

Dated: October 31, 2012
The following is SO ORDERED:




David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

TIC Memphis RI 13, LLC,

Case No. 12-29322

Debtor.

Chapter 11

Tax ID/EIN: 45-537262

ORDER RE NARROW ISSUE OF THE “BREAK UP FEE” ARISING OUT OF A LIMITED HEARING HELD ON OCTOBER 30, 2012 ON THE “DEBTOR’S AMENDED MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTIONS 105(a), 363(b), (f), (h) AND (m), AND 365 OF THE BANKRUPTCY CODE AND RULES 2002(a)(2), 6004, AND 6006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AUTHORIZING AND APPROVING THE SALE OF PROPERTY BY AUCTION” COMBINED WITH NOTICE OF THE ENTRY THEREOF

The instant core proceeding under 28 U.S.C. § 157(b)(2)(A) and (N) arises out of an amended motion filed by the above-named debtor in possession, TIC Memphis RI 13, LLC, (the “DIP”), on September 28, 2012 styled “Debtor’s Amended Motion for Entry of an Order Pursuant to Sections 105(a),

363(b), (f), (h) and (m), and 365 of the Bankruptcy Code and 2002(a)(2), 6004, and 6006 of the Federal Rules of Bankruptcy Procedure Authorizing and Approving the Sale of Property by Auction” (“Amended Motion”) and various objections thereto.¹ The sole and narrow question for judicial determination here is whether a certain break up fee, addressed more fully later, should be enforced under the circumstances. The court at this time does not address the ultimate outcome on the merits of the Amended Motion in full but rather now determines only the limited issue of the break up fee itself. After considering the case record as a whole and the oral testimony adduced on October 30, 2012, in open court along with statements of counsel, the following shall constitute the court’s findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The relevant background facts may be briefly stated as follows. The DIP holds an undivided 24.10866% tenant in common interest in a ground lease with the Memphis Center City Revenue Finance Corporation. The ground lease includes a 12 story, 90 room hotel located in downtown Memphis, Tennessee. The hotel is operated by a third party as a Residence Inn pursuant to a relicensing franchise agreement by and between the Master Tenant and the Marriott International, Inc. Essentially, the DIP is a single purpose entity having the 24.108665% tenant in common interest referred to a moment ago. This project is leased by the DIP and 15 other non-debtor holders of tenant in common interests. The ground lease contractually matures on December 31, 2024 with an option to renew for an additional 11 years.

Due to financial distress and to stop a scheduled non-judicial foreclosure sale, on June 14, 2012, the DIP filed an original chapter 11 petition in the Bankruptcy Court for the District of Delaware. On June 25, 2012, 110 Monroe Avenue Holdings, LLC, filed a motion to dismiss this case in the Delaware bankruptcy court under section 1112(b) of the Bankruptcy Code. Also, on June 25, 2012, 110 Monroe Avenue Holdings, LLC, filed a motion to transfer the venue of this chapter 11 case from the District of Delaware to the Western District of Tennessee bankruptcy court under 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1114(a)(1). It asserts approximately a \$10 million plus secured claim against the hotel, which

¹ The hearing on the Amended Motion is scheduled to be heard on November 6, 2012, at 3:00 p. m. central standard time.

includes a prepayment penalty in the approximate amount of \$1.3 million. On June 28, 2012, the DIP filed bankruptcy schedules. See especially Schedules A, D, and H.

The DIP and 110 Monroe Avenue Holdings, LLC, entered into a “Stipulation Term Sheet” that was approved on July 20, 2012, prior to the case being transferred by the Delaware bankruptcy court. This Stipulation Term Sheet required the DIP to file a motion to sell the project by September, 10, 2012 and required the DIP to provide a letter of intent by August 31, 2012 (timing was later modified/extended by consent). On July 23, 2012, the parties consented to the transfer of this chapter 11 case under 28 U.S.C. § 1412 and Fed. R. Bankr. P. 1014 from the District of Delaware to the Western District of Tennessee to be effective on August 31, 2012. In addition, the Delaware bankruptcy court entered an order authorizing the employment and retention of Business Debt Solution, Inc., specifically Mr. Robert Burrick, as investment banker for the DIP. On September 10, 2012 the DIP filed a motion seeking an order authorizing and approving the sale of the Residence Inn Hotel pursuant to the letter of intent dated September 17, 2012 that was filed in the Western District of Tennessee bankruptcy court and that was later amended on September 28, 2012 (the “Amended Motion”). A letter of intent, which was attached to the Amended Motion, was signed by Mr. Brian Dror, Managing Partner of RBC Equities, LLC.

