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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	:	Chapter 11
	:	
Crumbs Bake Shop, Inc., <i>et al.</i> , ²	:	Case No. 14-24287 (MBK)
	:	<i>Jointly Administered</i>
	:	
Debtors.	:	Hearing Date:
	:	
	:	The Honorable Michael B. Kaplan

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE UNITED STATES TRUSTEE FOR AN ORDER DIRECTING THE APPOINTMENT OF A CONSUMER PRIVACY OMBUDSMAN PURSUANT TO 11 U.S.C. §§ 363(b)(1) AND 332

The United States Trustee (the “U.S. Trustee”) by and through counsel, in furtherance of her duties and responsibilities, hereby respectfully moves for an Order Directing the Appointment of a Consumer Privacy Ombudsman Pursuant to 11 U.S.C. §§ 363(b)(1) and 332. This duty is part of the U.S. Trustee’s overarching responsibility to enforce the laws as written

² The Debtors in these jointly administered cases are: Crumbs Bake Shop, Inc. (14-24287 (MBK), Crumbs Hoboken, LLC (14-24285 (MBK); Crumbs Holdings, LLC (14-24288 (MBK); Crumbs 42nd Street II, LLC (14-24289 (MBK); Crumbs Broad Street, LLC (14-24290 (MBK); Crumbs Broadway, LLC (14-24291 (MBK); Crumbs Federal Street, LLC (14-24292 (MBK); Crumbs Garment Center, LLC (14-24293 (MBK); Crumbs Grand Central, LLC (14-24294 (MBK); Crumbs Greenvale, LLC (14-24295 (MBK); Crumbs Greenwich, LLC (14-24296 (MBK); Crumbs II, LLC (14-24297 (MBK); Crumbs Larchmont, LLC (14-24298 (MBK); Crumbs Lexington, LLC (14-24299 (MBK); Crumbs Park Avenue, LLC (14-24300 (MBK); Crumbs Retail Bake Shops, LLC 14-24301 (MBK); Crumbs Stamford, LLC 14-24303 (MBK); Crumbs Third Avenue, LLC 14-24305 (MBK); Crumbs Times Square, LLC 14-24306 (MBK); Crumbs Union Square, LLC 14-24307 (MBK); Crumbs Union Station, LLC 14-24309 (MBK) Crumbs West Madison, LLC 14-24310 (MBK); Crumbs Woodbury, LLC 14-24311 (MBK)

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); *Morgen Stern 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”).

Background

1. On July 11, 2014, (the “Petition Date”), Crumbs Bake Shop, Inc. et al., (collectively, the “Debtors”), commenced separate cases under Chapter 11 of title 11 of the United States Code, (the “Bankruptcy Code”). The Debtors have continued to manage their affairs as debtors in possession since the Petition Date.
2. According to the Affidavit of the CFO, John Ireland, Crumbs Bake Shop, Inc. (“Crumbs”) has been operating since 2011. Crumbs is a publicly held company whose stock was until recently, listed on the NASDAQ exchange under the symbol CRMB. The Debtors sold cupcakes and other baked goods such as cookies, brownies muffins, coffee drinks, etc.
3. Shortly before the Petition Date, the Debtors were forced to cease operations due to severe liquidity problems. On July 14, 2014, the Debtors filed a Motion for an Order pursuant to 11 U.S.C. §§ 363 and 365 and Fed. R. Bankr. P. 2002, 6004 and 6006: (1) Approving “Stalking Horse” Asset Purchase Agreement for the Sale of Substantially All the Debtors’ Assets; (2) Approving Bidding Procedures and Form, Manner and Sufficiency of Notice; (3) Scheduling (A) an Auction sale and (B) a Hearing to Consider Approving the Highest and Best Offer; (4) Authorizing the Debtors to Sell Substantially All Their Assets Free and Clear of Liens, Claims, Encumbrances, and Interests and to Assume and Assign Certain Related Executory Contracts and Unexpired Leases; and (5) Granting Other Related Relief (the “Sale Motion”).

4. On July 25, 2014, the bankruptcy court entered an order approving, among other things, the bidding procedures and scheduling an auction sale and a hearing to approve the highest and best offer (the “Bid Procedures Order”). Pursuant to the Bid Procedures Order, the auction sale is scheduled for August 21, 2014. Objections to the sale must be filed no later than August 25, 2014 and a hearing to approve the sale is scheduled for August 26, 2014.

