

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: :
LEHMAN BROTHERS SECURITIES : Civil Action 09 MD 2017 (LAK)
AND ERISA LITIGATION :
This Document Applies to: :
In re Lehman Brothers Equity/Debt Securities :
Litigation, 08 Civ. 5523 (LAK) :
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**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO
PERMIT CLEARY GOTTLIEB STEEN & HAMILTON LLP TO
WITHDRAW AS COUNSEL OF RECORD FOR
DEFENDANT UTENDAHL CAPITAL PARTNERS, L.P.**

Cleary Gottlieb Steen & Hamilton LLP (“Cleary Gottlieb”) submits this memorandum of law in support of its motion for an order permitting it to withdraw as counsel of record for defendant Utendahl Capital Partners, L.P. (“Utendahl”).

PRELIMINARY STATEMENT

Cleary Gottlieb seeks the Court’s permission to withdraw as counsel to defendant Utendahl.

We understand that, earlier this year, Utendahl shut down its operations and liquidated its business. By March 12, 2010, it had terminated all of its employees, and today its offices are closed. As such, Cleary Gottlieb is no longer able to communicate effectively with Utendahl. Further, Utendahl has not, since the end of 2009, compensated Cleary Gottlieb for the legal services it has performed on Utendahl’s behalf, and there is no apparent prospect that it will do so for any future services Cleary Gottlieb may render on its behalf. For these reasons Cleary Gottlieb seeks permission to withdraw as counsel for Utendahl at this time.

BACKGROUND

On February 23, 2009, plaintiffs filed their Second Amended Complaint in this action naming Utendahl as a defendant. Cleary Gottlieb filed a notice of appearance on behalf of more than 40 underwriter defendants, including Utendahl, on February 27, 2009. On March 17, 2010, this court permitted plaintiffs to file a third amended complaint (“TAC”). The TAC was filed on April 23, 2010, again naming Utendahl as a defendant.¹ Cleary Gottlieb moved to dismiss the TAC on behalf of its underwriter defendant clients, but did not move on behalf of Utendahl because Cleary Gottlieb has been unable to contact Utendahl to get authorization for bringing such a motion.

¹ The TAC asserts that defendant Williams Capital Group acquired Utendahl on or about January 10, 2010. We understand that assertion to be incorrect.

Cleary Gottlieb was advised by Utendahl's general counsel, Ria Davis, that the firm is no longer in business, that it and its affiliate Utendahl Capital Group, LLC (UCG) have ceased conducting a securities business, and that all employees (save for a handful working to liquidate the operations) have been terminated. Declaration of Victor Hou, ¶ 2. Finally, Utendahl stopped paying Cleary Gottlieb for its legal services in December 2009. Id. at ¶ 3. Repeated efforts to address this have also been unsuccessful. Id.

According to the Financial Industry Regulatory Authority ("FINRA"), Utendahl terminated or withdrew its FINRA registration on January 11, 2010, and as of March 12, 2010 it was no longer registered with FINRA. Id. at ¶ 4. For a considerable period, Cleary Gottlieb has not been able to contact anyone at Utendahl's offices. Although Cleary Gottlieb lawyers have made repeated attempts to contact Utendahl, the calls have been unanswered and the voicemail system has been shut down. Id. at ¶ 5.

Since the date of filing the motion to dismiss the TAC, Cleary Gottlieb has been in contact with Utendahl's insurer and Utendahl's counsel. However, Cleary Gottlieb has not had any further direct contact with anyone from Utendahl and neither Utendahl nor its counsel have given Cleary Gottlieb authorization to act on its behalf in this litigation. Id. at ¶ 6. Moreover, Utendahl has not paid Cleary Gottlieb for past or continuing legal services. Id.

Cleary Gottlieb has conferred with counsel for class plaintiffs and they consent to this motion to permit Cleary Gottlieb to withdraw as counsel of record for Utendahl. Id. at ¶ 7.

ARGUMENT

An order permitting the withdrawal of counsel of record may be granted "upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal" S.D.N.Y. Local Rule 1.4. Here, such satisfactory reasons plainly exist and withdrawal should be permitted.

Utendahl has shut down its operations and no longer exists as a going concern. As a result, Cleary Gottlieb is unable to communicate with Utendahl, impairing its ability to represent that firm. Further, Utendahl has ceased paying Cleary Gottlieb's legal fees, and provided no assurance that past fees, or any incurred in the future, will be compensated. Accordingly, Cleary Gottlieb seeks permission to withdraw from the representation of Utendahl in this matter.

First, where there is an existing client but the client fails to "cooperate with counsel in the prosecution or defense of an action by, among other things, failing to communicate with counsel," it is well established that "an adequate basis" exists "upon which to permit an attorney to be released from the obligation of continuing to represent the attorney's client." Callahan v. Consolidated Edison Co. of New York, Inc., No. 00 Civ. 6542(LAK)(KNF), 2002 WL 1424593, *1 (S.D.N.Y. July 1, 2002). In addition, Rule 1.16(c)(7) of the New York Rules of Professional Conduct expressly authorizes withdrawal when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively." Here, Utendahl has liquidated its business, terminated all its employees and closed its offices, and going forward has no personnel available to respond to this matter. Hou Decl. ¶ 2. This basis alone is sufficient to permit withdrawal. See Bio Hi-Tech Co., Ltd. v. Comax, Inc., No. 07 CV 2260(RRM)(CLP), 2008 WL 3849554, *2 (E.D.N.Y. Aug. 18, 2008) (permitting withdrawal where among other things the client has "failed to communicate with [counsel] [and] ha[s] not maintained contact" with counsel).

Second, the New York Rules of Professional Conduct also authorize withdrawal where "the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." N.Y. Rules of Prof. Conduct 1.16(c)(5). Thus, "[i]t is well-settled that nonpayment of fees is a valid basis for the Court to grant counsel's motion to withdraw." D.E.A.R. Cinestudi

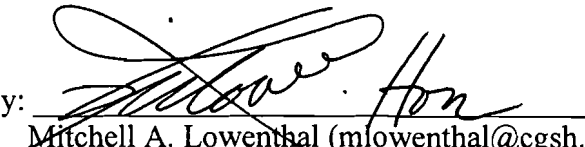
S.P.A. v. International Media Films, Inc., No. 03 Civ. 3038(RMB), 2006 WL 1676485, *1 (S.D.N.Y. June 16, 2006); see also Itar-Tass Russian News Agency v. Russian Kurier, Inc., No. 95 Civ. 2144(JGK), 1997 WL 109511, at * 2 (S.D.N.Y. Mar. 11, 1997) (“Courts have uniformly granted motions to withdraw when attorneys allege non-payment of fees by their clients.”). Here, Utendahl has failed to pay Cleary Gottlieb’s last four invoices, dating back to December 2009, and owes Cleary Gottlieb for nearly seven months of work. Hou Decl. ¶ 3. And there is no likelihood that Cleary Gottlieb will be paid for any subsequent legal work it might perform on Utendahl’s behalf.

CONCLUSION

For the forgoing reasons, Cleary Gottlieb’s motion to withdraw as counsel of record for Utendahl Capital Partners should be granted.

Dated: New York, New York
July 13, 2010

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