UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Adoption of Sale Guidelines Administrative Order No. 557

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UPON the resolution of the Board of Judges for the United States Bankruptcy Court for the Eastern District of New York, it is hereby

ORDERED, that the annexed Sale Guidelines are adopted.

Dated: Brooklyn, NY
March 29, 2010

/s/Carla E. Craig
CARLA E. CRAIG
Chief United States Bankruptcy Judge

SALE GUIDELINES

The United States Bankruptcy Court for the Eastern District of New York (the "**Court**") has adopted the following guidelines (the "**Sale Guidelines**") for the conduct of asset sales under section 363(b) of 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**"). The Sale Guidelines are designed to: (a) help practitioners identify issues that typically are of concern to parties and the Court, so that, among other things, determinations can be made, if necessary, on an expedited basis, (b) highlight certain Extraordinary Provisions, defined below, which ordinarily will not be approved without good cause shown and (c) set forth best practices with respect to notice.

The Sale Guidelines do not: (a) address the circumstances under which an asset sale is appropriate (b) address other substantive legal issues or (c) constitute rules of the Court.

The Sale Guidelines supplement but do not replace, sections 363(b) and 365 of the Bankruptcy Code, Rules 2002 and 6004 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and Rules 6004-1 and 6005-1 of the Local Bankruptcy Rules for the Eastern District of New York (the "**Local Rules**").

1. Motions

(a) Motion Content – When an auction is contemplated in cases filed under chapter 11 and where appropriate under other chapters, the Debtor[1] should ordinarily file a single motion seeking the entry of two orders to be considered at two separate hearings. The first order (the "**Sale Procedures Order**") will approve procedures for the sale process, including any protections for an initial, or stalking horse bidder ("**stalking horse**"), and the second order (the "**Sale Order**") will approve the sale to the successful bidder at the auction. If no auction is contemplated or the Debtor has not actively solicited or will not actively solicit higher and better offers, the motion seeking approval of the sale should explain why the Debtor proposes to structure the sale in such manner.

(i) The proposed purchase agreement, or a form of proposed agreement acceptable to the Debtor if the Debtor has not yet entered into an agreement with a proposed buyer, should be attached to the motion.

(ii) The motion also should include a copy of the proposed order(s), particularly if the order(s) include any Extraordinary Provisions, defined below.

(iii) The motion must comply in form with the Local Rules.

(iv) If a hearing is required under section 363(b) of the Bankruptcy Code in connection with the sale of personally identifiable information subject to a privacy policy of the Debtor, the motion should request appointment of a

[1] The term "Debtor" includes "debtor in possession" and "trustee," as appropriate under the particular circumstances.

consumer privacy ombudsman under section 332 of the Bankruptcy Code if the proposed sale does not fall under section 363(b)(1)(A) of the Bankruptcy Code.

(b) Bidding Procedures – Generally, a Sale Procedures Order should include a motion for proposed bidding procedures which are in the Debtor's reasonable business judgment, likely to maximize the sale price. Such procedures must not chill the receipt of higher and better offers and must be consistent with the Debtor's fiduciary duties. It is recommended that such procedures include the following:[2]

(i) Qualification of Bidders – An entity that is seeking to become a qualified bidder will deliver financial information by a stated deadline to the Debtor and other key parties (ordinarily excluding other bidders)[3] reasonably demonstrating such bidder's ability to consummate a sale on the terms proposed. Such financial information, which may be provided confidentially, if appropriate, may include current audited or verified financial statements of, or verified financial commitments obtained by, the potential bidder (or, if the potential bidder is an entity formed for the purpose of acquiring the property to be sold, the party that will bear liability for a breach). To be qualified, a prospective bidder also may be required by a stated deadline to make a non-binding expression of interest and execute a reasonable form of non-disclosure agreement before being provided due diligence access to non-public information.

(ii) Qualification of Bids Prior to Auction

(1) The bidding procedures should state the criteria for a qualifying bid and any deadlines for (i) submitting such a bid and (ii) notification whether the bid constitutes a qualifying bid.

