

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:

VANTAGE TRAVEL SERVICE,
INC.,

Debtor

Chapter 11
Case No. 23-11060-JEB

**UNITED STATES TRUSTEE'S OMNIBUS OBJECTION
TO DEBTOR'S FIRST DAY MOTIONS
(WITH CERTIFICATE OF SERVICE)**

William K. Harrington, the United States Trustee for Region 1, hereby objects to this Court granting any relief at the July 5, 2023 first day hearing beyond such relief as is necessary to avoid irreparable harm and to preserve the status quo and he reserves his rights to raise any and all issues at the first day hearing in response to the seven first day motions¹ filed by Vantage Travel Service, Inc. (“Debtor”). Fed. R. Bankr. P. 4001(b) and (c) and 6003.

¹ DE6 (sale procedures motion); DE7 (motion for post-petition financing); DE9 (cash management); DE10 (motion to pay pre-petition wages and benefits); DE11 (motion directing appointment of consumer privacy ombudsman); 12 (motion to seal customer list); and DE13 (motion to employ Stretto as claims and noticing agent).

PRELIMINARY STATEMENT

The Debtor filed its voluntary chapter 11 petition late last Thursday afternoon, just before the Fourth of July weekend, and sought a first day hearing immediately following the Federal holiday. Thus, at best, a select group of creditors (as noted more fully below, the Debtor failed to provide notice to any of its customers, so its largest creditor constituency did not get any notice of the hearing) and other parties in interest were provided two business days' notice of the hearing. The filing appears to have been orchestrated to limit notice and to prevent parties in interest from having an adequate opportunity to review the filings and raise objections at the first day hearing.

Furthermore - at what, under the circumstances, is essentially an *ex parte* hearing – the Debtor is seeking to dictate the future of the case by requesting Court approval of bid procedures for a sale of substantially all of its assets that it admits will provide no benefit to anyone other than insiders, the Debtor's professionals and the stalking horse purchaser and approval of DIP financing provided by the stalking horse purchaser and insider that provides funding solely to facilitate the sale. Offering that no avoidance actions exist, the Debtor says that it will dismiss the case after the sale closes.

Under the financing motion (DE7), the Debtor requests authorization to

borrow up to \$1,000,000 from the stalking horse purchaser, United Travel Pte. Ltd. (“United”), and the Henry R. Lewis Trust (“HRL Trust”) and Mr. Henry R. Lewis (together the “Pre-petition Lender”) to finance the section 363 sale of the Debtor’s assets under the APA. The DIP advances will be secured by priming liens on all of the estate’s assets, except avoidance actions, and will have superpriority over the Pre-petition lender’s pre-petition liens and administrative expenses. DE7-2 (interim order) at 15. United will use its \$750,00 portion of the advance to credit bid. *Id.* at 16-17.

Under the sale motion (DE3), the Debtor proposes to close a sale of substantially all of its assets, subject to higher and better bids, to United on August 11, 2023. DE3 (APA) at 7. The delta between the balance of United’s DIP loan and \$1,000,000 will be paid in cash. *Id.*

While the sale motion indicates that United will pay additional consideration based upon a percentage of sales over five years generated from the Debtor’s customers, neither the sale motion nor the APA estimate a range for future payments to the Debtor or future credits for customers. The Debtor admits that the future payments will be inadequate “to satisfy more than a portion of the” Pre-petition Lender’s claim. *Id.* at 12.

The Debtor did not file its schedules and statement of financial affairs with the first day pleadings. Moreover, the first day motions, cash forecast (DE7-2) and supporting affidavits of the Debtor's COO/CFO, Mr. Gregory DelGreco (DE14), investment banker, Gordian Group, LLC (DE15), and financial advisor, Argus Management Corporation (DE17), provide little information about the Debtor's current financial position and pre-petition financial transactions, including with affiliated entities that own and operate vessels (DE14 at 3, n. 3) and the Pre-petition Lender.

What they do show is that pre-petition the Debtor used \$80,300,000 in customer deposits to fund its pre-petition operations, that it borrowed \$35,000,000 in 2023 from the Pre-petition Lender collateralized by all of the Debtor's assets, that it owes an additional \$28,500,000 in customer refunds and cancellations and that it has cash of \$4,207. DE3 at 13; DE14 at 4-7; DE15 at 3.

The Debtor has provided no notice of the first day hearings to its customers, its single largest creditor group holding deposit, refund and approved travel protection claims totaling \$108,700,000, pending resolution of its motion to omit their identities from their schedule "E/F" and matrix on grounds that they constitute "proprietary" information" under 11 U.S.C. § 107. DE8 (update

Order); DE12 (seal motion); DE23 (motion to extend deadline to file matrix); DE24 (order granting the same). The United States Trustee has not yet solicited for a creditors' committee. 11 U.S.C. § 1102(a)(1).

