Educational Materials

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Creative Ways to Increase the Pot and Manage Your Odds in Bankruptcy Sales

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Creative Ways to Increase the Pot and Manage Your Odds in Bankruptcy Sales

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PART A

Creative Ways To Increase The Pot and Manage Your Odds In Bankruptcy Sales

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I. Overview of Section 363 Sales

The sale of estate property is an integral part of the bankruptcy process. While some asset sales are simple and easily generate proceeds for the estate, the sale of certain assets and circumstances may present a challenge to the trustee.[1] The nature of the property—think a crate of bananas—may require an expeditious sale before the value declines substantially. Unique assets may not have a ready market and finding interested purchasers may prove difficult. On the other end of the spectrum, numerous potential buyers may emerge for certain assets, which can become both a blessing and curse if disputes arise among the suitors. An asset encumbered by liens that appear to exceed the value presents a special challenge to find value for the estate.

In addition to these practical issues, a number of procedural hurdles exist. A trustee must provide the appropriate parties reasonable notice of the proposed sale and opportunity to object. Courts will require evidence that the trustee exposed the assets to the market and that the proposed sale is the highest and best offer. Creditors with liens on the assets and other interested parties may challenge the proposed sale and attempt to delay court approval to increase the sale price or to increase their leverage in negotiations over the distribution of the sale proceeds or other aspects of the case. Governmental bodies may oppose a proposed sale in order to protect a public interest. All of these factors require the trustee to maximize the return to the estate by strategically managing the process to minimize the costs and time incurred to realize the value. With careful planning and the utilization of appropriate legal and technological tools, trustees may achieve these goals.

The Bankruptcy Code and Federal Rules of Bankruptcy Procedure set forth the procedures that enable a trustee to sell property of the estate outside the ordinary course of the debtor's business. The trustee may sell estate assets after notice and a hearing. 11 U.S.C. § 363(b)(1). The court may authorize the sale without conducting a hearing if notice is properly given and a party in interest does not timely request a hearing or if there is insufficient time for the court to commence a hearing before the sale must be done and the court authorizes the sale. 11 U.S.C. § 102(1)(B); *In re Barfield*, 2015 WL 1815430, *4 (Bankr. C.D. Ill. 2015) (even when an act "must be done" by reason of some exigent circumstance before a hearing can be held, express court approval is still required before a trustee may proceed).

Unless the court orders otherwise, 21 days' notice of a proposed sale must be provided to the debtor, the trustee, the United States Trustee, all committees all creditors and indenture trustees. The notice shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed sale of personally identifiable information (PII) shall state whether the sale is consistent with any policy prohibiting the transfer of the information. Fed. R. Bankr. P. 2002(a)(2), (c)(1), (i), and (k) and 6004(a). In addition to the Federal Rules, some bankruptcy courts have established local rules that govern asset sales. *See, e.g.*, District of Oregon LBR 6004-1(c) (sales of all or substantially all assets in a chapter 11 case and any related sale procedures motion must comply with certain guidelines as to the form and the contents of the motion; Texas Uniform Rules for Complex

[1] Unless stated otherwise, references to the powers and duties of a trustee also include a debtor-in-possession. A debtor-in-possession has the same rights and powers and shall perform all the same functions and duties of a trustee under chapter 11. *See* 11 U.S.C. § 1107(a).

Chapter 11 Cases, Exhibit I ("Guidelines for Early Disposition of Assets in Chapter 11 Cases, the Sale of Substantially All Assets Under Section 363, and Overbid and Topping Fees"); District of Delaware LBR 6004-1 (requiring the highlighting of various provisions in the sale and procedures motions).

The trustee may sell property free and clear of any interest in the property upon the satisfaction of at least one of the following five conditions:

> (1) Applicable non-bankruptcy law permits sale of such property free and clear of the interest;
>
> (2) The entity holding the interest consents;
>
> (3) The interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) The interest is in bona fide dispute; or
>
> (5) The entity holding the interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. §363(f)(1) – (5).

A motion for authority to sell property free and clear of liens or other interests constitutes a contested matter under Bankruptcy Rule 9014, and the trustee must serve the motion (and not just the notice) on the parties who have liens or other interests in the property. Fed. R. Bankr. P. 6004(c). As a contested matter, the motion must be served in the same manner as a summons and complaint. Fed. R. Bankr. P. 9014(b).

II. Key Players in Asset Sales

Some asset sales involve very few parties. When the sale involves an on-going business or unique assets, there are often many more parties beyond the general unsecured creditors with interests in the outcome of the sale. Anticipating who will participate in the sale process, and then identifying and addressing their interests in advance of the sale hearing can significantly reduce the risk of disputes and delays. The key players in an asset sale will consist of some, if not all, of the following parties:

1. *The Seller*. The Bankruptcy Code authorizes a trustee or a debtor-in-possession to sell assets of the estate. 11 U.S.C. §363(b)(1).

2. *Bidders and Buyers*. The trustee may solicit multiple persons or entities to make offers on estate assets. Once the trustee identifies the highest and best offer, she or he seeks authority to sell the assets to the proposed buyer on those terms. As discussed below, obtaining court approval of sale and bidding procedures in advance may prevent complaints by jilted bidders and other interested parties. However, as discussed below, in some cases asset values may be depreciating so quickly that waiting to identify a buyer before filing a sale motion may not be prudent or practical. In such cases, it makes sense to file a sale motion, set a bid deadline

and a proposed auction date, and bring the results of the auction to the Bankruptcy Court for approval.

3. *Secured Creditors*. The parties with liens on estate assets wield considerable power in any efforts to sell free and clear of those liens. In most cases, such liens will need to be paid in full before any proceeds may be available to pay administrative or unsecured claims. At the same time, secured creditors may be willing to "carve out" a portion of the sale proceeds to which they are entitled rather than incur the time and expense of foreclosing its lien on the property. When the trustee seeks to complete a "short sale," e.g., sell an asset where the amount of the liens exceeds the value of the property, the trustee must negotiate a carve-out with at least one of the secured creditors.

4. *The United States Trustee.* The Office of the United States Trustee ("UST") oversees cases and the trustees in cases under all chapters (except cases commenced under chapter 9). 28 U.S.C. § 586(a)(3). The UST's enumerated duties include monitoring the progress of cases under chapter 11 and taking appropriate action to prevent the undue delay in such progress. 28 U.S.C. § 586(a)(3)(G). While the enumerated duties do not mention oversight of asset sales, the UST "may raise and may appear and be heard on any issue." 11 U.S.C. § 307; *In re Miles*, 330 B.R. 848, 849 (Bankr. M.D. Ga. 2005).

5. *Committees*. In chapter 11 cases, the UST may form an official committee of unsecured creditors and, in unusual cases, an official committee of equity security holders or of other constituents. 11 U.S.C. § 1102(a). If a sale does not generate sufficient proceeds to yield a meaningful distribution to unsecured creditors, the committee may oppose the sale to force the proposed purchaser to pay a higher price, to buy time to find a better deal, or to extract some concession from the trustee or the secured party receiving the sale proceeds. The sooner such negotiations are completed the better for consummating the sale and maximizing value.

6. *Professionals*. Courts may authorize the trustee to employ a professional, such as an investment banker, a real estate broker or auctioneer, to assist with identifying buyers and negotiating and consummating the sale of assets. 11 U.S.C. § 327(a). In addition to the quality of the professionals, the compensation structure (hourly, flat fee, commission) may play an important role in the success of a 363 sale.

7. *Patient Care Ombudsman* (PCO). If the debtor is a health care business within the meaning of 11 U.S.C. § 101(27A), then the court shall order the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds an ombudsman is not necessary for the protection of patients under the specific facts of the case. 11 U.S.C. § 333(a)(1). In such cases, any sale of estate assets will need to address any concerns that the patient care ombudsman may raise.

8. *Consumer Privacy Ombudsman* (CPO). The Bankruptcy Code imposes extra requirements for the sale of an asset that includes PII, such as customer lists. If the debtor provided to individuals a policy prohibiting the transfer of PII and that policy was in effect on the date of the commencement of the case, then the trustee may not sell PII to any person unless the sale is consistent with the debtor's policy. Alternatively, if the sale will not require the buyer to employ the debtor's policy, then the court must first order the UST to appoint a consumer

privacy ombudsman. After hearing from the ombudsman, the court may approve the sale if no showing was made that such sale or such lease would violate applicable non-bankruptcy law. 11 U.S.C. § 363(b)(1) (A) and (B); 11 U.S.C. § 332.

