

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

	X	
	:	Chapter 11
In re:	:	
	:	Case No. 15-10197 (BLS)
RADIOSHACK CORPORATION, <i>et al.</i> ,	:	Jointly Administered
	:	
Debtors.	:	Re: D.I. 1768
	:	
	X	Hearing Date: April 28, 2015, at 9:00 a.m. Obj. Deadline: April 21, 2015 at 4:00 p.m.

**OBJECTION OF THE UNITED STATES TRUSTEE TO THE DEBTORS’ COMBINED
MOTION FOR ENTRY OF ORDERS: (I) ESTABLISHING BIDDING AND SALE
PROCEDURES; (II) APPROVING THE SALE OF CERTAIN IP AND RELATED
ASSETS; AND (III) GRANTING RELATED RELIEF**

Andrew R. Vara, the Acting United States Trustee for Region 3, (the “U.S. Trustee”), through his undersigned counsel, hereby objects to the Debtors’ Combined Motion for Entry of Orders: (I) Establishing Bidding and Sale Procedures; (II) Approving the Sale of Certain IP and Related Assets; and (III) Granting Related Relief (D.I. 1768) (the “Motion”)¹, and in support of his objection respectfully states as follows:

JURISDICTION

1. Pursuant to 28 U.S.C. § 1334, applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and resolve this objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with monitoring the federal bankruptcy system. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that 11 U.S.C. § 307 gives

¹ The capitalized terms herein shall have the same meaning as set forth in the Motion.

the U.S. Trustee “public interest standing”); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a “watchdog”).

3. The U.S. Trustee has standing to be heard on the Motion pursuant to 11 U.S.C. § 307.

BACKGROUND AND RELEVANT FACTS

4. On February 5, 2015 (the “Petition Date”), the above-captioned debtors (the “Debtors”) filed chapter 11 petitions in this Court.

5. On February 13, 2015, the U.S. Trustee appointed an Official Committee of Unsecured Creditors. (D.I. 262).

6. On March 5, 2015, the Court entered an order directing the appointment of a consumer privacy ombudsman (the “CPO”) pursuant to section 332 of the Bankruptcy Code. (D.I. 809). On March 12, 2015, the U.S. Trustee appointed Elise S. Frejka as the CPO in these cases. (D.I. 953).

7. In the Motion, the Debtors seek an order approving, among other things, an auction and bid procedures (the “Bidding Procedures”), as well as certain bidder protections, in connection with the sale (the “Sale”) of the Debtors’ global sourcing group, remaining intellectual property assets, including the U.S. trademarks, the Debtors' franchise and dealer network and infrastructure, and customer data (collectively, the “Assets”). Motion at p. 1-2.

8. The Debtors' customer data sought to be marketed and sold includes personally identifiable information (“PII”)². Motion at Paragraph 4.

² The Debtors previously marketed their consumer data, including PII, in connection with an earlier asset sale (D.I. 36). However, that sale ultimately did not include the sale of the customer data and PII.

9. The Debtors' also seek pre-approval of and authority to offer a break-up fee to any potential stalking horse bidder not to exceed in the aggregate 3% of the total purchase price. Motion at Paragraph 6.b.

LEGAL ANALYSIS AND ARGUMENT

A. The Debtors' Privacy Policy Prohibits the Sale of the Debtors' Customers Personally Identifiable Information and the Motion Does Not Permit the Consumer Privacy Ombudsman to Discharge Her Duties.

10. Section 363(b)(1) of the Bankruptcy Code provides:

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information³ about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless –

(A) such sale or lease is consistent with such policy;
or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease –

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

³ Section 101(41A)(i)-(vi) of the Bankruptcy Code defines "personally identifiable information" to include (i) the first name (or initial) and last name of such individual, whether given at birth or time of adoption, or resulting from a lawful change of name; (ii) the geographical address of a physical place of residence of such individual; (iii) an electronic address (including an e-mail address) of such individual; (iv) a telephone number dedicated to contacting such individual at such physical place of residence; (v) a social security account number issued to such individual; or (vi) the account number of a credit card issued to such individual; in connection with obtaining a product from a debtor primarily for personal, family or household use. 11 U.S.C. 101(41A)(i)-(vi).

