

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) Chapter 11
)
GULF PACKAGING, INC.,) Case No. 15-15249
)
Debtor.) Hon. Pamela S. Hollis
)
) Hearing Date: February 11, 2016 at 10:30 a.m.
)

NOTICE OF EMERGENCY MOTION

PLEASE TAKE NOTICE that on February 11, 2016 at 10:30 a.m., the undersigned shall appear before the Honorable Pamela S. Hollis in Courtroom 644, or whomever may be sitting in her place and stead, at the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, 219 S. Dearborn Street, Chicago, Illinois and will then and there present the *Emergency Motion for Entry of an Order Compelling Xsys, Inc. to Turnover the Debtor's Books and Records to the Creditor Trustee* a copy of which is attached hereto and herewith served upon you.

Dated: February 10, 2016

**JOSEPH MYERS, CREDITOR TRUSTEE
OF THE GULF PACKAGING, INC.
CREDITOR TRUST**

By: /s/ Shelly A. DeRousse
One of His Attorneys

Shelly A. DeRousse, Esq.
Devon J. Eggert, Esq.
Elizabeth L. Janczak, Esq.
FREEBORN & PETERS LLP
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677
Telephone: 312.360.6000
Facsimile: 312.360.6520

Counsel for the Creditor Trustee

**UNITED STATES BANKRUPTCY COURT
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CERTIFICATE OF SERVICE

I, Shelly A DeRousse, an attorney, hereby certify that on February 10, 2016, I caused a true and correct copy of the foregoing *Notice of Emergency Motion* and *Emergency Motion for Entry of an Order Compelling Xsys, Inc. to Turnover the Debtor's Books and Records to the Creditor Trustee*, to be filed with the Court and served upon the following parties by the manners listed.

/s/ Shelly A. DeRousse

Facsimile Service List

Xsys, Inc. (219) 531-1411
(219) 707-8470
(219) 707-8471
Kevin H. Morse (312) 876-6273

E-mail Service List

Kevin H. Morse KArmiros@arnstein.com

CM/ECF Service List

Zarine L. Alam zarine.alam@goldbergekohn.com
Michael W. Bishop mbishop@grayreed.com
Jason S. Brookner jbrookner@grayreed.com
Erich S. Buck ebuck@ag-ltd.com
Elizabeth Bando Calvo ebcavlo@pbfc.com
William J. Choslovsky wchoslovsky@foxrothschild.com
Jeffrey C. Dan jdan@craneheyman.com
David J. Fischer dfischer@lockelord.com
Joseph D. Frank jfrank@fgllp.com

Chad H. Gettleman	cgettleman@ag-ltd.com
Stevem A. Ginther	ndilecf@dor.mo.gov
John W. Guzzardo	jguzzardo@shawfishman.com
Dimitri G. Karcazes	dimitri.karcazes@goldbergkohn.com
Jeremy C. Kleinman	jkleinman@fgllp.com
Tyler Steven Mertes	tyler.mertes@troutmansanders.com
Mark L. Radtke	mradtke@shawfishman.com
Brian Raynor	braynor@lockelord.com
Peter J. Roberts	proberts@shawfishman.com
Gregg R. Smith	gregg@greggsmithlaw.com

**UNITED STATES BANKRUPTCY COURT
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In re:) Chapter 11
)
GULF PACKAGING, INC.,¹) Case No. 15-15249
)
Debtor.) Hon. Pamela S. Hollis
)

**EMERGENCY MOTION FOR ENTRY OF AN ORDER COMPELLING
XSYS, INC. TO TURNOVER THE DEBTOR’S BOOKS AND
RECORDS TO THE CREDITOR TRUSTEE**

Joseph Myers, not individually but solely as trustee (the “*Creditor Trustee*”) of the Gulf Packaging, Inc. Creditor Trust (the “*Creditor Trust*”), by and through his undersigned counsel, hereby moves this Court (the “*Motion*”) for entry of an order, pursuant to Section 13.3 of the Creditor Trust Agreement (defined below), compelling Xsys, Inc. (“*Xsys*”) to turn over to the Creditor Trustee the financial, accounting, tax and all other books and records (the “*Electronic Data*”) of Gulf Packaging, Inc. (the “*Debtor*”) which Xsys is currently hosting on its computer servers. In support of the Motion, the Creditor Trustee states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334 and Article XII of the Plan (defined below). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested herein are section 105(a) of title 11 of the United States Code (the “*Bankruptcy Code*”).

