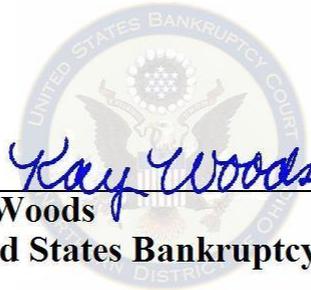


IT IS SO ORDERED.



**Dated: November 23, 2010
03:13:13 PM**

**Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**FORUM HEALTH, et al.,

Debtors.**

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* **CASE NUMBER 09-40795**
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* **CHAPTER 11**
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* **HONORABLE KAY WOODS**
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**ORDER GRANTING MOTION OF ARDENT MEDICAL SERVICES, INC. AND AHS
OHIO HOLDINGS, LLC FOR APPROVAL OF EXPENSE REIMBURSEMENT**

Before the Court is Motion of Ardent Medical Services, Inc. and AHS Ohio Holdings, LLC for Approval of Expense Reimbursement ("Ardent's Motion") (Doc. # 1130) filed by Ardent Medical Services, Inc. and AHS Ohio Holdings, LLC (collectively, "Ardent") on September 22, 2010, as supplemented by Supplement to Motion of Ardent Medical Services, Inc. and AHS Ohio Holdings, LLC for Approval of Expense Reimbursement ("Ardent's Supplement") (Doc. # 1197) filed by Ardent on November 2, 2010 (collectively, "Motion to Approve Expense Reimbursement"). No party objected to Ardent's

Motion. Debtors Forum Health, et al. ("Debtors") filed (i) Debtors' Statement of No Objection to the Motion of Ardent Medical Services, Inc. and AHS Ohio Holdings, LLC for Approval of Expense Reimbursement (Doc. # 1159) on October 6, 2010; and (ii) Debtors' Supplemental Statement Regarding Motion of Ardent Medical Services, Inc. and AHS Ohio Holdings, LLC for Approval of Expense Reimbursement (Doc. # 1200) on November 2, 2010 (collectively, "Debtors' Statement in Support").

The Motion to Approve Expense Reimbursement was authorized and contemplated by Order Granting, in Part, Debtors' Motion Pursuant to Sections 105(a), 363 and 365 of the Bankruptcy Code for Orders: (i) Approving Sale and Bidding Procedures and Auction Date; (ii) Scheduling Date and Time for a Hearing on the Approval of Proposed Sale; (iii) Approving Form and Manner of Notice of Hearing and Auction; (iv) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; and (v) Approving a Break-up Fee ("Sales Procedures Order") (Doc. # 913) entered by the Court on June 25, 2010. The Sales Procedures Order provided, among other things, for payment by the Debtors of a break-up fee in the amount of \$750,000.00 ("Break-Up Fee") to Ardent in the event that Ardent was not the ultimate purchaser of substantially all of the Debtors' assets at the contemplated auction. In addition, Ardent was permitted to seek reimbursement for expenses (capped at \$1,750,000.00) it actually incurred and paid in connection with being the stalking horse

bidder.

The Court held a hearing on October 19, 2010 ("Reimbursement Hearing"), at which time the Court questioned Ardent's request for expenses incurred on or after June 10, 2010, the date the Asset Purchase Agreement ("APA") between Ardent and the Debtors was filed, and/or June 22, 2010, the date the Court held a hearing on the Debtors' motion to establish bid procedures and the Break-Up Fee ("Procedures Hearing"). The Court further suggested that the Break-Up Fee should be credited against the expense reimbursement claimed by Ardent in order to avoid a windfall to Ardent. At the Reimbursement Hearing, counsel for Ardent requested leave to supplement its request for reimbursement, which the Court permitted.

I. CREDITING OF THE BREAK-UP FEE

Subsequent to the Reimbursement Hearing, the Court reviewed the recording and transcript of the Procedures Hearing. In Debtors' Statement in Support, the Debtors represent their understanding that the Break-Up Fee and the provision for expense reimbursement are separate and distinct elements. Ardent and the Debtors each argue that the Break-Up Fee is to compensate Ardent as the stalking horse bidder for in-house costs rather than out-of-pocket expenses. Based upon the Court's further review of the record of the Procedures Hearing and Debtors' Statement in Support, this Court determines that any allowed expense reimbursement is not and will not be subject to setoff or credit of the Break-Up Fee. As a consequence, the Court's concern at the Reimbursement Hearing that Ardent may

receive a windfall has been resolved.

II. TIME PERIOD FOR EXPENSE REIMBURSEMENT

The Sales Procedure Order authorized the Break-Up Fee, but provided no guidance about the time period for which Ardent may seek reimbursement of expenses.

4. The Break-Up Fee shall be Approved subject to the following modifications:
 - a. AHS shall be, and hereby is, entitled to a break-up fee of \$750,000; and
 - b. AHS shall be, and hereby is, entitled to an expense reimbursement in an amount not to exceed \$1,750,000, for costs and expenses actually incurred and paid by AHS or any affiliate of AHS, subject to allowance by the Court.

Sales Procedures Order at 3.

One of the cases Ardent cites - *In re Sight Resource Corp.*, 2005 Bankr. LEXIS 2902 (Bankr. S.D. Ohio 2005) - addresses the unique nature of each break-up fee and directs a court to examine the contract to determine what the parties negotiated. "Each asset purchase agreement in a § 363 bankruptcy sale is a unique contract, the terms of which are negotiated under an array of circumstances and from numerous bargaining positions." *Id.* at *8. "Every contract must be construed in order to effectuate the true intentions of the parties as gathered from the entire document. Courts look, first and foremost, to the terms employed in an instrument in order to ascertain the parties' intent." *Id.* at *10. In the present case, the APA between Ardent and the Debtors merely provided, "Sellers shall pay to Buyer a break-up fee equal to

\$3,000,000 (the "Break-Up Fee")." APA, § 8.2(d). The APA did not otherwise describe the Break-Up Fee.

