

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

In re:

GOLDEN COUNTY FOODS, INC., *et al.*¹

Debtors.

Chapter 11

Case No. 15-11062 (KG)

Jointly Administered

Hearing Date: June 15, 2015 at 1:30 p.m.

Objections Due: June 8, 2015 at 4 p.m.,

Extended for the US Trustee to June 10, 2015
at 12 p.m.

Related to Docket No. 58

**UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' MOTION FOR ENTRY
OF ORDERS (I) APPROVING BIDDING PROCEDURES, SCHEDULING AN
AUCTION, AND A SALE HEARING, AND (II) GRANTING RELATED RELIEF**

Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), by and through his undersigned attorneys, hereby objects to the Debtors' Motion for Entry of Orders (I) Approving Bidding Procedures, Scheduling an Auction, and a Sale Hearing, and (II) Granting Related Relief (the "Bid Procedures Motion") (Docket No. 58), and states as follows:

PRELIMINARY STATEMENT

1. The Motion seeks approval of a rushed sale of substantially all of the Debtors' assets to the proposed stalking horse bidder Monogram Appetizers, LLC ("Monogram"). The U.S. Trustee first objects to the break-up fee and expense reimbursement that the Debtors propose to pay Monogram if Monogram is outbid at auction. Although Monogram purports to have committed to the auction process, this commitment is illusory, as Monogram has refused to

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Golden County Foods, Inc., (3018), GCF Holdings II, Inc. (3151), and GCF Franchisee, Inc. (4385). The address of the Debtors' corporate headquarters is 300 Moore Road, Plover, Wisconsin, 54467.



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even be the backup bidder if an auction occurs and another bidder wins and then cannot consummate the sale. Further, Monogram's bid contains contingencies that only Monogram can satisfy, and it is inappropriate to award Monogram a break-up fee or expense reimbursement in the event a sale closes to another bidder but Monogram has not demonstrated that its own contingencies have been satisfied. As a result, the break-up fee and expense reimbursement proposed in the Bidding Procedures Motion are therefore not "actually necessary to preserve the value of the estate, as required under Third Circuit law. *See Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999).

2. The U.S. Trustee also objects to the time allotted for the marketing and auction process. A mere 14 days has been provided between the sale procedures hearing and the bid deadline. The Debtors have put forth no evidence to suggest that, even in the absence of an order approving the Bidding Procedures Motion, they have been actively marketing their assets, allowing potentially interested parties access to the Debtors' financial and other information, or other indicia of a robust sale process. Therefore, this extremely truncated period is insufficient for the Debtors to fully market their assets, and for potential purchasers to perform due diligence. Such a truncated sale process will likely chill competitive bidding, thereby eliminating any challenges to Monogram's bid.

3. Further, the bidding procedures contained in the Bidding Procedures Motion (the "Bidding Procedures") are themselves unfairly tilted in favor of Monogram, in that they, among other things, require other potentially interested parties to make repetitive and burdensome disclosures in order to qualify to bid, and unfairly restrict time periods for potential bidders while

at the same time, providing the Debtors with unfettered discretion to alter the Bidding Procedures.

4. For these reasons, set forth in detail below, the U.S. Trustee respectfully requests this Court to issue a ruling denying the Motion.

Jurisdiction

5. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this objection.

6. Pursuant to 28 U.S.C. § 586(a)(3), the U. S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U. S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the "U. S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the "U. S. Trustee as a "watchdog").

7. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Bidding Procedures Motion and the issues raised in this objection.

Background

8. On May 15, 2015 (the "Petition Date"), Golden County Foods, Inc. and 2 affiliated companies (the "Debtors") filed for relief under chapter 11 of the Bankruptcy Code.

9. On May 22, 2015, the Debtors filed the Bidding Procedures Motion, which seeks, among other things, approval of the Bid Procedures for the sale of substantially all of the Debtors' assets through a bidding and auction process.