(2) The bidding procedures may require each qualified bid to be marked against the form of a stalking horse agreement or a form of proposed agreement, showing amendments and other modifications (including price and other terms) proposed by the qualified bidder. The bidding procedures may limit bidding to the terms of a stalking horse agreement or proposed form of agreement; provided, however, that, bidding on less than all of the assets proposed to be acquired by a stalking

[2] When multiple asset sales over time are expected, the Debtor may consider seeking Court approval of global bidding procedures to avoid the need to obtain Court approval of procedures for each such sale. Similarly, the Debtor may consider seeking Court approval of global notice and other appropriate procedures to facilitate sales of assets of limited value or *de minimis* sales that do not warrant an auction or a separate motion for each sale. What constitutes a *de minimis* sale will depend on the facts of each case.

[3] It is expected that the Debtor will also share its evaluation of bids with key parties-in-interest, such as representatives of official committees, and that it will in its reasonable judgment identify the winning bidder only after consultation with such parties.

horse normally should be permitted, unless such bidding is inconsistent with the purpose of the sale.

(3) A qualified bid should clearly identify all conditions to the qualified bidder's obligation to consummate the purchase.

(4) A qualified bid should include a good faith deposit, which will be non-refundable if the bidder is selected as the successful bidder and fails to consummate the purchase (other than as a result of a breach by the seller) and refundable if it is not selected as the successful bidder (other than as a result of its own breach). The amount of, and rules governing, the good faith deposit will be determined on a case-by-case basis, but generally each qualified bidder, including any stalking horse should be required to make the same form of deposit.

(iii) Backup Buyer – The Sale Procedures Order may provide that the Debtor in the reasonable exercise of its judgment may accept and close on the second highest qualified bid received if the winning bidder fails to close the transaction within a specified period. In such case, the Debtor would retain the second highest bidder's good faith deposit until such bidder was relieved of its obligation to be a backup buyer.

(iv) Stalking Horse Protections/Bidding Increments

(1) Break-Up/Topping Fees and Expense Reimbursement – The propriety of any break-up or topping fees and other bidding protections (such as the estate's proposed payment of out-of-pocket expenses incurred by a bidder in connection with the proposed transaction or the compensation of a bidder for lost opportunity costs) will be determined on a case-by-case basis. Generally such fees should be payable only from the proceeds of a higher or better transaction entered into with a third party within a reasonable time of the closing of the sale. Such provisions must be prominently disclosed and described with particularity in the motion.

(2) Bidding Increments – If a proposed sale contemplates the granting of a break-up or topping fee or expense reimbursement, the initial bidding increment must be more than sufficient to pay the maximum amount payable thereunder. Additional bidding increments should be appropriate in light of the value of the asset being sold and should not be so high as to chill further bids.

(3) Rebidding – If a break-up or topping fee is requested, the Sale Procedures Order should state whether the stalking horse will be deemed to waive the break-up or topping fee by rebidding. In the absence of a waiver, the Sales Procedure Order should state whether the stalking horse will receive a "credit" equal to the break-up or topping fee if the

stalking horse is the successful bidder at a higher price than the stalking horse's initial bid.

(4) No-Shop or No-Solicitation Provisions – Limited no-shop or no-solicitation provisions may be permissible if they are necessary to obtain a sale, they are consistent with the Debtor's fiduciary duties, they do not chill the receipt of higher or better offers and they are appropriate under the circumstances of the case. Such provisions must be prominently disclosed in the motion and described with particularity.

(v) Auction Procedures

(1) If an auction is proposed, the Sale Procedures Order generally should provide that the auction will be conducted in the presence of all qualified bidders and other interested parties, and that each bidder will be informed of the terms of the previous bid. The motion should explain the rationale for proposing a different auction format in the Sale Procedures Order.

(2) If a professional auctioneer will conduct the auction, the parties should refer to the statutory provisions and rules governing the conduct of professional auctioneers. *See* Bankruptcy Rule 6004 and Local Rules 6004-1 and 6005-1.

