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April 26, 2005

The Honorable Mary F. Walrath
Chief Bankruptcy Judge
United States Bankruptcy Court for
the District of Delaware
824 Market Street, 5th Floor
Wilmington, DE 19801

Re: Women First Healthcare, Inc. (the "Debtor"), Case No. 04-11278 (MFW) - Sun Administrative Expense Motion [Related Docket No. 609]

Dear Judge Walrath:

Kelly Beaudin Stapleton, the United States Trustee for Region 3 (the "UST") hereby files this Post-Trial Letter Brief in support of her objection (the "Objection") to the Motion for Allowance and Payment of Administrative Expenses (the "Motion") filed by Sun Pharmaceutical Industries, Ltd. ("Sun").

At trial, Sun failed to present sufficient evidence to support its allegations that Sun reasonably and justifiably relied on the Sun Sale Order when it incurred approximately $300,000 in expenses (the "Sun Claim").

The evidence presented by Sun demonstrated that any expenses incurred by Sun after the entry of the Sun Sale Order,[1/] were expended by Sun to preserve its interest in the Bactrim Assets, which under the Sun Sale Order it was to receive at a significant discount. Moreover, the vast majority of the costs and expenses comprising the Sun Claim were incurred by Sun after it was on notice that Mutual Pharmaceutical Company, Inc. ("Mutual") had challenged the validity of the Sun Sale Order and that Mutual was interested in bidding for the Bactrim Assets. Finally, Sun failed to provide credible evidence that the alleged expenses were reasonable under the circumstances.

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

Sun Failed to Prove That It Was Entitled to an Administrative Expense Claim Under Section 503(B) or 105(a) of the Bankruptcy Code

Sun has alleged that it is entitled, pursuant to 11 U.S.C. §§ 503(b) and 105(a), to an administrative claim for of the costs and expenses it allegedly incurred in connection with its efforts to close the transaction approved by the Sun Sale Order. Section 503(b) of the Bankruptcy Code provides that there shall be allowed administrative expenses for the actual, necessary costs and expenses of preserving the estate. 11 U.S.C. § 503(b). Whether a claim is entitled to administrative priority is determined by a two part test: (i) there must be a post-petition transaction between the creditor and the debtor; and (ii) the estate must receive benefit from the transaction. *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999); *Microsoft Corp v. DAK Indus., Inc. (In re DAK Indus, Inc.)*, 66 F.3d 1091 (9th Cir. 1995); *In re Mid-American Waste*, 228 B.R. 816 (Bankr. D. Del. 1999).

Sun bears the burden of demonstrating that its claim is entitled to administrative priority and that its services conferred a benefit to the estate. *See In re Bake-line Group, LLC*, 312 B.R. 48 (Bankr. D. Del. 2004). Sun failed to meet its burden.

Veiled Attempt to Recover an Additional Break-Up Fee or to Seek a Claim for Substantial Contribution

In Sun's Prehearing Memorandum in Support of Motion for Allowance and Payment of Administrative Expense (the "Prehearing Memorandum"), Sun implicitly, although indirectly, acknowledged that the Sun Claim is an attempt by Sun to collect an additional break-up fee. Alternatively, the Sun Claim is nothing more than a veiled attempt to seek a claim for substantial contribution in a case where Sun cannot substantiate that its conduct provided any benefit to the estate.

Claim for Unauthorized Additional Break-Up Fee

Pursuant to the terms of the Bid Procedures Order, Sun was entitled to a break-up fee of $82,500. It is undisputed that the Debtor paid such amount to Sun. In the Prehearing Memorandum, Sun stated that the funds Mutual agreed to place in escrow prior to the November auction to "compensate Sun for its costs and expenses" were "part of Mutual's cost for re-opening the auction and acquiring the Bactrim Assets." [Pre-hearing Memorandum at paragraph 24.]

Any request for a break-up fee is governed by the Third Circuit's decision in *Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999). In *O'Brien*, the Third Circuit 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." *O'Brien*, 181 F.3d at 535 (emphasis added). The burden is on the Debtor to prove the necessity of, and benefit to the estate from, the proposed breakup fee.

