of action, defenses or objections the Committee believes the Debtors’ estates have against the First Lien Lenders. The foregoing rights are in addition to those the Committee enjoys under Section 1103(c) of the Bankruptcy Code.

7. On September 30, 2009, the Debtors filed the Motion.

The Committee’s Objection to the Motion

8. The Committee recognizes that in filing the Motion, the Debtors are seeking to fulfill certain obligations that the Restructuring Agreement imposes upon them. Nevertheless, because the Agreement seeks to grant broad releases to the current and former officers and

² Pursuant to Section 1103(c) of the Bankruptcy Code, the Committee may, in addition to other things, “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan[.]” 11 U.S.C. § 1103(c)(2). The Committee may also “perform such other services as are in the interest of those represented.” 11 U.S.C. § 1103(c)(5).

directors of the Debtors and their respective officers, directors, equityholders, affiliates, agents, attorneys, direct and indirect owners, predecessors, successors and assigns, past or present (collectively, the "Sponsor Released Parties"), as well as to the First Lien Agent, the Second Lien Agent and the Lenders, and their respective officers, directors, equityholders, affiliates, agents, attorneys, direct and indirect owners, predecessors, successors and assigns, past or present (collectively, the "Lender Released Parties"), without offering any valid justification therefor and in direct contravention of the rights granted to the Committee in this case, the Committee respectfully objects to the Motion.

9. Section 5(a) of the Agreement states as follows:

In exchange for valuable consideration, the receipt and sufficiency of which is expressly acknowledged, each of the First Lien Agent and the Required Lenders, the Second Lien Agent and the Required Second Priority Lenders, and each BLB Debtor and each Colorado Entity, on behalf of itself, its direct and indirect owners and its successors, assigns, subsidiaries and affiliates (collectively, the "Lender/BLB Debtor/Colorado Entity Releasing Parties"), hereby irrevocably release each of the Sponsor Representatives, BLB Investors, the Sponsor Entities and their respective officers, directors, equityholders, affiliates, agents, attorneys, direct and indirect owners, predecessors, successors and assigns, past or present (collectively, the "Sponsor Released Parties") from any and all claims, actions, causes of actions, demands, liens, agreements, contracts, covenants, actions, suits, obligations, controversies, debts, costs, fees, dues, expenses, damages, judgments, orders and all other claims and liabilities of every nature and description, known or unknown, matured or unmatured, at law or equity, and whether or not contingent (collectively, "Claims") which any Releasing Party now has or ever had against any of the Sponsor Released Parties in connection with, arising out of, in relation to, or in any way associated with the BLB Debtors or the Colorado Entities and their affiliates and subsidiaries, the First Lien Credit Agreement, the Second Lien Credit Agreement, the Promissory Note, the Chapter 11 Cases, any BLB Debtor's or Colorado Entity's board of directors or committee of the board of directors (including any individual being a member thereof), any subsidiary of any BLB Debtor or any Colorado Entity (including any individual being a director or officer thereof), the board of directors of any such subsidiary (including any individual being a member thereof) and/or any investment in, loan to, or contract, agreement or other arrangement with or relating to, any BLB Debtor or Colorado Entity or any affiliate or subsidiary of any BLB Debtor or any Colorado Entity (collectively, the "Applicable Claims"), except that the Applicable Claims shall not include any Claims arising out of or related to any fraudulent act by or on

behalf of, the gross negligence of, any willful misconduct by, or any knowing misrepresentation made by, the Sponsor Released Parties.

See Agreement at 7.

10. In addition to seeking to grant broad releases to the Sponsor Released Parties, the Debtors seek to grant broad releases to the Lender Released Parties. Specifically, Section 5(b) of the Agreement states:

In exchange for valuable consideration, the receipt and sufficiency of which is expressly acknowledged, each of the BLB Debtors, the Colorado Entities, the Sponsor Entities and the Sponsor Representatives, on behalf of itself, its direct and indirect owners and its successors, assigns, subsidiaries and affiliates (collectively, the “BLB/Colorado/Sponsor Releasing Parties” and, together with the Lender/BLB Debtor/Colorado Entity Releasing Parties, the “Applicable Entities”), hereby irrevocably release each of the First Lien Agent, the Second Lien Agent and the Lenders and their respective officers, directors, equityholders, affiliates, agents, attorneys, direct and indirect owners, predecessors, successors and assigns, past or present (collectively, the “Lender Released Parties”) from any and all Claims which any of the BLB/Colorado/Sponsor Releasing Parties now has or ever had against any of the Lender Released Parties in connection with, arising out of, in relation to, or in any way associated with the Applicable Claims, except that the Applicable Claims shall not include any Claims arising out of or related to any fraudulent act by or on behalf of, the gross negligence of, any willful misconduct by, or any knowing misrepresentation made by, the Lender Released Parties.

See id. at 7-8.