9. *Federal, State, and Local Government Agencies*. Many government agencies may appear in larger and more complex bankruptcy cases with interests that may or may not be monetary. Federal agencies include the Internal Revenue Service (who may assert liens on the assets); the Federal Trade Commission (who may want to protect privacy and other consumer rights); the Federal Communications Commission (if the sale involves telecommunication licenses); the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) (who enforces environmental regulations related to offshore oil and gas operations), among others. Similarly, state and local actors who may participate include attorneys general (who may also seek to protect privacy and consumer rights), state taxing authorities (who may seek substantial amounts in transfer taxes), and local taxing authorities (who may have substantial liens on assets for unpaid taxes).

10. *Landlords.* Often the acquired assets are housed in leased property, or consist of or include one or more real property leases. Except in certain limited situations, the trustee may assume and assign unexpired commercial leases to a buyer, even if the lease contains anti-assignment language. 11 U.S.C. § 365(a) and (f)(1). While the Bankruptcy Code authorizes the trustee to assign the lease over the landlord's objection in most situations, a dispute with a property owner over whether the trustee can assign the lease and, if so, what defaults need to be cured can delay the sale and potentially reduce the return to the estate. Attention must be paid to common law liens that might attach to items stored in leased property such as Warehouseman's Liens.

11. *Consignment Vendors.* When the acquired assets include inventory, the interests of vendors who have sold product to the debtor under consignment agreements will be affected. The issue may then arise whether the consent of the consignment vendor is required to effectuate the sale. Often, the rights of secured lenders viz. the consignment vendors will be at issue as well, as the secured lender is often looking to a sale to satisfy its secured claims. Actions to determine the "validity, priority, or extent of [an] interest in property" must be commenced by adversary proceedings. Fed. R. Bank. P. 7001(2). Disputes over the effectiveness of a consignment vendor's retention of title can delay or frustrate sales and cause a loss in inventory value.

III. Finding Value in Unusual Assets

1. *Litigation*. A debtor's causes of action that existed at the time of the bankruptcy filing are property of the bankruptcy estate. *In re Tribune Co. Fraudulent Conveyance Litig*., 818 F.3d 98, 113 (2d Cir. 2016) (under section 541(a)(1), property of the estate includes legal claims that could have been brought by the debtor); *U.S. ex rel. Spicer v. Westbrook,* 751 F.3d 354, 361–62 (5th Cir. 2014)). Section 363(b) permits the trustee to sell property of the estate. However, there is a distinction between a cause of action that belongs to the debtor because such action existed at the time of the bankruptcy, and causes of action that the trustee has the power to pursue under the Bankruptcy Code. *See In re Cybergenics Corp.*, 226 F.3d 237, 242–43 (3d Cir. 2000) (cause of action not property of the debtor's estate and cannot be sold, but may be

undertaken by trustee on behalf of the all of the debtor's creditors); *and Picard v. Fairfield Greenwich Ltd.,* 762 F.3d 199, 212 (2d Cir. 2014); *Tribune Co.,* 818 F.3d at 117; *but see In re Moore*, 608 F.3d. 253, 262 n. 17 (5th Cir. 2010) (court expressly declines to determine whether chapter 5 avoidance actions may be sold); *In re P.R.T.C.*, 177 F.3d 774 (9th Cir. 1999) (permitting assignment of avoidance actions arising under sections 541–52 of the Bankruptcy Code, but requiring 50% of the assignees recovery be remitted to the bankruptcy estate, and, thus, arguably, satisfying the requirements of § 503(b)(3)); *see also In re Lahijani*, 325 B.R. 282, 288 (B.A.P. 9th Cir. 2005) (*P.R.T.C.* does "not mandate . . . that avoidance powers can only be sold to a creditor who agrees to pursue those avoidance powers for the benefit of all creditors.").

In the *In re Moore* case, a creditor brought a pre-petition fraudulent conveyance action under Texas state law to recover allegedly fraudulent conveyances made to various business entities owned by the debtor's wife. *In re Moore*, 608 F.3d at 255, 260. The creditor continued to fund the litigation post-petition, despite the ownership of the litigation transferring to the estate. However, after investing $60,000 in the litigation, the creditor refused to fund the trustee's hiring of a forensic expert without an estimate of the associated costs. As a result of such refusal, the trustee settled the state law claims for $37,000. The creditor objected to the settlement, offering to purchase the claim for $50,000 or, in the alternative, requested that the court hold an auction for the litigation claims. The bankruptcy court denied the creditor's request, questioning whether the estate had the right to sell the section 544(b) avoidance action under section 363. The Fifth Circuit overturned the bankruptcy court, determining that section 363 allowed a sale of a cause of action to the original creditor, who outbid an existing settlement offer, which effectively served as a backup bid. *Id.* at 257-266

In *In re Cybergenics Corp.*, the debtor filed bankruptcy following a leveraged buy-out and subsequently sold all of its assets in a section 363 sale. 226 F.3d at 244. Following the sale, the debtor's creditors sought to bring state law fraudulent conveyance actions related to the leveraged buy-out, arguing that such claims could not have been sold by the debtor in possession. The Third Circuit agreed, holding that the right to bring a post-petition state law fraudulent conveyance action did not belong to the debtor in possession and was not and could not be sold in the section 363 sale. *Id*. at 245. The Third Circuit reasoned that, though the debtor in possession had a duty to pursue such actions for the benefit of all creditors, it did not have the ability to sell such causes of action for its own benefit, which the Third Circuit determined would be the result of liquidating the cause of action under section 363. *Id.* at 240–241 ("This attribute is no more an asset of [the] debtor in possession than it would be a personal asset of [an appointed trustee]. Much like a public official has certain powers upon taking office as a means to carry out the functions bestowed by virtue of the office or public trust, the debtor in possession is similarly endowed to bring certain claims on behalf of, and for the benefit of, all creditors."). *See also*, *See In re Boyer,* 372 B.R. 102, 105-06 (D. Conn. 2007), *aff'd,* 328 F. App'x 711 (2d Cir. 2009) (avoidance claims cannot be sold or assigned to a seeking to pursue the claims on its own behalf.) ("[N]either a trustee in bankruptcy, nor a debtor-in-possession, can assign, sell, or otherwise transfer the right to maintain a suit to avoid a preference. [S]uch transfers would run contrary to two primary policies underlying the Bankruptcy Code. First, the Code allows only the trustee or debtor-in-possession to sue on a preference because only that trustee or debtor-in-possession represents the interests of all the creditors in maximizing the value of the debtor's estate. . . . Second, permitting trustees alone to sue on a preference facilitate[s] the prime bankruptcy policy of equality of distribution among creditors of the debtor. . . . It is feared that

by allowing one creditor to buy a claim from the trustee and pursue that claim on his own behalf, that creditor may be allowed to recover more of the estate's assets than would otherwise rightfully be due to that creditor.") (internal citations omitted).

2. *Intellectual Property*. Intellectual Property is defined in Section 101(35A) of the Code. Significantly, two common types of intellectual property are excluded from the definition: trademarks and domain names. Bankruptcy Courts have struggled to fill in the blanks left by this definition. *See, e.g.*, *Mission Product Holdings, Inc. v. Tempnology, LLC*, BAP No. NH 15-065 (B.A.P. 1st Cir. Nov. 18, 2016). The sale of intellectual property often affects the interests of numerous non-debtor parties including:

(i) Licensees: Generally, a buyer of Intellectual Property is seeking to acquire assets "free and clear of all liens, claims, and encumbrances." This may create challenges when the IP assets are encumbered by outbound licenses. When the Debtor is the Licensor of Intellectual Property, its ability to sell free and clear of any licenses may be affected by Section 365(n).

(ii) Licensors: If the Debtor is the Licensee, it is generally understood that it cannot sell or assign its rights under an Intellectual Property license agreement. 11 U.S.C. § 365(c)(1). *See In re Catapult Entm't, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999). In some cases, the Court will stretch to find exceptions to the general rule. However, where the court finds the license unassumable, it may also not be assigned. *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116 (Bankr. D. Del. 2015) (citing *In re West Elecs. Inc.*, 852 F.2d 79 (3d Cir. 1988)).

3. *Customer Lists*. As noted above, Section 363(b)(1) imposes limitations on the sale of PII. A threshold issue for Debtors seeking to sell PII is understanding whether the selling company has a privacy policy, and if so, what limitations does it impose on the assignment of that PII.

(i) Privacy Policies: Before seeking to sell PII, the Debtor should ascertain where its privacy policies have been published (e.g., website, in a store, in a catalog, etc.). The Debtor should also determine whether there are inconsistent or outdated statements that exist in other formats such as FAQs, loyalty program descriptions, etc. Finally, it should ascertain when updates were made to the privacy policy and whether any changes were made to how the company described its potential use of PII.

(ii) CPOs: If a restrictive Privacy Policy is in place, the Debtor should consider being proactive in engaging a CPO. Usually this can be handled through informal contact with the UST followed by a consensual motion to authorize the appointment. Waiting until the last minute to engage a CPO can lead to delays in the sale of PII and generate misunderstandings with potential buyers as to the conditions upon which PII may be acquired.