(3) If the auction is sufficiently complex or disputes can reasonably be expected to arise, it is advisable at the sale procedures hearing to ask the Court whether it will consider conducting the auction in open court, or otherwise be available to resolve disputes. If the Debtor proposes to conduct the auction outside the presence of the judge, the auction proceedings should be audiotaped, videotaped or otherwise recorded, or the motion should explain why this is not appropriate.

(4) Each bidder is expected to confirm at the auction that it has not engaged in any collusion with respect to the bidding or the sale.

(5) The Sale Procedures Order should provide that the Court will not consider bids made after the auction has been closed, unless a motion to reopen the auction is made and granted.

(c) Sale Hearing – The evidence presented or proffered at any sale hearing should be sufficient to enable the Court to make the following findings: (1) a sound business reason exists for the transaction; (2) the property has been adequately marketed, and the purchase price constitutes the highest or otherwise best offer and provides fair and reasonable consideration; (3) the proposed transaction is in the best interests of the Debtor's estate, its creditors, and where relevant, its interest holders; (4) the purchaser has acted in good faith, within the meaning of section 363(m) of the Bankruptcy Code;

(5) adequate and reasonable notice has been provided; (6) the "free and clear" requirements of section 363(f) of the Bankruptcy Code, if applicable, have been met; (7) if applicable, the sale is consistent with the Debtor's privacy policy concerning personally identifiable information, or, after appointment of a consumer ombudsman in accordance with section 332 of the Bankruptcy Code and notice and a hearing, no showing was made that such sale would violate applicable nonbankruptcy law; (8) the requirements of section 365 of the Bankruptcy Code have been met in respect of the proposed assumption and assignment or rejection of any executory contracts and unexpired leases; (9) where necessary, the Debtor's board of directors or other governing body has authorized the proposed transaction; and (10) the Debtor and the purchaser have entered into the transaction without collusion, in good faith, and from arm's-length bargaining positions, and neither party has engaged in any conduct that would cause or permit the agreement to be avoided under section 363(n) of the Bankruptcy Code.

(i) Sound Business Purpose – The Debtor must demonstrate the facts that support a finding that a sound business reason exists for the sale.

(ii) Marketing Efforts – The Debtor must demonstrate the facts that support a finding that the property to be sold has been marketed adequately under the circumstances.

(iii) Purchase Price – The Debtor must demonstrate that fair and reasonable value will be received and that the proffered purchase price is the highest or best under the circumstances. If a bid includes deferred payments or any equity component, the Debtor should present evidence concerning, as applicable, its assessment of the proposed buyer's creditworthiness or ability to realize the projected earnings upon which future payments or other forms of consideration to the estate are based. Any material purchase price adjustment provisions should be identified.

(iv) Assumption and Assignment of Contracts and Leases – the Debtor must demonstrate at a minimum: (a) that it or the assignee has cured or will promptly cure all existing defaults under the agreement(s), and (b) that the assignee can provide adequate assurance that it will perform under the terms of the agreement(s) to be assumed and assigned under section 365 of the Bankruptcy Code. Additional notice and opportunity for a hearing for the non-debtor party to the lease or executory contract may be required if the offer to purchase a lease or executory contract sought to be approved at the sale hearing is submitted by a different entity than the stalking horse or the winning bid identifies different contracts or leases for assumption and assignment, or rejection, than the initial bid that was noticed for approval. If this possibility exists, the sale motion should acknowledge the Debtor will provide additional notice and opportunity to object under such circumstances.

(d) Extraordinary Provisions – The following provisions ("**Extraordinary Provisions**") must be disclosed conspicuously in a separate section of the sale motion

and, where applicable, in the related proposed Sale Procedures Order or Sale Order, and the motion must provide substantial justification therefor:[4]

(i) Sale to Insider – If the motion proposes a sale to an insider, as defined in the Bankruptcy Code, the motion must disclose what measures have been taken to ensure the fairness of the sale process and the proposed transaction.

(ii) Agreements with Management – If the proposed buyer has discussed or entered into any agreements with management or key employees regarding compensation or future employment, the motion must disclose the material terms of any such agreements, and what measures have been taken to ensure the fairness of the sale and the proposed transaction in the light of any such agreements.

