

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

In re: :
: Chapter 11
TACTICAL INTERMEDIATE : Case No. 14-11659 (KG)
HOLDINGS, INC., *et al.*, :
: (Jointly Administered)
: :
Debtors. : **Hearing Date: Aug. 22, 2014, at 2:30 PM**
: **Objection Due: Aug. 18, 2014, at 4:00 PM¹**

**LIMITED OBJECTION BY THE UNITED
STATES TO THE DEBTORS MOTION TO
SELL THE ASSETS OF DEBTOR MASSIF
MOUNTAIN GEAR COMPANY, L.L.C. (D.I. 40)**

The United States, on behalf of the Department of Defense, including the United States Army Contracting Command and its components (collectively “DoD”), objects in part to the Debtors' Motion For Sale of Property Free and Clear of Liens under Section 363(f) Debtors' Motion for an Order (A) Approving Stalking Horse Purchase Agreement; (B) Approving, Subject to Higher or Better Offers, Sale of Substantially all of the Assets of Debtor Massif Mountain Gear Company, L.L.C. Pursuant to Section 363 of the Bankruptcy Code Free and Clear of all Liens, Claims, Interests and Encumbrances; (C) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Pursuant to Section 365 of the Bankruptcy Code; (D) Authorizing the Debtors to Consummate Transactions Related to the Above; and (E) Granting Other Relief (D.I. 40)(the “Sale Motion”), and in support thereof avers as follows:

¹ Objection Deadline extended per agreement with the Debtors.

Background

1. The Debtors currently have at least one contract with the DoD, contract ID W91CRB-07-D-0033, with the U.S. Army (the "DoD Contract").

2. On July 8, 2014, the Debtors filed voluntary bankruptcy petitions seeking relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). The following day, the Debtors filed the Sale Motion. Among other things, the Sale Motion sets forth procedures concerning the assumption and assignment of certain executory contracts, which includes government contracts.

3. On July 31, 2014, the Debtors filed a Notice of Potential Assumption, Sale and Assignment of Certain Unexpired Leases and Executory Contracts (D.I. 164, the "Contract Notice"), which states that the Debtors may seek to assume, sell and assign certain of its executory contracts, including the DoD Contract. The DoD filed an objection to the Contract Notice as well.

Objection

4. The DoD objects to the Sale Motion to the extent that it proposes to authorize the sale, assumption, and assignment of executory DoD contracts in violation of Federal law and regulations.

A. Consent Requirements of the Anti-Assignment Act

5. The DOD objects to the Sale Motion to the extent it seeks relief that might impair the DoD's rights under the Anti-Assignment Act. The Bankruptcy Code provides that the trustee may not assume or assign a contract if "applicable law excuses a party . . . to such contract . . . from accepting performance from . . . an entity other than the debtor" when "such party does not consent to such assumption or assignment" *See* 11 U.S.C. § 365(c)(1). In this case, the Anti-

Assignment Act bars the assignment of the DoD Contracts absent the DoD's consent. *See* 41 U.S.C. § 6305(a) (providing that "a purported transfer in violation of this subsection annuls the contract or order so far as the Federal Government is concerned."); *see also In re TechDyn Sys. Corp.*, 235 B.R. 857, 864 (Bankr. E.D. Va. 1999) ("Because the Anti-Assignment Act plainly prohibits assignment of the debtor's contracts with the United States Government, the debtor . . . is barred by § 365(c)(1) from assuming those contracts over the Government's objection.").

6. Further, under 11 U.S.C. § 365, a debtor assumes a contract *cum onere* requiring the debtor to accept its burdens as well as its benefits. *See Chrysler Corp. v. Monroeville Dodge (In re Monroeville Dodge)*, 166 B.R. 264, 267 (Bankr. W.D. Pa. 1994)("an executory contract assumed in a bankruptcy proceeding is accepted *cum onere*"); *In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 173 (Bankr. E.D. Va. 1993)(discussing required cure obligations); *see also American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999)(noting the basic concept of contractual assignment wherein "every contractual assignee takes the entire bundle of rights and obligations under the contract").

7. The United States reserves its rights under the Anti-Assignment Act, 41 U.S.C. § 6305 to bar the assumption, or the assumption and assignment, of any of the DoD Contracts absent its consent.

B. Novation Requirement of the Federal Acquisition Regulation

8. The Government objects to the Sale Motion to the extent that it does not comply with the requirements of the Federal Acquisition Regulation (the "FAR"), as incorporated into DoD contracts.

9. Pursuant to the FAR, the Government may recognize a third party as the successor in interest to a government contract by executing a novation agreement. *See FAR*

42.1204(a). First, the contractor (the "Transferor") and/or its successor in interest (the "Transferee") must submit a written request to the responsible contracting officer. FAR 42.1203(a). Next, the contracting officer responsible for processing and executing novation agreements shall determine whether it is in the Government's interest to recognize the Transferee. FAR 42.1203(c). In making this determination, the contracting officer must be privy to specific information about the proposed transfer, including, but not limited to: (1) the Transferee's responsibility under FAR Subpart 9.1 ("Responsible Prospective Contractors"), (2) whether any significant organizational conflicts of interest exist under FAR Subpart 9.5 ("Organizational and Consultant Conflicts of Interest"), (3) evidence of the Transferee's capability to perform; and (4) evidence that any security clearance requirements have been met. FAR 42.1203(c)(2); FAR 42.1204.

10. A Transferee generally assumes all the Transferor's obligations under the contract. FAR 42.1204 (h)(1). As such, novation agreements must include a statement indicating that "[t]he Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer." *See* FAR 42.1204(i)(a)(4).

11. The Sale Motion makes no provision that the proposed sale, assumption and assignment will recognize the U.S. Government's right to unilaterally consent to any assignment of DoD contracts, and it does not require compliance with the novation provisions of the FAR.

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12. The government has proposed the following language to counsel for the relevant parties, and the government maintains its request for such language to be added to the Sale Order:

Notwithstanding any provision in the Sale Motion, this Sale Order or implementing Sale documents (collectively, "Documents"), any property, including but not limited to intellectual property, licenses, inventions, authorizations, leases, contracts, agreements, or other interests of the federal government (collectively, "federal interests") shall be treated, determined, administered and paid in the ordinary course of business as if the debtors' bankruptcy cases were never filed and the debtors and the Purchaser shall comply with all applicable non-bankruptcy law, federal regulations and statutes, including but not limited to the Anti-Assignment Act and the Federal Acquisition Regulation. Moreover, without limiting the foregoing, nothing in the Documents shall be interpreted to set cure amounts or to require the government to novate or otherwise consent to the transfer of any federal interests. The government's rights to offset or recoup any amounts due under, or relating to, any federal interests are expressly preserved.

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WHEREFORE, the DoD respectfully requests that the Court deny the Sale Motion to the extent it seeks to sell, assume and assign DoD contracts in violation of the Anti-Assignment Act and the FAR, without the consent of the DoD, and in accordance with the requirements of the DoD contracts; and the DoD respectfully requests any further relief the Court deems necessary and just.

Dated: August 18, 2014

CHARLES M. OBERLY, III
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By: _____

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AFFIDAVIT OF SERVICE

I, Cynthia J. Kemske, an employee in the Office of the United States Attorney for the District of Delaware, hereby attest under penalty of perjury that on August 18, 2014, a copy of the **LIMITED OBJECTION BY THE UNITED STATES TO THE DEBTORS MOTION TO SELL THE ASSETS OF DEBTOR MASSIF MOUNTAIN GEAR COMPANY, L.L.C. (D.I. 40)**

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