(iii) Managing CPO Process with the Court and UST: Once a CPO is appointed, the Debtor is well-served to provide the CPO access to the information it has gathered

concerning the nature of the consumer data in its possession as well as the terms under which it was collected. Clearly defining the methodology consumers used to "opt in" to future marketing messages by the Debtor will help the CPO form an understanding of what are the consumers' reasonable expectations concerning the use of their PII.

(iv) CPO Expenses: Failure to properly manage the CPO process can often lead to the incurrence of additional expenses that may not have been contemplated by the DIP Budget. In some cases, CPOs have sought to retain counsel. The authority for this retention is unclear. *See, e.g*., *In re Synergy Hematology-Oncology Medical Assoc.*, Inc., 433 B.R. 316 (Bankr. C.D. Cal. 2010) (discussing PCO and CPO and finding authority to appoint counsel is grounded in section 105 of the Bankruptcy Code). In cases in which the CPO is allowed to hire counsel, expenses can exceed $100,000.

(v) Attorneys General and the FTC: In addition to CPOs, the sale of consumer customer data may draw the attention of State Attorneys General and the FTC. In the *RadioShack* bankruptcy case, 35 State Attorneys General and the FTC provided comments to the Court and the CPO with respect to the proposed sale of PII. In a May 16, 2015 letter to the RadioShack CPO, the FTC set forth its views on the sale of Customer Data stating that:

> We believe the *Toysmart* precedent[2] is an appropriate model to apply here to third parties. In this case, consumers provided personal information to RadioShack with the expectation that RadioShack might use it, for example, to make new offers of interest to consumers, but not to sell or rent it. As in *Toysmart*, our concerns about the transfer of customer information inconsistent with privacy promises would be greatly diminished if the following conditions were met:
>
> - The customer information is not sold as a standalone asset;
> - The buyer is engaged in substantially the same lines of business as RadioShack;
> - The buyer expressly agrees to be bound by and adhere to the terms of RadioShack's privacy policies as to the personal information acquired from RadioShack; and
> - The buyer agrees to obtain affirmative consent from consumers for any material changes to the policy that affect information collected under the RadioShack policies.

Ultimately, the bankruptcy court approved the sale of PII in the *RadioShack* case based on a settlement agreement among the Debtor, the AGs, the FTC and the buyer following a full day mediation before a retired Bankruptcy Judge. The *Toysmart* guidelines continue to be followed in most cases.

[2] *In re Toysmart.com, LLC*, Case No. 00-13995-CJK (Bankr. E.D. Mass. July 20, 2000).

(vi) Managing Buyer Expectations: As the foregoing demonstrates, debtors seeking to sell PII should work with potential buyers to properly set and manage expectations as to what will and will not be transferred and the future conditions on use. While the principal focus of potential buyers may be the customer marketing data, helping the buyers understand the *Toysmart* criteria and getting upfront buy in to its conditions will forestall misunderstandings that may ultimately lead to a change in pricing or worse, a failed sale transaction.

4. *Over-encumbered Property*. As a general rule, trustees should not administer assets solely for the benefit of secured creditors. *In re Jones*, 548 B.R. 658, 660 (Bankr. W.D.N.Y. 2016). An exception may arise, however, where the sale of certain collateral might reduce the total indebtedness secured by other collateral that the trustee might sell for the benefit of the estate. *Id*. at 661. The trustee might also obtain the secured creditor's consent to a carve-out from proceeds for the benefit of unsecured creditors. *In re KVN Corp*., Inc., 514 B.R. 1, 8 (B.A.P. 9th Cir. 2014). Known as a "short sale," these transactions can take substantial time to negotiate. The trustee has to contact the secured party (and sometime finding a contact may be a challenge) and convince it to accept less than the amount owed *and* to allow the trustee to retain some of the sale proceeds. Secured parties may agree to this process to avoid the costs and time to foreclose and, if it acquires title, then market and sell the property. Meanwhile, the trustee must make sure the buyer does not walk from the transaction until the trustee can complete these negotiations and obtain a sale order. An efficient short sale process such as the "RealAssist™" program described in Part II can reduce the time and transactions costs and create value in over-encumbered property.

IV. Managing the Process

Establishing an organized process is important to maximizing the value of a bankruptcy sale, especially in competitive sales. Sale procedures are also a key part of the sale approval process. The Bankruptcy Code does not provide any guidance or requirements for approval of a sale. The generally accepted standard for approval of a Section 363 sale is the "business judgment standard," which is considered a low standard for approval that is borrowed from corporate law. The following are factors that bankruptcy courts commonly use when applying the business judgment standard to sales: (i) whether a sound business justification exists for the sale; (ii) whether adequate and reasonable notice of the sale was provided to interested parties; (iii) whether the sale will produce a fair and reasonable price for the property; and (iv) and whether the parties have acted in good faith. *See In re Decora Indus., Inc*., Case No. 00-4459, 2002 WL 32332749, at *2 (D. Del. May 20, 2002) (citing *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991)).

If the sale is for substantially all assets, another standard may apply. Circuit courts have adopted a "good business reason" or "sound business purpose" standard when the debtor seeks to sell substantially all assets. *See, e.g*., *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1066–70 (2d Cir. 1983); *In re Cont'l Air Lines*, 780 F.2d 1223, 1226 (5th Cir. 1986); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Schipper*, 933 F.2d 513 (7th Cir. 1991).

If the sale is to an insider, the court may apply yet another standard: the "entire fairness" standard. Under the entire fairness standard, the debtor must prove that the transaction is "entirely fair" by demonstrating fair price and fair dealing. *See Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 (Del. Ch. 2011). A court applying the entire fairness standard will conduct a thorough review of the transaction, and both elements must be met. *See, e.g.*, *Orman Cullman*, 794 A.2d 5, 21 (Del. Ch. 2002); *In re Nine Sys. Corp. Shareholders Litig*., 2014 WL 4383127, at *3 (Del. Ch. Sept. 4, 2014), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015) (even where the price achieved is ultimately found to be fair, transaction fails entire fairness and should not have been approved if it was the product of an unfair process). "Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair . . . ." *Reis*, 28 A.3d at 459.

An organized (and preferably pre-approved) sale process can be valuable to the debtor's burden to establish that it satisfies the applicable sale standard. Since the passage of the Bankruptcy Code, the sale process has evolved into a somewhat standardized process for routine sales. But the sale process is not a one size fits all procedure. The following are some elements of a typical bankruptcy sale process:

1. *Notice of the Motion*. Often, time is of the essence in asset sale. The asset itself may have value for a limited time (such as the crate of bananas) or the window for selling a business may be closing (sale of a ski equipment business will yield more prior to winter). In some cases, the potential purchaser imposes a deadline by which the sale must close or else it will move on to other opportunities. In these circumstances, the trustee may desire to have the court conduct a sale hearing much sooner than the rules require. When presented such a request, courts must balance the exigencies (which may be real, perceived, or created by a lack of diligence) of the circumstances against the need to afford due process to interested parties, such as creditors with liens secured by the assets. Apprising key players of intentions to sell, even informally, as soon as possible may ameliorate the situation when asking the court to reduce the notice period or approve a sale without a hearing.

2. *Stalking Horse*. A common first step in the sale process is locating a stalking horse. A stalking horse will establish the base bid (purchase price, purchased assets, assumed liabilities, etc.) from which other bidders will bid against. If no other bidder bids against the stalking horse bid, the stalking horse will prevail as the successful bidder.

(i) Advantages: A central reason to lock down a stalking horse is that the presence of a stalking horse may incentivize other bidders to participate. "If the stalking horse submitted a bid after performing diligence and negotiating with the debtor, the assets must be attractive, right?" The stalking horse agreement also gives the debtor some certainty that it has secured at least one binding commitment even if the bid process does not yield any bids. From the stalking horse's perspective, it may be desirable to have a lengthier diligence period where it will have access to management and key employees. The stalking horse may have more time to line up financing and obtain any necessary regulatory approvals.

(ii) Disadvantages: There are some disadvantages in proceeding in a sale process with a stalking horse. Because a stalking horse will normally negotiate vigorously for bid protections (discussed below), the downside to a stalking horse is that the debtor may not have as much flexibility in conducting a robust auction process. For example, the stalking horse will most likely not permit a provision in the bid procedures that allows the debtor and its professionals in their sole discretion to modify the bid procedures during the auction process. The stalking horse may also insist on tight "qualified bid" requirements (discussed below) or insist on short bid deadlines and auction dates, which may discourage other bidders from participating.