The Agreement Improperly Provides for Third-Party Releases

11. Notwithstanding the Debtors’ assertion that the “proposed releases are not third-party releases,” *see* Motion at 12, the Agreement will release claims that may exist and be brought by the Committee against non-debtor parties on behalf of the Debtors’ estate. The Committee respectfully notes that broad third-party releases are generally disfavored in bankruptcy, particularly when there is no disclosure of the potential claims and causes of action being released. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-143 (2d Cir. 2005); *In re Continental Airlines*, 203 F.3d 217-218 (3d Cir. 2000) (stating “[n]othing in the

Bankruptcy Code can be construed to establish such extraordinary protection for non-debtor parties”). In those limited circumstances where releases of non-debtor parties may be permitted, they should be contained in a plan of reorganization. *See Pension Benefit Guaranty Corporation v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 941 (5th Cir. 1983).

12. The Debtors seek to justify the releases being granted to the Sponsor Released Parties and the Lender Released Parties by stating that, after a preliminary investigation, the Debtors are unaware of any claims that may exist against the Sponsor Released Parties or the Lender Released Parties. Notwithstanding the Debtors’ assertion, there is no justification for this Court to approve such releases at this time and prior to the Committee’s opportunity to independently investigate whether such claims may or may not exist.

13. As additional support for the releases granted under the Transition Agreement, the Debtors rely on the Lenders’ analysis of the releases and their willingness to enter into the Transition Agreement. Although the Lenders may have an “overwhelming” economic interest in the Debtors’ Chapter 11 cases, reliance on the Lenders’ analysis may be unwarranted and not in the best interests of the Debtors or their estates. More specifically, the Motion does not disclose whether any claims exist between the Lenders and the Sponsor Released Parties. The existence of such claims could give rise to an independent justification of the Lenders to enter the Agreement and to provide a release of, and obtain a release from, the Sponsor Released Parties. Absent further disclosures, the mere fact that the Lenders have signed the Agreement does not establish that the releases provided therein are in the best interests of the Debtors’ estates.

14. The Debtors further assert that the releases provided under the Agreement are similar to customary releases provided for in a typical Chapter 11 plan of reorganization and that the only difference is the timing of such releases. As a general rule, a Chapter 11 plan’s release

of a debtor's management is typically limited to postpetition matters and the conduct of the debtor's case. Here, the Agreement seeks to release the Debtors' prepetition claims against the Sponsor Released Parties. A further distinction is that a committee will have had the opportunity to investigate claims prior to any releases that may be granted pursuant to a plan. As set forth above, approval of the releases in the Agreement at this time and prior to the Committee's investigation is inappropriate.

The Agreement Impairs the Committee's Investigative Rights

15. In addition, setting aside for the moment the fact that the Motion is silent with respect to any claims or causes of action that may or do exist in favor of the Debtors' estates and against any of the Sponsor Released Parties or the Lender Released Parties, the Motion seeks to grant broad releases to the Lender Released Parties in respect of all Claims

in connection with, arising out of, in relation to, or in any way associated with the BLB Debtors or the Colorado Entities and their affiliates and subsidiaries, the First Lien Credit Agreement, the Second Lien Credit Agreement, the Promissory Note, the Chapter 11 Cases, any BLB Debtor's or Colorado Entity's board of directors or committee of the board of directors (including any individual being a member thereof), any subsidiary of any BLB Debtor or any Colorado Entity (including any individual being a director or officer thereof), the board of directors of any such subsidiary (including any individual being a member thereof) and/or any investment in, loan to, or contract, agreement or other arrangement with or relating to, any BLB Debtor or Colorado Entity or any affiliate or subsidiary of any BLB Debtor or any Colorado Entity

see Agreement at 7-8, notwithstanding the fact that the Final Financing Order afforded the Committee certain rights with respect to the Lender Released Parties, which rights have not yet expired and must, if they are to have any efficacy whatsoever, be preserved if the Court sees fit to grant the Motion.

16. An example of a potential claim that may be improperly released by operation of the Agreement is any potential avoidance claims that the estate may hold against The Bank of

New York Mellon. The Agreement identifies The Bank of New York Mellon as the Second Lien Agent and one of the Lender Released Parties. As set forth in the *Statement of Financial Affairs* [Docket No. 247], the Debtor made two payments in the aggregate amount of \$1,947,755.87 to the “Bank of NY” within 90 days of the Petition Date. To the extent that (i) the Bank of NY and The Bank of New York Mellon are one and the same and (ii) the Debtors’ estates have causes of action, including claims and causes of action under Chapter 5 of the Bankruptcy Code, such claims and causes of action against the Bank of New York Mellon will be forever released and the Committee will be precluded from pursuing on behalf of the Debtors’ estates.

Conclusion

17. Provided that sufficient disclosures concerning the potential claims to be released are provided and the Committee has a sufficient opportunity to investigate the same, the releases granted under the Agreement may be supported by the Debtors’ business judgment and in the best interests of the Debtors’ estate. However, in the absence of such disclosures and an investigation by the Committee, it is impossible to determine whether the releases are an appropriate exercise of the Debtors’ business judgment and in the best interests of their estates. As such, for all of the foregoing reasons, and for any other reasons the Committee may state on the record at any hearing held in connection with the Motion, the Committee respectfully requests that the Court enter an order (i) sustaining this Objection, (ii) denying the Motion to the extent that it seeks authority to grant to the Sponsor Released Parties and Lender Released Parties broad releases from any and all claims and causes of action that the Debtors’ estates have or may have against them,

and (iii) granting to the Committee such other and further relief as the Court deems just and proper.

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF UTGR, INC. *et al.*

By its attorneys,

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