

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

GUE Liquidation Companies, Inc., et al.,

Debtors.

Chapter 11

Case No. 19-11240 (LSS)

(Jointly Administered)

Ref. Docket Nos. 1137, 1138, 1165,
1167, 1170

MEMORANDUM

The matter before me is the Third Omnibus Objection (Substantive) of the Debtor Liquidation Trust to Certain Disputed Claims¹ (“Third Omnibus Objection”), which, while denominated an omnibus objection, addressed only claims asserted by Randstad General Partners (US), LLC and Randstad North America, Inc. (collectively, “Randstad”). The Debtor Liquidation Trust contends that the matter can be resolved on the basis of legal argument only. Randstad contends that an evidentiary hearing is needed after targeted discovery.

After considering the submissions and the arguments of counsel, for the reasons set forth below, I will grant the Third Omnibus Objection as it relates to Randstad’s prepetition claims. But, an evidentiary hearing is needed with respect to Randstad’s administrative expense request, so the hearing on the Third Omnibus Objection will remain open for that purpose.

¹ D.I. 1137.

Background

1. On June 3, 2019, GUE Liquidation Companies, Inc. and certain of its affiliates (“Debtors”) filed voluntary bankruptcy cases in this Court. Thereafter, Debtors sold substantially all of their assets in multiple sales efforts.²

2. On December 19, 2019, the Court confirmed Debtors’ First Amended Joint Plan of Liquidation for the Debtors³ by which, among other things, two trusts were formed: the Debtor Liquidation Trust and the Committee Liquidation Trust. Upon the Effective Date, all of Debtors’ directors and officers were deemed to resign and Debtors were deemed dissolved for all purposes and of no further legal existence. No assets reverted in Debtors; rather, all assets vested in either the Creditor Liquidation Trust or the Committee Liquidation Trust as set forth in the Plan.

3. The Debtor Liquidation Trust is generally responsible for liquidating all of the assets of Debtors’ estates (other than assets that were vested in the Committee Liquidation Trust), assumed all of Debtors’ responsibilities under the Plan, and is charged with making distributions to holders of secured, administrative and priority claims and making appropriate reserves for the expenses of the Debtor Liquidation Trust. According to the Disclosure Statement,⁴ the holders of Secured Lender Claims (in the estimated amount of \$102 million) were projected to receive a recovery of 15%–20%.⁵

² The sales necessitated the change of name of the various debtor entities.

³ D.I. 1005.

⁴ Disclosure Statement for First Am. Joint Plan of Liquidation for the Debtors 3, D.I. 840 (“Disclosure Statement”).

⁵ The Committee Liquidation Trust was charged with making distributions to holders of general unsecured claims, pursuing certain causes of action transferred to it and reviewing, settling or prosecuting objections to general unsecured claims. To achieve its purposes, the Committee Liquidation Trust received \$4.2 million pursuant to a settlement with the secured lenders. According to the Disclosure Statement, holders of general unsecured claims (in the estimated amount of \$80-\$150 million) were projected to receive a recovery of 0%–5%. *Id.*

4. Particularly relevant here is that the Debtor Liquidation Trust is empowered to reconcile, object to and or settle claims other than general unsecured claims, i.e., secured, administrative, and priority claims.

5. Prepetition, Provide Commerce, Inc. on behalf of itself and its affiliated entities entered into a Corporate Temporary Staffing Services Agreement with Randstad North America, Inc. (“Staffing Services Agreement”). Pursuant to the Staffing Services Agreement, Randstad contracted to fill certain of Debtors’ staffing needs pursuant to a Statement of Work.