As set forth below, this Court should limit relief granted under the sale procedures (DE6) and post-petition financing (DE7) only to what is necessary to avoid immediate and irreparable harm and to preserve the rights of third parties pending a final hearing so that they may have an opportunity to be heard in opposition.

This Court should eliminate the 50% overbid requirement in the sale procedures motion (DE6), because it will unnecessarily chill counterbids. It should also eliminate United's \$300,000 breakup fee, because it does not represent actual, reasonable, and necessary costs of preserving the estate under 11 U.S.C. 503(b).

And the Court should deny the seal motion.

JURISDICTION, VENUE AND BASIS FOR RELIEF

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334.
2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).
3. Venue is proper in this court under 28 U.S.C. §§ 1408 and 1409.

4. The legal basis for relief includes 28 U.S.C. § 586(a)(3), 11 U.S.C. §§ 307, 363(b) and (c), 364, 503(b), Fed. R. Bankr. P. 4001(b)(2), 6003 and 6004 and MLBR 4001-2 and 6004-1.

5. Under this Court's June 30, 2023 scheduling order, objections to the first day motions may be made at the July 5, 2023 hearing. DE21.

6. This objection is therefore timely. *Id.*

FACTS

A. The Debtor files its voluntary chapter 11 petition

7. The Debtor filed its voluntary chapter 11 petition at 3:31 p.m. on June 29, 2023, along with the first day motions. DE1.

8. That same day, this Court directed the Debtor to file its matrix and verification on or before June 30, 2023. DE8.

9. On June 30, 2023, this Court granted (DE24) the Debtor's motion (DE23) to extend the deadline to file the matrix through July 6, 2023, pending resolution of the Debtor's first day motion to seal (DE12).

10. By order dated June 30, 2023, this Court also scheduled emergency hearings on the first day motions for July 5, 2023 at 11:00 a.m. DE21.

11. The United States Trustee has not yet had time to solicit a creditors' committee. 11 U.S.C. § 1102(a)(1).

B. The Debtor's financial position

12. The Debtor has not yet filed its schedules and SOFA.

13. The first day motions, cash forecast (DE7-2) and supporting affidavits of Mr. DelGreco (DE14), Gordian (DE15) and Argus (DE17) provide little information about the Debtor's current financial position and pre-petition financial transactions, including with affiliated entities that own and operate vessels (DE14 at 3, n. 3) and the Pre-petition Lender.

14. But they state that the Debtor:

- a. used \$80,300,000 in customer deposits to fund its pre-petition operations;²
- b. borrowed \$35,000,000 in 2023 from the Pre-petition Lender collateralized by all of the Debtor's assets;
- c. owes an additional \$28,500,000 in customer refunds and cancellations;
- d. recently terminated all but 5 of its employees; and
- e. had cash of \$4,207 as of the petition date.

15. According to its cash forecast (DE7-1), the Debtor will need to make disbursements totaling \$355,595 on July 7, 2023, including for payroll expenses.

² According to publicly available records, the Debtor received two PPP loans totaling approximately \$4,300,000.

16. If the statements in the first day pleadings, the supporting affidavits and APA are correct, then the Debtor's liabilities exceed its assets by at least \$170,851,388 as of June 30, 2023, exclusive of lease rejection claims.

17. Based upon information and belief, including the first day motions, supporting affidavits (DE14; DE15), the APA (DE3-1) attached to the sale motion and the extension motion (DE23) and subject to further discovery:

- a. the Debtor's single most valuable asset is its customer list;
- b. United values all of the Debtor's assets, including the customer list, at \$1,000,000;
- c. the largest single group of creditors is the Debtor's customers; and
- d. the customers have not received notice of the July 5, 2023 hearing.

C. The seal motion

18. Under the seal motion (DE12), the Debtor requests authorization to omit the identities of its single largest creditor group – customers holding deposit, refund and approved travel protection claims totaling \$108,700,000 – from its schedule “E/F” and matrix on grounds that this group, defined as “Creditor Information” (*Id.* at 2), overlaps with those persons identified in its customer list, defined as “Customer Information” (*Id.* at 4), and therefore

constitutes “proprietary” information under 11 U.S.C. § 107 that must be sealed from public view.

D. The post-petition financing motion

19. Under the financing motion (DE7), the Debtor requests authorization to borrow up to \$1,000,000 from United and the Pre-petition Lender to finance the section 363 sale of the Debtor’s assets under the APA. The DIP advances will be secured by a priming liens on all of the estate’s assets, except avoidance actions, and will have superpriority over the Pre-petition lender’s pre-petition liens and administrative expenses. DE7-2 (interim order) at 15. United will use its \$750,000 portion of the advance to credit bid. *Id.* at 16-17.