10. On May 27, 2015, the U.S. Trustee appointed an official committee of unsecured creditors (the "Committee").

11. Pursuant to the Bidding Procedures Motion, the Debtors seek to (i) establish June 29, 2015 as the bidding deadline for the purchase of all of the Debtors' assets; (ii) schedule an auction for July 1, 2015; and (iii) schedule a hearing to consider approval of the proposed sales on July 2, 2015. *See Bidding Procedures Motion*, ¶13.

12. Monogram has offered to purchase all of the assets of the Debtors for a cash purchase price of \$22 million, plus the assumption of certain liabilities. *See Bidding Procedures Motion*, ¶ 9.

13. Through the Motion, the Debtors seek approval of the Bidding Procedures, which contain protections for Monogram, including a break-up fee of \$500,000 (the "Break-Up Fee") and authority to reimburse Monogram's expenses up to a maximum amount of \$150,000 (the "Expense Reimbursement") payable to Monogram in the event Monogram is outbid at the Auction. *See Bidding Procedures Motion*, ¶ 13(m) and (n). The Motion also seeks to have the Break-Up Fee and Expense Reimbursement awarded administrative expense status. *See id.*

Legal Argument and Basis for Relief

Objection to the Break-Up Fee and Expense Reimbursement

14. The U.S. Trustee objects to the Motion because the Break-Up Fee and the Expense Reimbursement are unreasonable and not appropriate under relevant Third Circuit law. In particular, the Break-Up Fee and the Expense Reimbursement should not be allowed where, as

here, the stalking horse refuses to commit to being a backup bidder. Further, it is inappropriate to authorize Monogram to receive the Break-Up Fee and Expense Reimbursement if there are unresolved contingencies to Monogram's bid, which, as of the date of this objection, there are.

15. To award a break-up fee (or expense reimbursement) to a potential bidder, the court must determine that the fee was an actual and necessary cost and expense of preserving the estate. *See In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999). In *O'Brien*, the Third Circuit Court of Appeals held that "the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." *Id.* at 535.

16. The burden is on the Debtors to prove the necessity of, and benefit to the estate from, the proposed breakup fee or expense reimbursement. In addition, although "the considerations that underlie the debtor's judgment may be relevant to the bankruptcy court's determination on a request for break-up fees and expenses, the business judgment rule should not be applied as such in the bankruptcy context." *Id.*

17. Moreover, as recognized by the Third Circuit in *O'Brien*:

[E]ven if the purpose for the break-up fee is not impermissible, the break-up fee may not be needed to effectuate that purpose. For example, in some cases a potential purchaser *will bid whether or not break-up fees are offered* In such cases, the award of a break-up fee cannot be characterized as necessary to preserve the value of the estate.

181 F.3d at 535 (emphasis added).²

18. Here, there has been no showing that the Break-Up Fee and Expense Reimbursement were in any way necessary to preserve the estate. Nor have the Debtors shown that the Break-Up Fee and Expense Reimbursement were necessary to induce Monogram to bid.

² *See also In re Reliant Energy Channelview LP*, 200 F.3d 594 (3d Cir. 2010) (affirming disallowance of retroactive grant of break-up fee that was sought after the stalking horse bidder had bid for the assets).

Such fees therefore are not “actually necessary to preserve the value of the estate.” *O’Brien*, 181 F.3d at 535.

19. The Break-Up Fee and the Expense Reimbursement are not truly bid protections, but rather are blocking protections. These costs simply make it more difficult for other bidders to propose a qualified bid in the first instance, let alone to become the winning bidder. In that respect, the Break-Up Fee and the Expense Reimbursement chill the bidding process, which make these costs impermissible under the *O’Brien* standard.

20. Finally, if any Break-Up Fee or Expense Reimbursement were to be allowed, there is no basis under the Bankruptcy Code to permit Monogram to receive them if it has unresolved bid contingencies that are its responsibility. As a result, the Break-Up Fee and the Expense Reimbursement are objectionable.