5. According to Asset Purchase Agreement (the “APA”) attached to the Sale Motion, the purchaser is buying all of the Debtors’ books and records as well as tangible personal property and all intangible assets, including certain intellectual property. *See* APA, section 2.1. It appears that customer lists are being sold through the Sale Motion.

6. The Debtors have a privacy policy posted on their website at www.crumbs.com/privacy, which reads in part as follows:

Crumbs Bake Shop is highly sensitive to the privacy interests of consumers and believes that the protection of those interests is one of its most significant responsibilities. In acknowledgement of its obligations, Crumbs Bake Shop has adopted the following Privacy Policy applicable to information about consumers that it acquires in the course of its business...

3. **Disclosure to Third Parties.** We will provide individually – identifiable information about consumers to third parties only if we are compelled to do so by order of a duly-empowered governmental authority, we have the express permission of the consumer, or it is necessary to process transactions or provide our services....

Relief Requested

7. The U.S. Trustee requests that this court direct the appointment of a consumer privacy ombudsman pursuant to Sections 363(b)(1) and 332 of the Bankruptcy Code.

Basis For Relief Requested

8. It appears that the Debtors are selling their customer lists. It is the Debtor's burden to establish that the sale of the information is consistent with the Debtors' privacy policy the Debtor may have. 11 U.S.C. § 363(b)(1).

9. The Bankruptcy Code contains provisions designed to protect certain personally identifiable information of consumers in connection with the sale of assets under section 363(b) of the Bankruptcy Code. Section 363(b)(1) states as follows:

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 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 the 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

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

11 U.S.C. § 363(b)(1).

Section 332 of the Bankruptcy Code states as follows:

(a) If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 7 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman.

(b) The consumer privacy ombudsman may appear and be heard at such 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 such personally identifiable information under section 363(b)(1)(B). Such information may include presentation of -

- (1) the debtor's privacy policy;
- (2) the potential losses or gains of privacy to consumers if such sale or lease is approved by the court;
- (3) the potential costs or benefits to consumers if such sale or such lease is approved by the court; and
- (4) the potential alternatives that would mitigate potential privacy losses or potential costs to consumers.

(c) A consumer privacy ombudsman shall not disclose any personally identifiable information obtained by the ombudsman under this title.

11 U.S.C. § 332.

10. Personally identifiable information is defined in Section 101(41A) of the Bankruptcy Code and includes, among other things, names, addresses and telephone numbers. 11 U.S.C § 101(41A).

11. Federal Rule of Bankruptcy Procedure 6004(g) requires that any motion for authority to sell or lease personally identifiable information under section 363(b)(1)(B) of the Bankruptcy Code shall include a request for an order directing the United States trustee to appoint a consumer privacy ombudsman. The motion must, at a minimum, be served on the any committee appointed under Section 1102 of the Bankruptcy Code, the twenty largest unsecured creditors and such other entities as the court may direct. If an ombudsman is appointed, the United States trustee must file, no later than seven days before the hearing under section 363(b)(1)(B), a notice of appointment. Fed. R. Bank. P. 6004(g).

12. The Application includes the sale of the Debtors' customer lists in the assets to be sold. The Debtors' privacy policy allows for the transfer of such information in only three instances; (1) if compelled to do so by a duly empowered governmental authority, (2) if the

Debtors have the express permission of the consumer, or (3) if it is necessary to process transactions and provide services. Since the sale of the customer lists to a third party does not fall within one of the carved-out exceptions, the sale of the lists is prohibited. To read the policy differently would render the Debtors' privacy policy meaningless, leading consumers to believe their personal information is protected when in fact, it is not. Since the sale of the Debtors' customers' personal information is not consistent with the Debtors' privacy policy, a consumer privacy ombudsman must be appointed under sections 363(b)(1) and 332 of the Bankruptcy Code.

Conclusion

WHEREFORE, for the foregoing reasons, the U.S. Trustee requests that this Court enter an Order directing the appointment of a consumer privacy ombudsman and for such other and further relief that the court deems just, fair and equitable.

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE
REGION 3

By: /s/ Donald F. MacMaster
Donald F. MacMaster
Trial Attorney

DATED: July 30, 2014