3. *Approval of Bid Protections*. The stalking horse will normally insist on certain protections if its bid will be subjected to a competitive process. Without these protections, the stalking horse may wish to participate in the general sale process rather than be the target of other bidders. Depending on the nature of the sale process, bid procedures may also be extended to a winning bidder, particularly when a sale hearing does not closely follow the auction. Typical bid protections include:

(i) Break-up Fee and Expense Reimbursement: The promise of a break-up fee and a reimbursement of expenses can incentivize prospective purchasers to bid on the assets as a stalking horse. The break-up up fee is usually a percentage of the stalking horse's purchase price (not usually higher than 3%), and that fee is paid when the debtor accepts a higher and better offer than the stalking horse's bid. The break-up fee and expense reimbursement are usually paid by the successful bidder, because the successful bidder normally has to exceed the stalking horse's bid by the break-up fee and expense reimbursement. As such, courts will generally scrutinize break-up fees if the fee will deter participation in the bid process (i.e., chill bidding). The proponent of the break-up fee and expense reimbursement will usually argue that these bid protections are not only necessary to incentivize a stalking horse's participation, they also compensate the stalking horse for the time and expense of preparing the initial bid, which is intended to attract other bids for the debtor's assets.

(ii) Bid Increments and Matching Rights: A stalking horse usually negotiates for some type of bid increments, i.e., the minimum amount required for another bid to top the stalking horse bid. The stalking horse may also negotiate for the right to match any other topping bids (i.e., a "right of first refusal"). While the debtor wants to offer these bid protections to incentivize the stalking horse to offer a material bid, the debtor will also be mindful of whether these bid protections will chill other bidders.

(iii) No Shop: A "no-shop" provision prohibits the debtor from soliciting or encouraging other bids. No-shops are antithetical to a robust sale process. But a bidder may successfully negotiate for such provision if it offers a high enough purchase price. A non-shop provision may contain a "fiduciary out," which would allow the debtor to entertain other superior proposals if failing to do so

could be a violation of the debtor's fiduciary duties. The definition of a "superior proposal" will likely be heavily negotiated.

4. *Approval of Bid Procedures*. The debtor may seek approval of procedures for interested bidders to participate in a competitive sale process. Bid procedures serve a number of functions. They provide a means by which the court pre-approves a sale process, which is helpful when it comes time to approve the winning bid. Approved bid procedures also mitigate the debtor's exposure to objections from jilted bidders. If the debtor or trustee conducts the sale in accordance with the court-approved bid procedures, the jilted bidder will have little room for objection unless it can prove fraud, collusion, or misapplication of the bid procedures. As such, potential bidders need to be wary when the debtor files a motion to approve bid procedures. For example, a provision in the bid procedures that gives the debtor and its professionals sole discretion to modify the bid procedures during the process may not withstand objection but may be approved without an objection. However, a competing bidder may not have standing to object to bid procedures. The bankruptcy court will most likely focus on the potential return to the bankruptcy estate rather than "fairness" to competing bidders. A bidder may seek to gain standing as a "party in interest" under Section 1109(b) of the Bankruptcy Code by buying a claim in the bankruptcy if it is not already a creditor in the bankruptcy case.

Common bid procedures will establish a bid deadline, requirements to be a "qualified bid," and an auction date if more than one qualified bid is received by the bid deadline. Establishing requirements for a "qualified bid" is an important part of the bid procedures process. Typical qualifications include that the bid: be in writing, identify the assets to be purchased and liabilities to be assumed, disclose the legal entity to acquire the assets, disclose any connections to the debtors or other known qualified bidders, include an irrevocable and executed copy of a purchase agreement (or purchase agreement redlined against the stalking horse agreement), a proposed list of contracts to be assumed, include evidence of financial wherewithal to consummate the transaction or demonstrate other financing commitments, describe any financing contingencies (or state that the bid is not subject to any financial contingencies), describe any other contingencies or "outs," agree to serve as a "back-up bidder" in the event the successful bid does not close, and include a good faith deposit. The debtor will then notify bidders whether their bid is considered a "Qualified Bid." Only Qualified Bids are normally invited to participate in an auction, which will be held only if the debtor receives more than one Qualified Bid.

5. *Contract Assignment*. Contract assignment is an important part of the sale process. Often, a buyer will be interested in the debtor's valuable contracts and will seek to take advantage of 11 U.S.C. § 365(f)(1), which provides that a debtor's contracts may be assigned notwithstanding any anti-assignment provision. Conversely, the debtor's business may be very attractive but for burdensome contracts or leases that are now out of market. The Bankruptcy Code permits rejection of these burdensome contracts. 11 U.S.C. § 365(a).

The contract assignment process has the potential to delay the sale process, and thus the debtor may decide to deal with contractual assignment disputes well before the sale process is complete. At the beginning of the sale process, i.e., before bids are even received, the debtor may seek approval to file a list of "potentially assumed and assigned contracts," listing a cure amount for such contract with a deadline for objections to (a) the assignment of such

contract and (2) the cure amount for such contract. The debtor may not yet know whether a potential buyer would want to assume a particular contract. But resolving any disputes as to the assignability of a contract (*e.g.*, a 11 U.S.C. § 365(c) objection) or cure amount of such contracts either through settlement or litigation can streamline the entire sale process. Some potential buyers may want the comfort of knowing that there will be no challenge to the assignment of a desirable contract or disputes over the cure cost of such contract. Resolving these issues before an auction can be a valuable way of maximizing a competitive sale process. However, the buyer will still need to provide evidence of adequate assurance that it can comply with the remaining obligations under the contract or lease under 11 U.S.C. § 365(f)(2). A bidder may include as part of its bid a list of the contracts it desires to assume. Because the speed of bankruptcy sales normally makes contract diligence difficult, if not impossible, to complete before a bid deadline, the bidder may reserve a period of time until (or even post) closing to designate additional contracts to assume or reject.

In cases in which the bidder is buying substantially all assets, the debtor has thousands of contracts and leases, and if the bidder is very familiar with the debtor's business, the buyer may request that the debtor include in a provision in the chapter 11 plan stating that "all executory contracts and unexpired leases that are not expressly rejected are assumed and assigned to the buyer." Otherwise, the bidder may request a provision in the plan saying the opposite, "all executory contracts not expressly assumed or assigned are rejected." In the *Noble Energy, Inc. v. ConocoPhillips Company*, Case No. 15-0502 (Tex.) case, the State of Louisiana sued ConocoPhillips for environmental contamination-related damages the state alleged occurred when ConocoPhillips operated a property that it later conveyed to Alma Energy. Alma subsequently sold the property to Noble Energy's predecessor in Alma's bankruptcy. ConocoPhillips and Alma had previously been a party to an "Exchange Agreement" prepetition whereby Alma agreed to indemnify ConocoPhillips on that property. Noble's predecessor listed over 500 contracts as purchased assets in the purchase agreement, and the Exchange Agreement was not listed. But Alma's chapter 11 plan stated that "all executory contracts not expressly rejected were assumed and assigned" to the buyer. Accordingly, a Houston state appellate court rendered a judgment against Noble for $63 million (the settlement amount between ConocoPhillips and the State of Louisiana) after determining that the Exchange Agreement was assigned under the catch-all provision in the plan. The Texas Supreme Court affirmed the Houston appellate court's decision.[1]

6. *Auction Procedures*. In general, it is useful to clearly articulate auction procedures in order to provide bidders comfort in what to outsiders often seems like a strange way to sell assets. We typically utilize one of several auction methodologies depending on the number of bidders, the conformity or non-conformity of bids, and the desire to create an auction environment that will lead to maximum results. The most common procedures we have used, and some of the pitfalls, are as follows:

(i) Sealed Bids: In the sealed bid method, bidders are asked to make their best bid at the outset. In a pure sealed bid, only one round of bidding may occur and the highest bidder wins. In a modified sealed bid, there may be a subsequent round or rounds among a defined set of high bidders (usually 2 or 3), or among bidders that make initial bids within a certain percentage of the high bid. The idea of the sealed bid is to encourage the high bidder to bid more than it would have if it

[1] Noble is seeking reconsideration of the Texas Supreme Court's decision.

knew the amount of the next highest bid. A challenge can occur when the participants in the sealed bidding are not clear on the fact that they may not be able to make a subsequent bid. In a Delaware bankruptcy case for the consumer electronics retailer The Wiz, Inc. (*In re TW, Inc.*, Case No. 03-10785 (MFW)), PC Richard & Son participated in a sealed bid auction for the debtor's intellectual property. When they learned that they were not the high bid, they complained that it was not clear to them that there would be only one round of bidding. At the sale hearing, the Court found that the sealed bid procedures were not clearly communicated and re-opened the auction. The ultimate amount paid for the intellectual property increased from $1 million to an eventual high bid from PC Richard & Son of $2.5 million.

