

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11  
: :  
HOMELIFE CORPORATION, : Bankruptcy Case No. 01-2412 (EIK)  
et al., : (Jointly Administered)  
: :  
Debtors. : :

---

Laura Davis Jones, Hamid R. Rafatjoo, and David W. Carickhoff, Jr., Esquires of PACHULSKI, STANG, ZIEHL, YOUNG & JONES P.C., Wilmington, Delaware.  
Of Counsel: James H.M. Sprayregen, James A. Stempel, Jonathan P. Friedland, and Steven R. Kotarba, Esquires of KIRKLAND & ELLIS, Chicago, Illinois.  
Attorneys for Debtors and Debtors in Possession.

Brendan Linehan Shannon, Esquire of YOUNG CONAWAY STARGATT & TAYLOR LLP, Wilmington, Delaware  
Of Counsel: Lawrence C. Gottlieb, Ronald R. Sussman, Eric J. Haber and Gregory G. Plotko, Esquires of KRONISH LIEB WEINER & HELLMAN LLP, New York, New York.  
Attorneys for a Joint Venture Comprised of the Ozer Group LLC and Gordon Brothers Retail Partners, LLC.

Thomas G. Macauley, Esquire of ZUCKERMAN SPAEDER LLP, Wilmington, Delaware.  
Of Counsel: Sydney G. Platzer, and Clifford A. Katz, Esquires of PLATZER, SWERGOLD, KARLIN, LEVINE, GOLDBERG & JASLOW, LLP, New York, New York.  
Attorneys for the Official Committee of Unsecured Creditors.

David Buchbinder, Esquire of OFFICE OF THE UNITED STATES TRUSTEE, DISTRICT OF DELAWARE, Wilmington, Delaware.  
Attorney for the United States Trustee.

---

**MEMORANDUM OPINION**

September 20, 2002  
Wilmington, Delaware.

**FARNAN, District Judge**

Presently before the Court is a "Motion By The Official Committee Of Unsecured Creditors For Reconsideration Of First-Day Order Authorizing Payment Of Termination Fee (Docket No. 16)".<sup>1</sup> The Committee requests that the Court reconsider its Bid Procedures Order (D.I. 16) to the extent that the Order authorized payment of a termination fee to a joint venture comprised of the Ozer Group, LLC and Gordon Brothers Detail Partners, LLC ("Ozer/Gordon"). The Committee contends that the Debtors cannot demonstrate that the termination fee of \$750,000.00, which was paid, conferred an actual and significant benefit to the bankrupt estates (D.I. 216 para. 11) as required by the Third Circuit in In re O'Brien Environmental Energy, Inc., 181 F.3d 527 (3d Cir. 1999).

Ozer/Gordon filed an objection to the motion. (D.I. 240). The objection recounts the efforts of Debtors to engage an entity as their liquidation agent to conduct going out of business sales related to Debtors' decision to close its retail stores (D.I. 240).

On July 16, 2001, Debtors filed their voluntary petitions for relief under Chapter 11 of title 11 of the United States Code. Simultaneously with the filing of their petitions, Debtors

---

<sup>1</sup> There appears to be two similar motions (D.I. 206 and D.I. 216). The Court will treat them as one.

filed an Expedited Motion For Entry Of An Order (A) Authorizing The Debtors To Conduct Going-Out-Of-Business Sales Pursuant To Section 363 Of The Bankruptcy Code, (B) Approving Termination Fee And The Terms And Conditions Of Auction, (C) Authorizing The Debtors To Enter Into Agency Agreement For Liquidation Of Merchandise, And (D) Fixing Manner And Extent Of Notice, ("the Sale Motion"). The facts and circumstances underlying the filing of the Sale Motion are set forth in detail in the Sale Motion and the Affidavit of Joseph M. Baron, Debtors' President and Chief Executive Officer. As is the case in many retail bankruptcies, Debtors argued there was some urgency which required a liquidation of inventory so as to maximize the value of existing assets for the benefit of creditors and to minimize administrative expenses.

