

UNITED STATES BANKRUPTCY COURT 2010 JUL -8 PM 4:26
NORTHERN DISTRICT OF OHIO

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YOUNGSTOWN

IN RE:

DENMAN TIRE, LLC,

Debtor.

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* CASE NUMBER 10-40855
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* CHAPTER 7
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* HONORABLE KAY WOODS
*

ORDER DENYING MOTION FOR BREAK-UP FEE

This cause is before the Court on Supplemental Motion of the Trustee for an Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, Authorizing the Trustee to Sell Certain Assets of Denman Tire, LLC by Private Sale [Related Docket No. 83] (i) Designating Soberay & Sons, Inc. [sic] or its Designee the Stalking Horse Purchaser; (ii) Authorizing Payment of a Break-Up Fee; and (iii) Granting Related Relief ("Motion for Break-Up Fee") (Doc. # 101) filed by Richard G. Zellers, Chapter 7 Trustee, on June 4, 2010. No objections or responses were filed to the Motion for Break-Up Fee.

The Court held a hearing on the Motion for Break-Up Fee on July 7, 2010 ("Hearing"). The Court denied the Motion for Break-Up Fee at the Hearing and enters this Order to formalize that ruling. The findings set forth on the record at the Hearing are incorporated by reference herein. To the extent such findings conflict with this Order, this Order controls.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in

this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. PROCEDURAL AND FACTUAL BACKGROUND

Debtor Denman Tire, LLC filed a voluntary chapter 7 petition on March 17, 2010 ("Petition Date"), and Mr. Zellers was appointed Chapter 7 Trustee. Approximately two months after the Petition Date, on May 18, 2010, the Trustee filed Motion of the Trustee for an Order, Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, Authorizing the Trustee to Sell Certain Assets of Denman Tire, LLC by Private Sale ("First Sale Motion") (Doc. # 83). In the First Sale Motion, the Trustee asked the Court to approve the sale of certain of the Debtor's assets, as defined in the Purchase Agreement (First Sale Mot., Ex. A) ("Acquired Assets"), to Soberay & Sons, Ltd. ("Soberay") for \$1.2 million. The First Sale Motion provided that the Trustee would entertain competing offers for the Acquired Assets until seven business days prior to the hearing on the First Sale Motion. If the Trustee received at least one "qualified bid," as defined in the First Sale Motion (see First Sale Mot., ¶¶ 11-12), the Trustee would conduct an auction to determine the highest and best offer for the Acquired Assets.

On June 4, 2010 (almost three weeks after filing the First Sale

Motion), the Trustee filed the Motion for Break-Up Fee, in which the Trustee asks the Court to: (i) designate Soberay as the stalking horse bidder for the Acquired Assets; and (ii) authorize a \$50,000.00 break-up fee ("Break-Up Fee") to Soberay if Soberay was not the successful bidder for the Acquired Assets.

On June 15, 2010, the Trustee filed Motion to Approve \$1,470,000.00 Offer of Titan Tire Corporation for Certain Identified Personal Property and Notice of Competing Bids with Regard to the Motion of the Trustee for an Order, Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code, Authorizing the Trustee to Sell Certain Assets of Denman Tire, LLC by Private Sale [Docket No. 83] and Trustee's Application to Sell Inventory [Docket No. 97] ("Second Sale Motion") (Doc. # 106). In the Second Sale Motion, the Trustee requested approval to sell: (i) the Acquired Assets to Titan Tire Corporation ("Titan") for the higher and better offer of \$1.35 million; and (ii) other assets of the Debtor ("Other Assets") to Titan for \$120,000.00, for a total purchase price of \$1.47 million, subject to higher and better offers.

The Court held the Hearing on July 7, 2010, at which appeared (i) Richard G. Zellers, Esq., on behalf of the Trustee; and (ii) Harry W. Greenfield, Esq., on behalf of Soberay. At the Hearing, the Trustee represented that he had erroneously omitted the request for the Break-Up Fee in the First Sale Motion, but asked the Court to approve the Break-Up Fee to compensate Soberay for its efforts. The Trustee also confirmed that Titan had submitted a

higher and better qualified bid for the Acquired Assets and that he intended to conduct an auction for the Acquired Assets and/or Other Assets. At the Hearing, Soberay represented that the Break-Up Fee was an integral part of its initial offer to purchase the Acquired Assets and that Soberay's due diligence enabled Titan to submit its topping offer. Soberay noted that the contract embodying Titan's topping offer was based upon Soberay's initial offer and contained only minor modifications, including the proposed purchase of the Other Assets. Soberay contended that its due diligence added value to the estate by encouraging bidding and, thus, the Court should approve the Break-Up Fee.

II. STANDARD FOR REVIEW AND ANALYSIS

Break-up fees are administrative expenses that shall be allowed if they are "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A) (West 2009). Therefore, "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.'" *In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (quoting *Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl. Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999)). A break-up fee can preserve the value of the estate in two ways: (i) a break-up fee may be necessary to induce a potential bidder to submit a bid; and/or (ii) a break-up fee may be necessary to induce a bidder to adhere to its bid. *Id.* Both of these factors

should be weighed against the potential for a break-up fee to chill the bidding process. *Id.* at 208.

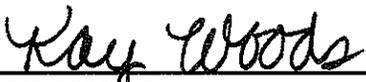
In the instant case, the Purchase Agreement states, “[Debtor] shall also seek the Bankruptcy Court’s approval” of the Break-Up Fee. (See Purchase Agreement, Art. 8.2 (emphasis added).) Because Soberay did not condition its bid upon Court approval of the Break-Up Fee, retroactive Court approval of the Break-Up Fee cannot have induced Soberay to submit its bid. Instead, only the possibility of the Break-Up Fee was needed to induce Soberay to submit its bid.

There is also nothing in the record that suggests Soberay is willing to abandon its efforts to obtain the Acquired Assets if the Court denies the Break-Up Fee. Under normal circumstances, there is “no reason to believe that bidders who already have made a full and complete bid necessarily will abandon their efforts to obtain an asset without an assurance of a break-up fee.” *In re Reliant Energy*, 594 F.3d at 208. Furthermore, prior to the Hearing, Titan submitted a qualified topping offer, which eliminates any potential harm to the estate if Soberay abandons its efforts to obtain the Acquired Assets. Because a topping offer has been submitted, it is not necessary to approve the Break-Up Fee to induce Soberay to adhere to its bid.

For the reasons set forth above, the Court cannot approve the

Break-Up Fee.¹ Although Soberay's bid benefitted the estate by establishing a minimum purchase price and initial purchase terms, the Trustee and Soberay failed to establish that the Break-Up Fee is an "actual, necessary cost[] [or] expense[] of preserving the estate." Accordingly, the Trustee's Motion for Break-Up Fee is denied.

IT IS SO ORDERED.



KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

¹ Moreover, the proposed Break-Up Fee of \$50,000.00 is excessive vis-a-vis Soberay's purchase price of \$1.2 million. At 4.17%, the Break-Up Fee exceeds the percentage amount of break-up fees that courts generally have approved. See *In re Nashville Senior Living*, 2008 Bankr. LEXIS 3197, *6, 2008 WL 5062366, *2 (Bankr. M.D. Tenn. 2008) (citing *In re Hupp Indus., Inc.*, 140 B.R. 191, 194 (Bankr. N.D. Ohio 1992)) ("Except in extremely large transactions, break-up fees ranging from one to two percent of the purchase price have been authorized by some courts.").