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9 THE WILKES BASHFORD COMPANY

FILED
NOV 10 2009
UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

10 UNITED STATES BANKRUPTCY COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 In re
14 The Wilkes Bashford Company,
15 Debtor.
16 Tax I.D. 94-2944325

Case No. 09-33497 TEC

Chapter 11

ORDER ESTABLISHING BID
PROCEDURES AND ALLOWING
BREAK-UP FEE IN CONNECTION WITH
THE SALE OF ASSETS PURSUANT TO
BANKRUPTCY CODE § 363

17 The Court having considered the Debtor's Emergency Motion to Establish Bid
18 Procedures and Allow Break-Up Fee in Connection With the Sale of Assets Pursuant to
19 Bankruptcy Code § 363 (the "Bid Procedures Motion"); the court having considered the Bid
20 Procedures Motion, and the supporting declaration of Michael Appel, the representations
21 made at the hearing; and having found that notice was given as proper under the
22 circumstances, and good cause appearing therefore,

23 IT IS HEREBY ORDERED that:

- 24 1. The Motion is granted;
25 2. The Bid Procedures set forth in the Bid Procedures Motion are

26 *as modified,*
27 approved;
28 *A*

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3. Notice of the Bid Procedures shall be provided substantially as set forth in the attached exhibit ("Notice of Bid Procedures").

**** END OF ORDER ****

THOMAS E. CARLSON
11/10/27

NOTICE OF BID PROCEDURES

The following bid procedures for the sale of the assets of the Wilkes Bashford Company ("Debtor") were approved by Court order entered on November 10, 2009:
↳ tentatively

1. Sale Hearing: The Debtor shall cause, on or before November 10, 2009, service by first class mail of notice of the hearing on the Sale Motion and notice of the Bidding Procedures approved by the Court on all known creditors.

2. Service of Sale-Related Pleadings:

(a) Notice of Sale Hearing. The Debtor shall cause, on or before November 10, 2009, service by first class mail of notice of the hearing on the Sale Motion and notice of the Bidding Procedures approved by the Court on all known creditors.

(b) Moving Papers. The Debtor shall cause, on or before November 10, 2009, service by first class mail of (a) the Sale Motion (which service shall attach the Agreement and include the Agreement and the order on this Bid Procedures Motion filed by the Court), all declarations in support, and information supporting Mitchell's ability to provide adequate assurance of future performance, on (1) all parties asserting a security interest in the Debtor's assets, (2) all parties to the unexpired leases and executory contracts proposed to be assumed and assigned under the sale agreement (the "Assumed Contracts") and their counsel, if known, (3) the Debtor's creditors holding the twenty largest unsecured claims, (4) the Office of the United States Trustee, (5) all parties having filed and served request for notice in the Chapter 11 case, (6) Mitchell, and (7) all entities, and if known, their counsel, who have expressed a bona fide interest in acquiring the Assets or that the Debtor believes may be interested in proposing a competing bid upon assets of the Debtor. The Sale Motion shall set forth any amount required to satisfy the requirements of Bankruptcy Code § 365(b)(1)(A) and (B) (the "Cure Amount") according to the Debtor's books and records.

3. Due Diligence. Any party interested in bidding for the Assets may conduct reasonable due diligence upon the signing of an agreement acceptable to the Debtor providing that such party will not disclose to any third party non-public information regarding the Debtor or its affairs and consistent with the terms of any such agreement executed by Mitchell.

4. Objection Bar Dates

(a) Objection to Asset Sale. Any objection to the Sale Motion must be in writing, comply with the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules, be filed with the Court on or before ~~November 19, 2009~~, and be served on (1) Debtor's counsel, (2) counsel for Mitchell, and (3) the Office of the United States Trustee no later than November 18, 2009.
November 18, 2009 at 12:00 Noon PST, ↳ at 12:00 NOON PST.

