

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
: :
THQ Inc., et al., : Case No. 12-13398 (MFW)
: :
: :
Debtors : **Obj. Deadline: January 2, 2013 at 4:00 p.m.**
: **Hearing Date: January 4, 2013 at 10:30 a.m.**

UNITED STATES TRUSTEE'S OBJECTION TO MOTION OF DEBTORS FOR ENTRY OF (I) AN ORDER (A) AUTHORIZING AND APPROVING BID PROCEDURES IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (B) AUTHORIZING AND APPROVING STALKING HORSE PROTECTIONS, (C) AUTHORIZING AND APPROVING PROCEDURES RELATED TO THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH THE SALE, (D) SCHEDULING AUCTION AND SALE APPROVAL HEARING, (E) APPROVING THE FORM AND MANNER OF THE NOTICE OF THE SALE HEARING AND (F) GRANTING CERTAIN RELATED RELIEF

In support of her Objection To Motion Of Debtors For Entry Of (I) An Order (A) Authorizing And Approving Bid Procedures In Connection With The Sale Of Substantially All Of The Debtors' Assets, (B) Authorizing And Approving Stalking Horse Protections, (C) Authorizing And Approving Procedures Related To The Assumption And Assignment Of Executory Contracts And Unexpired Leases In Connection With The Sale, (D) Scheduling Auction And Sale Approval Hearing, (E) Approving The Form And Manner Of The Notice Of The Sale Hearing And (F) Granting Certain Related Relief (the "Objection"), Roberta A. DeAngelis, the United States Trustee for Region 3, through her undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this 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 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”).

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

BACKGROUND

4. On December 19, 2012, the Debtors¹ filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

5. As of this date, the U.S. Trustee has not appointed a statutory committee of unsecured creditors.

6. On December 19, 2012, the Debtors filed the Motion, whereby the Debtors seek approval of bidding procedures to sell substantially all of their assets. The proposed stalking horse purchaser is Clearlake Capital, LLC (“Clearlake”). Clearlake has offered to pay (a) sufficient cash or waive all claims under the DIP Credit Facility to fund payment in full of the secured claims, including the DIP Credit Facility (the projected balance at closing will be approximately \$29 million), (b) pay the Debtors \$6.65 million in cash, (c) assume certain liabilities, and (c) deliver to the Debtors a promissory note in the face amount of \$10 million.

¹ All capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

(Motion, ¶ 33).

ARGUMENT

Timing of Sale

7. The U.S. Trustee objects to the Motion to the extent that the time table set forth in the Motion denies parties in interest an opportunity to effectively participate in the proposed sale process. In the Motion, the Debtors propose that the auction for the sale of substantially all of the Debtors' assets will be held on January 9, 2013, approximately five days after the January 4, 2013 hearing on the bidding procedures, with a closing scheduled for January 14, 2013. Assuming that a potential bidder or interested party receives effective notice of the sale, it is unlikely that such person will be able to or will choose to participate in the sale process in any meaningful manner.

8. The Debtors have alleged that the sale must be conducted on an expedited basis because the forbearance agreement with the secured lender, Wells Fargo, expires on January 15, 2013. The forbearance agreement has resulted in changes to the Debtors' operations, including the sweep by Wells Fargo of the Debtors' accounts, meaning that the Debtors no longer have access to cash on hand. It appears that it is the secured lender's own actions which have resulted in the need to close a sale so quickly.

9. Due process requires that notice be reasonably calculated, under all circumstances, to advise interested parties of the pendency of an action. *Folger Adam Security v. DeMatteis/MacGregor*, 209 F.3d 252 (3d Cir. 2000). Accordingly, the U.S. Trustee objects to the Debtors' proposed sale process as it fails to allow meaningful participation in the sale process by all interested parties.

Breakup Fee, Expense Reimbursement and Initial Overbid Provisions

10. The Debtors have agreed to pay a Break-Up Fee of \$1.75 million and an Expense Reimbursement of up to \$500,000 in the event that the APA is terminated, subject to the conditions set forth in the APA.