6. Prior to the respective bar dates established in the bankruptcy cases, each Randstad entity filed an identical proof of claim against each of GUE Liquidation, Inc. f/k/a FTD, Inc. and GUE Liquidation Commerce f/k/a Provide Commerce LLC. These four proofs of claim (“Proofs of Claim”) assert identical claims in the amount of \$922,297.02 of which \$677,500.02 is asserted as a priority claim under § 507(a)(4) of the United States Bankruptcy Code.⁶ The fifth proof of claim is asserted by Randstad North America, Inc. against GUE Liquidation Commerce f/k/a Provide Commerce LLC in the amount of \$362,083.20. Notwithstanding the use of a “Proof of Claim” form, Randstad asserts this amount is entitled to administrative expense status per § 507(a)(2) of the Bankruptcy Code (“Administrative Expense Claim”).

7. On February 11, 2020, the Debtor Liquidation Trust filed the Third Omnibus Objection objecting to the Proofs of Claim and the Administrative Expense Claim. The Debtor Liquidation Trust asserts that Randstad has misclassified its prepetition claim in that none of the claimed \$922,297.02 is entitled to priority; the entirety is a general unsecured

⁶ 11 U.S.C. §101 *et seq.* (“Bankruptcy Code”).

claim. The Debtor Liquidation Trust asserts that the Administrative Expense Claim should be disallowed, or alternatively, reclassified as a general unsecured claim.

8. In its Response,⁷ Randstad narrows the issues and affirmatively states the basis for the priorities/status asserted in its Proofs of Claim and Administrative Expense Claim as follows:

- Randstad asserts a single “pure” § 507(a)(4) claim in the amount of \$13,650 as a “corporation” under that section.⁸
- Randstad asserts that \$677,500.02 of its prepetition claim is entitled to priority based on the Employee Wage Motion⁹ and the Orders¹⁰ entered thereon under a theory of judicial estoppel.¹¹
- Randstad asserts that its Administrative Expense Claim in the amount of \$362,083.20 is based on Debtors’ postpetition breach and/or termination of the Staffing Services Agreement.¹²

9. A hearing on the Third Omnibus Objection was held on March 12, 2020 consisting solely of legal argument. I will address each argument in turn.

⁷ Resp. of Randstad General Partner (US), LLC and Randstad North America, Inc. to the Third Omnibus Obj. (Substantive) of the Debtor Liquidation Trust to Certain Disputed Claims, D.I. 1165 (“Randstad Response”).

⁸ Randstad Response ¶ 5.

⁹ Debtors’ Mot. for Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Employee Wages, Benefits, and Related Items and (II) Granting Certain Related Relief, D.I. 5 (“Employee Wage Motion”).

¹⁰ Final Order Granting Mot. of the Debtors for an Order (I) Authorizing the Debtors to Pay Prepetition Employee Wages, Benefits, and Related Items and (II) Granting Certain Related Relief, D.I. 268.

¹¹ Randstad Response ¶¶ 8-9. The Attachment to Randstad’s proof of claim states that Randstad “file[s] this proof of claim for pre-petition claims, which were granted priority pursuant to the Debtors’ Motion for Interim and Final Orders (I) Authorizing the Debtors to Pay Prepetition Employee Wages, Benefits, and Related Items and (II) Granting Certain Related Relief (the “Employee Wage Motion”) [Docket No. 5], and the orders thereon.” Claim No. 110. At argument, however, Randstad conceded that the Order contained no language granting priority to claims and Randstad, therefore, is not pursuing this argument. March 12, 2020 Hr’g Tr. 52:2–14, D.I. 1329 (“Transcript”).

¹² Randstad Response ¶ 12 *et seq.*

Discussion¹³

To foster one of the core bankruptcy policies—the equitable distribution of estate assets to creditors—provisions of the Bankruptcy Code allowing for priority treatment are narrowly construed.¹⁴

A. No Portion of Randstad's Prepetition Claim Is Entitled to Priority under § 507(a)(4)(A).

Section 507(a)(4) provides:

(a) The following expenses and claims have priority in the following order:

* * *

(4) Fourth, allowed unsecured claims, but only to the extent of \$13,650 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services

Randstad argues that it is entitled to priority under the plain language of subsection (A). Specifically, Randstad argues that subsection (A) applies to corporations for two reasons. First, subsection (A) uses the word “individual” and not “employee.” Second, the use of the word “corporation” in the initial part of § 507(a)(4) means it applies to claims falling under both subsections (A) and (B).