(b) Objection to Assumption and Cure Amounts. Any objection to assumption of the Assumed Contracts on grounds other than lack of adequate assurance of future performance must be in writing, comply with the Federal Rules of Bankruptcy

18, 2009 at NOON PST,

18, 2009 at NOON PST,

Procedure and the Local Bankruptcy Rules, be filed with the Court on or before November 19, 2009, and be served on (1) Debtor's counsel, (2) counsel for Mitchell, and (3) the Office of the United States Trustee no later than November 19, 2009. Such objection must set forth (a) the basis for the objection, and, if applicable, (b) the amount the party asserts as the Cure Amount. If no such objection is received by November 18, 2009, then the Debtor shall be determined not to owe any Cure Amount that otherwise could have been asserted by the non-debtor party to the Assumed Contracts against the Debtor, Mitchell or such other Mitchell of the Assets through the effective date of the assumption and assignment in respect of such Assumed Contract.

at NOON PST,

(c) The Court will hear any objections at a hearing ON

November 19, 2009 at 2 p.m.

~~(e) Objection to Lack of Adequate Assurance of Future Performance. Any bidder other than Mitchell who wishes to become a Qualified Bidder to the Assets ("Prospective Bidder") shall give notice by electronic mail of such desire to the Debtor's counsel at their electronic mail addresses no later than 1 p.m. PT on November 13, 2009. Any such Prospective Bidder shall include with such notice all information in .pdf format that the Prospective Bidder deems appropriate to qualify it as an entity that could provide adequate assurance of future performance, as that term is used in Bankruptcy Code § 365 ("Adequate Assurance Package"). The Debtor shall, on or before 4 p.m. PT on November 14, 2009, provide by electronic mail, facsimile or first class mail to the parties to the Assumed Contracts the names of the Prospective Bidders together with their Adequate Assurance Package. The parties to the Assumed Contracts shall have until November 20, 2009 to file with the court and serve on (1) Debtor's counsel, (2) counsel for Mitchell, (3) counsel for each of the Prospective Bidders and (4) the Office of the United States Trustee any objection to the Adequate Assurance of Future Performance by Mitchell or any of the Prospective Bidders ("Adequate Assurance Objection"). If an Adequate Assurance Objection is timely filed, such objection shall be heard and resolved at a hearing immediately prior to the Auction (defined below). If the Court finds that any party has not provided adequate assurance of future performance, such party shall not be deemed a Qualified Bidder, and will not be qualified to bid on the Assets.~~

(d) Effect of Failure to Object. The failure of any person to file a timely objection shall bar the assertion at the Sale Hearing or thereafter of any objection to the Sale Motion and the Debtor's consummation and performance of the Agreement with Mitchell or any ~~Prospective Bidder~~

↳ bidder other than mitchell who wishes to become a Qualified Bidder ("Prospective Bidder")

(e) Modifications to the List of Assumed Contracts. The Debtor, at the request of Mitchell, may remove any contract from the list of Assumed Contracts at any time prior to the fifth business day prior to the Closing Date. Additional contracts may be added to the list of Assumed Contracts, provided that to the extent contracts are added following service of the Sale Motion and notice of hearing, assumption of any such contracts shall be requested by separate motion.

5. Alternative Bid Deadline. All alternative bids must be submitted to Debtor's counsel by hand delivery or electronic mail not later than 1 p.m. PT on November 23, 2009 (the "Alternative Bid Deadline"). Debtor shall immediately distribute a copy of each alternative bid received to Mitchell, Mitchell's counsel, each alternative bidder and their counsel.

