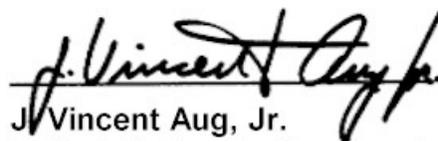


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.




J. Vincent Aug, Jr.
United States Bankruptcy Judge

Dated: February 28, 2011

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In re
Milacron, Inc., et al.

Case No. 09-11235
Jointly Administered

Debtors

Chapter 11
Judge Aug

**ORDER DENYING MOTION TO COMMENCE AND PROSECUTE
CAUSES OF ACTION ON THE DEBTORS' BEHALF**

This matter is before the Court on the Motion for an Order Authorizing Certain Noteholders to Commence and Prosecute Causes of Action Against Certain Directors and Officers of the Debtors on the Debtors' Behalf (Doc. 895), the Amended Motion for and Order Authorizing Avenue Special Situations Fund IV, L.P., Avenue Investments, L.P., Avenue CDP Global Opportunities Fund, L.P., Avenue International Master, L.P., & Avenue Special Situations Fund V, L.P. ["Avenue Movants"] to Commence and Prosecute Causes of Action Against Certain Directors and Officers of the Debtors on the Debtors' Behalf (Doc. 919), the Objection of Ronald Brown (Doc. 1026), and the Avenue Movant's Reply (Doc. 1034).

The Avenue Movants are the owners of 100% of the equity of Milacron Holdings, Inc. ["New Milacron"], which purchased substantially all the assets of the Debtors through a court authorized sale on August 21, 2009, and through the purchase of remaining shares in a subsequent transaction¹. The Avenue Movants are requesting an order from this Court

¹The first motion also states that the Avenue Movants are pre-petition, impaired creditors of the Debtors. However, the amended motion removes this reference.

authorizing them to prosecute causes of action against the Debtors' directors, officers and controlling shareholders for conduct which allegedly caused harm to the Debtors' bankruptcy estates². The Avenue Movants contend that the causes of action could permit a recovery of damages over \$50 million.

Ronald Brown ["Brown"], a former President, Chairman and CEO of the Debtor who is named as a defendant in the proposed complaint, contends that the Avenue Movants have not met the requirements as outlined by the Sixth Circuit in *In re Gibson Group, Inc.*, 66 F.3d 1436 (6th Cir. 1995). Specifically, Brown contends that the Avenue Movants have not shown that the causes of action will benefit the Debtors' estate.

The Sixth Circuit has determined that a party may have standing to bring a derivative action if it can show that it has alleged a colorable claim that would benefit the estate, if successful, based on a cost-benefit analysis performed by the bankruptcy court; that it has made a demand on the debtor to file the action; that the demand has been refused; and the refusal is unjustified in light of the statutory obligations and fiduciary duties of the debtor in a Chapter 11 reorganization. *In re Gibson*, 66 F.3d at 1439; *see also, In re LTV Steel Co., Inc.*, 333 B.R. 397 (Bankr. N.D. Ohio 2005).

As to the first prong of the *Gibson* test, the Avenue Movants must show that not only do they have colorable claims against the proposed defendants, but also that any recovery received from those claims would benefit the estate.

The Avenue Movants have alleged breach of fiduciary duty, fraud, and negligent misrepresentation claims against certain officers, directors, and controlling shareholders of the Debtors. The colorable claim requirement is satisfied if the party has asserted claims for relief that, on appropriate proof, would allow for recovery. *In re LTV Steel Co., Inc.*, 333 B.R. at 406. We find that the proposed causes of action set forth by the Avenue Movants would, if proven, allow for a recovery.

Brown contends that even if the Avenue Movants are successful in their causes of action against the proposed defendants, any recovery made from those causes of action would not benefit the estate. Brown avers that, if successful, the proceeds from these causes of action will flow to the purchaser of the Debtors' assets, who is owned by the Avenue Movants, and the estate will see no benefit.

The Avenue Movants contend that since they are advancing the cost of the litigation, and would only be reimbursed through any potential recovery, there is no cost to the estate. However, no cost to the estate is not the same as a benefit to the estate. The *Gibson* test contemplates a cost-benefit analysis, and the Sixth Circuit has recently referenced a "net value"

²Attached to the first motion is a proposed complaint styled to be filed in the United States District Court for the Southern District of Ohio. The amended complaint revises this and the proposed complaint attached to the amended motion is styled to be filed as an adversary proceeding in this bankruptcy court.

approach as it relates to the *Gibson* test. *In re LTV Steel, Co., Inc.*, 560 F.3d 449, 455 (6th Cir. 2009)(“Presumably they would not have done so if they did not believe that their actions will increase the net value of the estate.”). Regardless of the fact that they are advancing the costs of litigation, if the Avenue Movants are successful in their litigation, it is clear that the only party to receive the benefit would be the Avenue Movants. The net effect to the Debtors’ bankruptcy estate would be zero.

The Avenue Movants also contend that there is a benefit to the estate because any proceeds from these causes of action would first flow to the estate, then distributed to New Milacron, of which the Avenue Movants own 100% of the equity. This argument is tenuous at best. Assuming, arguendo, that any proceeds from these causes of action would flow first to the estate, under the terms of the purchase agreement the proceeds must flow straight out of the estate to New Milacron. The net effect to the estate would be zero.

Finally, the Avenue Movants contend that the Debtors have already received a benefit from these potential causes of action by selling them to New Milacron through the purchase agreement. The cases cited by the Avenue Movants describe a clear benefit received by the estate. For instance, in *In re Maxwell Newspapers, Inc.*, the court found a benefit where the creditors were assigned avoidance claims in exchange for the withdrawal of a \$93 million claim. 189 B.R. 282, 287 (Bankr. S.D.N.Y. 1995). In *In re Churchfield*, the avoidance claims were exchanged for a direct payment to creditors and for payment of administrative expenses. 122 B.R. 76, 82-83 (Bankr. N.D. Ill. 1990). Finally, in *In re Burlington Motor Holdings, Inc.*, the successor corporation paid \$3.8 million directly to creditors and assumed liability administrative and tax claims in exchange receiving substantially all of the debtors’ assets, including the right to pursue avoidance actions. 2002 WL 73478 (D.Del. 2002). In this case, the Avenue Movants have not articulated the consideration paid for these claims, and therefore this Court cannot determine any net benefit to the estate.

The Avenue Movants describe themselves “owners of 100% of the equity of New Milacron,” the ultimate beneficiary of these causes of action. (Doc. 1034, p. 3). The Avenue Movants also state that they are “the only party with a real economic interest in [these actions].” (Doc. 919, p. 4). Therefore, there would be no benefit to the Debtors’ bankruptcy estates in prosecuting these causes of action.

Since the Avenue Movants have not met the first prong of the test under *Gibson*, this Court does not need to examine the remaining elements of the *Gibson* test.

Accordingly, the Avenue Movants’ motion is hereby DENIED.

IT IS SO ORDERED.

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