(ii) Open Outcry: Another popular auction methodology is the Open Outcry in which bidders are allowed to bid during the auction, or not bid, as the purchase price increases. This allows bidders who may be on the fence as to their level of interest or valuation, to sit on the fence as others bid. Often they are encouraged to participate later in the auction by the behavior of other bidders. This is especially useful when strategic buyers are bidding against each other as buyers may be motivated to participate based on their assessment of post-auction market dynamics if a leading bidder ultimately wins the auction.

(iii) Serial Bidding: In this auction methodology, bidders are assigned turns. When it is their turn, the bidder must make a higher bid or it is out. Sometimes, bidders may be given the opportunity to pass without being declared out. This methodology is often used in liquidation auctions where bidders are bidding against the same contract in small increments.

(iv) Changes in Auction Mechanics: It is good practice to maintain the flexibility in Bid Procedures and Auction Rules, to change the auction procedures if circumstances dictate. A good recent example of this involved the sale of the RadioShack intellectual property. At the outset of the auction, four qualified bidders participated in an open outcry format. After a full day of bidding, the Debtor declared a recess in the auction and required parties interested in continuing to bid to top up their deposits. After another full day of bidding, there were three active bidders, however, it was clear that two of the bidders were reaching their limits. The Debtor and its advisors concluded that if it were to continue by open outcry, the most motivated bidder might only bid the minimum increment necessary to win, even though it had the ability and desire to bid much higher. The Debtor announced a change in the auction procedures to a final sealed bid. The three remaining bidders submitted bids. The winning bid ($26.5 million) was several millions higher than the second-place bid. Following the auction, the second-place bidder objected to the change in auction procedures claiming that it would have bid more if given another chance. In its objection to the sale, it stated its willingness to now bid $30 million for the assets, almost $4 million more than the winning bid. At the sale hearing, the Court noted that the sale and auction procedures gave the Debtor wide latitude to modify procedures in consultation with the Creditors Committee and secured lenders, that the decision

to modify the procedures was clearly announced and explained, that the bidders had in fact followed the revised procedures, and that the policy of the Bankruptcy Court was to respect the outcome of auctions conducted in accordance with announced procedures. Finally, the Court noted the large disparity in amount between the winning and second-place bids noting "that the results speak for themselves." *In re RadioShack Corp.*, Case No. 15-10197 (BLS) (Bankr. D. Del. 2015). *See also* https://www.law360.com/articles/658118/radioshack-judge-won-t-reopen-auction-oks-26m-ip-sale

(v) Loser's Remorse: The outcome in the RadioShack case is consistent with the policy of honoring the reasonable expectations of the parties to a sale process in terms of the reliance on published and announced sale procedures and the finality of the result achieved at the auction. *See Corp. Assets, Inc. v. Paloian (In re Goss Int'l Corp)*, 368 F.3d 761, 768 (7th Cir. 2004); *First Nat'l Bank v. M/V Lighting Power*, 776 F.2d 1258, 1261 (5th Cir. 1985). That said, as demonstrated by the Court's decision to re-open the auction in the Wiz case, the Bankruptcy Courts have significant discretion when it comes to the determination of whether the auction procedures were fair and reasonable, and resulted in generating the best value for the estate. *In re Del. & Hudson Ry. Co.*, 125 B.R. 169 (D. Del. 1991). In a perfect world, sale and auction procedures are blessed by the Bankruptcy Court in advance. However, when timeframes are compressed, and asset values are eroding, there may be no time to get sale procedures approved. In such cases, debtors are best advised to work with professional brokers and to get the buy in from the interested parties discussed above to create a sale and auction process designed to elicit offers and create a competitive bidding environment.

7. *No Auction*. The Bankruptcy Code does not require that the trustee or debtor in possession conduct an auction as a prerequisite to sale approval. In many cases, an auction is used to demonstrate that the sale process yielded the highest and best price for the assets, which assists the court in approving the sale under section 363(b). But conducting an auction, and soliciting bids through the bid procedure process discussed above, can be costly. The trustee and debtor in possession must engage in a cost/benefit analysis. If the debtor has a firm offer with certainty of closing and believes that a competitive process will not yield a more valuable bid, the debtor may ask the court to approve the sale outright. For example, in the *In re Troxell Company, Inc.* case, the debtor filed a motion to sell substantially all assets on the petition date. Case No. 17-42453, dkt 16 (Bankr. N.D. Tex. June 13, 2017). The debtor requested sale approval less than two weeks from the petition date. The debtor reasoned that the sale price was sufficient to pay off first and second liens, leaving $300,000 for administrative and unsecured creditors. Thus, unsecured creditors, who were to receive a fractional recovery, would essentially pay for any marketing and competitive bidding process. The debtor believed that it would not receive any superior bid based on certain facts, including that the purchaser owned the real property on which the assets were located. Any other bidder would be required to pay to haul the heavy equipment in addition to the sale price.

8. *Jilted Bidders and No Bidders*. The bankruptcy process promotes a robust, competitive sale process that provides a platform for multi-bidder participation. A sale process involving multiple bidders that does not involve court-approved procedures, however, may cause

problems and expense at the sale hearing. This situation may arise when time pressure or lack of interest impede the ability to generate a stalking horse bid in advance of the filing of a sale motion. On the other side of the spectrum, the best efforts of the trustee and professionals may not generate any offers. Anticipating both possibilities and developing contingency plans is critical to avoiding delays and declines in asset values. Moreover, there is a tension between providing parties a clear understanding of the rules of the road, while maintaining procedural flexibility that often can lead to buyer's or loser's remorse when parties are unable to adjust to changes in auction procedures.

V. The Sale Hearing

The bankruptcy sale hearing is the last step in the sale process before closing. If the hearing is a section 363 sale, the debtor will seek to approve the sale under the applicable standards discussed above. If the sale is through a chapter 11 plan, the debtor will have meet the requirements of section 1129. At the sale hearing, the debtor may also need to resolve any objections to assignment of a contract or the cure amount.

At the sale hearing, the debtor will summarize for the court the marketing efforts that its professionals undertook, the notices of the sale process given to parties in interest, the bid procedures that were employed in the sale process, the auction process, the result of the auction, any objections to the sale (including any resolutions), and other evidence germane to the court's findings under section 363(f) for free and clear sales and section 363(m) for good faith findings.

The court will hear any objections to the sale as well as any remaining disputes regarding the assignment of contracts. At the conclusion of the sale, the debtor will offer a proposed sale order that is normally heavily negotiated between the debtor and the buyer. Sale orders can be lengthy and complex and may address a variety of legal issues including successor liability, treatment of contracts that are assigned or rejected, tax matters, liens, and other regulatory matters. Governmental entities may carefully scrutinize a proposed sale order to ensure that the sale complies with applicable regulatory law and that the buyer will comply with such laws post-closing.

PART B

Real Assist (Short Sale Auction)

By Melinda Teter, Vice President of Client Services, BMS

In 2008, the real estate market suffered greatly, with a deep impact on single-family properties. A majority of the chapter 7 bankruptcies involved over-encumbered real property in which the debtor abandoned. Bankruptcy trustees would not administer the asset because the real property was over-encumbered and wouldn't realize enough for unsecured creditors to make a meaningful distribution. It also created an extremely large REO (Real Estate Owned by a lender) inventory for lenders who were unable to quickly foreclose and liquidate the properties. As a result of this "lose-lose" scenario, certain service providers, like BMS, developed a short sale process by coordinating with the lenders/servicers and the trustee to auction these properties. In these deals, the servicers pre-approve a short sale with an agreed upon carve-out for the benefit of the estate. The trustee can then market and sell the property with confidence that the sale will yield a minimum return to the estate. This paper focuses on the "RealAssist™," program offered by BMS.

The RealAssist™ program assists the chapter 7 trustee to liquidate what may initially appear as over-encumbered property. The program makes it easy for an interested chapter 7 trustee to list the property for auction. There are 5 steps:

1. List the property;
2. Sign and file your documents with the court;
3. Market and Auction;
4. Wait for closing; and
5. Collect / Carve-Out.

All properties are pre-approved by the servicer for a short sale and a negotiated carve-out for the benefit of the estate. Through RealAssist™, the Trustee will only be presented with pre-approved, eligible properties to be considered for sale.

With the streamlined process provided by RealAssist™, all parties involved in the sale benefit:

- Debtors are saved the hassle of going through the painful foreclosure process;
- Servicers get a timely, less costly and less risky process of selling the asset;
- The estate is guaranteed a minimum amount of the sale proceeds; and
- The program creates greater opportunities for chapter 7 trustees to provide a distribution to creditors on real estate properties that were previously abandoned.

Other services include tailored templates for motions to sell and applications to employ, thus reducing the administrative expense to the estate.

As noted above, there is a GUARANTEED Carve-out to the estate. 5% of the winning bid or $7500 (whichever is greater).