6. Qualified Alternative Bid. An alternative bid will only be considered if the alternative bid is a "Qualified Alternative Bid." To be a Qualified Alternative Bid, the alternative bid must:

(a) Identify the party submitting the alternative bid and such party must be a "Qualified Bidder." A Qualified Bidder shall mean Mitchell and any other person (i) that the Debtor has determined in the exercise of its reasonable business judgment is financially able to consummate the purchase of the Assets if the Court enters an order approving such purchase and (ii) who can give adequate assurance of future performance of the Assumed Contracts through the procedure set forth above;

(b) Propose in writing a transaction that the Debtor determines, in good faith, is not materially more burdensome or conditional than the terms set forth in the Agreement, identifies the assets subject to the offer, provides the proposed closing date, and has a value that exceeds the Asset Purchase Price by \$250,000;

(c) Consist of an agreement in the form of the Agreement, marked to show changes thereto, that is when taken as a whole on terms and conditions no less favorable to Debtor than the terms and conditions contained in the Agreement, including but not limited to price, time of closing and additional financing through closing;

(d) Not be subject to termination by the Prospective Bidder except on the same terms as the Agreement;

(e) Include evidence acceptable to the Debtor of the Prospective Bidder's financial capabilities to fully consummate the purchase, including reference to the Adequate Assurance Package previously provided by the Prospective Bidder;

(f) Not be subject to any contingencies, including any financing, corporate approval or due diligence contingencies;

(g) Be accompanied by an initial deposit in the amount of \$250,000, which deposit is immediately refundable only if the Prospective Bidder is not selected to purchase the Assets; and

(h) Provide for payment in full of any debtor in possession financing at closing.

7. Auction, Bidding Increments and Bids Remaining Open

(a) If the Debtor receives at least one Qualified Alternative Bid, the Debtor shall conduct an auction (the "Auction") at the Sale Hearing. Only Mitchell and Qualified Bidders shall be allowed to make any additional bids ("Subsequent Bids") at the Auction. The Debtor may announce at the Auction procedural rules that are reasonable under the circumstances for conducting the Auction so long as such rules are not inconsistent with these Bidding Procedures.

(b) At the Auction, bidding shall begin with the highest Qualified Alternative Bid and continue in minimum increments of at least \$100,000 higher than the previous bid. Mitchell shall have the right but not the obligation to participate in the Auction. Mitchell shall have the right to match any overbid and to credit bid the "Break-Up Fee" (defined below) in the Auction.

(c) At the conclusion of the bidding, the Debtor shall announce its determination as to the Qualified Bidder submitting the successful bid, and shall seek approval of the Court for such bid at the Sale Hearing, or shall determine that it will not proceed with a sale, subject to the terms of the Agreement.

(d) If the Debtor does not receive any Qualified Alternative Bids, the Debtor will report the same to the Court and will proceed with the sale to Mitchell on the terms set forth in the Agreement at the Sale Hearing, unless the Debtor terminates the Agreement pursuant to its terms.

(e) Break-up Fee. If the Agreement is terminated for any reason, other than (i) if there has been a material breach by Mitchell of its representations and warranties or in the observance, or in the due and timely performance, of any of the covenants or agreements contained in the Agreement on Mitchell's part to be performed, and such breach shall not have been cured within ten (10) days after written notice thereof, (ii) a termination by Mitchell prior to approval of the Break-up Fee based on its dissatisfaction with its due diligence review of the business and assets to be purchased, or (iii) a termination by Mitchell based on a material adverse effect with respect to Mitchell, then the Debtor shall pay, or cause to be paid to Mitchell a "Break-up Fee" of \$100,000, plus out-of-pocket expenses of Mitchell (not to exceed an additional \$250,000). Such Break-up Fee shall be in addition to the return to Mitchell of its deposit. The obligation of the Debtor to pay the Break-up Fee to Mitchell shall: (a) be entitled to administrative expense claim status under Bankruptcy Code §§ 503(b)(1)(A) and 507(a)(2); (b) not be subordinate to any other administrative expense claim against the Seller, other than any superpriority claim granted under any debtor-in-possession order; (c) survive the termination of the Agreement; and (d) in the event of consummation of a sale to an alternate purchaser be satisfied from the proceeds of such sale. Any payment to Mitchell of a Break-up Fee shall constitute Mitchell's sole and exclusive remedy against the Debtor on account of the termination of the Agreement due to acceptance of a Qualified Alternative Bid.

8. Deposits shall be returned within two (2) days of Court approval of another party's bid.

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