¹³ I previously ruled from the bench on Debtors' objection to the claims of another staffing agency which also argued that its claims were entitled to priority under § 502(a)(4). As Randstad points out, it was not a party to that dispute and Randstad has made arguments different from and in addition to those made by the other staffing agency. Under these circumstances, I have looked at the issue anew (and in the context of Randstad's argument) and without any deference to my previous ruling.

¹⁴ *In re Trump Ent. Resorts, Inc.*, No. 14-12103 (KG), 2015 WL 1084294, at *2 (Bankr. D. Del. Mar. 9, 2015) (citing *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667, (2006) (“To give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution; it dilutes the value of the priority for those creditors Congress intended to prefer.”)); *In re Unidigital, Inc.*, 262 B.R. 283, 288 (Bankr. D. Del. 2001).

Randstad is correct that subsection (A) uses the word “individual” and not “employee.” But I disagree with Randstad’s legal conclusion that the use of the word “individual” also includes corporations. First, had the drafters intended to include corporations within subsection (A), they could have done so, as they did in subsection (B). Indeed, corporation is a defined term in the Bankruptcy Code.¹⁵ To therefore suggest that the word “individual” means or includes “corporation” is inconsistent with the Bankruptcy Code. This distinction between individuals and corporations is highlighted in the Code’s definition of “person” which includes both an “individual” and a “corporation.”¹⁶ Further, each of the words individual, corporation and person are used in various parts of § 507.¹⁷ I cannot conclude that the use of the word “individual” in subsection (A) was not intentional.

Moreover, Randstad’s claim is based on funds owed under the Staffing Services Agreement—contractual claims. Although Randstad supplied Debtors with staff who, as individuals, may have earned wages or commissions, Randstad’s claims are not for wages, salaries or commissions owed to it, and Randstad is not arguing that it is subrogated to the claims of any of those individuals it hired to satisfy Debtors’ staffing needs.

Finally, I also disagree with Randstad’s legal conclusion that the use of the word corporation in the initial part of § 507 (a)(4) “means it clearly applies to claims of a type on Section 507(a)(4)(A) as well as (B).”¹⁸ The initial language “for each individual or corporation, *as the case may be*” is a clear reference to the use of the words “individual” or “corporation” in subsection (A) or (B), where such words are found. Nothing in the initial

¹⁵ 11 U.S.C. §101(9).

¹⁶ 11 U.S.C. §101(41).

¹⁷ *See, e.g.*, 11 U.S.C. § 507(a)(5) (“employee”), (a)(6) (“persons”).

¹⁸ Randstad Response ¶ 6.

language suggests it was meant to import the word “corporation” into (A) when the word “corporation” does not appear in that subsection.

Accordingly, I conclude that Randstad does not have a priority claim for any amount based on § 507(a)(4)(A).¹⁹

B. The Debtor Liquidation Trust Is Not Judicially Estopped from Objecting to Randstad's Proofs of Claim as Misclassified

As part of the first day relief Debtors sought in these bankruptcy cases, Debtors filed the Employee Wage Motion by which Debtors sought authority to pay specified wages and benefits to certain of its workforce. Debtors described their workforce as including: (i) Core Employees, which included salaried and hourly employees and (ii) Non-Core Employees, which included employees hired through staffing agencies, some of whom were Seasonal Employees and some of whom were Non-Seasonal Temporary Employees. In the aggregate, Debtors sought authority, but not direction, to pay up to \$3.5 million in Prepetition Compensation subject to the statutory cap for any individual employee. The Employee Wage Motion was granted on an interim and final basis.²⁰

Randstad argues, and the Debtor Liquidation Trust appears to concede, that the defined term “Prepetition Compensation” includes claims of staffing agencies.²¹ And, for purposes of this Memorandum, I will accept the representations of Randstad’s counsel that he could show at an evidentiary hearing that amounts owed to Randstad were included in

¹⁹ Randstad did not argue that it had a priority claim based on § 507(a)(4)(B).