On July 18, 2001, pursuant to the Court's original jurisdiction a "first-day" hearing was held to consider applications in connection with the Debtors' recently filed petitions.<sup>2</sup>

---

<sup>2</sup> In July 2001, because of the large volume of filings in the District of Delaware, the district court did not utilize an automatic reference order. Instead, the district court retained jurisdiction over Chapter 11 cases and assigned Chapter 11 cases between district judges and the district's bankruptcy court so as to balance the workload of the court's chapter 11 caseload. As part of this effort, first day proceedings in all Chapter 11 cases were conducted by a district court judge. After the first day proceedings were concluded the Chief Judge of the district court assigned the case.

At the first day hearing, the Court considered the Sale Motion and approved it, including the \$750,000.00 termination fee ("the Bid Procedures Order").

On July 23, 2001, an Order of Reference was entered by the Chief Judge referring and assigning the case to the Bankruptcy Court, specifically Bankruptcy Judge Erwin I. Katz. On July 26, 2001, the Debtors, pursuant to the July 18 Bid Procedures Order entered by this Court, entered into a final version of their Agency Agreement with Ozer/Gordon.

Ozer/Gordon in their objection to the instant motion, rely on the executed Agreement and the Declaration of David Peress, Managing Director and General Counsel of Ozer (D.I. 240-Peress Declaration) and contend that the Ozer/Gordon bid and its stalking horse status provided a significant benefit to the Debtors' estate and maximized its value. As a result, Ozer/Gordon requests the Court to deny the Committee's motion for reconsideration.

Debtors have also filed a Response to the Committee's motion (D.I. 242). The Debtors' Response contends that the Debtors, in the Sale Motion, sought and obtained approval of the termination fee in compliance with the Third Circuit's O'Brien decision (Sale Motion at para. 63). Further, Debtors argue that the termination fee benefitted Debtors' estates by stimulating bidding by more than one bidder and encouraging other bidders to

make their best offers. Specifically, Debtors assert that after the Ozer/Gordon stalking horse bid was in place, the opening bid at the subsequent auction was more than two basis points higher.

In answer to the Committee's contention that without further scrutiny by the Committee the benefit of the termination fee is questionable, the Debtors assert the Ozer/Gordon bid:

... resulted in an auction at which, assuming no amounts [are] paid by the Debtors' liquidation agent, the successful bid enhanced recoveries by approximately \$2.4 Million, some \$1.65 million in excess of the termination fee.

The Committee filed a Reply to the objections of Debtors and Ozer/Gordon. (D.I. 548). In its Reply the Committee notes that the motion to reconsider filed pursuant to Local Bankruptcy Rule 9013-2(a)(e) places the burden of proof with respect to the appropriateness of the order targeted for reconsideration on the debtor. The Committee restates its contention that the termination fee should be stricken from the Bid Procedures Order because the fee was not in the best interests of unsecured creditors. The Committee requests discovery and an evidentiary hearing so that it can be prepared to challenge Debtors' evidence as to the appropriateness of the fee (or the amount of the fee) in this case. (D.I. 548 para. 21).

#### **CONCLUSIONS**

The following are the Court's conclusions with regard to the various issues the instant motion raises;

- 1) The Court reads Del. Bankr. LR 9013-2 to provide an

opportunity for a court to reconsider an order it has entered on the request of an interested party. The rule does not require reconsideration, or require discovery or a hearing.

2) If a court denies itself the opportunity to review its decision, the original order is appealable and so no prejudice results to the movant.

3) In this case, the Court has decided not to reconsider the order allowing the \$750,000.00 termination fee. The Court is persuaded that the Debtors' established in their Sale Motion papers and at the first-day hearing that the factors required by the Third Circuit's O'Brien decision were met in the circumstances of this case. Further, the Court's review and consideration of the papers submitted in connection with the instant motion convince it that the O'Brien requirements have been met and the termination fee allowed to Ozer/Gordon was appropriate and in the best interests of all the constituencies of the bankrupt estates.

Therefore, the Court will deny the motion to reconsider by entry of an appropriate order.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11  
: :  
HOMELIFE CORPORATION, : Bankruptcy Case No. 01-2412 (EIK)  
et al., : (Jointly Administered)  
: :  
Debtors. : :

**O R D E R**

Now Therefore, for the reasons discussed in the Court's  
Memorandum Opinion,

IT IS HEREBY ORDERED that:

1. The Motion To Reconsider (D. I. 206, 216) is **DENIED**.
2. The Ozer/Gordon Motion For Protective Order (D.I.338)  
is **DENIED as Moot**.

September 20, 2002  
DATE

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE