

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re</i>	:	
	:	Chapter 11
	:	
GULF COAST HEALTH CARE, LLC,	:	Case No. 21-11336 (KBO)
<i>et al.</i> , ¹	:	(Jointly Administered)
	:	
Debtors.	:	Re: D.I. 107
	:	
	:	Hearing Date: Nov. 23, 2021 at 9:00 A.M. ET
	:	

**OBJECTION OF THE UNITED STATES TRUSTEE TO THE
MOTION OF DEBTORS FOR ENTRY OF ORDER APPROVING ASSUMPTION OF
RESTRUCTURING SUPPORT AGREEMENT**

In support of his objection in response to the motion of the above-captioned debtors and debtors in possession (the “Debtors”) for entry of an order approving the assumption of a restructuring support agreement (the “Motion”), Andrew R. Vara, United States Trustee for Region Three (“U.S. Trustee”), through his counsel, avers:

INTRODUCTION

1. This Court has jurisdiction over the above-captioned cases pursuant to 28 U.S.C. § 1334. This Court is authorized to hear and determine the Motion pursuant to 28 U.S.C. § 157(a, b), and the amended standing order of reference issued by the United States District Court for the District of Delaware dated February 29, 2012. Venue of the cases is proper in this District pursuant to 28 U.S.C. § 1408(1).

¹ The last four digits of Gulf Coast Health Care, LLC’s federal tax identification number are 9281. There are 62 Debtors in these chapter 11 cases, which cases are being jointly administered for procedural purposes only. A complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent at <https://dm.epiq11.com/GulfCoastHealthCare>. The location of Gulf Coast Health Care, LLC’s corporate headquarters and the Debtors’ service address is 9511 Holsberry Lane, Suite B11, Pensacola, FL 32534.

2. Under 28 U.S.C. § 586, the U.S. Trustee is generally charged with monitoring the federal bankruptcy system. *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”). Specifically, the U.S. Trustee is charged with “monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress.” 28 U.S.C. § 586(a)(3)(G).

3. The U.S. Trustee has standing to be heard with respect to the Motion pursuant to 11 U.S.C. § 307.

GROUND FOR OBJECTION

4. By the Motion, the Debtors seek authorization to assume the restructuring support agreement (the “RSA”) entered into by the Debtors on October 14, 2021. The U.S. Trustee objects to the Debtors’ request as (a) there is insufficient evidence in the record to justify what is, in essence, a private sale of the business proposed to be transferred to the New Operator, without any marketing of same, and (b) the RSA prohibits the Debtors from entertaining a “higher and better” offer under any circumstances, arguably nullifying the “fiduciary out” in the RSA.

A. The Record Lacks Evidence of the Justification for the Private Sale Proposed in the RSA.

5. A debtor in possession has a “fiduciary duty to maximize the value of the bankruptcy estate.” *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003). The Motion states that “months of financial and operational analysis” and “confidential restructuring negotiations with certain of the Debtors’ key stakeholders” led to the decision to transfer operations pursuant to the RSA. Mot. ¶¶ 3, 4. The Debtors apparently did

not conduct a marketing process to test the value of the Debtors' leasehold interests and operations. It is the Debtors' burden to demonstrate that the price received is fair and that there is a sound business purpose for the sale. *See In re Exaeris, Inc.*, 380 B.R. 741, 744-45 (Bankr. D. Del. 2008) (insufficient evidence found to support finding that proposed purchase price for going concern was fair; lack of marketing process cited). Absent a robust marketing process, there presently is an insufficient record to justify the transfer of the Debtors' leasehold interests and operations to entities chosen at the discretion of the Existing or New Landlords.²

B. The RSA Prohibits the Debtors From Entertaining a Higher and Better Offer, Arguably Nullifying the “Fiduciary Out.”

6. Although the Debtors do not justify the private sale proposed in the RSA, the Debtors assert that they are nonetheless able to comply with their fiduciary duties to creditors. Mot. ¶ 19. The RSA contains what the Debtors term as a “fiduciary out” provision:

Fiduciary Duties. Notwithstanding anything to the contrary contained in this Agreement, until the entry of the Confirmation Order, nothing in this Agreement shall require the Company or any director, manager, or officer of the Company (in such person's capacity as a director, manager, or officer) to take any action, or to refrain from taking any action, to the extent that doing so would be inconsistent with its fiduciary obligations under applicable law (as determined by it after consultation with outside legal counsel), provided that within one (1) day of approval by the board of directors (or such analogous governing body) of the Company of any material action to evaluate, structure, or consummate an Alternative Transaction, including approving the retention of additional counsel or other advisors in connection therewith, the Company shall have delivered written notice to the Omega Entities, New Ark, the Equity Sponsors, and the Service Providers (which may be provided by email).

Mot. Ex. 1 (RSA) ¶ 8. The Debtors assert that this “preserv[es] the Debtors' flexibility to pursue an alternative value-maximizing transaction (an “Alternative Transaction”), should one arise.”

² “*New Operator(s)*” is defined in the RSA as the party or parties designated by the Existing Landlords or one or more New Landlord(s), in their sole and absolute discretion, to effectuate the MOTA(s) and the transactions contemplated hereunder. RSA Definitions.

Mot. ¶ 19. However, paragraph 6(h) of the RSA specifically bars the Debtors from taking any actions to entertain a higher and better offer:

6. Commitment of the Company. Between the date hereof and the Termination Date, the Company agrees to take any and all reasonably necessary and appropriate actions, and make all commercially reasonable efforts, to:

h) not (i) directly or indirectly seek, solicit, support, propose, assist, encourage, vote for, consent to, enter, or participate in any discussion regarding the negotiation or formulation of an Alternative Transaction, (ii) publicly announce its intention not to pursue the Restructuring Transactions, or (iii) object to, impede, delay, or take any action that is inconsistent with, or that would prevent, interfere with, impede, or delay the proposal, solicitation, confirmation, or consummation of the Restructuring Transactions as soon as reasonably practical;

RSA ¶ 6(h). An Alternative Transaction is not likely to “arise” unless the Debtors have the ability to entertain a higher and better offer. This provision, when combined with the lack of justification for the transfer of the Debtors’ leasehold interests and operations without a marketing effort, renders the “fiduciary out” illusory. *See In re Innkeepers USA Trust*, 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010) (“fiduciary out” provision of a PSA “flawed” where debtors were prohibited from taking actions consistent with their fiduciary obligations). Further, the actions prohibited under ¶ 6(a) of the RSA appear to be Termination Events thereunder. Mot. Ex. 1 (RSA) ¶¶ 7(b)(ii)(A), (iii)(A), (iv)(A), and (vii)(C).

CONCLUSION

WHEREFORE the U.S. Trustee respectfully requests that this Court enter an order granting relief consistent with this objection.

Dated: November 16, 2021
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE,
REGIONS 3 and 9

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