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

11. Section 332 of the Bankruptcy Code provides, in pertinent part that the CPO may appear and be heard at any such sale hearing and shall provide to the court information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of any PII section 363(b)(1)(B) which information may include presentation of (i) the Debtors' privacy policy; (ii) the potential losses or gains of privacy to consumers if such sale or such lease is approved by the court; (iii) the potential costs or benefits to consumers if such sale or such lease is approved by the court; and (iv) the potential alternatives that would mitigate potential privacy losses or potential costs to consumers. 11 U.S.C. § 332(b).

12. The Motion does not provide any detail or information as to what customer data or PII is proposed to be marketed or sold or how many customers may be affected. The Motion and the Bidding Procedures do not require bidders to separately allocate a portion of their bid for the customer data or PII. The lack of specificity and clarity surrounding the sale of consumer data and PII eviscerates the effect of section 332, hampers the CPO's ability to perform her statutory duties and prevents the Court from considering the facts and circumstances of any proposed sale so that it may, among other things, weigh the potential alternatives that would mitigate privacy losses or costs to consumers if a sale of such customer data and PII is approved.

B. The Pre-Approval of a 3% Break-Up Fee Does Not Comply with Section 503(b) and Applicable Third Circuit Law as There is No Evidence that the Proposed 3% Break-Up Fee is an Actual and Necessary Cost and Expense of Preserving the Estate.

13. The U.S. Trustee also objects to the Motion because the break-up fee portion of the Bid Protections is not appropriate under these circumstances and under relevant and applicable law where the proposed amount of the break-up fee does not correlate or equate to an actual and necessary cost and expense of preserving the estate.

14. There is no proposed Stalking Horse Bidder committed to purchase the Debtors' assets nor is there any definitive and binding asset purchase agreement ("APA"). In order to award a break-up fee (or expense reimbursement) to a potential bidder, the court must determine that the break-up fee is an actual and necessary cost and expense of preserving the estate. *See Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.)*, 181 F.3d 527 (3d Cir. 1999).

15. In *O'Brien*, the Third Circuit Court of Appeals stated that ". . . 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." *O'Brien*, 181 F.3d at 535. The burden is on the Debtors to prove the necessity of, and benefit to the estate from, the proposed breakup fee or expense reimbursement. Moreover, although "the considerations that underlie the debtor's judgment may be relevant to the bankruptcy court's determination on a request for break-up fees and expenses," "the business judgment rule should not be applied as such in the bankruptcy context." *O'Brien*, 181 F.3d at 535.

16. In these cases, there is no APA and no potential buyer. The proposed Bid Protections are not appropriate where a there is no stalking horse bidder and no APA has been

executed. There is no basis upon which to determine that the Bid Protections are valid and beneficial to the estate as an administrative expense where there is no Stalking Horse Bidder committed to a purchase anything. The approval of any such bid protections in these cases is unjustified because there is no evidence that the potential break-up fee will attract bidders to the auction, is the catalyst to attract additional bids, or in some other way serves to preserve or enhance the value of the estate.

17. Because there is no basis upon which to pre-approve and award the future allowance of any administrative expense under section 503(b)(1), the proposed Bidding Procedures should not be approved.

WHEREFORE, the U.S. Trustee respectfully requests that (i) the Debtors' customers data and PII be specifically excluded from this proposed sale, (ii) the proposed Bid Protections not be approved, and this Court grant such other relief as is deemed fair and just.

Dated: April 21, 2015
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

By: /s/ Richard L. Schepacarter
Richard L. Schepacarter
Trial Attorney
United States Department of Justice
Office of the United States Trustee
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (fax)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

-----	X	
	:	Chapter 11
In re:	:	
	:	Case No. 15-10197 (BLS)
RADIOSHACK CORPORATION, <i>et al.</i> ,	:	Jointly Administered
	:	
Debtors.	:	Re: D.I. 1768
	:	
-----	X	Hearing Date: April 28, 2015 at 9:00 a.m. Obj. Deadline: April 21, 2015 at 4:00 p.m.