11. The requested Break-Up Fee and Expense Reimbursement appear to total over 6% of the cash component of the purchase price (\$29 million to satisfy DIP Credit Facility,² plus \$6.65 million cash). The amount of the bid protections is excessive when measured against the cash component of the purchase price and does not represent the “actual, necessary” cost of preserving the Debtors’ estate. *See Calpine Corp. v. O’Brien Environmental Energy, Inc. (In re O’Brien Environmental Energy, Inc.)*, 181 F.2d 527 (3d Cir. 1999).

12. In the Motion, the Debtors propose that the minimum overbid must equal \$2.75 million and each bid thereafter shall require a minimum additional increment of \$500,000. In light of the fact that the stalking horse bid has a limited cash component, the proposed initial overbid should be removed. Such a sizeable initial overbid may chill bidding by discouraging potential bidders from participating in the proposed auction. *See In re Mama’s Original Foods, Inc.*, 234 B.R. 500, 505 (Bankr. C.D. Cal. 1999) (stating that “the appropriate level for a minimum overbid is the minimum level that is high enough to move the procedure along toward achieving the highest bid.”)

13. In addition, the proposed order attached to the Motion provides that the break-up fee will be treated as a superpriority administrative expense, senior to all other priority and superpriority claims in these cases other than the superpriority administrative

² This amount may decrease to the extent that Clearlake is permitted to credit bid the portion of its participation in the DIP Credit Facility.

claim granted to the DIP lender. The granting of superpriority status to a break-up fee is not authorized by the Bankruptcy Code. Superpriority administrative status may only be granted under Bankruptcy Code sections 364(c)(7) and 507(b); those sections are addressed exclusively to claims of creditors who have received insufficient “adequate protection” of interest secured by liens on property of a debtor in connection with the extension of credit. No such situation exists here.

Local Rule Requirements

14. The proposed bidding procedures provide that only the authorized representatives and advisors of each of the Qualified Bidders, the Debtors, the DIP Lenders and any statutorily appointed committee shall be permitted to attend the auction. (Motion, ¶ 51). Local Rule 6004-1 (c)(ii) states that unless otherwise ordered by the Court, the sale procedures order shall provide that (i) “the auction be conducted openly and all creditors will be permitted to attend.” There does not appear to be justification for waiver of this requirement in this case.

Consumer Privacy Under 11 U.S.C. § 363(b)(1)

15. The Motion does not provide sufficient information for the U.S. Trustee to determine whether a consumer privacy ombudsman needs to be appointed to protect personally identifiable information about individuals. 11 U.S.C. § 363(b)(1) provides:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless –

(A) such sale or lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease –

- (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
- (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

16. It is the understanding of the U.S. Trustee that the Debtors' privacy policy permits the sale of personally identifiable information about individuals, but that the purchaser must adhere to the Debtors' privacy policy. Accordingly, the U.S. Trustee requests that the Debtors confirm that it is the Debtors' intent to address any and all issues related to consumer privacy under Section 363(b)(1) in any subsequent order seeking approval of a sale under the sale procedures.

WHEREFORE, the U.S. Trustee requests that this Court issue an order denying approval of the Motion as written and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

By: /s/ Jane M. Leamy
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Dated: January 2, 2013

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FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
 THQ, Inc., et al., : Case No. 12-13398 (MFW)
 :
 Debtors. :

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on January 2, 2013, the United States Trustee's Objection to Motion Of Debtors For Entry Of (I) An Order (A) Authorizing And Approving Bid Procedures In Connection With The Sale Of Substantially All Of The Debtors' Assets, (B) Authorizing And Approving Stalking Horse Protections, (C) Authorizing And Approving Procedures Related To The Assumption And Assignment Of Executory Contracts And Unexpired Leases In Connection With The Sale, (D) Scheduling Auction And Sale Approval Hearing, (E) Approving The Form And Manner Of The Notice Of The Sale Hearing And (F) Granting Certain Related Relief was caused to be served via electronic mail to the following persons:

Gibson Dunn & Crutcher LLP 333 South Grand Ave. Los Angeles, CA 90071 Attn: Jeffrey Krause	Young Conaway Stargatt & Taylor LLP 1000 West Street Wilmington, DE 19899 Attn: Mike Nestor and M. Blake Cleary
DLA Piper 1251 Avenue of the Americas New York, New York 10020-1104 Attn: Gregg Galardi	DLA Piper 919 North Market Street Suite 1500 Wilmington, Delaware 19801 Attn: Stuart Brown
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/s/ Jane Leamy

Trial Attorney