Examples:

Asset	BPO	Reserve Estimate	Winning Bid	Carve Out
House 1	$185,000	$151,000	$145,000	$7,500
House 2	$306,000	$217,000	$262,500	$13,125
House 3	$420,000	$408,000	$408,000	$20,400

http://www.bmsadvantage.com/chapter7bankruptcy/realassist-streamlined-bankruptcy-property-sales

The Auction.com website is frequented by nearly 1.7 million buyers each month. Properties listed for sale through the RealAssist™ program get seen by buyers around the world.

What is the process?

- A participating mortgage servicer provides BMS with a list of properties, pre-approved for short sale and eligible for liquidation through the RealAssist™ program. Among other things, this means that the servicer has confirmed there are no ongoing loss mitigation efforts (i.e., no payments being made, no loan modification application pending, etc.). The debtor further confirms that it intends to surrender the home pursuant to their Statement of Intent and has opted to take zero or a very small exemption.

- A broker's price opinion ("BPO") will be provided to the Trustee for any property deemed eligible as well as a property report that will include title notes, liens and encumbrances, property taxes, conveyance documents, etc.

- If the Trustee opts to participate, it may use a template for necessary court documents, including an Application to Employ and Motion to Sell Real Property Pursuant to 11 USC § 363.

- The Application to Employ contemplates the hiring of not only Auction.com but also a listing agent to assist with marketing the asset prior to auction. A trustee may choose their own listing agent for the property, or BMS can provide a recommendation.

Once the application and motion are filed and approved by the Court:

- There is a minimum 21-day marketing period during which ADC will work with the listing agent to generate the greatest amount of exposure for the property;
- At the conclusion of the marketing period, a reserve is set by the servicer and the property is taken to auction, a maximum of three times;
- If the reserve price is met at auction, the sale closes shortly thereafter and the servicer agrees to pay to the estate 5% of the sale price or $7,500.00, whichever is greater.
- If the reserve is not met at the conclusion of the third auction, the servicer will purchase the property on a credit bid and agrees to pay the estate 5% of the credit bid or $7,500.00, whichever is greater; and
- Closing costs, the listing agent commission, or similar marketing or auction expenses are paid by the lender or the buyer, and are not deducted from the estate's carve-out.

In short, regardless of whether the asset sells at auction, the estate will receive a minimum $7,500.00, paid by the servicer, for disbursement to allowed creditors. If the property is valued by the lender at an amount greater than $150,000.00, it is likely that the estate will benefit from a higher-than-minimum estate carve-out, depending on the asset's appraised value and performance at auction.

PART C

Case	Court	Jdg	Case No.	Docket No. of Bidding Proc. Order	Assets Sold	Purchase Price	Stalking Horse Offer	Break-Up Fee	Expense Reimbursement	Credit Bid Break-Up Fee/ER?	Non- Solicit. Clause	Stalking Horse ("SH") Initial Deposit	Upset Bid/Initial Overbid	Bid Increment	Bidder Earnest Money/ Good Faith Deposit	Bid Deadline (Days from date of entry of Bid Procedures Order)	Auction Date (Days from Bid Deadline and Auction Date)	Sale Hearing Date (Days from Auction Date and Sale Hearing)	Req.to Serve as Back Up Bidder?	Notable Auction Format?	Miscellaneous	Other Relevant Docket Items.
Notes:									amount of cap on expenses							(according to BPO)						
Golfsmith Int'l Holdings	DE	LSS	16-12033	196	Substantially All assets	$69,000,000	n/a	n/a	Debtors' proposed $500,000 expense reimbursement to Yellen Partners was denied.	n/a	n/a	n/a	n/a	Determined by Debtors at auction.	10% (to which Credit Bid or Landlord credit may be applied).	11	2	5	Yes, to extent of assets bid on.	Procedure may be adjusted at auction in debtors' discretion, subject to fiduciary duty and applicable law.	Debtors attempted to provide two bidders "participation fees" of 500k, which debtor's counsel said was well below the standard 3% of fees. Seeking to avoid setting new 363 precedent, Judge denied "participation fees, " which were found not to be "actually necessary to preserve the value of the Debtors' estate." CRO testified that bidding stalled after $60mm baseline bid was established and that additional bidding only occurred after the two $500k participation fee offers, stating that the purchase price was ultimately raised by $20mm (but price only 9mm more). No stalking horse had been selected at time bid procedures motion filed.	Bid Procedures Motion: 20 Notice of Selection of Successful Bidder and Backup Bidder: 404 Notice of Revised Proposed Sale Order: 422 (includes proposed participation fees) Order Approving Sale of Substantially all Assets: 457
Golfsmith Int'l Holdings	DE	LSS	16-12033	548	Austin Campus	$22,150,000	n/a	$300,000 (1.35% of SH Bid, Debtors originally asked for $500,000 (2.26%))	n/a	n/a	Solicitation permitted.	$250,000 (1.13%)	$800,000	Determined by Debtors at auction.	10%	24	6	5	Yes	Procedure may be adjusted at auction in debtors' discretion, subject to fiduciary duty and applicable law.	Bidders reserved the right to consider landlord bids or other bids for any individual leases. Debtors decided to exclude Austin-based real estate from larger sale after determining bidders were not providing "sufficient value" for the real estate and that they could achieve better value through a separate sale. No auction was held due to lack of bids. Assets were sold to the SH.	Bid Procedures/Stalking Horse Motion: 506 Order Approving Sale/Cancelling Auction: 608
American Apparel, LLC II	DE	BLS	16-12552	216	Substantially All Assets	$88,000,000 + certain cash amounts related to purchase of wholesale inventory and wholesale purchase orders	$66,000,000	$1,980,000 (3%)	$1,000,000	n/a	Solicitation permitted.	10%	$68,980,000	Determined by Debtors at auction.	10%	32	3	3	Yes	n/a	Debtors may modify bid procedures to maximize value, consistent with their fiduciary duties.	Order Approving Sale: 491 Sale Motion: 460 Bid Procedures Motion: 53
Violin Memory	DE	LSS	16-12782	93	Substantially All Assets	$14,500,000	n/a	3% (no SH at time order was issued)	2% (no SH at time order was issued)	n/a	n/a	n/a	Sufficient to cover SH bid protections and incremental overbid, if applicable	Determined by Debtors at upon selection of SH or auction.	10%	12	5	7	Yes	n/a	No SH selected at time BPO was entered.	
Garden Fresh Restaurant Corp.	DE	CSS	16-12174	354	Substantially All Assets	$95,000,000 (credit bid)	n/a	n/a	n/a	n/a	n/a	n/a	$1,750,000	$250,000	10%	21	6	7	Yes	n/a	Bidders required to provide a commitment to close as soon as practicable and, if necessary, agree to fund the Debtors in the interim period through the closing date. No auction occurred.	Bid Procedures Motion: 103

Case	Court	Jdg	Case No.	Docket No. of Bidding Proc. Order	Assets Sold	Purchase Price	Stalking Horse Offer	Break-Up Fee	Expense Reimbursement	Credit Bid Break-Up Fee/ER?	Non- Solicit. Clause	Stalking Horse ("SH") Initial Deposit	Upset Bid/Initial Overbid	Bid Increment	Bidder Earnest Money/ Good Faith Deposit	Bid Deadline (Days from date of entry of Bid Procedures Order)	Auction Date (Days from Bid Deadline and Auction Date)	Sale Hearing Date (Days from Auction Date and Sale Hearing)	Req.to Serve as Back Up Bidder?	Notable Auction Format?	Miscellaneous	Other Relevant Docket Items.
Argent	SDTX	DJR	16-20060	92-4	Substantially All Assets	$45,575,000	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	10% (after selection of a Successful Bidder)	30	14	10 days from announcement of chosen bidder.	All bids irrevocable until 4/14, date of execution of PSA by Successful bidder	n/a	Secured creditors declined to credit bid and were given full access to all qualifying bids. No qualifying bid was capable of becoming the successful bid without consent of the secured creditor, unless capable of taking out the Secured Creditor's debt (and any debt of a higher priority). Debtors had no obligation to conclude the sale.	
Aeropostale	SDNY	SHL	16-11275	572	Substantially All Assets	$243,000,000	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Determined by Debtors at auction.	10%	20	3	5	Yes	Live auction which may include individual negotiations with the qualified bidders and/or open bidding in the presence of all qualified bidders.	Hearing confirming auction results pushed from 9/6/16 to 9/12/16 given lengthy auction with 2 active bidders.	Bid Procedures Motion: 438
Noranda Aluminum Holding Corporation	EDMO	BSS	16-10083	471	US Downstream Aluminum Rolling Business	$324,200,000 ($309,700,000 net cash)	$302,500,000 ($288,000,000 net cash)	$4,320,000 (1.5%)	$1,500,000	n/a	Seller from entering into stalking horse agreements.	10%	$6,320,000 (incremental)	$500,000, subject to adjustment by debtors.	10%	5	7	7	Yes	n/a		Bid Procedures Motion: 272 Stalking Horse Order: 898
Noranda Aluminum Holding Corporation	EDMO	BSS	16-10083	1252	Gramercy Assets and St. Ann Assets Associated with the Debtors' Upstream Business.	$24,430,000 secured note	$21,500,000	$645,000	$1,000,000	n/a	n/a	n/a	n/a	$100,000, subject to adjustment by debtors	10%	57	7	5	Yes	n/a	No SH. Sale of assets in lots.	
Noranda Aluminum Holding Corporation	EDMO	BSS	16-10083	1152	New Madrid Assets Associated with the Debtors' Upstream Business	$24,430,000 secured note	$13,000,000	$390,000 (3%)	$130,000 (1%)	n/a	n/a	$1,300,000 (10%)	$620,000	$100,000, subject to adjustment by debtors	10%	57	7	5	Yes	n/a	No SH. Sale of assets in lots.	
Sports Authority Holdings, Inc.	DE	MFW	16-10257	1186	From Auction of Substantially All Assets: 1.) Agency Agreement for Going Out of Business Sale of Debtor's Assets.	Agent's fee: (1) first priority - 6% of cost of goods sold + 50% of aggregate proceeds attributable to Delivery Commissions and (2) 50% of remaining sale proceeds.	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Determined by Debtors at auction.	Greater of $5,000,000 or 7.5%of bid.	27	5	8	Yes	n/a	No SH at time of BPO	Sale Notice: 2081

