

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

<i>In re</i>	:	Chapter 11	
	:		
IMRIS, Inc., <i>et al.</i>	:	Case Number 15-11133(CSS)	
	:		
	:	Hearing Date:	June 16, 2015 at 10 a.m.
Debtors	:	Objection Deadline:	June 11, 2015 at 4:00 p.m.
	:		June 12, 2015 at 5:00 p.m.
	:		(for UST by agreement)

ACTING UNITED STATES TRUSTEE’S LIMITED OBJECTION TO MOTION OF THE DEBTORS AND DEBTORS IN POSSESSION PURSUANT TO SECTIONS 105(a), 363 AND 365 OF THE BANKRUPTCY CODE FOR AN ORDER (I)(A) APPROVING PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS’ ASSETS; (B) SCHEDULING THE RELATED AUCTION AND HEARING TO CONSIDER APPROVAL OF SALE; (C) APPROVING PROCEDURES RELATED TO THE ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; (D) APPROVING THE FORM AND MANNER OF NOTICE THEREOF; (E) APPROVING EXPENSE REIMBURSEMENT; AND (F) GRANTING RELATED RELIEF; AND (II)(A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS’ ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS; (B) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO; AND (C) GRANTING RELATED RELIEF (D.E. 15, “Bid Procedures Motion”)

In support of his Limited Objection (the “Objection”) to Motion Of The Debtors And Debtors In Possession Pursuant To Sections 105(a), 363 And 365 Of The Bankruptcy Code For An Order (I)(A) Approving Procedures In Connection With The Sale Of Substantially All Of The Debtors’ Assets; (B) Scheduling The Related Auction And Hearing To Consider Approval Of Sale; (C) Approving Procedures Related To The Assumption Of Certain Executory Contracts And Unexpired Leases; (D) Approving The Form And Manner Of Notice Thereof; (E) Approving Expense Reimbursement; And (F) Granting Related Relief; And (II)(A) Authorizing The Sale Of Substantially All Of The Debtors’ Assets Free And Clear Of Liens, Claims, Encumbrances, And



Other Interests; (B) Approving The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases Related Thereto; And (C) Granting Related Relief (D.E. 17, “Bid Procedures Motion”), Andrew R. Vara, Acting United States Trustee for Region Three (“ U. S. Trustee”), states as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.

2. Pursuant to 28 U.S.C. § 586, the U. S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). This duty is part of the U. S. Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST 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”).

3. Pursuant to 11 U.S.C. § 307, the U. S. Trustee has standing to be heard with regard to this Objection.

4. This case was filed on May 25, 2015. The Motion was filed on the petition date. The Motion proposes procedures to designate a stalking horse and conduct an auction for the sale of substantially all assets of the Debtors. The Motion seeks authority to designate Deerfield Acquisition Corp. as the Stalking Horse Purchaser and to approve the bid protections of a Break-Up Fee and Expense Reimbursement in favor of the designated Stalking Horse Purchaser.¹ The Motion does not describe the pre-petition process leading to the selection of the Stalking Horse Purchaser or other efforts to market the assets.

¹ Terms shall have the same meaning as ascribed to them in the Motion.

5. The proposed Stalking Horse Purchaser is related to the Debtors' prepetition lenders (the "Purchaser Related Entities"). The Purchaser Related Entities are owed not less than \$26,874,162.

6. The Debtors did not file their Schedules of Assets and Liabilities and Statements of Financial Affairs with their petitions, and have obtained an extension of time through July 13, 2015 to file these required documents. The Motion calls for an expedited sales process that will culminate in an auction, if necessary, on July 23, 2015.

7. The stalking horse bid is for a purchase price of \$9,500,000, all of which is a credit bid.

8. The Motion seeks a Breakup Fee of \$100,000 and an Expense Reimbursement of up to \$1,000,000. In its capacity as prepetition lender, Deerfield is already entitled to receive reimbursement of all its professional fees.

9. The acquired assets include "all Avoidance Actions relating to the Purchaser, any Purchaser Related Entity or any of their Affiliates, any party that is subject to Assumed Contracts or Assumed Leases, or any Transferred Employee" as well as the Assumed Benefit Plans. The Assumed Liabilities include "all liabilities and obligations related to the Assumed Benefit Plans."

10. The Stalking Horse Agreement includes the following provision:

Section 5.20. Plan of Reorganization. Notwithstanding anything in this Agreement to the contrary, at any time prior to ten (10) days before the Closing, any Seller or Non-Debtor Sub, as may be requested by Purchaser, in Purchaser's sole discretion, shall file a Plan of Reorganization under Chapter 11 of the Bankruptcy Code which provides for the conversion of the Claim Amount into Interests of such Seller or Non-Debtor Sub, as applicable.

11. The U. S. Trustee objects to the Debtors' proposed Breakup Fee and Expense Reimbursement inasmuch as Deerfield is the Debtors' prepetition secured lender, DIP lender and

Stalking Horse Purchaser. As the Debtors' lender, Deerfield does not need a Breakup Fee or Expense Reimbursement to induce it to become a bidder. Deerfield has negotiated its status as the Stalking Horse Purchaser, with the right up to ten days before closing of its sale to demand that a plan be filed converting its claim into equity in the reorganized debtor (or non-debtor subsidiaries). *See* Stalking Horse Agreement at Section 5.20. This is clear evidence that it desires to be a bidder and requires no further inducement. The proposed Breakup Fee and Expense Reimbursement are interposed here primarily to chill bidding.