DIP’s Amended Motion filed in the Western District of Tennessee bankruptcy court seeks, inter alia, to sell the hotel by auction free and clear of all liens prior to the approval of a disclosure statement and plan as allowed under appropriate circumstances by *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 388 (6th Cir. 1986). The DIP seeks to sell this estate’s interest and also the interests of all sixteen tenants in common regarding the hotel property in accordance with *In re Nashville Senior Living, LLC*, 407 B.R. 222, 227 (6th Cir. BAP 2009). As noted earlier, the property proposed to be sold is described by the collective term “project” used in the Amended Motion which is the Residence Inn hotel and contents in the downtown Memphis hotel.

As noted earlier, attached to the Amended Motion is the letter of intent that includes, in relevant part here, a “break up fee” for the potential purchaser if the sale is not approved and executed. Specifically, the break up fee is “\$100,000 plus 50% of the final bid over \$6,000,000 not to exceed

\$250,000.” 110 Monroe Avenue Holdings, LLC, and the United States Trustee for Region 8, for example, each objects to the Amended Motion and, specifically, the break up fee provision being included as part of letter of intent incorporated into the Amended Motion. As noted earlier, the judicial holding today is a very narrow one regarding only the break up fee. It is expressly noted that this break up fee is not associated with a formal stalking horse purchaser.

Bankruptcy Code § 506(c) allows the trustee, or debtor in possession here,² to recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. “The debtor in possession . . . must show that its funds were expended primarily for the benefit of the [secured] creditor and that the creditor directly benefited from the expenditure. . . . A debtor [in possession] does not meet this burden of proof by suggesting possible or hypothetical benefits.” *In re Flagstaff Foodservice Corp.*, 762 F.2d 10 (2nd Cir. 1985). Absent consent by the secured creditor, fees and costs against the secured creditor’s collateral ordinarily cannot be paid by the DIP unless they are reasonable, necessary, and directly benefit the secured creditor. *See also In re Flagstaff Foodservice Corp.*, 739 F.2d 73 (2nd Cir. 1984).

It appears here considering a totality of the particular facts and circumstances and applicable law that a break up fee is neither necessary nor for the direct benefit of 110 Monroe Avenue Holdings, LLC. It is expressly noted that 110 Monroe Avenue Holdings, LLC, does not consent to this break up fee or the Amended Motion. 110 Monroe Avenue Holdings, LLC may be an undersecured creditor regarding the hotel loan note; therefore, if this is accurate, any break up fee at this time would only serve to further reduce the collateral value or the proceeds thereof that the secured lender would receive upon sale of the business assets, especially if the secured lender exercises its credit bid rights under 11 U.S.C. § 363(k). Accordingly, the court disallows the break up fee as outlined in the letter of intent and no funds are to be transferred on this disallowed break up fee.

² See 11 U.S.C. § 1107(a) and Fed. R. Bankr. P. 9001 (10).

This order, however, is without legal prejudice to Business Debt Solutions, Inc., Mr. Robert Burrick, or any other employed professionals under 11 U.S.C. § 327(a) from filing an application at a later time for professional fees under 11 U.S.C. § 330 and Fed. R. Bankr. P. 2016 related to a success fee or any other appropriate and authorized fee and/or expense. See, e.g., 11 U.S.C. § 503(a)

ORDER AND NOTICE THEREOF

Based on the forgoing and Fed. R. Bankr. P. 7052, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that the request for a break up fee is hereby denied. The Bankruptcy Court Clerk is directed to cause a copy of the Order and Notice to be immediately sent to the following persons by email:

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