

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In Re:

FONTAINEBLEAU LAS VEGAS
HOLDINGS, LLC, et al.

Case No. 09-21481-BKC-AJC

Chapter 11
(Jointly Administered)

Debtors.

**EMERGENCY MOTION OF CONTRACTOR CLAIMANTS FOR ORDER DIRECTING
THE UNITED STATES TRUSTEE TO FORM AN OFFICIAL COMMITTEE OF
CONTRACTOR CLAIMANTS**

[EMERGENCY HEARING REQUESTED ON OR BEFORE JUNE 23, 2009 at 3:00 P.M.]

The Contractor Claimants, described below, respectfully request an emergency hearing in this matter on or before June 23, 2009 at 3:00 P.M. pursuant to Local Rule 9075-1. The Contractor Claimants seeks the appointment of an Official Committee of Contractor Claimants to protect and represent the critical interests of the numerous and economically significant group of contractor and similarly situated claimants in these jointly administered cases. The Contractor Claimants wish to continue to provide the Debtors with expert building, air conditioning and ventilation, electrical, mechanical and other services and equipment that are indispensable to the completion of the Fontainebleau project (the "Project"). The Contractor Claimants submit that the formation of an Official Committee of Contractor Claimants is necessary to adequately protect and represent not only the interests of contractor claimants, who assert greater than \$100 million in mechanics' liens against the Project, but also to preserve the possibility of completing the project. Counsel for the Contractor Claimants has petitioned the Office of the United States Trustee, requesting formation of an Official Committee, but the United States Trustee has deferred that request pending a decision from the Court. In addition, there are too many parties in interest in these cases to obtain advance consent to this critical motion. Accordingly, the Contractor Claimants requests that the requirements of Local Rule 9075-1 be waived.

Desert Fire Protection, a Nevada Limited Partnership, Bombard Mechanical, LLC, Bombard Electric, LLC, Warner Enterprises, Inc. d/b/a Sun Valley Electric Supply Co., Absocold Corporation d/b/a Econ Appliance, Austin General Contracting, and Powell Cabinet

and Fixture Co., Safe Electronics, Inc, who collectively comprise the Contractor Claimants (the “Contractors Claimants”), by and through undersigned counsel, move the Court on an emergency basis pursuant to 11 U.S.C. § 1102(a)(2) of the United States Code (the “Bankruptcy Code”) for an order directing the United States Trustee to form an Official Committee of Contractor Claimants (the “Motion”). In support of the Motion, the Contractor Claimants state:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicate for the relief sought in this Motion is 11 U.S.C. § 1102(a).

BACKGROUND

2. On June 9, 2009 (the “Petition Date”), each of the Debtors¹ filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

3. The Debtors are currently operating their businesses and managing their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

4. The Debtors’ bankruptcy cases are being jointly administered pursuant to the *Order Jointly Administering Debtors’ Chapter 11 Cases* pursuant to Bankruptcy Rule 1015(b) and Local Rule 1015-1(B). (D.E. 10).

5. The Contractor Claimants currently assert an aggregate \$112,376,545.81 in mechanics’ lien claims. The Contractor Claimants have been in contact with other similarly situated claimants, who have expressed strong interest in joining with the Contractor Claimants in support of the Motion to form an official committee. Accordingly, the Contractor Claimants

¹ The Debtors are Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas, LLC, and Fontainebleau Las Vegas Capital Corp.

expect their \$112,376,545.81 in asserted mechanics' lien claims to grow significantly by the time this Motion is heard.