Case	Court	Jdg	Case No.	Docket No. of Bidding Proc. Order	Assets Sold	Purchase Price	Stalking Horse Offer	Break-Up Fee	Expense Reimbursement	Credit Bid Break-Up Fee/ER?	Non- Solicit. Clause	Stalking Horse ("SH") Initial Deposit	Upset Bid/Initial Overbid	Bid Increment	Bidder Earnest Money/ Good Faith Deposit	Bid Deadline (Days from date of entry of Bid Procedures Order)	Auction Date (Days from Bid Deadline and Auction Date)	Sale Hearing Date (Days from Auction Date and Sale Hearing)	Req.to Serve as Back Up Bidder?	Notable Auction Format?	Miscellaneous	Other Relevant Docket Items.
					2.) Designation rights to determine which of Sports Authorities stores will be kept and which will be closed.	$8,000,000	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Determined by Debtors at auction.	(Escrow amount per APA is $525,000)	n/a	31	16	yes	n/a	Sold at Adjourned Auction on 6/29 - sale hearing	Sale Notice: 2357
					Certain Litigation Claims	$3,300,000									No additional deposits required.							
					IP Assets	$14,500,000																
					Unexpired Leases	Various							$75,000 per store per lease plus cure costs		Non-Landlords: $20,000 per lease Landlords: 10% of Cash portion of LL Offer (LLs could credit bid)	14	6	21	Yes		Auction adjourned from 5.4.16 to 5.16.16 for certain leases subject to auction; leases with only one bid closed.	
Gander Mountain Company	MN	MER	17-30673	301	Substantially All Assets	$37,750,000	n/a	The lesser of (A) $2,000,000 and (B) 1% of the Cost Value of the Merchandise as reflected on Merchant's books and records at the close of business on April 13, 2017.	0.2% of the Cost Value of the Merchandise as reflected on Merchant's books and records at the close of business on the date that is two days before entry of the Bidding Procedures Order.	n/a	n/a	5%	SH Bid + Bid Protections + .25% of the aggregate cost value of the Merch. included in the bid.	.25% of the Cost Value of the Merch. included in bid as reflected on the Debtors' books and records at the close of business on April 13, 2017.	5%	25	3	3	Yes	n/a		
Vestis Retail Group, LLC	DE	LSS	16-10971	283	Non-Residential Real Property Leases	various	n/a	n/a	n/a	n/a	n/a	n/a	$20,000	Determined by Debtors at auction.	Greater of $20,000 or 10% of Bid.	18	5	14	Yes	Debtors permitted to select any format the see fit		Bid Procedures Motion: 259
				363	Substantially All Assets	$3,000,000 + $35,000,000 credit bid and SH's pay off all DIP Financing Obligations & Second Lien Financing Obligations + Assumed Liabilities		n/a	1500000	Yes	n/a	Assumption of $1,500,000 of Third Lien Financing Obligations in lieu of cash deposit.	$2,000,000	$250,000	$2,500,000	57	3	3	Yes	n/a		Bid Procedures Motion: 18 Notice of Sale: 590

Case	Court	Jdg	Case No.	Docket No. of Bidding Proc. Order	Assets Sold	Purchase Price	Stalking Horse Offer	Break-Up Fee	Expense Reimbursement	Credit Bid Break-Up Fee/ER?	Non- Solicit. Clause	Stalking Horse ("SH") Initial Deposit	Upset Bid/Initial Overbid	Bid Increment	Bidder Earnest Money/ Good Faith Deposit	Bid Deadline (Days from date of entry of Bid Procedures Order)	Auction Date (Days from Bid Deadline and Auction Date)	Sale Hearing Date (Days from Auction Date and Sale Hearing)	Req.to Serve as Back Up Bidder?	Notable Auction Format?	Miscellaneous	Other Relevant Docket Items.
Eastern Outfitters, LLC	DE	LSS	17-10243	261	Substantially All Assets	$114,500,000 consisting of credit bids of its own $85,000,000 DIP financing and $29,000,000 in second lien debt, plus $500,000 in cash.	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	Motion for approval of bid procedures withdrawn, converted to private sale.	Bid Procedures Motion: 76
Phoenix Brands LLC	DE	BLS	16-11242	136	RIT Business	$16,800,000	$13,000,000	4%	$300,000	Yes	Section 7.3 of SH APA: prior to entry of Bid Procedures Order, Seller may not solicit any alternative transaction. Upon receipt of alternative offer, Seller must inform SH of such offer, but is not required to disclose identity of offerer.	10%	655000	Determined by Debtors at auction.	10%	29	4	7	Yes	n/a		
					US Laundry Business	$10,700,000	$5,900,000	3%	0.005	Yes		10%	$306,500	Determined by Debtors at auction.	10%	29	4	7	Yes		Bankruptcy Court order reads as if granting 7% bidding protections, but states that the Stalking Horse APA controls. Section 7.1 of SH APA clarifies aggregate total of bid protections is equal to 3.5%. Bid Protections will rise to match greatest protections approved in sale of any of Debtors other assets.	
					Canada Laundry Business	$5,000,000	Same	3% + Mold Repurchase (as defined in Section 7.1 of SH APA)	$150,000 (Canadian)	Yes		7.5%	$277,000	Determined by Debtors at auction.	10%	28	5	6	Yes			
Emerald Oil	DE	KG	16-10704	664	Substantially All Assets	$110,000,000	$73,000,000	3% (minus expense Reimbursement)	1%	n/a	n/a	$3,650,000	$2,690,000	$500,000	5%	27	2	1	Yes	n/a		Stalking Horse Agreement: 343-1
New WEI, Inc. f/k/a Walter Energy, Inc.	NDAL	TOM	15-02741	1119	Substantially All Assets	$5,400,000 + release from $1,250,000,000 of First Lien Obligations	n/a	n/a	Uncapped = equal to reasonable out of pocket expenses of Buyer, Steering Committee, Credit Agrmt. Agent, and Indenture Trustee (re. the formation and operation of buyer and x-actions contemplated by the SH APA), to extent not otherwise paid under cash collateral orders.	Yes	Section 7.13 of SH APA: No Shop.	n/a	$10,000,000	$10,000,000	10%	39	3	1	Yes	n/a	Sale free and clear of any future coal act liability set new precedent.	
Sherwin Alumina Company LLC	SDTX	DRJ	16-20012	433	Substantially All Assets	$54,500,000 ($50,000,000 credit bid, $4,500,000 cash)	n/a	3%	100000	Yes	n/a	n/a	n/a	$500,000	10%	29	4	4	Yes	n/a		Bid Procedures Motion: 25

