

PROCEDURES RE: MOTIONS FOR SALE OF ALL OR SUBSTANTIALLY ALL ASSETS

Application. Except as otherwise provided in the Local Bankruptcy Rules (LBRs), these guidelines apply in chapter 11 cases to:

1. A motion to sell all or substantially all property of the estate under 11 U.S.C. (Bankruptcy Code) § 363(b) (a "Sale Motion"); and
2. A motion seeking approval of sale, bid or auction procedures in anticipation of or in conjunction with a Sale Motion ("Sale Procedures Motions").

These guidelines also may be applied to other motions to sell property of the estate under § 363(b) in chapter 11 cases.

Definitions. As used herein, the following terms shall have the following meanings:

1. "Highlight" means to provide text describing the existence, location and other required information concerning terms described in these guidelines, and/or color, bold type or similar treatment in the exhibits.
2. "Trustee" means the debtor in possession if a trustee has not been appointed. Other terms are defined in LBR 9001-1.

Sale Motions.

- A. Contents of Sale Motion. Except as otherwise provided in these guidelines, the LBRs, the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (FRBPs), or an order of the court, all Sale Motions must attach or include the following:
 - (1) A copy of the proposed purchase agreement, or a form of the agreement substantially similar to the one the trustee reasonably believes it will execute in connection with the proposed sale. If there is no proposed purchase agreement, a copy of the term sheet must be attached, and parties must be given sufficient time to review and object to the terms of the purchase agreement once it has been finalized.
 - (2) A copy of a proposed form of sale order.
 - (3) A request, if necessary, for the appointment of a consumer privacy ombudsman under § 332.
 - (4) The reason and necessity for a sale of all or substantially all the assets prior to or in lieu of confirmation of a plan and the benefits to the estate and the creditors from the sale.
- B. Provisions to be Highlighted. Any provisions of the type set forth below must

comply with the requirements set forth therein. In addition, the Sale Motion must highlight material terms, including but not limited to whether the proposed form of sale order or underlying purchase agreement contains any provision of the type set forth below, and if so, the location of that provision in the proposed form of order or purchase agreement and the justification for its inclusion.

- (1) Purchase Price. The Sale Motion must identify the purchase price or the method by which the purchase price shall be ascertained.
- (2) Sale to Insider. If the proposed sale is to an insider, as defined in § 101(31), or to an entity in which an insider holds or has a right to acquire an equity or other ownership interest, the Sale Motion must (a) identify the insider, (b) describe the insider's relationship to the debtor, and (c) set forth any measures taken to ensure the fairness of the sale process and the proposed transaction, such as an auction, advertisement, or other measures allowing access to competing purchasers.
- (3) Agreements with Insiders or Management. If the proposed buyer has entered into any agreement with an insider of the debtor or with an executive or other key employee of the debtor regarding compensation or future employment, or if the proposed buyer has engaged in discussions or intends to engage in discussions regarding an agreement, the Sale Motion must disclose (a) the identity of each insider or key employee who is the subject of any of those discussions, (b) the material terms of any agreement or contemplated agreement, and (c) the measures that have been taken to ensure the fairness of the sale and the proposed transaction in the light of that agreement or contemplated agreement. If discussions are held or an agreement is entered into after the filing of but before the hearing on the Sale Motion, the trustee must disclose the same at or before the hearing on the Sale Motion.
- (4) Sales Free and Clear. The Sale Motion must disclose whether the sale will be free and clear of liens and other interests, and if so, disclose the identity of each party that has a lien on or interest in the property to be sold and the nature of that interest, the total amount of the claims secured by liens on the property, and the subsections of §363(f) that permit the property to be sold free and clear of those interests. As used herein, "interest" includes any interest that is not a lien, for example a possessory leasehold interest, license or other right.
- (5) Assumption, Assignment and Rejection of Executory Contracts and Unexpired Leases. The Sale Motion must disclose the trustee's intentions regarding the assumption, assignment and rejection of executory contracts and unexpired leases to which the debtor is a party and which are part of the sale. The Sale Motion must either seek appropriate relief under § 365 with regard to those contracts and leases or be accompanied by one or more separate motions seeking that relief.