6. On June 17, 2009, the United States Trustee filed the *Appointment and Notice of Appointment of Committee of Creditors Holding Unsecured Claims* (the "Notice of Appointment"). (D.E. 97). The Notice of Appointment appoints five members to the Committee of Creditors Holding Unsecured Claims (the "GUC"), including Kelley II, LLC d/b/a Kelley Technologies, Minibar North America, Inc., Paul Steelman Design Group/Steelman Partners, Decca Hospitality, and Wells Fargo Bank, N.A. as Trustee for \$675 million of 10.25% Second Mortgage Notes Due 2015 (collectively, the "GUC Members"). Excluding Wells Fargo, the GUC Members represent \$5,278,435.83 in unsecured claims (\$4,299,917.85 of which are listed as "disputed" on the Debtors' petition). (D.E. 1 in Case No. 09-21482-AJC).

7. On June 17, 2009, the Debtors filed the *Emergency Motion for Entry of An Order Authorizing the Debtors to Pay Prepetition Critical Vendor Claims in the Ordinary Course of Business* (the "Critical Vendor Motion"). (D.E. 99). The Critical Vendor Motion seeks to pay certain trade creditors (the "Vendors") that have performed services on the Fontainebleau project, but, curiously, the list of such Vendors does not include any of the Contractor Claimants. The Vendors represent only \$7,954,374 in claims.

**THE OFFICE OF THE UNITED STATES TRUSTEE SHOULD
FORM AN OFFICIAL COMMITTEE OF CONTRACTOR CLAIMANTS**

8. The Court should enter an order directing the United States Trustee to form an Official Committee of Contractor Claimants. In these cases, the Debtors have represented to the Court at the hearing on First Day Motions held on June 11, 2009 at 3:00 p.m. (the "First Day Hearing") that there are approximately \$403 million in "project payables," "that might result in mechanics liens against the Project" of which the Contractor Claimants currently compose more

than a quarter and anticipate composing an even greater percentage. *See Declaration of Howard C. Karawan in Support of Debtors' Chapter 11 Petitions and First Day Pleadings* (the "Karawan Declaration") (D.E. 5 at ¶ 17). In contrast, there are only \$37 million in general unsecured claims. *See* "Capitalization Table" composed by Debtors, attached as **Exhibit A**. The Contractor Claimants hold claims totaling almost three times those of general unsecured claims, excluding the claims of Wells Fargo, which may also be characterized as lien claims. Moreover, the Contractor Claimants are not asserting general unsecured claims; they assert mechanics' lien claims, which may prime the claims of those entities referenced in the Debtor's cash collateral motion as "Prepetition Lenders," the "Prepetition Secured Parties," and the "Prepetition Term Lenders," (hereinafter referred to collectively as the "Banks") under Nevada Law. The Contractor Claimants are, therefore, adverse to the GUC. Accordingly, the Contractor Claimants are not adequately represented by the GUC, and this Court should direct the United States Trustee to form an Official Committee of Contractor Claimants.

9. Section 1102 of the Bankruptcy Code authorizes the Court, on request of a party in interest, to appoint additional creditors' committees "if necessary to assure adequate representation of creditors or equity security holders." *In re Winn-Dixie Stores, Inc.*, 326 B.R. 853, 857 (Bankr. M.D. Fla. 2005). In making its determination, the court has discretion to appoint an additional committee to *assure adequate representation*. *In re Enron Corp.*, 279 B.R. 671, 684 (Bankr. S.D.N.Y. 2002) (emphasis in original). The decision whether to appoint an additional committee is made on a case-by-case basis. *Id.* (citations omitted). "The party seeking the appointment of an additional committee bears the burden of proving it is not adequately represented." *In re Winn-Dixie Stores, Inc.*, 326 B.R. at 857. Contractor Claimants recognize that the appointment of an additional committee is an extraordinary remedy. *See id.* In this

instance, however, the appointment of an Official Committee of Contractor Claimants is an appropriate and necessary remedy to protect not only the Contractor Claimants and others similarly situated, but also to protect the Project itself.