(iii) Private Sale/No Competitive Bidding – If no auction is contemplated, the Debtor has agreed to a limited no-shop or no-solicitation provision, or the Debtor has otherwise not sought or is not actively seeking higher or better offers, the sale motion must so state and explain why such sale is likely to maximize the sale price.

(iv) Deadlines that Effectively Limit Notice – If the proposed transaction includes deadlines for the closing or Court approval of the Sale Procedures Order or the Sale Order that have the effect of limiting notice to less than outlined in 2, below, the sale motion must provide an explanation.

(v) No Good Faith Deposit – If any qualified bidder, including a stalking horse, is excused from submitting a good faith deposit, the sale motion must provide an explanation.

(vi) Interim Arrangements with Proposed Buyer – If the Debtor is entering into any interim agreements or arrangements with the proposed purchaser, such as interim management arrangements (for which, approval, must also be sought after notice and a hearing under section 363(b) of the Bankruptcy Code), the sale motion must disclose the terms of such agreements.

(vii) Use of Proceeds – If the Debtor proposes to release sale proceeds on or after the closing without further Court order, or to provide for an allocation of sale proceeds between or among various sellers or secured creditors, the sale motion must describe the intended disposition of such amounts and the rationale therefor.

(viii) Tax Exemption – If the Debtor is seeking to have the sale declared exempt from taxes under section 1146(a) of the Bankruptcy Code, the sale motion

[4] The fact that a similar provision was included in an order entered in a different case does not constitute a justification.

must prominently disclose the type of tax (e.g., recording tax, stamp tax, use tax, capital gains tax) for which the exemption is sought. It is not sufficient to refer simply to "transfer" taxes. In addition, the Debtor must identify the state or states in which the affected property is located.

(ix) Record Retention – If the Debtor proposes to sell substantially all of its assets, the sale motion must confirm that the Debtor will retain, or have reasonable access to, its books and records to enable it to administer its bankruptcy case.

(x) Sale of Avoidance Actions – If the Debtor seeks to sell its rights to pursue avoidance claims under chapter 5 of the Bankruptcy Code, the sale motion must so state and provide an explanation of the basis therefor.

(xi) Requested Findings as to Successor Liability – If the Debtor seeks findings limiting the purchaser's successor liability, the sale motion must disclose the adequacy of the Debtor's proposed notice of such requested relief and the basis for such relief. Generally, the proposed Sale Order should not contain voluminous findings with respect to successor liability, or injunctive provisions, except as provided in 3, below.

(xii) Future Conduct – If the Debtor seeks a determination regarding the effect of conduct or actions that may or will be taken after the date of the Sale Order, the sale motion must set forth the legal authority for such a determination.

(xiii) Requested Findings as to Fraudulent Conveyance – If the Debtor seeks a finding to the effect that the sale does not constitute a fraudulent conveyance, it must explain why a finding that the purchase price is fair and reasonable is not sufficient.

(xiv) Sale Free and Clear of Unexpired Leases – If the Debtor seeks to sell property free and clear of a possessory leasehold interest, license or other right, the Debtor must identify the non-debtor parties whose interests will be affected, and explain what adequate protection will be provided for those interests.

(xv) Relief from Bankruptcy Rule 6004(h) – If the Debtor seeks relief from the stay imposed by Bankruptcy Rule 6004(h), the sale motion must disclose the business or other basis for such request.

2. Notice

(a) General – Notice is always required under section 363(b) of the Bankruptcy Code; however, a hearing is required only if there are timely objections or the Court otherwise schedules a hearing.

(b) Notice of Proposed Sale Procedures

(i) Notice Parties – Notice may be limited to those parties-in-interest best situated to articulate an objection to the limited relief sought at this stage, including:

(1) any official or unofficial creditors' committee or other committee, or if no creditors' committee exists, the 20 largest unsecured creditors;

(2) office of the United States Trustee;

(3) postpetition lenders (or administrative agent thereof, if any);

(4) indenture trustees;

(5) prepetition lenders (or administrative agent thereof, if any);

(6) all entities who have requested notice under Bankruptcy Rule 2002;

(7) entities known or reasonably believed to have asserted a lien, encumbrance, claim or other interest in any of the assets offered for sale; and

(8) parties to executory contracts and unexpired leases proposed to be assumed and assigned, or rejected as part of the proposed transaction.