²⁰ Interim Order Granting Mot. of the Debtors for an Order (I) Authorizing the Debtors to Pay Prepetition Employee Wages, Benefits, and Related Items and (II) Granting Certain Related Relief, D.I. 52; Final Order Granting Mot. of the Debtors for an Order (I) Authorizing the Debtors to Pay Prepetition Employee Wages, Benefits, and Related Items and (II) Granting Certain Related Relief, D.I. 268 (“Employee Wage Order”). Each term in this paragraph is defined in the Employee Wage Motion.

²¹ See Reply in Supp. of Third Omnibus Obj. (Substantive) of the Debtor Liquidation Trust to Certain Disputed Claims ¶ 13.

the caps set forth in the Employee Wage Motion; specifically, amounts owed to Randstad were included in the \$1.4 million in accrued and unpaid Prepetition Compensation on account of obligations to Non-Seasonal Temporary Employees.²² Further, the Debtor Liquidation Trust admits that Debtors did pay certain staffing agencies pursuant to the authority granted to them under the Employee Wage Order.²³

Randstad argues that the Debtor Liquidation Trust is judicially estopped from objecting to the priority of its prepetition claim because Debtors took the position in the Employee Wage Motion that: “Claims for Prepetition Compensation are entitled to priority treatment, subject to the Employee Cap.”²⁴ Randstad argues that while Debtors reserved the right not to pay the wage claims immediately, or only pay a portion of the claims because of liquidity constraints,²⁵ Debtors “absolutely took the position that the claims of Randstad’s non-seasonal staffing were priority claims.”²⁶ Randstad argues that judicial estoppel applies because “the Court was convinced of that position, by granting the Employee Wage Motion.” Randstad also argues that the Debtor Liquidation Trust should

²² Employee Wage Motion ¶ 14.

²³ Transcript 75:18–76:6.

²⁴ Employee Wage Motion ¶ 42. The entire paragraph reads:

Claims for Prepetition Compensation are entitled to priority treatment, subject to the Employee Cap. Specifically, section 507(a)(4) of the Bankruptcy Code provides that individuals holding prepetition claims for “wages, salaries, or commissions, including vacation, severance, and sick leave pay earned” within 180 days before the petition date are entitled to priority claim status up to an allowed amount of \$13,650 on account of such claim. See 11 U.S.C. § 507(a)(4)(A). Similarly, section 507(a)(5) of the Bankruptcy Code grants a priority claim to “contributions to an employee benefit plan arising from services rendered within 180 days before the” petition date. See 11 U.S.C. § 507(a)(5)(A). These claims are similarly subject to a cap equal to “(i) the number of employees covered by each such plan multiplied by \$13,650; less (ii) the aggregate amount paid to such employees under [section 507(a)(4)], plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.” 11 U.S.C. § 507(a)(5)(B).

²⁵ Now that the Plan has been confirmed, which calls for payment in full of priority claims, Randstad contends the time to pay has arrived.

²⁶ Randstad Response ¶ 9(ii).

be bound by Debtors' statements in the Employee Wage Motion because the Plan provides that in any litigation the Debtor Liquidation Trust is simply substituted for Debtor, and the Plan renders Randstad unimpaired.²⁷

The Debtor Liquidation Trust makes several arguments in response. First, it argues that Randstad ignores paragraph 64 of the Employee Wage Motion and paragraph 13 of the Employee Wage Order both of which provide that nothing in the motion waives the right of Debtors (or a committee) to dispute any claim, or the amount or priority of any claim on any grounds.²⁸ Second, it argues that the Debtor Liquidation Trust it is not a debtor in this case and so it made no representations in the Employee Wage Motion by which it could be bound. And finally, it argues that there were multiple rationales provided in the Employee Wage Motion for payment of Prepetition Compensation, pointing specifically to the doctrine of necessity. As both parties agree, the Employee Wage Order did not state the grounds upon which it was granted nor did it contain language granting priority to any claim.