10. “The Bankruptcy Code does not define adequate representation.” *Winn-Dixie*, 326 B.R. at 857. In considering whether a creditor constituency is adequately represented, bankruptcy courts typically apply a number of factors including: (1) the ability of the committee to function; (2) the nature of the case; (3) the standing and desires of the various constituencies; (4) the ability for creditors to participate in the cases without an official committee and the potential to recover expenses pursuant to § 503(b); (5) whether different classes may be treated differently under a plan and need representation; (6) the motivation of the movants; (7) the costs incurred by the appointment of additional committees; and (8) the task that a committee or separate committee is to perform. *Id.* at 857 (citing *In re Enron Corp.*, 279 B.R. 671, 685 (Bankr. S.D.N.Y. 2002)). In this case, the balance of the factors weighs heavily in favor of the formation of an Official Committee of Contractor Claimants.

11. It is highly probable that any party or constituency would concede that these jointly administered cases are complex. *See, e.g., generally Karawan Declaration*. “In a large case, in which there are significant groups of creditors or equity security holders with conflicting claims which are likely to be affected by the plan of reorganization, the court *should authorize the appointment of additional committees.*” *In re Beker Indus. Corp.*, 55 B.R. 945, 948-49 (Bankr. S.D.N.Y. 1985) (citing 5 L. King, *Collier on Bankruptcy* ¶ 1102.2 at 1102-18 (15th Ed.1984), and *In re Fidelity America Mortg. Co.*, 7 B.R. 1186 (Bankr. E.D. Pa. 1981)) (emphasis added). These cases involve approximately \$1.85 billion in loan commitments and multiple constituencies with conflicting claims and interests. The Contractor Claimants desire to form a

committee that represents their significant economic and legal interests in large part because they cannot be adequately represented by the GUC or any other constituency in the case.

12. The Contractor Claimants are in a unique position in these cases. Under Nevada Law, the Contractor Claimants may prime the Banks on both the “Term Loan Facility” and the “Revolver Facility.” *See generally, Karawan Declaration.* At the First Day Hearing, Debtor’s counsel apprised the Court that it appeared that mechanic lienholders primed the Banks under Nevada law and that the potential for disputes arising from those competing interests were foreseeable.

13. Nevada Revised Statute 108.225, “Priority of Liens,” provides, in pertinent part that construction liens, as defined in the statute, are preferred to:

1 ...

(a) Any lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement.

(b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against the property at the commencement of construction of a work of improvement.

2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement are subordinate and subject to the liens provided for in NRS 108.221 to 108.246, inclusive, regardless of the date of recording the notices of liens.

14. Upon good information and belief, the work on the Project was well under way before the deeds of trust of the Banks were recorded against the Project. If this is in fact the case, then the claims of all Contractor Claimants who provided materials or labor to the Project, even those who commenced work on the Project subsequent to the recordation of the Banks’ deed of trust, will prime the lien position of the Banks. Accordingly, the Contractor Claimants are not only well ahead of the general unsecured creditors in priority, they are very likely ahead

of the interest of the Banks as well. As such, the Contractor Claimants' interests are not aligned with those of the GUC. The GUC, therefore, cannot adequately represent the Contractor Claimants.

15. An Official Committee of Contractor Claimants would be cohesive in its purpose and legal position. The Contractor Claimants have performed significant labor, and supplied massive quantities of parts and equipment for the Project. They are unified and incentivized to seeing the Project through to completion and getting paid for their work in the process. The Contractor Claimants have already or are in the process of perfecting their mechanics liens, and under applicable bankruptcy and Nevada law, these liens relate back to the date of commencement of work on the Project. *See, e.g., In re Kara Homes, Inc.*, 374 B.R. 542, 553-54 (Bankr. D.N.J. 2007) (an entity is authorized to perfect an interest postpetition to the extent state law provides for perfection to relate back to the prepetition interest); *Durango Georgia Paper Co. v. Wood Fire Protection*, 356 B.R. 305, 309 (Bankr. S.D. Ga. 2005) ("If a creditor has a right of delayed perfection under applicable law, Section 546(b)(1) preserves this right and makes it available to the creditor during bankruptcy"); *Glinka v. Hinesburg Sand and Gravel, Inc.*, (*In re APC Constr., Inc.*), 132 B.R. 690, 695 (Bankr. D. Vt. 1991) (same). There is no bankruptcy law impediment to additional contractors and other similar creditors taking the same steps and ascending to the same rights as the Contractor Claimants. In the event that such additional creditors join with the Contractor Claimants, the support for an Official Committee will exceed the \$112,376,545.81 currently represented by the Contractor Claimants. Such a significant economic constituency should be separately represented and recognized as an Official Committee. In addition, because of their unique position, the Contractor Claimants anticipate being treated differently than general unsecured claimants under any plan in this case. As such,

