



(“KEIP”) that provides bonus compensation to certain employees, including two top executives.

The KEIP consists of an incentive plan for two key officers of the Debtors and a sale bonus plan for these, as well as 15 essential non-executive level employees. The Creditors’ Committee objects to the KEIP plan as a disguised retention plan that does not satisfy the requirements of 11 U.S.C. § 503(c)(1). They also object to the sale bonus payments to the non-executive level employees, because they are inappropriate under § 503(c)(3), because the Debtors have failed to provide adequate justification for these payments under the facts and circumstances of these cases, particularly given the limited amount of work remaining to close the sale of the Debtors’ assets.

As stated recently by the Bankruptcy Court for the Southern District of New York, “[a]ttempts to characterize what are essentially prohibited retention programs as ‘incentive’ programs in order to bypass the requirements of section 503(c)(1) are looked upon with disfavor, as the courts consider the circumstances under which particular proposals are made, along with the structure of the compensation packages, when determining whether the compensation programs are subject to section 503(c)(1).” *In re Borders Group, Inc.*, \_\_B.R.\_\_, 2011 WL 1563633 \*7 (Bankr. S.D.N.Y. April 27, 2011) (citing *In re Dana Corp.*, 351 B.R. 96, 102 (Bankr. S.D.N.Y. 2006)).

While the Debtor makes a case for the KEIP as an incentive plan, it does not set out enhanced job duties and/or goals, but is based on the amount received at the auction that had already passed the minimum requirements of the plan, and seems to be largely based on retaining the two top executives through the sale process, thus the requirements of § 503(c)(1) must be addressed by the Debtors.

Justification for the sale bonus plan also fails for the reasons stated in the Committees' objection. The Debtors have failed to demonstrate how these individual participants have enhanced the value of the Debtors' assets to improve the sales price, or a justification for these additional payments for a sale that will soon close to a going concern that may employ these key individuals post-closing. Especially in a case such as this, with very little currently available for unsecured creditors.

Thus, for the reasons stated in the Unsecured Creditors Committee's objection, the Motion must be denied. However, this court and the Unsecured Creditors Committee surely recognizes the efforts made by the employees and the results of the sale process. Therefore, this ruling is without prejudice to the employees seeking a reasonable substantial contribution claim under section 503 (b) (3) to the extent that they meet the requirements of that section..

It is **SO ORDERED**.

### END OF ORDER ###