To provide additional marketing of the assets, the Debtor also should send a copy of the motion to entities known or reasonably believed to have expressed an interest in acquiring any of the assets offered for sale. Nothing herein is meant to imply that prospective bidders have standing to be heard with respect to the sale procedures.

(c) Notice Period – As a general matter, the minimum 21-day notice period set forth in Bankruptcy Rule 2002(a) may be shortened with respect to the request for approval of a proposed Sale Procedures Order, that does not involve Extraordinary Provisions, and complies with these Sale Guidelines. The 14-day notice period provided for in EDNY LBR 9006-1(a) should provide sufficient time, under most circumstances, to enable any parties-in-interest to file an objection to proposed sale procedures.

(d) Contents of Notice – Notice should comport with Bankruptcy Rules 2002 and 6004.

3. Notice of Sale

(a) Notice Parties – Generally the sale and hearing to approve the sale requires more notice than the hearing on approval of sale procedures. Notice of the sale and of the hearing to approve the sale should ordinarily be given to:[5]

(i) official and unofficial creditors' committee and other committees;

(ii) office of the United States Trustee;

(iii) entities who have requested notice under Bankruptcy Rule 2002[6] (and, if the proposed sale is of a significant portion of the Debtor's assets, all creditors of the Debtor);

(iv) postpetition lenders (or administrative agent thereof, if any);

(v) indenture trustees;

(vi) prepetition lenders (or administrative agent thereof, if any);

(vii) entities known or reasonably believed to have asserted a lien, encumbrance, claim or other interest in any of the assets offered for sale;

(viii) parties to executory contracts or unexpired leases to be assumed and assigned, or rejected as part of the transaction;

(ix) affected federal, state and local regulatory (including, for example, environmental agencies) and taxing authorities,[7] including the Internal Revenue Service;

(x) if applicable, a consumer privacy ombudsman appointed under section 332 of the Bankruptcy Code; and

(xi) the Securities and Exchange Commission (if appropriate).

If the contemplated sale implicates the antitrust laws of the United States, or a debt (other than for taxes) is owed by the Debtor to the United States government, notice also should be given to:

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[5] In larger cases, a sale of significant assets may also require notice of the proposed sale in publications of national circulation or other appropriate publications.

[6] In the case of publicly traded debt securities, notice to indenture trustees and record holders may be sufficient to the extent that the identity of beneficial holders is not known.

[7] Notice must be given to applicable taxing authorities, including the state attorney general or other appropriate legal officer, affected by the relief requested under section 1146(a) of the Bankruptcy Code.

(xii) the Federal Trade Commission;

(xiii) the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice; and

(xiv) the United States Attorney's Office.

To provide additional marketing of the assets, notice also should be sent to any entities known or reasonably believed to have expressed an interest in acquiring any of the assets.

See 1(c)(4), above, for circumstances in which it may be required, based on changes in the proposed transaction that had originally been noticed, to give additional notice to parties to executory contracts and unexpired leases proposed to be assumed and assigned or rejected under section 365 of the Bankruptcy Code.

(b) Notice Period – The statutory 21-day notice period should not be shortened for notice of the actual sale without a showing of good cause. The service of a prior notice or order, that discloses an intention to conduct a sale but does not state a specific sale date, does not affect the 21-day notice period.