their goals and rights may require counsel and advice that at best are not necessarily aligned with the goals of the general unsecured creditors and at worst simply adverse.

16. At the same time, the existence of an Official Committee of Contractor Claimants will not impede the functioning of the GUC. The GUC will have its own agenda, which may converge with that of the Contractor Claimants on some issues, but is adverse on other issues. So long as the GUC are adequately represented, which the Contractor Claimants anticipate, the GUC should be able adequately to pursue its goals, while allowing the Official Committee of Contractor Claimants to pursue its goals separately. In fact, the likelihood that both constituencies will be represented by its own able counsel can factor in advancing this case and in fostering communication and negotiations along the way.

17. Moreover, the Debtors will not adequately represent the Contractor Claimants and other similar creditors. The Critical Vendor Motion did not include a single Contractor Claimant despite their combined total of over One Hundred Million Dollars in claims and the critical role that each performs in constructing the Project. Instead, the Debtors seek to pay the Vendors, who represent only \$7,954,374 in claims, and do not provide the construction services that are immediately necessary to preserve the Project, including enclosing the Project and securing the exposed equipment and infrastructure. The Debtors' omission of the Contractor Claimants from the group of preferred Vendors is particularly acute where they seek to pay the Las Vegas Fire Department, but not Desert Fire Protection, which installs the Debtors fire protection systems. Accordingly, the Debtors own actions reveal that they cannot and will not provide the Contractor Claimants and adequate representation.

18. There are many instances in which bankruptcy courts have appointed official committees in addition to unsecured creditor committees and equity security holder committees

to represent interests as diverse as secured creditors, employees, and even industry competitors. *See, e.g., In re Diversified Capital Corp.*, 89 B.R. 826, 831 (Bankr. C.D. Cal. 1988) (secured creditors committee); *In re Nat. Equip. & Mold Corp.*, 33 B.R. 574, 575 (Bankr. N.D. Ohio 1986) (committee of priority creditors); *In re Bear Lake West, Inc.*, 32 B.R. 272, 275 (Bankr. Idaho 1983) (undivided interest holders); *In re Cloud Nine, Ltd.*, 3 B.R. 199, 200 (Bankr. D. N.M. 1980) (property owners creditors committee); *In re Western Farmers Ass'n*, 8 B.R. 539, 540 (Bankr. W.D. Wash. 1981) (finance fund certificate holders committee); *In re A.H. Robins Co.*, 65 B.R. 160 (E.D. Va. 1986) *aff'd* 825 F.2d 794 (4th Cir. 1987) (tort claimants); *In re Mesta Mach. Co.*, 67 B.R. 151 (Bankr. W.D. Pa. 1986) (hourly employees); *In re Matter of Patrick Cudahy, Inc.* 88 B.R. 895, 898 (Bankr. E.D. Wis. 1988) (retirees); *In re Texaco, Inc.*, 73 B.R. 960 (Bankr. S.D.N.Y. 1987) (listing committee of industry competitors).

