



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 8, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

DELTA RADIO NETWORK, LLC,

CASE NO. 15-13216-NPO

DEBTOR.

CHAPTER 11

IN RE:

DELTA RADIO, LLC,

CASE NO. 15-13217-NPO

DEBTOR.

CHAPTER 11

**ORDER GRANTING MOTION TO
SUBSTANTIVELY CONSOLIDATE CASES**

This matter came before the Court for hearing on December 17, 2015 (the “Hearing”), on the Motion to Substantively Consolidate Cases (the “Network Motion”) (Case No. 15-13216-NPO, Dkt. 13) filed in the bankruptcy case of Delta Radio Network, LLC (“Network”) and the Motion to Substantively Consolidate Cases (the “Radio Motion”) (Case No. 15-13217-NPO, Dkt. 14) filed in the bankruptcy case of Delta Radio, LLC (“Radio”).¹ At the Hearing, Jeffrey A. Levingston (“Levingston”) appeared on behalf of the Debtors. After fully considering the matter, the Court finds as follows:

¹ Network and Radio will be collectively referred to as the “Debtors.” The Network Motion and Radio Motion will be collectively referred to as the “Motions.”

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A). Notice of the Motions was proper under the circumstances.

Facts

1. Network filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code on September 11, 2015 (Network Dkt. 1).² Radio also filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code on September 11, 2015 (Radio Dkt. 1).

2. On September 25, 2015, the Debtors filed the identical Motions. In the Motions, the Debtors argued that the Network Bankruptcy Case and the Radio Bankruptcy Case should be substantively consolidated because the Debtors have “common ownership, maintain common financial records, have common creditors, and are essentially operated as a single entity.” (Mots. at 1).

3. At the Hearing, Larry Fuss, Sr. (“Fuss”), the managing member of Network and Radio, testified on behalf of the Debtors. Fuss stated that Network and Radio were formed in Nevada and with the exception of one person, they share the same members. Fuss testified that the Debtors’ separate corporate identities always have been disregarded and they consistently have operated as one corporation. According to Fuss, all of the Debtors’ revenue is in one account, the bills are paid out of one account, they share employees, they file one tax return, and

² Citations to the docket in Case No. 15-13216-NPO (the “Network Bankruptcy Case”) will be cited as “(Network Dkt. ____).” Citations to the docket in Case No. 15-13217-NPO (the “Radio Bankruptcy Case”) will be cited as “(Radio Dkt. ____).” The Network Bankruptcy Case and the Radio Bankruptcy Case will be collectively referred to as the “Bankruptcy Cases.”

they keep one set of records. Fuss testified that the creditors will not be prejudiced by substantive consolidation because no creditor will receive less as a result.

4. At the Hearing, Levingston stated that the primary reason the Debtors filed the Bankruptcy Cases was because of tax debt. According to Levingston, the Debtors have entered into preliminary agreements with the Internal Revenue Service and the Mississippi Department of Revenue that will allow them to repay their debts under the chapter 11 plan.

Discussion

Bankruptcy courts have the power to substantively consolidate bankruptcy cases as part of their general equitable powers pursuant to § 105.³ *In re Coleman*, 417 B.R. 712, 725 (Bankr. S.D. Miss. 2009) (citations omitted). Substantive consolidation allows courts to consolidate the assets and liabilities of separate legal entities “so that the assets and liabilities are dealt with as if the assets were held by and the liabilities were owned by a single legal entity.” 2 COLLIER ON BANKRUPTCY ¶ 105.09[1][a](16th ed. 2015). “Substantive consolidation allows the court to disregard a separate corporate entity in order to reach assets for the satisfaction of debts of a separate but related debtor.” *In re Coleman*, 417 B.R. at 725. It results in “the effective merger of two or more legally separate and distinct entities into a single debtor.” *Id.* When the Court grants substantive consolidation, a single estate with a common fund of assets is formed and the “[a]ssets and liabilities of each entity are pooled and inter-entity accounts and claims are eliminated. Creditors of the separate entities become creditors of the consolidated entity.” *Id.* (quoting *Gill v. Sierra Pac. Constr. Inc.*, 89 B.R. 832, 836 (Bankr. C.D. Cal. 1988)).

³ All code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless stated otherwise.