(c) Contents of Notice – Proper notice should comport with Bankruptcy Rules 2002 and 6004 and should include:

(i) the Sale Procedures Order (including the date, time and place of any auction, the bidding procedures related thereto, the objection deadline for the sale motion and the date and time of the sale hearing);

(ii) reasonably specific identification of the assets to be sold, and instructions for promptly obtaining a bid package or any other detailed information being made available to prospective bidders;

(iii) the proposed form of asset purchase agreement, or instructions for promptly obtaining a copy;

(iv) if appropriate, representations describing the sale as being free and clear of liens, claims, interests and other encumbrances (other than any claims and defenses of a consumer under any consumer credit transaction that is subject to the Truth in Lending Act or a consumer credit contract (as defined in 16 C.F.R. § 433.1, as amended), with all such liens, claims, interests and other encumbrances attaching with the same validity and priority to the sale proceeds;

(v) any commitment by the buyer to assume liabilities of the Debtor; and

(vi) notice of proposed cure amounts and the right and deadline to object thereto and otherwise to object to the proposed assumption and assignment, or rejection of executory contracts and unexpired leases (*see* 1(c)(4), above, for additional notice that the Debtor may need to acknowledge may be required).[8]

4. Sale Order

In the typical case, the findings in a proposed Sale Order should be limited to those set out in 1(c), above, tailored to the particular case. The decretal paragraphs should also be limited, and if more than one decretal paragraph deals with the same subject matter or form of relief, the proponent of the Sale Order should explain the reason. Finally, if the order contains a decretal paragraph that approves the purchase agreement or authorizes the Debtor to execute the purchase agreement, it should not also contain separate decretal paragraphs that approve specific provisions of the purchase agreement or declare their legal effect.

With these admonitions, the Court may enter a Sale Order containing the following, if substantiated through evidence presented or proffered at the sale hearing:

(a) Approval of Sale and Purchase Agreement – The order should authorize the Debtor to (1) execute the purchase agreement, along with any additional instruments or documents that may be necessary to implement the purchase agreement, provided that such additional documents do not materially change its terms; (2) consummate the sale in accordance with the terms and conditions of the purchase agreement and the instruments and agreements contemplated thereby; and (3) take all further actions as may reasonably be requested by the purchaser for the purpose of transferring the assets.[9]

(b) Transfer of Assets – The order may provide that the assets will be transferred free and clear of all liens, claims, encumbrances and interests, other than any claims and defenses of a consumer under any consumer credit transaction subject to the Truth in Lending Act or a consumer credit contract, as defined in 16 C.F.R. § 433.1 (and as may be amended), with all such interests attaching to the sale proceeds with the same validity and priority, and the same defenses, as existed immediately prior to the sale,[10]

[8] This notice may be provided in a separate schedule sent only to the parties to such agreements.

[9] Each and every federal, state and local government agency or department may be directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the purchase agreement.

[10] If any person or entity that has filed financing statements, mortgages, mechanic's liens, *lis pendens*, or other documents evidencing interests in the assets has not delivered to the Debtor prior to the closing date termination statements, instruments of satisfaction, and/or releases of all such interests, the Debtor may be authorized and directed to execute and file such statements, instruments, releases and other documents on behalf of such person or entity.

The Debtor should try to anticipate whether there are any allocation issues presented by the proposed "free and clear" relief.

and persons and entities holding any such interests will be enjoined from asserting such interests against the purchaser, its successors or assigns, or the purchased assets, unless the purchaser has otherwise agreed.

(c) Assumption and Assignment of Executory Contracts and Leases to Purchaser – The Debtor will be authorized and directed to assume and assign to the purchaser executory contracts and leases free and clear of all liens, claims, encumbrances and interests, with all such interests attaching to the sale proceeds with the same validity and priority as they had in the assets being sold (provided, however, that in certain circumstances additional notice may be required before assumption and assignment or rejection of executory contracts and leases can be granted. *See* 1(c)(4), above).

(d) Statutory Provisions – The proposed order should specify those sections of the Bankruptcy Code and Bankruptcy Rules that are being relied on, and identify those sections, such as Bankruptcy Rule 6004(h), that are, to the extent permitted by law, proposed to be limited or abridged.

(e) Good Faith/No Collusion – The transaction has been proposed and entered into by the Debtor and the purchaser without collusion, from arm's-length bargaining positions, and in good faith within the meaning of section 363(m) of the Bankruptcy Code. The proposed Sale Order should also specify that neither the Debtor nor the purchaser has engaged in any conduct that would cause or permit the transaction to be avoided under section 363(n) of the Bankruptcy Code.