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Axion International Holdings Inc.	DE	CSS	15-12415	319	Various Asset Lots Described in Bidding Procedures Order	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	$10,000	10%	7	2	26	Yes	Auction first held for various asset lots, then when that auction concluded, all Qualified Bidders were given the option to submit a final bid (including credit bids, if applicable) on multiple or all lots.		Notice of Designation of Successful Bidder: 352
The Great Atlantic & Pacific Tea Company	SDNY	RRD	15-23007	1845	Global Intellectual Property	$17,500,000	n/a	3%	$25,000	n/a	From the execution of the SH APA until the entry of bid procedures, Sellers prohibited from soliciting bids, but allowed to respond to inquiries.	10%	$1,875,000	$50,000	10%	14	3	8	Yes	n/a		Bid Procedures Motion: 1681
The Great Atlantic & Pacific Tea Company	SDNY	RRD	15-23007	495	Debtor's Leasehold Interest in 12 Properties and Certain Related Assets	$40,000,000	n/a	$1,200,000 (3%)	n/a	Yes	n/a	$2,000,000	> $1,200,000 (also applicable to Credit bidding parties)	2% of applicable baseline bid	5%	11	2	8	Yes	n/a		1381
Quicksilver resources	DE	LSS	15-10585	681	Substantially All Assets	$245,000,000	n/a	n/a	n/a	n/a	n/a	n/a	$500,000 (+ bid protections if applicable)	$500,000 (subject to change by debtor)	5%	24	9	5	Yes	n/a	No SH at time of BPO.	Bid Procedures Motion: 636
Anna's Linens Inc.	CD CA	Albert	15-13008	528	Substantially All Assets	IP Assets: $275,000 Unexpired Real Property Leases: Varied	$1,400,000	3% (aggregate)		n/a	n/a	15%	Determined by Debtors at auction.	Determined by Debtors at Auction.	15%	3	3	12	Yes	n/a	No SH at time of BPO. Judge displeased with Debtors later request for break up fees for two different potential stalking horse bidders.	
Aereo Inc.	SDNY	SHL	14-13200	176	Substantially All Assets	Approx. $1,879,000	n/a	3% (aggregate with Expense Reimbursement)	$500,000	n/a	n/a	n/a	n/a	n/a	10%	30	4	11	Yes	n/a	No SH at time BPO issued	
Cal Dive International	DE	CSS	15-10458	539	Substantially All Assets	Aggregate of Seven Various Assets Classes: $37,300,000 Sea Horizon Barge: $8,800,000	Separate SHs for separate assets. Holmen Sea Horizon Bid: $12,000,000 Modern American Recycling Services: $4,100,000	n/a	Holmen: $100,000 Modern American Recycling Services: $82,000	n/a	n/a	10%	n/a	$50,000 (per vessel, or $250,000 for going concern)	10%	22	5	2	Yes	Auction first held for various asset lots, then when that auction concluded, all Qualified Bidders were given the option to submit a final bid (including credit bids, if applicable), on multiple or all lots.	Stalking Horse Bidder Holmen International did not fulfill its obligations under the previously approved stalking horse agreement with respect to the "Sea Horizon" vessel. Case ultimately converted to chapter 7 in 3.2017, after 2015 asset sales.	Bid Procedures Motion: 426 SH Motion: 549-50 SH Order: 563

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Ciber, Inc.	DE	BLS	17-10772	150	Substantially All Assets	$93,000,000	$50,000,000	$1,500,000 (3%)	$500,000	Yes	n/a	$5,000,000 (10%)	$53,000,000 (sum of: SH PP, Amt of Bid Protections and $1,000,000)	500000	10%	13	2	2	Yes	n/a	HTC overbid SH.	Bid Procedures Motion: 8 Order Approving Sale: 246
Molycorp Minerals, LLC (2017)	DE	CSS	15-11371	296	Substantially All Assets and Related Real Property Rights	Sale hearing set for 6.23.17	$1,200,000	n/a	$150,000	n/a	n/a	n/a	Sum of SH PP; Amt of Bid Protections and $50,000		10%	28	2	9	Yes	n/a		SH APA: Exhibit 2 of 251
Cosi, Inc.	EDMA	MSH	16-13705	280	Substantially All Assets.	$10,000,000 (including $4,100,000 credit bid)	$10,000,000 (including $4,100,000 credit bid)	$315,000	$325,000	Yes	n/a	n/a	$10,740,000	$50,000	$1,000,000	35	2	8	Yes	n/a	Debtors ultimately did not hold an auction.	SH APA: Exhibit 1 of 339
Harvest Oil and Gas, LLC (Saratoga Resources, Inc.)	WDLA	RS	15-50748	872	Substantially All Assets	$10,700,000	$10,000,000	n/a	$1,100,000*	n/a	n/a	n/a	$10,100,000	$100,000	$2,000,000	15 days prior to Sale Hearing	TBD (at time order was entered)	Day of auction.	No	n/a	*Expense Reimbursement included as part of any bid for assets, includes non-stalking-horse parties. Stalking horse agreed to pay these expenses as well.	Bidding Procedures Motion: 829 Order Approving Sale: 932
ERG Intermediate Holdings, LLC	NDTX	HDH	15-31858	281	Substantially All Assets	n/a	n/a	$0	n/a	n/a	n/a	10%	$250,000,000	Determined by Debtors at Auction.	10%	42	2	5	Yes	n/a	Canceled 363 Process after failing to receive any qualified bids. No SH at time BPO entered.	Notice of Cancellation of Sale Process: 415
Family Christian Stores	WDMI	JTG	15-00643	597	Substantially All Assets	Approx. $55,000,000	n/a	n/a	n/a	n/a	n/a	n/a	n/a	$100,000	Greater of $1,000,000 or 3.5% of cash purchase price.	33	3	14	Yes	n/a	No SH at time BPO was entered.	Bidding Procedures Motion: 30
In re Buckingham Oil Interests, Inc.	EDMA	NJF	15-13441	500	Legacy Assets	Approx. $185,000	n/a	n/a	n/a	n/a	n/a	n/a	Buyer may set a per-parcel reserve minimum prior to auction.	Determined by Debtors prior to online auction.	n/a	15	n/a	5	No	Debtors requested authority to conduct internet auction. Court approved online auction/sale via EnergyNet.com		Sale Motion: 461 Order Approving Sale: 551
Edison Mission Energy	NDIL	JPC	12-49219	1424	Substantially All Assets	$2,635,000,000	$2,635,000,000	$65,000,000	Reasonable Documented Out of Pocket Expenses	n/a	"Go Shop" provision which allowed the debtor to shop the assets for an addition 43 days, after which time party was not allowed to solicit additional purchase offers.	n/a	n/a	n/a	n/a	43	n/a	n/a	n/a	Sale approved without auction, however contained a "Go"Shop" provision which allowed the debtor to shop the assets for an addition 43 days, after which time party was not allowed to solicit additional purchase offers.		Motion to Approve Plan Sponsor Agreement: 1375

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C. Wonder LLC	NJ	MBK	15-11127	151	Non-Residential Real Property Lease	$1,650,000	$1,200,000	$50,000	n/a	n/a	n/a	10% ($120,000)	1450000 (SH PP + $250,000)	50000	10%	19	3	5	yes	n/a	Court did not determine whether or not to approve the Break-Up Fee until Sale Hearing. SH lost the auction with a $1,600,000 bid; but its $50,000 Break-Up fee was approved in the Sale Order.	Bidding Procedures Motion: 102 Sale Order: 202
C. Wonder LLC	NJ	MBK	15-11127	92	Debtors' Remaining Assets	Same as SH offer.	$2,050,000	n/a	n/a	n/a	n/a	$500,000	SH PP + $50,000 (Unless bid is for less than all assets)	n/a	10%	31	2	6	yes	Parties may bid for less than all assets.	Court did not determine whether or not to approve the Break-Up Fee until Sale Hearing. SH lost the auction with a $1,600,000 bid; but its $50,000 Break-Up fee was approved in the Sale Order.	Bidding Procedures Motion: 22 SH APA: 22-2
CS Mining, LLC	UT	WTT	16-24818	433	Substantially All Assets	n/a	n/a	n/a	$250,000	n/a	n/a	n/a	Bid Protections amount + $100,000, if applicable.	n/a	5%	73	3	TBD	yes	n/a	No SH at the time BP were entered. SH required to be selected 59 Days from entry of BPO (but date could be extended once by debtors). Auction delayed to July 10, 2017. SH selection deadline extended to 6/26.	
Gordmans Stores, Inc.	NE	TLS	17-80304	159	Substantially All Assets	Unknown. However, purchaser topped SH offer with respect to at least 58 stores, with SH to liquidate 48 remaining stores.	$74,150,000 + 5% of in store sales and 25% of online sales	$1,125,000 SH does not get Break-Up Fee if it joints with another qualified bidder to submit and alternative bid.	Advisor Expenses: $250,000 Sale Signage Expenses: $450,000 Additional Agent Merchandise Costs: $5,000,000	n/a	n/a	$3,500,000	SH Bid + Bid Protections Amount + $1,400,000 (however, minimum amount shall not apply to bids which provide for the going concern sale of at least 35 stores).	$250,000	$7,000,000 (or if a bid for less than all of the assets as part of the joint bid, than the joint bidding parties aggregate deposit must equal $7,000,000)	6	1	7	yes	n/a	Because Stalking Horse was to commence certain going out of business sale actions prior to sale hearing, it was permitted to be reimbursed for certain advertising related expenses if it did not ultimate close the transaction.	Sale Motion: 24 Sale Order: 330