IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
KIOR, Inc.	:	Case No. 14-12514 (CSS)
	:	
	:	**Obj. Deadline: May 22, 2015**[1]
Debtor	:	**Hearing Date: June 3, 2015 at 10:00 a.m.**

UNITED STATES TRUSTEE'S OBJECTION TO DEBTOR'S SECOND AMENDED CHAPTER 11 PLAN OF REORGANIZATION, AS REVISED DATED APRIL 7, 2015

In support of his Objection to the Debtor's Second Amended Chapter 11 Plan of Reorganization, as Revised Dated April 7, 2015 (the "Objection"), Andrew R. Vara, the Acting United States Trustee for Region 3, through his undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this Objection.

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 this Objection.

[1] The objection deadline was extended by agreement of the parties.

BACKGROUND

4. On November 9, 2014, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

5. On April 7, 2015, the Debtor filed its Second Amended Chapter 11 Plan of Reorganization, as Revised April 7, 2015 ("Plan")(D.I. 470), together with a Second Amended Disclosure Statement in support of the Plan ("Disclosure Statement") (D.I. 471).

PRELIMINARY STATEMENT

6. A chapter 11 plan may not be confirmed unless the Court can find that the plan complies with the provisions of 11 U.S.C. § 1129 (a). A plan proponent bears the burden of proof with respect to each and every element of 11 U.S.C. § 1129 (a). *See In re Genesis Health Ventures, Inc*., 266 B.R. 591 (Bankr. D. Del. 2001). As discussed below, the Plan is not confirmable because (a) it does not meet the feasibility requirement of Bankruptcy Code section 1129(a)(11) and (b) it contains an exculpation provision that is contrary to applicable law in this District.

ARGUMENT

Feasibility

7. To confirm a plan of reorganization, a debtor must establish by a preponderance of the evidence that the plan complies with all of the requirements of section 1129 of the Bankruptcy Code. *See, e.g.*, *In re Rubicon U.S. REIT, Inc.*, 434 B.R. 168, 174 (Bankr. D. Del. 2010). Among these is the "feasibility" requirement of section 1129(a)(11) of the Bankruptcy Code, which requires that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11

U.S.C. § 1129(a)(11).

8. To demonstrate that a plan is feasible, it is not necessary for a debtor to guarantee success. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 649 (2d Cir. 1988). "The purpose of the feasibility test is to protect against visionary or speculative plans." *In re Indianapolis Downs, LLC*, 486 B.R. 286, 298 (Bankr. D. Del. 2013). "The inquiry is on the viability of the reorganized debtor and its ability to meet its future obligations, both as provided for in the plan and may be incurred in operations. Particularly important in this regard is that the plan proponent demonstrate that any necessary financing has been obtained or is likely to be obtained." 7 *Collier on Bankruptcy* ¶1129.02 [11] (16th ed.).

9. In addressing the feasibility of the Plan, Section VIII. A. of the Disclosure Statement provides that:

> As set forth in the one-year budget attached hereto as Exhibit D, the Reorganized Debtor intends to continue its research and development activities but will not generate substantial revenues during the 12-24 months following the Effective Date of the Plan. In the absence of material revenues during the 12-month period following the Effective Date of the Plan, the Reorganized Debtor will be funded entirely by the Exit Facility. The Debtor believes that the Plan Support Parties have the desire and the ability to fund the Exit Facility, as required by the Plan.

Disclosure Statement Section VIII.A.

10. In addressing risk factors, Section X. D. of the Disclosure Statement provides that:

> While the Debtor strongly believes in its technology and has continued improving aspects alternatively of its technology during the bankruptcy case, there is no guaranty that it will be successful in developing the technology to the point of commercial viability. As such, even with the infusion of approximately $30 million in new money it may be necessary to obtain additional capital in the form of loans or equity after the Exit Facility has been fully funded.

Disclosure Statement Section X. D. Based on the budget attached as Exhibit D to the

Disclosure Statement it appears fairly certain that the Debtor will need to obtain additional funding to operate the company after the 12 month post Effective Date period has elapsed.[2] The Debtor has provided no indication that this will be possible. The Debtor admits that it will not generate substantial revenues for at least 24 months following the Effective Date. Indeed, the one-year budget attached as Exhibit D to the Disclosure Statement does not contain any revenue projections, but simply provides for the drawdown of the Exit Facility to fund Plan payments and the Debtor's operations for the next year. Of the projected $30 million in exit financing, approximately $7.1 is earmarked to fund Plan disbursements. That leaves just $21 million to fund the Reorganized Debtor's efforts to make its technology commercially viable, of which amount approximately $10 million is for allocated for employee payroll and benefits.

11. The Exit Facility appears to adequately provide for payments that are to be made pursuant to the Plan. However, the Debtor does not address what will happen at the end of the one year period if additional funding is not obtained. Given that the Reorganized Debtor does not expect to generate revenue for at least two years post Effective Date, there is a substantial risk that the Debtor will require further financial reorganization if the Reorganized Debtor is unable to secure additional financing once the Exit Facility is depleted. The Debtor has not proven by a preponderance of the evidence that the Plan is feasible and that confirmation of the Plan is unlikely to be followed by the need for further financial restructuring.

[2] Indeed, earlier in the Disclosure Statement, the Debtor states that "[t]hese funds will run out in about one (1) year, and additional capital will be required to continue research and development activities unless at that time another commercial transaction takes place such as the Reorganized Debtor entering into licensing or joint venture agreements." Disclosure Statement, Section II. A.

Exculpation

12. As currently drafted, the exculpation provision contained in section X. G. of the Plan is overbroad and should be revised to include a carve-out for willful misconduct or gross negligence. See *PWS Holding Corp*, 228 F.3d 224, 246 (3d Cir. 2000)(holding that estate fiduciaries may be exculpated except for willful misconduct or gross negligence). *See also In re Coram Healthcare Corp*., 315 B.R. 321, 337 (Bankr. D. Del. 2004) (stating that "[third party release provisions against Trustee, Equity Committee and their respective agents and professionals] are not permissible except to the extent they are limited to post-petition activity which does not constitute gross negligence or willful misconduct."

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

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

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