- (6) Releases and Insider Benefits. The Sale Motion must highlight any provisions pursuant to which (a) any claim against an entity is to be waived or released, or (b) any insider of the debtor or any executive or other key employee of the debtor is to receive any economic benefit, directly or indirectly.
- (7) Private Sale; No Competitive Bidding. The Sale Motion must disclose whether an auction is contemplated and, if so, must include a summary of the sale procedures. The Sale Motion must disclose whether the proposed purchaser has met all the bid requirements that competing bidders must meet, and, if not, why this provision should not apply to the proposed purchaser, and highlight any provision in which the trustee has agreed not to solicit competing offers for the property or to otherwise limit shopping of the property.
- (8) Closing, Other Deadlines and Contingencies. The Sale Motion must highlight any deadlines for the closing of the proposed sale or deadlines that are conditions to closing the proposed transaction, and any contingencies to either party's obligation to close the proposed transaction.
- (9) Good Faith Deposit. The Sale Motion must highlight whether the proposed purchaser or any competing bidder has submitted or will be required to submit a good faith deposit and, if so, the conditions under which the deposit may be forfeited.
- (10) Interim Arrangements with Proposed Buyer. The Sale Motion must highlight any provision pursuant to which a debtor is entering into any interim agreements or arrangements with the proposed purchaser, such as interim management arrangements (which, if out of the ordinary course, also must be subject to notice and a hearing under § 363(b)) and the terms of those agreements.
- (11) Use of Proceeds. The Sale Motion must highlight any provision pursuant to which a debtor proposes to release sale proceeds on or after the closing without further court order, or to provide for a definitive allocation of sale proceeds between or among various sellers or collateral.
- (12) Record Retention. The Sale Motion must identify what access the trustee will have to the debtor's books and records to enable the trustee to administer the bankruptcy case.
- (13) Sale of Avoidance Actions. The Sale Motion must highlight any provision pursuant to which the trustee seeks to sell or otherwise limit its rights to pursue avoidance claims under chapter 5 of the Bankruptcy Code.
- (14) Requested Findings as to Successor Liability. The Sale Motion must highlight

any provision limiting the proposed purchaser's successor liability.

- (15) Credit Bid. The Sale Motion must highlight any provision by which the trustee seeks to limit credit bidding under § 363(k).
- (16) Standard for Approval. The Sale Motion must state under what standard of approval the trustee is seeking approval of the Sale Motion, whether it be the "business judgment" standard, "best interests of the estate" standard, or other standard.
- (17) Relief from FRBP 6004(h). The Sale Motion must highlight any request for relief from the 14-day stay imposed by FRBP 6004(h) and the justification for the request.
- (18) Solicitation Process. The Sale Motion must identify to whom notice has been given or will be given and the efforts, if any, that have been or will be taken to publicize the sale to the debtor's competitors or other possible bidders.

Notice of Sale. Any party filing a Sale Motion must provide notice of the sale pursuant to either [Local Bankruptcy Form \(LBF\) 760.5](#) or a notice that includes the requirements of LBR 2002-1(b)(3).

Sale Procedures Motions. A trustee may file a Sale Procedures Motion seeking approval of an order (a "Sale Procedures Order") either as part of the Sale Motion or by a separate motion filed in anticipation of an auction and a proposed sale.