GROUND/BASIS FOR RELIEF

Break-Up Fee and Expense Reimbursement Provisions

12. As Deerfield is the Debtors' pre- and post-petition lender as well as the Stalking Horse Purchaser, there is no need to grant it or any of its insiders or affiliates with a Breakup-Fee or Expense Reimbursement in this case. In *O'Brien*, the Third Circuit Court of Appeals stated 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." *See Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527, 533 (3d Cir. 1999). No Breakup-Fee should be awarded, if at all, until after a sale has been consummated, all interested parties are given notice and an opportunity to be heard, and the Court has determined that the fee was an actual and necessary cost and expense of preserving the estate. *Id.*

13. Deerfield has positioned itself as the Stalking Horse Purchaser, with the right to convert its claim into Interests through a plan if it so desires. Coupled with its status as the Debtors' pre- and post-petition lenders, Deerfield does not require the enhancement of bid protections to induce it to become a bidder for the Debtors' assets.

14. In addition, the purchase by Deerfield of any avoidance action against it or related entities is equivalent to a release. Without the benefit of schedules and statements, the parties cannot determine the value of any potential avoidance actions being transferred or whether the consideration being proposed is fair consideration.

15. The Stalking Horse Agreement also requires the sale of the Assumed Benefit Plans, as well as placing on the purchaser the liability to pay any amounts owing under such plans. These plans have not been disclosed, nor does the motion make clear what these plans are and what they include. It is therefore possible that one or more of the assumed benefit plans may include severance or retention bonuses, subject to 11 U.S.C. § 503, and cannot be approved through a sale of the Debtors' assets.

16. This Court's ruling in *In re Foothills of Texas, Inc.*, 408 B.R. 573 (Bankr. Del 2009)(Sontchi, J.), is directly on point. There, the Court denied the debtors' motion to assume employee agreements with officers under § 365 of the Code, and to pay such officers bonuses under § 363(b), holding that, "[a]s the Debtors' sole motivation for filing and prosecuting the motion is to obtain authority to make retention payments that are prohibited by § 503(c)(1) of the Bankruptcy Code, it is not a reasonable exercise of the Debtors' business judgment to assume the agreements and/or make the payments." *Id.* at 584-5.

17. Also instructive is a decision of the Bankruptcy Court of the Southern District of New York, *In re AMR Corp.*, 497 B.R. 690 (Bankr. S.D.N.Y. 2013). There, the Court rejected a plan provision to pay a departing CEO amounts in excess of the § 503(c)(2) severance limits, holding that, under § 1129(a)(1) of the Code, "the Court cannot approve a payment [under a plan] that is clearly prohibited by another, more specific part of the Bankruptcy Code. *Id.* at 696 (citing *RadLAX Gateway Hotel*, 132 S. Ct. 2065 (2012), and *In re Adelphia Communs. Corp.*,

441 B.R. 6, 13, n. 18 (Bankr. S.D.N.Y. 2010)(noting that meeting the requirements of § 503(c) was the *only* method of approving a severance payment to a debtor's insider in the context of a Chapter 11 case).

18. The *AMR* Court further noted that “it is not surprising then that courts disfavor attempts to bypass the requirements of § 503(c) given the history and intent of the section.” 497 B.R. at 696. The history referenced by the Court is that § 503(c) was added to the Bankruptcy Code in 2005 as a part of the BAPCPA amendments, to “eradicate the notion that executives were entitled to bonuses simply for staying with the [c]ompany through the bankruptcy process.” *Id.*, quoting *In re Velo Holdings, Inc.*, 472 B.R. 201, 209 (Bankr. S.D.N.Y. 2012)(citing *In re Global Home Prods., LLC*, 369 B.R. 778, 783-84 (Bankr. D. Del. 2007)).

19. Under the above-referenced authority, the Debtors may not avoid the requirements of § 503(c) by having a buyer assume any liabilities that otherwise would be subject to § 503(c). The Assumed Benefit Plans must be identified and disclosed to the court before a determination can be made whether these are appropriate.

20. The proposed procedures also do not provide sufficient notice to parties. The procedures require the Debtors to serve on counterparties to executory contracts notice of the successful bidder by fax, email or overnight mail, one business day after the auction is adjourned. The auction is to be held on Thursday, July 23. Assuming the auction is concluded on that day, overnight packages would be sent to counterparties on Friday, July 24, being delivered Monday, July 27. The sale hearing is scheduled for Monday, July 27. This is

insufficient notice for counterparties to interpose any adequate assurance of future performance objection.

Conclusion

21. The U. S. Trustee leaves the moving party to its burden and the U. S. Trustee reserves and any all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection and to 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 requests that this Court issue an order denying the Motion as written and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

Andrew R. Vara
UNITED STATES TRUSTEE

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Dated: June 12, 2015

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FOR THE DISTRICT OF DELAWARE

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	:		(for UST by agreement)

CERTIFICATE OF SERVICE

I certify that on June 12, 2015, I caused to be served a copy/copies of Acting United States Trustee's Limited Objection To Motion Of The Debtors And Debtors In Possession Pursuant To Sections 105(A), 363 And 365 Of The Bankruptcy Code For An Order (I)(A) Approving Procedures In Connection With The Sale Of Substantially All Of The Debtors' Assets; (B) Scheduling The Related Auction And Hearing To Consider Approval Of Sale; (C) Approving Procedures Related To The Assumption Of Certain Executory Contracts And Unexpired Leases; (D) Approving The Form And Manner Of Notice Thereof; (E) Approving Expense Reimbursement; And (F) Granting Related Relief; And (ii)(A) Authorizing The Sale Of Substantially All Of The Debtors' Assets Free And Clear Of Liens, Claims, Encumbrances, And Other Interests; (B) Approving The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases Related Thereto; And (C) Granting Related Relief ("Objection"), via email and regular mail to the following persons:

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DATED: June 12, 2015

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