Judicial estoppel is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice."²⁹ It is a judge made doctrine and is a sanction that a court may impose pursuant to its inherent equitable authority.³⁰ A court considers three factors, all of which must be met, to properly apply judicial estoppel: (i) "the party to be estopped must have taken two positions that are irreconcilably inconsistent;" (ii) the party must have "changed his or her position in bad

²⁷ Transcript 52:10-53:10.

²⁸ Employee Wage Motion ¶ 64; Employee Wage Order ¶ 13.

²⁹ *In re Olympus Healthcare Grp., Inc.*, No. 01-0855 (MFW), 2004 WL 144240, at *2 (Bankr. D. Del. Jan. 23, 2004) (quoting *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996)).

³⁰ *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779 (3d Cir. 2001).

faith—i.e., with intent to play fast and loose with the court;” and (iii) granting the relief must be “tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant’s misconduct.”³¹

Judicial estoppel is not appropriate here. First, while Debtors’ statement in the Employee Wage Motion is inconsistent with the Debtor Liquidation Trust’s statements/position in the Third Omnibus Objection, the Debtor Liquidation Trust did not step into ongoing litigation brought by Debtors. Rather, under the Plan the Debtor Liquidation Trust was empowered to object to claims, which it did. Further, while the Plan does provide that priority claims are unimpaired, in order to receive that treatment, a creditor’s claim must actually be a priority claim.

Second, any change in position before the court is not necessarily in “bad faith.” Debtors’ statement in the Employee Wage Motion that Prepetition Compensation (all components) is entitled to priority under § 502(a)(4) was more likely the result of imprecise drafting or legal analysis than a blatant attempt to mislead the court.³² And, the Employee Wage Motion also contained alternative legal authority upon which the motion could be granted.

More importantly, even assuming the first two factors are met, the third is not. Granting judicial estoppel would not be tailored to the asserted harm. Here, the Debtor Liquidation Trust is acting in its capacity as such and for the benefit of the trust’s beneficiaries—all holders of allowed claims against the estates other than holders of general unsecured claims. The Debtor Liquidation Trust is not acting on behalf of Debtors, nor are

³¹ *Montrose*, 243 F.3d at 779–780 (cleaned up).

³² A finding of bad faith means that the party is engaged in intentional wrongdoing which assaults the dignity or authority of the court. *Id.* at 781.

Debtors beneficiaries of the trust. The only “potential wrongdoers” are Debtors,³³ but Debtors would not be the parties harmed here if I grant judicial estoppel; rather, the beneficiaries of the Debtor Liquidation Trust would be harmed. Such a result does not serve equity or avoid a miscarriage of justice.³⁴

Further, it would be a perverse outcome to award Randstad a priority claim in the amount of \$677,500.02, when it asserts that only \$13,650 of its claim is actually entitled to a statutory priority. Judicial estoppel is not a statutorily enumerated ground for priority over other creditors. Allowing Randstad a priority claim that is 50-fold more than it is statutorily entitled to is directly contrary to the Bankruptcy Code.

Granting judicial estoppel under the circumstances here in no way rectifies any harm visited upon the court. To the extent any sanction is necessary or appropriate, it is not this one.

³³ Randstad Response ¶ 9(iv). Randstad claims Debtors made the representation in the Employee Wage Motion “in order to portray a ‘business as usual’ approach to vendors such as Randstad – when Randstad suspects the evidence will also show - the Debtors had no liquidity, or perhaps any intention to begin with, of paying the claims they described.”