¹ The last four digits of the Debtor’s tax identification number are 5030.

BACKGROUND

3. On April 29, 2015 (the “*Petition Date*”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois (the “*Court*”).

4. On December 15, 2015, the Court entered an order (the “*Confirmation Order*”) confirming the Debtor’s First Amended Chapter 11 Plan, as amended (the “*Plan*”), including the Gulf Packaging, Inc. Creditor Trust Agreement (the “*Creditor Trust Agreement*”) separately filed with the Plan Supplement.

5. The Plan became effective on January 22, 2016.

6. Xsys is owned by Melissa Sarkisian, the wife of Arman Sarkisian who served as the Debtor’s Chief Executive Officer until a few months prior to the Petition Date when the Debtor hired a chief restructuring officer.

7. Xsys provided data, storage, accounting, and e-mail services to the Debtor and the Debtor’s affiliates prior to the Petition Date and during the pendency of the chapter 11 case.

8. Xsys continues to host the Debtor’s data, storage, accounting and e-mail on its servers.

9. In January 2016, the Creditor Trustee issued a letter to Xsys demanding the return of \$367,682.78 in allegedly preferential transfers pursuant to sections 547 and 550 of the Bankruptcy Code.

10. Xsys responded (the “*Response Letter*”) to the demand letter by serving a ten-day notice of termination that it would terminate all services to the Debtor and the Creditor Trustee unless the Creditor Trustee withdrew the preference demand letter and paid an alleged \$55,616.10 post-petition administrative claim. A true and correct copy of the Response Letter is attached hereto as Exhibit A.

11. The Response Letter stated that “. . . upon termination of services, the Debtor, the Creditor Trustee, and you will permanently lose all access to the Debtor’s accounting, operations, and e-mail services that are stored and maintained at Xsys’ facilities.” (Response Letter at pp. 1-2) (emphasis added).

12. The Creditor Trustee and Xsys engaged in discussions with respect to resolution of the preference demand, the alleged post-petition debt, and the Electronic Data hosted by Xsys.

13. Xsys has agreed to continue providing services through February 11, 2016.

14. On February 8, 2016, the Creditor Trustee requested that Xsys make the Debtor’s Electronic Data available for copying while the parties continued to engage in negotiations regarding the preference demand, the alleged post-petition debt, and the possibility of Xsys continuing to host the Debtor’s Electronic Data.

15. On February 9, 2016, Xsys informed the Creditor Trustee that it would not be possible to simply copy the Debtor’s Electronic Data stored on its servers due to alleged issues with certain software licenses. Further, Xsys contends that the Creditor Trustee may be unable to host the Electronic Data himself due to customizations to the configuration of the virtual servers which host the Debtor’s Electronic Data and the data of the Debtor’s affiliates.

16. Instead, Xsys asserted that the Creditor Trustee had only two options: (1) permit Xsys to continue to host the Debtor’s Electronic Data, or (2) a complete transfer of the Debtor’s Electronic Data to the Creditor Trustee for which Xsys would charge the Creditor Trustee a significant fee.

17. Regarding the first option, Xsys has threatened that will not provide services to the Creditor Trust unless the entire preference demand is waived.

18. Regarding the second option, Xsys provided the Creditor Trustee with an estimate of the cost associated with exporting (*i.e.* transferring) the Debtor's Electronic Data from Xsys' servers to an external hard drive. This estimate (the "*Estimate*") ranged from \$11,240 to \$12,400 and contemplated charging the Creditor Trustee for 32 hours of labor associated with isolating or purging the Debtor's affiliates' data from Xsys' servers and 8 hours of labor for deleting and destroying virtual servers and the Debtor's Electronic Data. A true and correct copy of the Estimate is attached hereto as Exhibit B.

19. The only reason the Debtor's Electronic Data needs to be separated from the affiliates' is because the Debtor's former CEO, Mr. Sarkisian, who is also the husband of Xsys' owner, set it up that way. The Creditor Trust should have to pay an insider to undo the improper method of storage and collection of the Debtor's Electronic Data set up by the insider.