As set forth above, the Break-Up Fee was significantly modified at the Procedures Hearing - *i.e.*, it changed from a flat fee of \$3 million to an arrangement comprised of two components. These two components are: (i) a flat fee of \$750,000.00; and (ii) reimbursement of actual expenses. Because expense reimbursement was not contemplated in the APA, there is no documentation concerning what kind of expenses or what time period was to be covered. At the Procedures Hearing, counsel for the Debtors explained the revised Break-Up Fee, as follows:

The breakup fee proposed and the treatment of Ardent proposed under the bid procedures would be modified as follows: Ardent would receive or be entitled to, if it is outbid, a breakup fee of \$750,000, but also would be entitled to expense reimbursement for its actual expenses up to \$1.75 million or an aggregate exposure to the Debtors of \$2.5 million.

Tr. Procedures Hr'g. at 59, lines 15-22.

As a consequence, the only indication of the parties' intent concerning the Break-Up Fee is the colloquy of counsel and the Court at the Procedures Hearing. Ardent argues that it is inappropriate to cut off the expense reimbursement request at either June 10, 2010, or June 22, 2010. Ardent states, "There was no discussion in the record at the Procedures Hearing or otherwise that the parties' agreement would so limit Ardent's Break-Up Fee. . . ." Ardent's Supp. at 12. Despite Ardent's protestation to the contrary, however, there was discussion about this topic, at least indirectly.

The Court took the position that, at the contemplated auction, Ardent should be able to credit bid only the \$750,000.00 Break-Up Fee rather than the potential "exposure" to the Debtors of \$2.5 million. In discussing the amount of Ardent's potential credit bid at the auction, the following exchange occurred.

MS. POWERS: Your Honor, just a question on the credit bid issue. I understand the Court's comment there that no part of the expenses may have been approved by the Court so they wouldn't be available for credit bidding. If - if in some potential place that I'm not sure we could get to, but if expenses had been approved by the Court at that time, would Ardent then be able to include those in the credit bid if there was a credit bid?

THE COURT: No. I guess it's too complicated. You're only going to be entitled to reimbursement of expenses if you're not the winning - winning bidder and so to somehow go through a process of approving what those expenses might be is just I think a waste of this Court's time and effort and definitely putting the cart before the horse. So no, I'm not willing to do that.

Tr. Procedures Hr'g. at 72, lines 3-19. Based upon this exchange, it is apparent that counsel for Ardent contemplated a process prior to the auction where the Court would approve Ardent's expenses. By suggesting an early determination of expense reimbursement for the purpose of credit bidding, Ardent acknowledged that its entitlement to expense reimbursement (should it not be the winning bidder) would terminate prior to the auction. Indeed, the time period for expense reimbursement would have to occur sufficiently in advance of the auction to give the Court time to determine the amount of allowable expense reimbursement. As a consequence, the Court understood that Ardent acknowledged its entitlement to expense reimbursement would

terminate no later than the date of the Procedures Hearing.

Moreover, the very purpose of a break-up fee is to compensate a stalking horse bidder for its due diligence and efforts in entering into the initial asset purchase agreement, which a debtor intends (or at least hopes) to use to obtain a higher and better offer. "A break-up fee should not be authorized as an administrative expense where it is ill-defined, *not correlated to an actual transactional cost or expense incurred by the negotiating bidder*, and otherwise cannot be addressed under a specific provision of § 503(b)." *In re Hupp Indus., Inc.*, 140 B.R. 191, 196 (Bankr. N.D. Ohio 1992) (emphasis added). The transactional costs and expenses incurred by the negotiating bidder are normally those incurred in the period prior to execution of an asset purchase agreement – in this case, such transactional costs and expenses are those that Ardent incurred through the Procedures Hearing when the Court approved Ardent as the stalking horse bidder.

III. AMOUNT OF ALLOWED EXPENSE REIMBURSEMENT

Ardent submits it incurred actual expenses in the amount of \$2,354,778.54 through the filing of Ardent's Motion. Ardent's Mot. at 3. In Ardent's Supplement, Ardent further submits it incurred additional actual expenses¹ in the amount of \$916,828.41 through August 2010. Ardent's Supp. at 14-15. At the Reimbursement Hearing, the Court indicated that its rough calculation of Ardent's

¹ The expenses included in Ardent's Supplement were generally in-house costs rather than out-of-pocket expenses.

actual expenses would be \$1,679,197.06 through June 10, 2010, and \$1,813,322.15 through June 22, 2010. Although provided with an opportunity to weigh in on the accuracy of the calculations, Ardent "respectfully submits that Ardent's own calculations resulted in numbers close to those reported by the Court at the [Reimbursement] Hearing." *Id.* at 16. Based on the discussion by and between Ardent's counsel and the Court concerning the issue of credit bidding, this Court finds that the appropriate date to cut off the entitlement for expense reimbursement is June 22, 2010 - the date of the Procedures Hearing.

As a consequence, this Court hereby grants Ardent's Motion to Approve Expense Reimbursement in the amount of \$1,813,322.15, capped at \$1,750,000.00. The Debtors are authorized to reimburse Ardent the amount of \$1,750,000.00, as set forth in the Sales Procedures Order.

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