19. In fact, the Bankruptcy Court for the Southern District of Florida, Fort Lauderdale Division appointed an Official Committee of Deposit Holders in the case of *In re Levitt and Sons, LLC et al.* *See* D.E. 766 in Case No. 07-19845-BKC-RBR. In that case, despite the existence of an ably represented unsecured creditors committee, Judge Ray appointed an additional official committee of deposit holders, who were a subclass of unsecured creditors, because of their sheer numerosity and need for representation apart from trade creditors and other unsecured creditors of the debtors.

20. Moreover, these cases are in their infancy, and no constituency will be prejudiced by the early appointment of an Official Committee of Contractor Claimants. To the contrary, affording the Contractor Claimants a prominent role in negotiations early in the case will most likely help resolve contested issues in the case and speed the completion of the Project. The Contractor Claimants represent exponentially larger claims than the GUC, and as such, have

more leverage and more influence in the negotiations process. Accordingly, an Official Committee is the proper vehicle through which other similar creditors in addition to the Contractor Claimants should organize and be heard with respect to critical issues in the case.

21. Administratively, an Official Committee will be less expensive for the Debtors' Estates, and streamline the proceedings than would be the case if mechanics' lien claimants were left to fend for themselves individually. One Official Committee of similarly situated creditors can represent the interests of the whole and avoid the inevitable multiplication of motions seeking individual forms of relief and the attendant delay that would necessarily follow from scheduling, responding to, and litigating the multiplicity of motions that mechanics' lien and similar claimants would file over each contested issue. Appointment of an Official Committee would actually reduce the administrative expenses of the estate by concentrating interests in one body and negotiating with the Debtors, lenders consortiums, and GUC through one representative group instead of multiple singly-represented creditors all seeking individual attention and possibly working at cross-purposes to each other.

22. It is also economically advantageous to the Debtors' estates to have a unified, statutory committee representing the interests of contractors generally as it relates to the priority of their claims against the Banks. Nevada Revised Statute 108.237 provides to a Contractor Claimant who successfully enforces a construction lien the award of costs and attorneys fees. It is more advantageous to have a unified Official Committee representing the interests of the Contractor Claimants, rather than having 30, 50, or more sets of lawyers coming to the Court on behalf of their respective clients to enforce priority of lien rights as it relates to the Banks, and seeking fees for what would definitely be duplicative services and efforts, particularly in the instance where the Contractor Claimants indeed prime the Banks and become entitled to

payment and award of fees allowable under NRS 108.237 as a predicate for seeking over secured fees under §506 (b) of the Bankruptcy Code.

23. Once the movant establishes the need for separate representation, as in this case, the “burden shifts to the opponent of the motion to show that the costs of the additional committee sought *significantly outweighs* the concern for adequate representation and cannot be alleviated in other ways.” *In re Beker Indus. Corp.*, 55 B.R. 945, 949 (Bankr. S.D.N.Y. 1985) (emphasis added). In the case of public debt and security holders, “[c]ost alone cannot, and should not, deprive [such] holders of representation,” and the case is no different here. *See In re McLean Indus., Inc.*, 70 B.R. 852, 860 (Bankr. S.D.N.Y. 1987). In this case, the Contractor Claimants and those like them require adequate, separate representation because active participation will be required to protect their interests. This is not a case where those holding claims similar to the Contractor Claimants “will be asked merely to vote on a plan.” *In re Beker Indus. Corp.*, 55 B.R. at 949. Certain constituencies in the case will, no doubt, object that an Official Committee of Contractor Claimants is unnecessary because such a committee would add additional costs to the case. As argued above, an Official Committee would more likely add to the economic and administrative efficiency of the case, and as with a committee of equity security holders, cost alone cannot deprive such a significant class of claimants adequate representation. *See In re McLean Indus.*, 70 B.R. at 860.