20. The Creditor Trustee inquired into the possibility of having his own computer technicians facilitate the Electronic Data transfer and was informed that it would be impossible as the Debtor's affiliates' data is housed on those same servers and the technician cannot be permitted access to that Electronic Data.

RELIEF REQUESTED

21. By this Motion, the Creditor Trustee respectfully requests the entry of an order, pursuant to Section 13.3 of the Creditor Trust Agreement, prohibiting Xsys from destroying, deleting or otherwise losing the Electronic Data and compelling Xsys to turn over the Debtor's Electronic Data to the Creditor Trustee in a usable, accessible format within seven (7) days.

22. Section 13.3 of the Creditor Trust Agreement provides as follows:

Pursuant to the Confirmation Order, the Debtor will provide the Creditor Trustee with access to or copies of such of the Debtor's books and records as the Creditor Trustee shall reasonably require for the purpose of performing its duties and exercising its powers under this Agreement, the Plan or the Confirmation Order. All third parties in possession of the Debtor's data shall provide the Creditor

Trustee with similar cooperation, and the Creditor Trustee shall have the right to seek appropriate relief from the Bankruptcy Court or any other court with competent jurisdiction to the extent that a party unreasonably refuses to cooperate with the Creditor Trustee's request.

(Creditor Trust Agreement, § 13.3, ECF No. 331) (emphasis added).

23. The Creditor Trustee has made demand upon Xsys to turn over the Electronic Data belonging to the Debtor. However, as of the date of this Motion, Xsys has offered only excuses as to why the Electronic Data cannot be copied and asserted that the Creditor Trustee must pay in excess of \$10,000 to gain access to the very Electronic Data to which he is entitled under the Creditor Trust Agreement.

24. Significantly, Xsys' contends the reason the Creditor Trustee cannot simply have his own technician copy the data and why the Estimate is so high is due to Xsys' own data management procedure whereby Xsys has commingled the Debtor's Electronic Data with the data of the Debtor's affiliates and, potentially, unrelated third parties.

25. Xsys should not be permitted to hold the Debtor's Electronic Data hostage until the Creditor Trustee either pays a ransom of \$11,000-\$12,000 or agrees to waive avoidance action claims of over \$350,000, particularly when the supposed reason for the high Estimate is Xsys' own fault.

26. In addition, the Creditor Trustee has serious concerns that Xsys may unilaterally terminate services and the Creditor Trustee could permanently lose access to the Electronic Data.

27. Accordingly, the Creditor Trustee requests that this Court enter an order, pursuant to Section 13.3 of the Creditor Trust Agreement, prohibiting Xsys from destroying, deleting or otherwise causing the loss of the Data and compelling Xsys to turn over the Debtor's Electronic Data to the Creditor Trustee in a usable, accessible format within seven (7) days.

NOTICE

28. Notice of this Motion has been or will be provided to Xsys via facsimile and to Xsys' counsel via e-mail and facsimile. Further notice has been provided via ECF notice to: (a) the Office of the United States Trustee for the Northern District of Illinois; (b) counsel to FCC, LLC; and (c) all parties that have filed a notice of appearance in these chapter 11 cases pursuant to Bankruptcy Rule 2002. The Creditor Trustee submits that, in light of the nature of the relief requested, no other or further notice is required.

WHEREFORE, the Creditor Trustee respectfully requests that the Court enter an order: (i) prohibiting Xsys from destroying, deleting or otherwise causing the loss of the Electronic Data, (ii) compelling Xsys to turn over the Debtor's Electronic Data to the Creditor Trustee in a usable, accessible format within seven (7) days, and (iii) granting such other and further relief as the Court deems just and proper.

Dated: February 10, 2016

**JOSEPH MYERS, CREDITOR TRUSTEE
OF THE GULF PACKAGING, INC.
CREDITOR TRUST**

By: /s/ Shelly A. DeRousse
One of His Attorneys

Shelly A. DeRousse, Esq.
Devon J. Eggert, Esq.
Elizabeth L. Janczak, Esq.
FREEBORN & PETERS LLP
311 South Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677
Telephone: 312.360.6000
Facsimile: 312.360.6520

Counsel for the Creditor Trustee