Courts should use the power to substantively consolidate cases sparingly because substantive consolidation poses the risk of potential harm to creditors.⁴ *Wells Fargo Bank of Tex. N.A. v. Sommers (In re Amco Ins.)*, 444 F.3d 690, 696 n.5 (5th Cir. 2006) (citations omitted). Because substantive consolidation is rooted in the Court’s equitable powers, there are no statutorily prescribed standards. 2 COLLIER ON BANKRUPTCY ¶ 105.09[2]. Accordingly, the Circuit Courts of Appeals have established several tests for determining whether bankruptcy cases should be substantively consolidated. Although the Fifth Circuit Court of Appeals has not adopted its own standard for determining when substantive consolidation is appropriate, this Court has held that in utilizing the various tests, courts generally consider two major factors: (1) whether creditors dealt with the debtors as if they were the same entity prior to the bankruptcy and (2) whether the debtors’ affairs after the bankruptcy “are so intertwined that the time and expense necessary to identify and allocate their assets and liabilities would likely erode the recovery of those assets and create substantial delays in effecting a distribution to creditors.” *In re Coleman*, 417 B.R. at 726 (citation omitted). These tests indicate that courts must undergo a “highly fact-specific analysis to determine whether substantive consolidation would effectuate the goal of fairness to all creditors.” *Mojave CP, LLC*, No. 10-50223-NPO, slip op. at 7 (Dkt. 92) (Bankr. S.D. Miss. Apr. 28, 2010); *Compass Pointe Holdings, LLC*, No. 10-50224-NPO, slip op. at 7 (Dkt. 89) (Bankr. S.D. Miss. Apr. 28, 2010).

In *Mojave CP, LLC*, No. 10-50223-NPO, slip op. at 1 (Dkt. 92) (Bankr. S.D. Miss. Apr. 28, 2010) and *Compass Pointe Holdings, LLC*, No. 10-50224-NPO, slip op. at 1 (Dkt. 89)

⁴ An example of potential harm to creditors is that sharing assets with all other creditors of a consolidated surviving entity could reduce the recovery of those creditors who transacted business solely with the entity having significantly greater funds. *Mojave CP, LLC*, No. 10-50223-NPO, slip op. at 4 (Dkt. 92) (Bankr. S.D. Miss. Apr. 28, 2010); *Compass Pointe Holdings, LLC*, No. 10-50224-NPO, slip op. at 4 (Dkt. 89) (Bankr. S.D. Miss. Apr. 28, 2010).

(Bankr. S.D. Miss. Apr. 28, 2010), the debtors filed motions to substantively consolidate their respective bankruptcy cases. The debtors alleged that they were closely related entities, they shared cash flow, expenses, means and methods of operation, and management of an apartment complex they purchased together, and that consolidation would ease administration, reduce duplicate filings, and promote judicial economy. *Id.* at 2. This Court denied the motions to substantively consolidate because the debtors did not share officers, owners, or directors, they did not have a parent/subsidiary relationship, and there was “no evidence that the two corporations commingled funds to the disadvantage of creditors or that they engaged in undocumented inter-company transactions.” *Id.* at 3. This Court concluded that the debtors were “separate legal entities, owned by separate individuals” that simply purchased an apartment complex together and that “the [d]ebtors presented no evidence that they hopelessly commingled funds, that they disregarded corporate formalities, or that creditors viewed them as one indistinguishable entity.” *Id.* at 8. Additionally, “cost-savings in the administration of the cases is insufficient reason in itself to justify such a drastic remedy.” *Id.* (citing *In re Owens Corning*, 419 F.3d at 195(3d Cir. 2005)).

Unlike the debtors in *Mojave* and *Compass Pointe*, the Debtors have demonstrated that they were essentially operating as one indistinguishable legal entity and that substantive consolidation would ease the administration of the Bankruptcy Cases. The Debtors share assets, share a bank account, pay their bills out of the same account, file one tax return, share employees, and keep one set of records. As this Court noted in *In re Coleman*, a factor courts consider in determining whether to allow substantive consolidation is whether the debtors’ affairs are so intertwined that it would delay recovery and the administration of the plan to identify the separate assets and liabilities of the entities. Identifying the separate assets and

liabilities of Network and Radio would require significant time and resources because they are heavily intertwined. Thus, requiring the Bankruptcy Cases to proceed separately would hinder and delay the administration of a chapter 11 plan and the creditors' ability to recover assets from the Debtors. Accordingly, the Court finds that it is in the best interest of both the Debtors and the creditors for the Bankruptcy Cases to be substantively consolidated.

IT IS, THEREFORE, ORDERED that the Motions are hereby granted.

IT IS FURTHER ORDERED that the Bankruptcy Cases are hereby substantively consolidated.

IT IS FURTHER ORDERED that all documents shall be filed with the following caption:

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**DELTA RADIO NETWORK, LLC AND
DELTA RADIO, LLC,**

DEBTORS.

CASE NO. 15-13216-NPO

**CHAPTER 11
Substantively Consolidated**

##END OF ORDER##