³⁴ As the Third Circuit instructs:

Perhaps more fundamentally, judicial estoppel was simply not tailored to address any malfeasance that may have occurred here. The only potential wrongdoers are the Hospital and the Plan, and the District Court's application of judicial estoppel did result in the dismissal of their claims against MONY and Bulger. The problem arises because the Hospital and the Plan do not seek personal gain in this case, but rather bring this action solely in their fiduciary capacities on behalf of fifty-three plan participants. It is those participants, *not* the Hospital and the Plan, that will be harmed by the District Court's dismissal. Even assuming that the Hospital and the Plan acted wrongly in “abandon[ing]” the *Hickok* plaintiffs, it is difficult to see how equity would be served by punishing fifty-three other plan participants in return.

In sum, the District Court erred in not considering whether any Rule or statute was “up to the task” before deciding to utilize its inherent sanctioning power, and abused its discretion in concluding that judicial estoppel was tailored to address any harm in this case.

Montrose, 243 F.3d at 786.

C. An Evidentiary Hearing is Needed on Randstad's Administrative Expense Claim

Randstad asserts an administrative claim in the amount of \$362,083.20 on account of Debtor's postpetition termination of the Staffing Services Agreement, without notice. Randstad's claim consists of (i) conversion fees; (ii) two weeks of average amounts incurred by Debtor, due because Debtor did not provide the requisite notice or obtain an order rejecting the Staffing Services Agreement prior to terminating it; and (iii) an estimated amount for out-of-pocket costs incurred by Randstad in losing those employees Debtor took in violation of the termination provisions of the Staffing Services Agreement.

The Debtor Liquidation Trust asserts various objections, including: (i) Debtors did not terminate or breach the Staffing Services Agreement; (ii) even if Debtors terminated the Staffing Services Agreement, Randstad could suffer no damages under the agreement because Debtors could terminate "immediately" upon filing bankruptcy; (iii) Randstad waived entitlement to certain types of damages under the Staffing Services Agreement; (iv) the conversion fee (for directly hiring any temporary staff provided under the Staffing Services Agreement) is not triggered because no hired employee worked the requisite hours or length to trigger the fee; and in any event (v) any postpetition breach of the Staffing Services Agreement could not be a benefit to the estate. As an initial matter, however, the Debtor Liquidation Trust argues that Randstad has not backed up its Administrative Expense Claim with evidence.

Randstad will be given an opportunity to do so.³⁵ It is clear from a review of the filings and arguments of counsel that there are disputed factual issues bound up in the

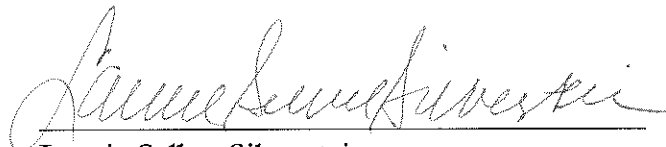
³⁵ Indeed, Randstad intended to take discovery so that it could present evidence at the hearing on the Third Omnibus Objection. The Debtor Liquidation Trust sought to forego an evidentiary hearing.

Administrative Expense Claim. While it may be possible to rule on certain issues as a contract interpretation, given the limited factual record that needs to be developed and the amount at stake, judicial economy counsels that I review and interpret the Staffing Services Agreement once, in the context of the entire dispute and with the benefit of a complete evidentiary record.

Conclusion

For the reasons set forth above, the Third Omnibus Objection is sustained, in part, and the Proofs of Claim are reclassified as general unsecured claims. The parties should consult on a discovery schedule with respect to the Administrative Expense Claim and contact chambers for a date for an evidentiary hearing. The parties should also consult on what forms of order, if any, are needed at this time.

Dated: March 26, 2021



Laurie Selber Silverstein
United States Bankruptcy Judge