Upon receipt of the break-up fee, Sun was adequately compensated for acting as the stalking horse bidder. Sun should not now be entitled to an additional break-up fee, simply because the Debtor mistakenly failed to provide notice to all interested parties and the auction had to be re-opened to ensure the propriety of the sale. The vast majority of the alleged costs and

expenses comprising the Sun Claim were incurred after Mutual filed the Reconsideration Motion on October 4, 2004 and after Sun's counsel was advised by Debtor's counsel on October 5, 2004 that the Debtor believed that the auction would be re-opened. [See Mutual Exhibit No. 4.] Michael Nestor, counsel for the Debtor, further testified, he never advised Sun that Mutual was not interested in bidding for the Bactrim Assets. Sun's conduct in requesting that the Debtor return of the final installment of the purchase price on October 5, 2005 demonstrates its awareness of the risks associated with the Reconsideration Motion. [Mutual Exhibits Nos. 7 and 8.] Aware of such risks, Sun voluntarily chose to incur the alleged expenses comprising the Sun Claim.

Although the evidence presented at trial indicated there was some confusion as to when certain individuals at Sun became aware of the risk, the Debtor certainly should have no liability for any internal communication problems at Sun. In light of the above, Sun is not now entitled to an additional administrative expense claim for its alleged unrecovered costs.

Claim for Substantial Contribution

Sun did not produce sufficient evidence at trial to support a claim for substantial contribution under § 503(b)(3)(D). First, Sun is not a creditor, which is a prerequisite to administrative expense under this section. The definition of creditor does not include an administrative expense claimant. *See* 11 U.S.C. § 101(10). Sun failed to present any evidence at trial indicating that it had any claims other than the alleged administrative claim arising from the sale of the Bactrim Assets which is at issue herein.

Second, Sun cannot satisfy the substantial contribution test under relevant Third Circuit law. *See Lebron v. Mechem Financial, Inc.*, 27 F.3d 937, 944 (3d Cir. 1994) (the test for determining whether an applicant made a substantial contribution under section 503(b)(3)(D) is whether "the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor's estate and creditors"). In fact, the Third Circuit expressly rejected payment under section 503(b)(3)(D) in a scenario similar to this case by stating: "substantial contribution should be applied in a manner that excludes reimbursement in connection with activities of creditors and other interested parties which are designed primarily to serve their own interests and which, accordingly, would have been undertaken absent an expectation of reimbursement from the estate." *Id.* at 944. Even viewing all of the evidence presented at trial in a light most favorable to Sun, the evidence demonstrates that Sun's activities were designed primarily, if not exclusively, to benefit Sun and to preserve its interest in the Bactrim Assets.

The preservation of the status quo, although detrimental to the Debtor's estate and its creditors, would have resulted an a substantial windfall for Sun. If the Court had opted not to vacate the Sun Sale Order, Sun would have been authorized to purchase the Bactrim Assets for $1,750,000.00. As demonstrated from the evidence produced at trial, Sun would have received an asset for $1,750,000.00, which Sun itself - - based on its final bid at the auction on November 10, 2004 and its initial offer to the Debtor in June 2004 for the Bactrim Assets- - valued at over $4,000,000.00. [Mutual Exhibit No. 28]

Sun Is Not Entitled to an Administrative Expense Claim for Alleged Tortious Conduct

Sun's reliance on *Reading Co. v. Brown,* 391 U.S. 471 (1968) is misplaced. In *Reading*

Co., the United States Supreme Court held that a party injured by the post-petition tortious conduct of a debtor in the operation of its business is arguably entitled to assert an administrative claim for damages arising from the tortious conduct. The Court's holding was premised upon the idea that the debtor's estate and its creditors benefitted from the debtor's continued operation of its business and that if such parties are entitled to benefit therefrom that such parties must share in the risk of compensating an entity injured as a result of the debtor's conduct while operating such business. As this Court has previously recognized, *Reading Co.* is subject to certain limitations and should not be extended to circumstances similar to those at issue in this case. *See In re Unidigital, Inc.*, 262 B.R. 283 (Bank. D. Del. 2001).

In *Unidigital*, this Court denied a landlord's request for an administrative expense claim arising from the alleged tortious conduct of the debtor because it noted that the tort, if in fact there was one, did not arise from the operation of the debtor's business. Similarly, the Debtor's alleged "tortious" conduct was not committed by a debtor engaged in the operation of its business. The Sun Claim arises from the Debtor's sale of assets outside of the ordinary course of business.