20. The Debtor also requests authorization to use the Pre-petition Lender’s cash collateral. *Id.* at 17. As adequate protection, the Debtor grants the Pre-petition Lender a replacement lien to the extent of diminution. *Id.*

21. The interim order requires the Debtor to stipulate to the amount of the Pre-petition Lender’s pre-petition claim and the validity and priority of its liens and to waive all claims and defenses against it. *Id.* at 5.

22. The interim order grants United and the Pre-petition Lender a 506(c) waiver subject to a \$25,000 carveout for non-debtor professionals and

United States Trustee fees. *Id.* at 22.

23. The interim order gives “parties in interest other than a Committee” until September 12, 2023 to commence an avoidance or other action against the Pre-petition lender. It also gives a committee until the lesser of September 27, 2023 or 60 days “following entry of an order authorizing the employment of counsel to the Committee” to commence such an action. *Id.* at 23-24.

E. The sale motion

24. Under the sale motion (DE3), the Debtor proposes to close a sale of substantially all of its assets, subject to higher and better bids, to United on August 11, 2023. United has made a stalking horse bid of up to \$1,000,000. DE3 (APA) at 7. The delta between the balance of United’s DIP loan and \$1,000,000 will be in cash. *Id.*

25. United will pay additional consideration based upon a percentage of sales over five years generated from the Debtor’s customers. *Id.* at 12. Subject to multiple preconditions, customers of the Debtor with refund and trip insurance claims totaling \$108,700,000 can get credits for booking trips through United of up to 20% of payments made to or owed by the Debtor, exclusive of credit card chargebacks. *Id.*

26. Neither the sale motion or the APA estimates a range for future payments to the Debtor or future credits for customers. The Debtor admits that the future payments will be inadequate “to satisfy more than a portion of the” Pre-petition Lender’s claim. *Id.*

27. Closing of the sale under the APA is not contingent upon this Court’s granting the seal motion. DE3-1 at 24-25.

28. The APA excludes the list of “Key Employees” who must be hired by United. *Id.* at 25; 44. It is therefore unclear whether United (or the successful bidder at the auction sale) must hire insiders.

29. According to the sale motion:

It is extremely unlikely that there will be assets available to pay even a fraction of . . . priority [customer] claims . . . The Debtor currently anticipates that there will be insufficient proceeds from the sale of the Assets to pay all secured claims in full, let alone to fund a distribution on account of non-administrative priority claims or general unsecured claims . . . [and] The absence of colorable preference claims would support a determination to seek dismissal of the Chapter 11 case after the closing of the Proposed Sale, rather than maintain a bankruptcy case with minimal or no assets to administer

DE3 at 22-25.

F. The sale procedures motion

30. Under the sales procedure motion, a competing bidder must make

a minimum counterbid of \$1,500,000. DE6 at 12. If United is outbid, it is also entitled to a \$300,000 breakup fee that will presumably be paid by the estate. *Id.* at 21.

31. The Debtor states that “The Break-Up Fee was necessary to induce [United] to submit a good faith, fair and reasonable offer and to negotiate the APA that will be used as the benchmark for solicitation of higher or otherwise better competing bids.” *Id.*

LEGAL FRAMEWORK

A. Rules 4001 and 6003

32. Rule 4001(b) (“Use of cash collateral”) and (c) (“Obtaining credit”) provide that the bankruptcy court “may commence a final hearing on a motion to use cash collateral [or to obtain credit] no earlier than 14 days after service of the motion . . . [T]he court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is [or “the obtaining of credit only to the extent”] necessary to avoid immediate or irreparable harm to the estate pending a final hearing” Fed. R. Bankr. P. 4001(b)(2) and (c)(2).

33. “Except to the extent that relief is necessary to avoid irreparable harm . . . ,” Rule 6003 prohibits a court, “within 21 days after the filing of the

petition,” from entering orders granting “a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate . . . but not a motion under Rule 4001.”

B. Public access to papers

34. Section 107(a) of the Bankruptcy Code provides that all papers “filed in a case under this title . . . are public records and open to examination” by the public. 11 U.S.C. § 107(a). “This policy of open inspection, codified generally in Section 107(a) of the Bankruptcy Code, evidences Congress’s strong desire to preserve the public’s right of access to judicial records in bankruptcy proceedings.” *Video Software Dealers Ass’n v. Orion Pictures Corp.* (*In re Orion Pictures Corp.*), 21 F.3d 24, 26 (2d Cir. 1994). *Accord In re Alterra Healthcare Corporation*, 353 B.R. 66, 71 (Bankr. D. Del. 2006)(“[D]ocuments filed in bankruptcy cases have historically been open to the press and general public.”); *In re Continental Airlines*, 150 B.R. 334, 341 (D. Del. 1993) (noting “the strong presumption in favor of public access to judicial records and papers . . .”).

