NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NORTHWESTERN CORPORATION,	)	Case No. 03-12872 (CGC)
	)	
Debtor.	)	
	)	

MEMORANDUM OPINION

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Dated: May 13, 2004

CASE, J.

The two motions before the Court are (I) the Motion of RCG Carpathia Master Fund, Ltd. and Kellogg Capital Group LLC f/k/a Performance Capital (1) for Permission to Present Testimony and Submit Pre-Trial Statements in Connection With Their Motion for Appointment of Official Equity Security Holders Committee and (2) Requesting That the Court Schedule a Hearing (the "Evidence Motion") (Docket No. 1231); and (II) the Motion of RCG Carpathia Master Fund, Ltd., Performance Capital and Smith Management LLC (collectively the "Movants") for Appointment of Official Equity Security Holders Committee (the "Committee Motion") (Docket No. 986). Upon consideration and review of all relevant pleadings; oral argument; and for the reasons set forth below, the Court denies both motions.

FACTS

On September 14, 2003 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its properties as debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

An Official Committee of Unsecured Creditors (the "Unsecured Creditors Committee") was appointed by the Office of the United States Trustee, District of Delaware, on September 30, 2003.

On March 11, 2004, the Debtor filed its disclosure statement and plan of reorganization. A hearing on the adequacy of the disclosure statement is scheduled for May 17, 2004.

On March 24, 2004, RCG Carpathia Master Fund, Ltd., Kellogg Capital Group LLC f/k/a/ Performance Capital and Smith Management LLC filed a Motion to Appoint an Equity

Security Holders Committee. Responses were filed by the Debtor, the Unsecured Creditors Committee, The United States Trustee, and Wilmington Trust Company as indenture trustee. The motion was originally scheduled to be heard at the regular omnibus hearing on April 8, 2004; it was continued by consent to May 17, 2004.

The Committee Motion was filed several months after the United States Trustee, on December 4, 2003, refused Movants' November 18, 2003 request to form a committee of equity security holders.

Two of the Movants[1] recently filed a Motion for Permission to Present Testimony and Submit Pre-Trial Statements in Connection With Their Motion for Appointment of Official Equity Security Holders Committee. The Evidence Motion was scheduled on special notice and a hearing was held on May 12, 2004.

DISCUSSION

The Movants' Committee Motion seeks an order appointing an equity security holders committee to represent the holders of common stock pursuant to Section 1102(a)(2) of the Bankruptcy Code. Section 1102(a)(2) states that

> On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

11 U.S.C. § 1102(a)(2). Such a determination is made on a case-by-case basis. See In re Williams Communications Group, Inc., 281 B.R. 216, 220 (Bankr. S.D.N.Y. 2002). Among the facts the court should consider when making this determination are: the solvency of the debtors,

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[1] Smith Capital LLC has not joined in the request for an evidentiary hearing.

timing, the number of shareholders, the complexity of the chapter 11 case, and whether the cost of an additional equity committee significantly outweighs the concern for adequate representation. Id. at 219. In addition, appointing an official equity committee "should be the rare exception" and an equity committee

> should not be appointed unless equity holders establish that (i) there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule, and (ii) they are unable to represent their interests in the bankruptcy case without an official committee.

Id. at 223.

At the heart of the parties' dispute is the value of the Debtor's enterprise. Debtor, through its experts and with the support of the Unsecured Creditors Committee, asserts that the estate is hopelessly insolvent and that equity is approximately $700 million out of the money. Therefore, it urges, supported by the Unsecured Creditors Committee and the United States Trustee, that the Committee Motion be denied but agrees that if the Court is to consider it further, an evidentiary hearing is required. The Movants assert that the Debtor's valuation fails even a minimal test of reasonableness and state that their expert is of the view that there is at least $200 million in value for equity.

The real issue here is which party should bear the cost of a valuation battle–the estate or the Movants. The Movants argue that it is appropriate for the estate to fund the costs of protecting the interests of equity given the size and complexity of the case and the possibility that value exists for equity. The objectors point out that the Movants have every right to raise their arguments in the context of plan confirmation but that the estate should bear the upfront cost where a favorable outcome is so dubious. Further, if they are successful, the Movants may assert

a claim for reimbursement of their fees and costs under Section 503(b)(3)(D) of the Bankruptcy Code.

Against this background, the initial question is whether an evidentiary hearing is appropriate. The Courts concludes not. Let us assume the best outcome for the Movants–that the testimony of Mr. Harris (their expert) is sufficiently compelling to create a credible argument that a higher value may be appropriate and the testimony of Lazard Freres, Debtor's expert, is sufficiently suspect to put the Debtor's valuation in doubt. Does that justify the appointment of a committee? The Court thinks not. All that would do is put the issue of value in play, not tip the scale to the extent that the valuation battle should be funded by the estate. Remember that there is a $700 million shortfall that needs to be overcome before there is any value for equity.[2] While not impossible, that is a steep hill to climb; indeed, the Court could eventually accept nearly 80% of the additional value urged by the Movants and equity would still be out of the money. This does not satisfy the "substantial likelihood that [equity] will receive a meaningful distribution" test set forth in In re Williams.

Under these circumstances, it is not in the best interests of the estate or its constituents to shift the cost of this valuation dispute from the Movants to the estate. As pointed out by Debtor's counsel, the Movants acquired their equity position post-petition[3], understanding the risk they undertook. They can decrease the risk by recruiting other equity holders to be part of an unofficial committee, thereby spreading the upfront costs. In any event, if they are correct, they

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[2] Roughly speaking, Mr. Harris' valuation indicates another $200 million for equity in value beyond the $700 million gap.

[3] Movants' counsel did not take issue with this statement at the hearing.

are protected by Section 503(b)(3)(D) of the Bankruptcy Code. Given the admittedly speculative nature of their position, this is a fair allocation of risk.

CONCLUSION

For the foregoing reasons, the Evidence Motion (Docket No. 1231) is denied. Further, given the Court's conclusions on the Evidence Motion, the Committee Motion (Docket No. 986) is also denied. The May 17, 2004 hearing on the Committee Motion is vacated and the Debtor is directed to delete that item from the Notice of Agenda.

It is so ordered.

Charles G. Case, II
United States Bankruptcy Judge