Accordingly, because Sun was not an innocent third party injured by the negligent conduct of a Debtor engaged in the operation of its business, the Sun Claim is not entitled to administrative priority status under *Reading Co.* and its progeny.

Sun Cannot Establish a Claim for Negligent Misrepresentation

Sun failed to establish a prima facie case for negligent misrepresentation. To establish a case for negligent misrepresentation, Sun must demonstrate that it was supplied with "false information" that was intended for its guidance and that its reliance on such information was "justifiable." *See Carello v. PricewaterhouseCoopers LLP*, 2002 WL 1454111 (Del. Super. 2002).

Sun failed to identify the "false information" it was provided by the Debtor. Kirti Ganorkar testified that Saundra Pelletier, a former employee of the Debtor, assured him that Mutual had no interest in the Bactrim Assets. [Ganorkar Transcript at p. 177.] However, according to Pelletier herself, she simply advised Ganorkar that Mutual had not previously contacted her to express an interest in purchasing the Bactrim Asset. Additionally, as noted above, counsel for the Debtor repeatedly advised Sun that the Mutual was interested in bidding for the Bactrim Assets.

Based on the evidence submitted at trial - - at best - - Sun could ostensibly argue it was confused because the Debtor was engaged in parallel track negotiations. On the one hand, the Debtor was negotiating a carve-out of Mutual's Intellectual Property with Mutual and Sun, so it could close the transaction with Sun, if the Sun Sale Order was ruled to be valid. On the other hand, the Debtor was negotiating an asset purchase agreement with Mutual, so Mutual could be qualified as a bidder, if the Sun Sale Order was vacated and the auction was re-opened. [Mutual Exhibits Nos. 9,11,12,13,14 and 16.] Sun is a highly sophisticated corporate entity that was represented by competent counsel at all relevant time herein. Accordingly, Sun's alleged mis-interpretation of the facts cannot support a claim for negligent misrepresentation.

Administrative Claim Not Properly Granted Under Section 105

It is universally recognized that the equitable power granted to bankruptcy courts under § 105(a) is not boundless. Section 105 does not allow a bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code. *See Southern Ry. Co. v. Johnson Bronze Co.,* 758 F.2d 137 (3d Cir. 1985). Section 105(a) does not give the Court power to create substantive rights that would otherwise no be available under the Bankruptcy Code. *See In re Continental Airlines,* 203 F.3d 203 (3d Cir. 2000). Accordingly, because Sun cannot demonstrate its entitlement to an administrative claim under § 503(b), it would be improper to grant the Sun Claim under section 105.

Sun Failed to Produce Sufficient and Credible Evidence to Support the Sun Claim

Finally, Sun failed to present sufficient and credible evidence to support its alleged costs and expenses: (1) Bio-Study Claim ($131,000) - Sun failed to demonstrate that it actually paid its wholly owned subsidiary for the study or that it made any effort to cancel the study when it became aware of the Reconsideration Motion; (2) Employee Claims ($75,000) - Sun failed to demonstrate how it calculated such claims and the related billing rates, why it can recover for claims of the Caraco employees and why, if the "US Road Trip" was conducted to promote various Sun products, the total cost of such trip was properly included in the Sun Claim; (3) Currency Conversion Claim ($23,000) - Sun did not submit sufficient evidence to substantiate this claim; and (4) Attorney's Fees Claim ($58,000) - Sun did not submit sufficient evidence to substantiate this claim.

CONCLUSION

Sun is not legally entitled to an administrative claim under section 503(b) of the Bankruptcy Code or the Reading exception thereto, or under section 105 of the Bankruptcy Code. If this Court finds that Sun is entitled to an administrative claim, however, Sun has neither provided that its expenses were actual or necessary or incurred in reasonable reliance on the Sun Sale Order nor had it provided any reasonable evidence supporting the amounts in its claim. Accordingly, the UST requests that this Court deny Sun's Motion for Allowance of an Administrative Claim in its entirety.

Respectfully submitted,

/s/ William Harrington
William K. Harrington
Trial Attorney

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