24. Turnberry West Construction, Inc. (“Turnberry”), the General Contractor on the Project has, upon information and belief, already filed a mechanic’s lien claim against the project in the amount of \$668,990,933.27. *See Karawan Declaration* at ¶ 27. As General Contractor, it is conceivable that Turnberry may argue that an Official Committee is unnecessary, as it, as General Contractor, will advocate for the interests of Contractor Claimants. The Contractor

Claimants are not comfortable with Turnberry serving as their advocate in the pursuit of construction liens under Nevada Revised Statute 108.221, et seq. for several reasons. First, Contractor Claimants believe Turnberry has performed nowhere near the \$668,990.933.27 in services now claimed by them in their lien claim. Contractor Claimants have themselves, performed the vast majority of the work on the Project and are therefore much better situated to advocate their own lien claims. Second, Jeffrey Soffer is the President, Secretary, Treasurer and sole director of Turnberry. Mr. Soffer is also the person in ultimate control of the Debtors. *See Karawan Declaration* at ¶ 12. Accordingly, the Contractor Claimants believe that Turnberry is conflicted, and cannot and should not, as a matter of law, be entrusted with the valuable lien claims of the Contractor Claimants. Finally, Turnberry, as mentioned by Debtors' counsel at the First Day Hearing, may be filing its own petition for chapter 11 protection in short order. Accordingly, neither the GUC, the Debtors, or Turnberry are well-suited to represent the Construction Claimants and others similarly situated and only an official committee of similarly-situated claimholders can represent the interests of that particular constituency.

CONCLUSION

For the foregoing reasons, Contractor Claimants believe that it is in the best interest of these estates that the Court direct the United States Trustee to appoint an Official Committee of Contractor Claimants

WHEREFORE, Desert Fire Protection, a Nevada Limited Partnership, Bombard Mechanical, LLC, Bombard Electric, LLC, Warner Enterprises, Inc. d/b/a Sun Valley Electric Supply Co., Absocold Corporation d/b/a Econ Appliance, Austin General Contracting, and Powell Cabinet and Fixture Co., Safe Electronics, Inc, respectfully request that the Court enter an

order directing the United States Trustee to form an Official Committee of Contractor Claimants, and for such other and further relief as the Court deems just and proper.

Respectfully submitted on June 18, 2009.

***I HEREBY CERTIFY** that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am qualified to practice in this Court as set forth in Local Rule 2090-1(A).*

EHRENSTEIN CHARBONNEAU CALDERIN

Attorneys for Contractor Claimants
800 Brickell Avenue, Suite 902
Miami, Florida 33131
www.ecclegal.com
T 305.722.2002 F 305.722.2001

By: /s/ Jacqueline Calderin, Esq.

Robert P. Charbonneau
Florida Bar Number 968234
rpc@ecclegal.com
Jacqueline Calderin, Esq.
Florida Bar Number: 134414
jc@ecclegal.com
Daniel L. Gold
Florida Bar Number 0761281
dg@ecclegal.com

Fontainebleau Las Vegas Holdings, et al.
Case No. 09-21481-BKC-AJC

Capitalization Table

(\$mm)	Outstanding	Commitments	Total	Maturity
Total Debt:				
Las Vegas Resort				
Las Vegas Funded Term Loan	700	700		6/2014
Las Vegas Delayed-Draw Term Loan ¹	337	350		6/2014
Las Vegas Revolver ²	13	800		6/2012
Las Vegas Swaps, Collars & Cash Mgmt Transactions ³	49			
Las Vegas Senior Debt	\$ 1,099	\$ 1,850		
Las Vegas 2nd Mortgage Notes	675	675		6/2015
Project Payables	365			
General Unsecured Claims	37			
Total Las Vegas Debt	\$ 2,176	\$ 2,525		

¹ - Approx. \$136 million of the proceeds from the Las Vegas Delayed-Draw Term Loan remains in the Bank Proceeds Account.

² - Letters of Credit in the approximate face amount of \$13 million.

³ - Unliquidated. The Debtors estimate the termination of the swaps will result in liability of approx. \$49 million in the aggregate.