Objection to the Abbreviated Time Frame of the Sale Process

21. Section 363(b)(1) of the Bankruptcy Code permits a Debtor-in-Possession to sell property of the estate outside the ordinary course of business. The Debtor-in-Possession bears the burden of proof to show that the sale is in the best interests of the creditors and the estate.

“The sale of assets which is not in the debtor’s ordinary course of business requires proof that: (1) there is a sound purpose for the sale; (2) the proposed sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the buyer has acted in good faith. The element of ‘good faith’ is of particular importance as the Third Circuit made clear in *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 149-50 (3d Cir. 1986).”

In re Exaris Inc., 380 B.R. 741 (Bankr. Del. 2008) (some citations omitted).

22. Initially, the Court must determine that the bidding procedures will bring the best and highest price for the debtors’ assets. The debtors must show that the assets have been fully marketed and that the sale is sufficiently publicized in order to prove that

the assets will be sold for a fair and reasonable price. *See In re Abbotts Dairies, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986).

23. The speed at which the Debtors propose to sell all of their assets creates a risk that not all potential buyers will be reached, thereby reducing competition for purchase of the Debtors' assets and, concomitantly, the proceeds to be realized from the sale of those assets.

24. There is room to extend the operative dates, as the DIP Facility Agreement allows for financing through July 16, 2015.

Bidding Procedure-Specific Objections

25. Additionally, the bidding procedures themselves are objectionable for a number of reasons, including:

- (a) They provide the Debtors discretion to delay notifying parties whether they are Potential Bidders or Qualified Bidders (the Debtors will notify "as soon as practicable," rather than in a specified period of time, such as 24 hours);
- (b) They require Potential Bidders to submit the same financial information and disclosures three separate times (Bidding Procedures (b)(ii), (g)(v), and (g)(x));
- (c) They permit the Debtors to modify the bidding procedures at any time without Court approval (Bidding Procedures, (e));
- (d) They permit the Debtors to unilaterally change the time and place of the auction, which is not appropriate when parties are coming from out of state and require notice in order to change travel arrangements (Bidding Procedures, (j)); and
- (e) Contains at least three different defined groups for noticing, making it unclear who is getting notice of what.

26. It would be relatively simple and non-prejudicial to any party to modify the Bidding Procedures to address these issues. Notwithstanding the U.S. Trustee's comments, the Debtors have not done so.

Conclusion

27. As set forth above, the Bidding Procedures Motion is objectionable because it unfairly tilts the playing field in favor of Monogram, unnecessarily compresses the sale process, and seeks various forms of relief without sufficient, or, indeed, any, supporting factual evidence. The U.S. Trustee therefore leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court deny the Bidding Procedures Motion as set forth herein and/or grant such other relief as this Court deems appropriate, fair and just.

Dated: June 10, 2015
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
Region 3

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Debtors.

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Case No. 15-11062 (KG)

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Related to Docket No. 58

CERTIFICATE OF SERVICE

I, Hannah Mufson McCollum, hereby certify that on June 10, 2015, I caused copies of the United States Trustee's Objection to Debtors' Motion for Entry of Orders (I) Approving Bidding Procedures, Scheduling an Auction, and a Sale Hearing, and (II) Granting Related Relief to be served first class mail upon the following persons, and also by e-mail, where indicated:

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¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Golden County Foods, Inc., (3018), GCF Holdings II, Inc. (3151), and GCF Franchisee, Inc. (4385). The address of the Debtors' corporate headquarters is 300 Moore Road, Plover, Wisconsin, 54467.

Golden County Foods, Inc.
300 Moore Road
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Attn.: James Bradford

On June 10, 2015, I further caused copies of the United States Trustee's Objection to Debtors' Motion for Entry of Orders (I) Approving Bidding Procedures, Scheduling an Auction, and a Sale Hearing, and (II) Granting Related Relief to be served by e-mail to the parties on the 2002/core list.

Dated: June 10, 2015
Wilmington, Delaware

Respectfully submitted,

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