

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
: :
ADVANTA CORP., *et al.* : Case No. 09-13931 (KJC)
: :
Debtors. : Jointly Administered
: :
: **Hearing Date: April 7, 2010 @ 3:00 p.m.**
: **Objections Due: April 2, 2010 @ 4:00 p.m.**
: **(extended for the UST until April 5, 2010)**
: :
: **Re: Docket No. 346**

**ACTING UNITED STATES TRUSTEE’S OBJECTION TO THE DEBTORS’
MOTION FOR AUTHORITY TO IMPLEMENT POSTPETITION SEVERANCE
PLAN AND OTHER RELATED RELIEF**

In support of her Objection to the Motion of the Debtors for Authority to Implement Postpetition Severance Plan and Other Related Relief (the “Motion”), Roberta A. DeAngelis, Acting United States Trustee for Region 3 (“U.S. Trustee”), by and through her undersigned counsel, states as follows:

Introduction

1. This Court has jurisdiction to hear and determine this Objection.
2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee’s overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST 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 UST as a “watchdog”).

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised by this Objection.

Preliminary Statement

4. The Debtors provide no specific information in the Motion to either justify the payments under the Postpetition Severance Plan¹ and the Incentive Bonus payment or to satisfy the legal standard for these types of payments. The Debtors provide no information about the Eligible Employees, including identification of those employees and the specific severance or bonus payments to be made to each employee. The Debtors also fail to provide specific information as to historical severance and bonus payments that it has previously made to employees. In a nutshell, the Debtors have not submitted sufficient information to allow parties in interest to evaluate whether the Debtors can meet its factual burden under 11 U.S.C. § 503(c).

5. Furthermore, in light of clear congressional intent under the Bankruptcy Code to limit payments to a debtor's management in bankruptcy cases, the Debtors have not demonstrated in the Motion that the Postpetition Severance Plan payments to insiders and the Incentive Bonus payment to an insider are appropriate under Section 503(c) of the Bankruptcy Code. The U.S. Trustee objects to the Motion because the Debtors have failed to meet their legal and factual burden of proof under section 503(c) of the Bankruptcy Code.

Background

6. On November 9, 2010 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and

^{1/} Capitalized terms used in this Objection without definition shall have the meanings ascribed to them in the Motion.

manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. On November 19, 2009, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”).

8. The Debtors have yet to file a plan in these cases. The Debtors reported recently that it will no longer seek to reorganize its business, but will use the chapter 11 process to ultimately liquidate its assets through a liquidating chapter 11 plan. The Debtors have not provided any indication of when such a plan may be filed or what the return to creditors may be under any such plan. Accordingly, parties in interest have no ability to determine the impact that any severance or bonus payments may have on any potential return to creditors.

9. On March 19, 2010, the Debtors filed the Motion, which seeks the following relief: (a) authorizing the Debtors to make payments under a new postpetition severance program (the “Postpetition Severance Plan”) applicable to all full-time hourly and salaried employees, other than Dennis Alter, the Chief Executive Officer, and William Rosoff, the President; (b) pay to one Eligible Employee, who is an “insider” under the Bankruptcy Code, a performance-based incentive bonus (the “Incentive Bonus”); (c) ratifying Interim Severance Payments made or owing to former hourly or salaries employees that were or will be terminated postpetition, but before the Postpetition Severance Plan takes effect; and (d) termination of all existing severance plans as of the date the Postpetition Severance Plan takes effect.

10. According to the Motion, the Debtors estimate that the aggregate potential payout under the Postpetition Severance Plan will be approximately \$2.1 million, and the total Interim Severance Payments to be ratified are approximately \$675,000².

Prepetition Severance Plan

11. The Motion contains a general summary of the Debtors' Prepetition Severance Plan. The Prepetition Severance Plan is not attached to the Motion. According to the Motion, the Prepetition Severance Plan covers most salaried and hourly employees and obligations under this plan vary from two (2) weeks to fifty-two (52) weeks' compensation. The Debtors' obligations to make severance payments to employees who are terminated without cause are dependent upon each terminated employee's respective base salary, years of service, and position.

12. The Motion also contains a summary description of three change of control severance plans: one applicable to all full-time and certain part-time employees that provides payments equal to between four (4) and sixty (60) weeks' base salary; one applicable to those employees participating in the annual bonus program that provides for severance payments equal to between four (4) and one hundred and four (104) weeks' base salary; and one applicable to Mr. Alter and Mr. Rosoff (collectively referred to as the "Change of Control Plans").

² The matter of the Interim Severance Payments is somewhat confusing because these payments seem to fall within either the Prepetition Severance Plan or Postpetition Severance Plan. Because of the lack of specific information on either of the severance plans, the U.S. Trustee is unsure how these payments are allocated and ultimately whether the approval of those payments is justified. The U.S. Trustee reserves all of rights related to the Interim Severance Payments until the specific information that is noted throughout this Objection is provided.

Postpetition Severance Plan

13. The Debtors propose to supersede the Prepetition Severance Plan and the Change of Control Plans with the Postpetition Severance Plan. The Postpetition Severance Plan is intended to cover 29 Eligible Employees, including four Eligible Employees that the Debtors consider to be insiders.

14. According to the Motion, the Eligible Employees will receive up to 26 weeks' compensation, with one non-insider employee receiving 39 weeks' compensation. The average amount of severance to be paid to each Eligible Employee is approximately \$71,000. The Debtors do not identify in the Motion who the Eligible Employees are and what position and job duties they currently hold with the Debtors.

15. Also, three non-insider Eligible Employees will receive salary increases retroactive to January 1, 2010 to compensate them for additional duties related to the chapter 11 cases. There is no description provided in the Motion as to who these Eligible Employees are, the amount of the salary increases, or the additional duties they are rendering.

16. Finally, the Motion provides that one non-insider Eligible Employee will receive severance compensation that includes a lump-sum bonus payment of \$7,500 (25% of the employee's base salary) for additional duties related to the chapter 11 cases. Similarly, there is no description provided in the Motion as to who this Eligible Employees is the additional duties that are being provided.

Incentive Bonus

17. The Motion also contains a request to pay an Incentive Bonus to one insider Eligible Employee who is "critical to the Debtors' efforts to achieve a successful resolution of these chapter

11 cases.” The Incentive Bonus is in addition to the severance payments to be made to this Eligible Employee. The Incentive Bonus will be paid on the effective date of the chapter 11 plan in an amount ranging from \$50,000 to \$200,000 depending on the estimated proceeds that will become available for distribution to the Debtors’ creditors. The Motion provides no information as to the identity of the Eligible Employee, that person’s job title and duties, and the specific metrics that will trigger the Incentive Bonus Payment.

Objection

18. The Motion is devoid of specific factual disclosures as to the Prepetition Severance Plan, Postpetition Severance Plan, and Incentive Bonus. In particular, the Debtors provide no information as to the identities, titles, and job duties of the Eligible Employees, including the insider who is contemplated to receive the Incentive Bonus. The Debtors provide no information as to the salaries of these individuals and the specific amount of severance or bonus payments to be made to each of the Eligible Employees. The Debtors provide nothing more than a cursory description of the Prepetition and Postpetition Severance Plans. There is no disclosure of historical data necessary to apply the relevant Bankruptcy Code sections. The lack of specific disclosure prevents a determination of whether the Postpetition Severance Plan is in compliance with 11 U.S.C. § 503(c)(2), and whether the Incentive Bonus meets the requirements of 11 U.S.C. § 503(c)(1),(3).

Argument

I. 11 U.S.C. § 503(c)(2) Applies to the Postpetition Severance Plan for Insiders

19. Bankruptcy Code Section 503(c)(2) reads in pertinent part as follows:

“(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(2) a severance payment to an insider of the debtor, unless--

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made.

20. Section 503(c)(2) pertains to any severance payments to insiders. Compliance with this provision requires that the Court find the existence of a severance program generally applicable to all full time employees, and that the amount of any payment is not greater than 10 times the amount of severance pay given to nonmanagement employees during the calendar year in which the payment is made. The Debtors state in the Motion that four (4) of the Eligible Employees under the Postpetition Severance Plan are insiders as defined under the Bankruptcy Court. The Debtors, however, provide no specific evidence to support this conclusion. This lack of factual information makes it virtually impossible to determine what Eligible Employees fall within section 503(c)(2), and whether the statute has been complied with for those Eligible Employees that are truly insiders. Moreover, this specific information on all of the Eligible Employees is needed to perform the calculation that is required under section 503(c)(2).

21. The problem with the lack of specific information in the Motion goes beyond the insiders and applies to all of the Eligible Employees under the Postpetition Severance Plan. The Debtors state in very general terms that the Postpetition Severance Plan is comparable in scope to the Prepetition Severance Plan. Again, the Debtors make this general conclusion without any evidence in support. There is virtually no information provided as to the Eligible Employees. The omissions include a failure to demonstrate the specifics of the historical severance plan and then to show what the Eligible Employees have received in the past year. Without this information, the U.S. Trustee avers that the Motion must be denied.

22. There is also concern that the Postpetition Severance Plan is unreasonable in the context of these pure liquidating chapter 11 cases. The Debtors are simply liquidating a finite group of assets, most of which is credit card receivables. There has been no indication of when a plan will be filed and what type of distribution will be made to creditors. Therefore, the U.S. Trustee must question the reasonableness and benefit to these estates of paying approximately \$2.1 million to employees for severance in the context of these cases.

II. The Incentive Bonus Does Not Meet the 503(c) Standard

23. The Debtors propose to pay the Incentive Bonus to an unknown insider employee for an amount yet to be determined, but ranging from \$50,000 to \$200,000. In fact, the mechanism that will trigger the Incentive Bonus is similarly ambiguous, with the only explanation in the Motion being that it depends on distributions under the plan that has not been filed. This explanation of the Incentive Bonus contains little substance with virtually no material facts to determine the allowability of the Incentive Bonus. The U.S. Trustee objects to the Incentive Bonus because the Debtors have not demonstrated that the bonus payment is appropriate under Section 503(c) of the Bankruptcy Code.

24. The Incentive Bonus provides for a bonus payment to an insider upon confirmation without specifying criteria for the creditor distributions to be achieved. In fact, one could surmise that some amount of the Incentive Bonus will be paid to the insider simply upon confirmation of a plan without any distribution to creditors. This type of bonus payment is a classic retention-based payment with no incentive-based criteria.

A. The Incentive Bonus Violates Section 503(c)(1) of the Bankruptcy Code

25. The Incentive Bonus is incentive-based in name only and is factually a retention payment to this insider. As described in the Motion, the primary purpose of the Incentive Bonus is to retain this insider employee through confirmation. Without anymore specific information, the Incentive Bonus has virtually no incentive criteria to it because it is based entirely on the insider remaining with the Debtors through confirmation. *See In re Dana Corp.*, 358 B.R. 567, 582 (Bankr. S.D.N.Y. 2006) (court found that benchmarks for the debtors' long-term incentive plan "are difficult targets to reach and are clearly not 'lay-ups'").

26. Again, the U.S. Trustee notes the issue of lack of information provided in the Motion. The Debtors provide no description as to the job title, job duties, salary, and previous bonus amounts for the insider Eligible Employee. The Incentive Bonus cannot be authorized based on the flimsy description set out in the Motion

27. Under Section 503(c)(1) of the Bankruptcy Code, the debtor must "based on evidence in the record" demonstrate all three of the required elements set forth in Section 503(c)(1). Section 503(c)(1) provides, in pertinent part, as follows:

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that:

(A) The transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) The services provided by the individual are essential to the survival of the business; and

(C) either (i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount

equal to 10 times the amount of the mean transfer or obligation of a similar kind given to non-management employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or (ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred (Emphasis added).

28. Section 101(31) of the Bankruptcy Code defines an “insider” of a corporation as an “officer,” a “director”, or a “person in control.”

29. The Debtors have not satisfied the elements of Section 503(c)(1) and thus, the Debtors’ request to pay the Incentive Bonus should be denied.

B. Incentive Bonus Is Not Justified by the Facts and Circumstances

30. The U.S. Trustee does not dispute that the payment of “wages, salaries, and commissions for services rendered after the commencement of the case” to Debtors’ employees are valid administrative expense claims for “the actual, necessary costs and expenses of preserving the estate.” See 11 U.S.C. § 503(b). However, Section 503(c) imposes certain limitations on such payments as Section 503(c) provides that “[n]otwithstanding subsection (b), there shall neither be allowed, nor paid . . .” certain transfers to insiders and members of Debtors’ management unless certain conditions are met. Accordingly, prior to making such payments, the Debtors must “based on evidence in the record” demonstrate the required elements set forth in Section 503(c)(3).

31. Section 503(c)(3) provides, in pertinent part, as follows:

other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or

obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition. (Emphasis added).

32. Administrative expenses are given priority status and paid ahead of other unsecured claims. See 11 U.S.C. § 507. *In re Insilco Technologies, Inc.*, 309 B.R. 111, 114 (Bankr. D. Del. 2004). In order to hold administrative expenses to a minimum and to maximize the value of the estate Section 503(b) is narrowly construed. See *In re N.P. Min. Co., Inc.*, 963 F.2d 1449, 1454 (11th Cir. 1992). To qualify for administrative priority status, an expense must arise from a transaction that accorded the estate an actual benefit. *Insilco Technologies*, 309 b.R. at 114 (citing *Calpine Corp. v. O'Brien Env'tl. Energy, Inc. (In re O'Brien Env'tl Energy, Inc.)*, 181 F.3d 527, 532-533(3d Cir. 1999).

33. Accordingly, the Debtors must demonstrate that the Incentive Bonus is “justified by the facts and circumstances of the case” and is necessary to preserve the value of the estate.

34. The Incentive Bonus Payment is a bonus payment to an unknown insider for remaining with the Debtors through confirmation of a plan in these liquidating chapter 11 cases. There is discussion that the Incentive Bonus will have some correlation to creditor distributions under the plan, but there is no specific information provided on that issue. What is known, however, is that this insider will receive a bonus between \$50,000 and \$200,000, which will be on top of whatever salary the insider employee earns. This is a large payout to an executive of a company that has gone out of business. The U.S. Trustee avers that in the context of this complete liquidation the Incentive Bonus is unreasonable and not justified by the facts and circumstances of this case.

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FOR THE DISTRICT OF DELAWARE

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: **Re: Docket No. 346**

CERTIFICATE OF SERVICE

IT IS CERTIFIED that on the 5th day of April, 2010, the Acting United States Trustee's Objection to the Debtors' Motion for Authority to Implement Postpetition Severance Plan and Other Related Relief, was caused to be served electronically and/or by placing copies thereof in the United States Mail, postage prepaid, addressed as follows:

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