A. Provisions to be Highlighted. Any proposed Sale Procedures Order filed in conjunction with a Sale Procedures Motion must highlight the following provisions:

- (1) Provisions Governing Qualification of Bidders. Any provision governing an entity's right to become a qualified bidder or defining what constitutes a qualified bidder, including but not limited to, an entity's obligation to:
 - (A) Deliver financial information by a stated deadline to the trustee and other key parties (ordinarily excluding other bidders).
 - (B) Demonstrate its financial wherewithal to consummate a sale.
 - (C) Maintain the confidentiality of information obtained from the trustee or other parties or execute a non-disclosure agreement.
 - (D) Make a non-binding expression of interest or execute a binding agreement.
- (2) Provisions Governing Qualified Bids. Any provision governing the nature, scope or quality of a bid or proposal, including, but not limited to:

- (A) Any deadlines for submitting a bid and the ability of a bidder to modify a bid not deemed a qualified bid.
 - (B) Any requirements regarding the form of a bid, including whether a qualified bid must (a) be marked against the form of a “stalking horse” agreement or a template of the debtor's preferred sale terms, showing amendments and other modifications (including price and other terms), (b) be for all of the same assets or may be for less than all of the assets proposed to be acquired by an initial, or “stalking horse,” bidder or (c) remain open for a specified period of time.
 - (C) Any requirement that a bid include a good faith deposit, the amount of that deposit, and under what conditions the good faith deposit is not refundable.
 - (D) Any other conditions for a bid to be considered a qualified bid or to permit a qualified bidder to bid at an auction.
 - (E) Whether the proposed purchaser has satisfied or is required to satisfy the above terms.
- (3) Provisions Providing Bid Protections to "Stalking Horse" Bidder. Any provisions providing an initial or "stalking horse" bidder a form of bid protection, including, but not limited to the following:
- (A) No-Shop or No-Solicitation Provisions. Any limitations on the ability or right of the trustee or any official committee to solicit higher or otherwise better bids.
 - (B) Break-Up/Topping Fees and Expense Reimbursement. Any agreement to provide or seek an order authorizing a break-up or topping fee and/or expense reimbursement, and the terms and conditions under which any of those fees or that expense reimbursement would be paid. The court will not normally approve the following provisions:
 - i. Approval of a breakup or topping fee in excess of the reasonable expenses actually incurred by the proposed purchaser in connection with the sale.
 - ii. The payment of a breakup or topping fee unless all professional reports (other than those subject to an applicable privilege, including information or reports prepared by attorneys), including but not limited to environmental reports, appraisals and title reports, are made available to all other potential bidders prior to the bid deadline.

- (C) Bidding Increments. Any requirement regarding the amount of the initial overbid and any successive bidding increments.
 - (D) Treatment of Break-Up and Topping Fees and Expense Reimbursement at Auction. Any requirement that the “stalking horse” bidder receive a credit equal to the break-up or topping fee and/or expense reimbursement when bidding at the auction.
- (4) Due Diligence Period. Any provision that sets forth the time that competing bidders have to conduct due diligence and the requirements and method for obtaining access to the estate's records.
 - (5) Modification of Bidding and Auction Procedures. Any provision that would authorize the trustee, without further order of the court, to modify any procedures regarding bidding or conducting an auction.
 - (6) Closing with Alternative Backup Bidders. Any provision that would authorize the trustee to accept and close on alternative qualified bids received at an auction if the bidder selected as the successful bidder at the conclusion of the auction fails to close the transaction within a specified period.
- B. Provisions Governing the Auction. Unless otherwise ordered by the court, the Sale Procedures Order shall:
- (1) Specify the date, time and place at which the auction will be conducted, and the method for providing notice to parties of any changes thereto.
 - (2) Provide that each bidder participating at the auction will be required to disclose, at or before the auction, (1) whether the bidder is bidding on its own behalf, on behalf of others, or on behalf of itself and others, (2) if the bidder is bidding other than on its own behalf, the identity of each entity on whose behalf the bidder is acting, and (3) whether the bidder is a party to any agreement limiting the bidders at the auction.
 - (3) State that the auction will be conducted openly and that all creditors will be permitted to attend.
 - (4) Provide that a record of bidding at the auction will be made.