

**UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES TRUSTEE
DISTRICT OF DELAWARE**

In re:

REAL MEX RESTAURANTS, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 11-13122(BLS)

(Jointly Administered)

Hearing Date: February 10, 2012 at 10:00 a.m.

Objection Deadline: January 16, 2012 at 4:00 p.m. (PST),

(Extended by Agreement: January 18, 2012)

Related to Docket No. 685

**UNITED STATES TRUSTEE'S
OBJECTION TO THE DEBTORS' MOTION FOR
AN ORDER: (I) APPROVING ASSET PURCHASE AGREEMENT AND
AUTHORIZING SALE OF DEBTORS' ASSETS OUTSIDE THE ORDINARY
COURSE OF BUSINESS, (II) AUTHORIZING SALE OF ASSETS FREE AND
CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS, (III)
AUTHORIZING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY
CONTRACTS AND UNEXPIRED LEASES AND (IV) GRANTING RELATED RELIEF**

In support of her objection (the "Objection") to the Debtors' Motion for an Order: (I) Approving Asset Purchase Agreement and Authorizing Sale of Debtors' Assets Outside the Ordinary Course of Business, (II) Authorizing Sale of Assets Free and Clear of Liens, Claims, Encumbrances and Interests, (III) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and (IV) Granting Related Relief (Docket No. 685) (the "Motion"), Roberta A. DeAngelis, the United States Trustee for Region 3 ("U.S. Trustee"), by and through her undersigned counsel, states as follows:

Jurisdiction

1. This Court has jurisdiction to hear the above-referenced Objection.

¹

The Debtors in these chapter 11 cases, along with the last four digits of each of the Debtors' federal tax identification numbers, are: Real Mex Restaurants, Inc. (2902); RM Restaurant Holding Corp. (2217); Acapulco Mark Corp. (3570); Acapulco Restaurant of Downey, Inc. (2910); Acapulco Restaurant of Moreno Valley, Inc. (4606); Acapulco Restaurant of Ventura, Inc. (3626); Acapulco Restaurant of Westwood, Inc. (1162); Acapulco Restaurants, Inc. (4897); ALA Design, Inc. (8584); Chevys Restaurants, LLC (2992); CKR Acquisition Corp. (8287); El Paso Cantina, Inc. (0112); El Torito Franchising Company (2754); El Torito Restaurants, Inc. (7059); Murray Pacific (1596); Real Mex Foods, Inc. (8585); and TARV, Inc. (8081).

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). This duty is part of the U.S. Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *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 U.S. Trustee 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 U.S. Trustee as a “watchdog”).

3. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard with regard to the above-referenced Objection.

Background

4. On October 4, 2011 (the “Petition Date”), the Debtors² filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”).

5. On October 14, 2011, the U.S. Trustee appointed a statutory committee of unsecured creditors in this case. *See* Docket Nos. 139, 594 and 718.

6. The Debtors filed the Motion on December 30, 2011.

7. The U.S. Trustee objects to the Motion because the proposed sale appears to violate section 363(b)(1) of the Bankruptcy Code.

Basis for Relief

8. The Motion does not provide sufficient information for the U.S. Trustee to determine whether a consumer privacy ombudsman needs to be appointed to protect personally

² All capitalized terms not defined herein shall have the meaning ascribed to them in the Motion

identifiable information about individuals. However, section 8.4(c) of the Agreement, attached to the motion as Exhibit A, provides the following:

Each of Purchaser and each Seller shall use its best efforts to cause to be entered by the Bankruptcy Court an Order, which may be the Sale Order, finding and determining that the sale of the Purchased Assets meets the requirements of Bankruptcy Code Section 363(b)(1) with respect to sales of personally identifiable information.

9. Also, as a condition precedent to closing the sale, section 10.3(c) of the Agreement requires the entry of an “[o]rder, which may be the Sale Order, finding and determining that the sale of the Purchased Assets meets the requirements of Bankruptcy Code Section 363(b)(1) with respect to sales of personally identifiable information”. Based on the foregoing, it appears that the Debtors are proposing to sale/transfer personally identifiable information.

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

(b)(1) 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 information 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 information³ to any person unless –

³ “Personally identifiable information” is defined in 11 U.S.C. § 101(41A) as meaning

(A) if provided by an individual to the debtor in connection with obtaining a product or a service from the debtor primarily for personal, family, or household purposes –

- (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; or

(B) if identified in connection with 1 or more of the items of information specified in subparagraph (A) --

- (i) a birth date, the number of a certificate of birth or adoption, or a place of birth; or
- (ii) any other information concerning an identified

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

11. It is the understanding of the U.S. Trustee that the Debtors do have a prepetition privacy policy prohibiting the transfer of personally identifiable information. Therefore, section 363(b)(1) of the Bankruptcy Code requires the appointment of an independent consumer privacy ombudsman to oversee the sale of personally identifiable information.

12. Based on the foregoing, the U.S. Trustee objects to the proposed sale until there is compliance with section 363(b)(1) of the Bankruptcy Code.

individual that, if disclosed, will result in contacting or identifying such individual physically or electronically.

WHEREFORE the U.S. Trustee requests that this Court issue an order denying the Motion as written and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: January 18, 2012
Wilmington, Delaware

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

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