CERTIFICATE OF SERVICE

I certify that on April 21, 2015, I caused to be served a copy of the United States Trustee’s Objection to the Debtors’ Combined Motion for Entry of Orders: (I) Establishing Bidding and Sale Procedures; (II) Approving the Sale of Certain IP and Related Assets; and (III) Granting Related Relief (D.I. 1768), *via* email and/or regular mail upon the following persons:

David M. Fournier, Esquire
Evelyn J. Meltzer, Esquire
Pepper Hamilton LLP
1313 N. Market Street
Wilmington, Delaware 19899-1709
Email: FournierD@pepperlaw.com
Email: MeltzerE@pepperlaw.com

Thomas A. Howley, Esquire
Paul M. Green, Esquire
Jones Day
717 Texas Suite 3300
Houston, Texas 77002
Email: tahowley@jonesday.com
Email: pmgreen@jonesday.com

David G. Heiman, Esquire
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114
Email: dgheiman@jonesday.com

Richard Hahn, Esquire
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
Email: rfhahn@debevoise.com

Gregory M. Gordon, Esquire
Jonathan M. Fisher, Esquire
Jones Day
2727 N. Harwood Street
Dallas, Texas 75201
Email: gmgordon@jonesday.com
Email: jmfisher@jonesday.com

Gregory Werkhesier, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market St., 16th Floor
Wilmington, Delaware 19801
Email: gwerkheiser@mnat.com

Gregg Galardi, Esquire
DLA Piper, LLP
1251 Avenue of the Americas
New York, New York 10020
Email: gregg.galardi@dlapiper.com

Cathy Hershcopf, Esquire
Seth Van Aalten, Esquire
Cooley LLP
1114 Avenue of Americas
New York, NY 10036
Email: chershcopf@cooley.com
Email: svanaalten@cooley.com

Christopher Samis, Esquire
Whiteford, Taylor & Preston
The Renaissance Centre
405 North King Street, Suite 500
Wilmington, Delaware 19801
Email: csamis@wtplaw.com

Susheel Kirpalani, Esquire
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Email: Susheelkirpalani@QuinnEmanuel.com

Adam G. Landis, Esquire
Kerri K. Mumford, Esquire
Landis, Rath & Cobb
919 North Market Street, Suite 1800
Wilmington, Delaware 19801
Email: landis@lrclaw.com
Email: mumford@lrclaw.com

Adam C. Harris, Esquire
David M. Hillman, Esquire
Brian C. Tong, Esquire
Schulte Roth & Zabel LLP
919 Third Avenue
New York, New York 10022
Email: adam.harris@srz.com
Email: david.hillman@srz.com
Email: brian.tong@srz.com

C. Barr Flinn, Esquire
Kenneth J. Enos, Esquire
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Email: bflinn@ycst.com
Email: kenos@ycst.com

Norman L. Pernick, Esquire
Cole Shotz, P.C.
500 Delaware Avenue, Suite 1410
Wilmington, DE 19801
Email: npernick@coleshotz.com

Michael G. Burke, Esquire
Brian J. Lohan, Esquire
Sidley Austin
787 Seventh Avenue
New York, NY 10019
Email: mgburke@sidley.com
Email: blohan@sidley.com

William P. Bowden, Esquire
Leigh-Anne M. Raport, Esquire
Ashby & Geddes, P.A.
500 Delaware Avenue
Wilmington DE 19899
Email: wbowden@ashby-geddes.com
Email: lraport@ashby-geddes.com

Frederick B. Rosner, Esquire
Julia Klein, Esquire
THE ROSNER LAW GROUP LLC
824 N. Market Street, Suite 810
Wilmington, DE 19801
Email: rosner@teamrosner.com
Email: klein@teamrosner.com

Elise S. Frejka, Esquire
FREJKA PLLC
733 Third Avenue
New York, NY 10017
Email: efrejka@frejka.com
Hal F. Morris, AAG
Ashley F. Bartram, AAG

Charlie Shelton, AAG
Christopher S. Murphy, AAG
Texas Attorney General's Office
Bankruptcy & Collections Division
P. O. Box 12548- MC 008
Austin, Texas 78711-2548
Email: hal.morris@texasattorneygeneral.gov
Email:
ashley.bartram@texasattorneygeneral.gov
Email:
charlie.shelton@texasattorneygeneral.gov
Email:
christopher.murphy@texasattorneygeneral.gov
[ov](#)

/s/Richard L. Schepacarter
Richard L. Schepacarter
Trial Attorney