35. A limited exception to public disclosure may be invoked to protect “an entity with respect to a trade secret or confidential research, development or commercial information” 11 U.S.C. § 107(b)(1). Fed. R. Bankr. P. 9018.

36. The moving party bears the burden of showing that a request to

impound documents falls within the parameters of 11 U.S.C. § 107(b) and Fed. R. Bankr. P. 9018 by demonstrating “that the interest in secrecy outweighs the presumption in favor of access” *Continental Airlines*, 150 B.R. at 340. *Accord*, *Food Mgmt. Group*, at 561; *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005). To meet this burden, the movant “must demonstrate extraordinary circumstances and compelling need to obtain protection” *Id.* at 561.

C. Breakup fees

37. Where a debtor requests bankruptcy court authorization to sell substantially all of its asset to a stalking horse bidder under a 11 U.S.C. § 363(b) auction process

it has become common for the buyer to demand a range of buyer protections . . . , including a breakup or topping fee, expense reimbursement[,] overbid increments . . . bidder qualification requirements, short deadlines for competing bidders’ due diligence and submission of competing bids, and deadlines for court approval of the bid protections and the sale. These protections, which are common in nonbankruptcy sales, provide the prospective buyer with some confidence that either the transaction will succeed or the buyer will be compensated for the failure.

Such protections are appropriate where the prospective buyer provides something of value to the estate in exchange, typically setting a floor under the auction by committing to purchase the assets at a minimum price. Thus, a court need not approve a breakup fee where the buyer is committed to its bid at the auction whether or not the court approves the fee

3 COLLIER ON BANKRUPTCY at 363.02[7] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2023) (collecting cases and citing, among others, *In re Reliant Energy Channelview LP* 594 F.3d 200 (3d Cir. 2010)).

38. Break-up fees for unsuccessful stalking horse bidders constitute administrative expenses should arguably be evaluated by the bankruptcy court under 11 U.S.C. § 503(b), not under the business judgment standard of 11 U.S.C. § 363(b), to determine whether they are necessary to preserve the value of the estate. *Calpine Corp. v. O'Brien Env't Energy, Inc. (In re O'Brien Env't Energy, Inc.)*, 181 F.3d 527, 535-537 (3d Cir. 1999) (affirming denial of break-up fee and administrative expenses requested by unsuccessful stalking horse bidder, because they were not necessary to preserve the value of the estate). *Accord In re Reliant Energy Channelview LP*, 594 F.3d at 206 (noting that it is “permissible to offer a break-up fee and reimbursement for expenses to induce an initial bid, provided the allowance of the fee does not give an advantage to a favored purchaser over other bidders by increasing the cost of acquisition . . .”).³

³ Compare *Official Committee of Subordinated Bondholders v. Integrated Resources, Inc. (In re Integrated Resources, Inc.)*, 147 B.R. 650, 657 (applying the business judgment standard and affirming a break-up fee under a three-part test, “(1) is the relationship of the parties who negotiated the break-up fee tainted by self-dealing or manipulation; (2) does the fee hamper, rather than encourage, bidding; (3) is the amount of the fee unreasonable relative to the proposed purchase price?”)”

39. Local Rule 6004-1 requires a debtor to request authorization to approve the bid procedures, where the proposed break-up fees “exceed the lesser of \$50,000 or 5% of the proposed original purchase price . . . and the minimum increase required for a higher offer . . . exceed[s] 5% of the proposed original purchase price” MLBR 6004-1.

I. ARGUMENT

40. This Court should limit relief granted under the sale procedures (DE6) and post-petition financing (DE7) only to what is necessary to avoid immediate and irreparable harm and to preserve the rights of third parties pending a final hearing so that they may have an opportunity to be heard in opposition.

41. This Court should eliminate the 50% overbid requirement in the sale procedures motion (DE6), because it will unnecessarily chill counterbids. It should also eliminate United’s \$300,000 breakup fee, because it does not represent actual, reasonable, and necessary costs of preserving the estate under 11 U.S.C. 503(b).

42. This Court should deny the seal motion, because the Debtor has not met its burden of demonstrating that extraordinary circumstances require that the identity of its creditor customers should be omitted from its schedules

“E/F” and matrix under 11 U.S.C. § 107.

REQUESTED RELIEF

For these reasons, the United States Trustee requests that the Court enter orders: 1) denying or, alternatively, modifying the terms and conditions of the DE6 (sale procedures motion); DE7 (motion for post-petition financing); and DE12 (seal motion); and 2) granting him all such other and further legal and equitable relief to which he may be entitled.

Respectfully submitted,

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Dated: July 3, 2023.

CERTIFICATE OF SERVICE

I certify that on July 5, 2023, true and correct copies of the foregoing objection were served by CM/ECF only upon the individuals who filed notices of appearance in the Court's CM/ECF database, including counsel for the Debtor, who are identified below.

Respectfully submitted,

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Dated: July 3, 2023.

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