

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11  
: :  
ALSET OWNERS, LLC, et al., : Case No. 09-11960 (BLS)  
: :  
Debtors. : :  
: : **Objections Due: July 2, 2009 at 4:00 p.m.<sup>1</sup>**  
: : **Hearing Date: July 7, 2009 at 11:30 a.m.**  
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**UNITED STATES TRUSTEE’S OBJECTION TO THE DEBTORS’ MOTION FOR ENTRY OF ORDERS (A) APPROVING BIDDING AND AUCTION PROCEDURES AND BIDDING INCENTIVES FOR THE STALKING HORSE BIDDER AND (B) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS’ ASSETS AND APPROVING THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

In support of her objection (the “Objection”) to the Debtors’ Motion for Entry of Orders (A) Approving Bidding and Auction Procedures and Bidding Incentives for the Stalking Horse Bidder and (B) Approving the Sale of Substantially All of the Debtors’ Assets and Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases (the “Motion”), Roberta A. DeAngelis, the Acting United States Trustee for Region 3 (“UST”), by and through her undersigned counsel, states as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.
2. Pursuant to 28 U.S.C. § 586, the UST 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 UST’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)

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<sup>1/</sup> The objection deadline was extended by agreement of the parties.

(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 (6<sup>th</sup> Cir. 1990) (describing the UST as a “watchdog”).

3. Pursuant to 11 U.S.C. § 307, the UST has standing to be heard with regard to the above-referenced Objection.

### **BACKGROUND**

4. On June 5, 2009 (the “Petition Date”), the Debtors<sup>2</sup> filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”).

5. On June 24, 2009, the UST appointed a statutory committee of unsecured creditors in this case.

6. The Debtors, the largest franchisee of Checkers Drive-In Restaurants, filed the Motion on June 19, 2009. The Motion seeks approval of bidding procedures and the sale of certain of the Debtors’ assets.

7. Checkerco, Inc. (“Checkerco”), the proposed “stalking horse” purchaser, is an affiliate of the Debtors’ franchisor, Checkers Drive-In Restaurants, Inc. (“Franchisor”). The proposed sale contemplates that Checkerco will pay: (a) \$1,200,000 for all of the Debtors’ Acquired Assets, except the Acquired Textron Assets, (b) \$300,000 for the Acquired Textron Assets, (c) \$3,800,000 payable to Franchisor for outstanding royalties and other payment obligations under the Franchise Agreements that are to be assumed and assigned to buyer, and (d) up to \$500,000 for restructuring costs of estate professionals payable by Buyer and Franchisor in

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<sup>2/</sup> All capitalized terms not defined herein shall have the meaning ascribed to them in the Motion.

accordance with Section 1.9 of the Purchase Agreement and a letter agreement dated June 5, 2009 between the Debtors and the Franchisor (the “Fee Agreement”).<sup>3</sup>

8. The UST objects to the Debtors’ proposed sale procedures to the extent that the Debtors seek approval to pay a break up fee to Checkerco, an affiliate of Debtors’ Franchisor, and an entity that should already be familiar with the Debtors’ operations.

#### **GROUND/BASIS FOR RELIEF**

9. In the Motion, the Debtors propose that competing bids must equal the stalking horse bid, plus (a) the break up fee of \$200,000 and (b) an initial overbid of \$50,000. The Debtors seek authority to pay Checkerco a break up fee in the event that the Agreement is terminated, subject to the conditions set forth in the Agreement.

10. The requested break up fee provision is not necessary to preserve the value of the Debtor’s estate under 11 U.S.C. § 503(b). *See Calpine Corp. v. O’Brien Environmental Energy, Inc. (In re O’Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999). Given that the stalking horse bidder is an affiliate of the Debtors’ Franchisor, it has strategic reasons for bidding. As the Third Circuit noted in *O’Brien*, entities that have a strategic incentive to bid do not need bid protections. *See id.* at 535. As the Debtors’ Franchisor, Checker’s Drive In Restaurants presumably already knows the details of the Debtors’ operations and financial

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<sup>3</sup> The UST has raised an informal objection to the Debtors’ attorneys retention application based upon its entering into the Fee Agreement. The UST has also raised concerns regarding the component of the purchase price that requires funding of up to \$500,000 in professional fees with counsel for the Debtors and reserves the right to raise an objection at the hearing to the extent that the parties have not reached a resolution. In particular, the UST believes that the Fee Agreement to allocate and set aside a portion of the sale proceeds for the sole benefit of estate professionals impermissibly prefers estate professionals over other administrative claimants by ensuring that professionals will be paid from proceeds of the sale. The UST believes that such agreement renders the Debtors’ counsel not disinterested as the Fee Agreement creates a material adverse interest to the interest of the estate and the Debtors’ creditors. Additionally, the UST is concerned that the Fee Agreement will have the effect of chilling alternate bids as alternate bidders may refuse to submit competing bids as a result of the Fee Agreement.

affairs.

11. In this case, no break up 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 expenses were an actual and necessary cost and expense of preserving the estate. *See O'Brien*, 181 F.3d at 535. In *O'Brien*, the Third Circuit Court of Appeals stated that the claimant bears “. . . the heavy burden of demonstrating that the costs and fees for which it seeks payment provided an actual benefit to the estate and that such costs and expenses *were* necessary to preserve the value of the estate assets.” *O'Brien*, 181 F. 3d at 533 (emphasis added). The emphasized text suggests that the review of necessity to preserve the value of the estate is backward-looking, not forward-looking, and necessarily takes place after a sale is consummated. Accordingly, the Debtors' request for approval of the break up fee provision should be denied.

12. The UST reserves any and 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 UST 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,

**ROBERTA A. DeANGELIS**  
**ACTING UNITED STATES TRUSTEE**

**By:** /s/ Jane M. Leamy

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Dated: June 30, 2009