

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

In re:) Chapter 11
)
Schwab Industries, Inc.) Case No. 10-60702
) (Jointly Administered)
Debtors.)
) Judge Russ Kendig

**OBJECTION OF THE NATIONAL LIME AND STONE COMPANY TO MOTION FOR
A REVISED BIDDING PROCEDURES ORDER APPROVING (1) EXECUTED
STALKING HORSE ASSET PURCHASE AGREEMENT; (2) PROPOSED BREAK-UP
FEE AND EXPENSE REIMBURSEMENT; (3) REVISED BIDDING PROCEDURES; (4)
THE FORM AND MANNER OF SERVICE OF NOTICE OF THE SALE HEARING AND
AUCTION; AND (5) THE FORM AND MANNER OF SERVICE OF NOTICE OF THE
ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND
UNEXPIRED LEASES**

NOW COMES, The National Lime and Stone Company (“National Lime”), a substantial unsecured creditor, party in interest and potential bidder, and by and through its undersigned counsel, does hereby object to the relief requested in Debtors’ Motion for a Revised Bidding Procedures Order Approving (1) Executed Stalking Horse Asset Purchase Agreement; (2) Proposed Break-Up Fee and Expense Reimbursement; (3) Revised Bidding Procedures; (4) The Form and Manner of Service of Notice of the Sale Hearing and Auction; and (5) The Form and Manner of Service of Notice of the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases (the “Motion”).

I. SUMMARY OF OBJECTIONS¹

The Motion should be denied for the following reasons:

1. The proposed revised bid and auction procedures will result in Cement Resources, LLC (“Cement”) gaining an unfair advantage over other bidders. The requests made in the Motion represent either the misplaced exercise of Debtors’ business judgment and/or the overt attempt by Cement to “lock-out” other potential bidders from having a fair and balanced ability to compete for the purchase of Debtors’ assets.

2. If the Motion is approved, both the structure of bids and the time frame within which bids must be submitted will have been changed drastically. At a minimum, the requested relief will make it extremely difficult if not impossible for National Lime to complete due diligence and submit its highest and best bid. At worse, the result will be a chilling effect on potential bidders, if not the actual foreclosing of competing bids—all to the detriment of Debtors’ estate and specifically to general unsecured creditors.

3. National Lime (as have other bidders) has relied upon the original bid and auction procedures **requested by Debtors** and approved by this Court on April 16, 2010 (the “Original Bid Procedures”). The Original Bid Procedures contemplated a deadline of May 28, 2010 for the submission of bids with an auction date of June 2, 2010. The Motion seeks to accelerate these dates to May 13 and May 17, respectively and thus significantly reduce available time for others to formulate and submit competing bids. National Lime has organized and conducted its due diligence with utmost dispatch and at substantial expense in reliance upon the fact that if it did not submit a stalking horse bid by the April 28, 2010 deadline, it would have until May 28, 2010 to submit a competing bid. Debtors’ stated reasons for requesting this drastic change do not justify the requested relief. National Lime (and other bidders) are entitled to have their reliance on the Original Bid Procedures protected.

4. The Original Bid Procedures authorized individual or aggregate bids on four distinct groupings of Debtors’ core assets. Non-core assets were to be included in separate auction sales. The Motion mandates that to be a qualifying bid, the bid must seek to acquire all of Debtors’ assets (including non-core assets). National Lime, in reliance upon the Original

¹ National Lime will file a separate objection addressing the impairment to National Lime’s rights as lessee under a prepetition lease and supply agreement with Medina Supply Company (“Lease”). The revised bid and auction procedures and the proposed Asset Purchase Agreement provide that Cement can reject the Lease without preserving National Lime’s rights under Section 365(h). National Lime contends that should the Lease be rejected, the sale of Debtors’ assets must be subject to its rights under Section 365(h).

Bid Procedures, has conducted its due diligence assuming that it could submit a bid for one or any combination of the four distinct asset groupings, including an aggregate bid for all of the core assets. The Motion outlaws anything other than a bid for all of Debtors' assets. National Lime's reliance on the Original Bid Procedures must be protected.

5. The proposed 4% break-up fee both alone and in combination with the \$750,000 expense reimbursement is excessive, is intended to limit the ability of competing bidders to challenge the Cement bid and will have a chilling effect on competitive bidding.

6. The participation of insiders as part of the Cement bid in combination with the undisclosed nature of such participation, requires that the relief requested by the Motion be subjected to close scrutiny.

II. DEBTORS' MOTION MUST BE DENIED BECAUSE (1) IT WILL GIVE CEMENT RESOURCES AN UNFAIR ADVANTAGE OVER OTHER BIDDERS, (2) IT DRASTICALLY CHANGES THE BID AND AUCTION PROCESS WITHOUT DUE CAUSE, (3) IT WILL LIKELY HAVE A CHILLING EFFECT ON BIDS, AND (4) NATIONAL LIME AND OTHER BIDDERS HAVE RELIED ON THE ORIGINAL BID PROCEDURES AND ARE ENTITLED TO HAVE SUCH RELIANCE PROTECTED

The auction sale process established by the Original Bid Procedures provided for an expedited sale process. The Original Bid Procedures were filed with the Court on April 5, 2010 and approved by the Court on April 16, 2010. April 28 was set as the date by which stalking horse bids were to be submitted and May 28, 2010 as the Bid Deadline by which Qualified Bids were to be submitted. Thus, as originally contemplated, the sale of Debtors' assets was on a fast track. Prospective bidders, especially those that had not previously considered and investigated the purchase of Debtors' assets, would need to move fast—less than 6 weeks. Of course, fast-moving auction sales are not uncommon in the Chapter 11 arena.

As a significant unsecured creditor of Debtors, National Lime is keenly interested in the outcome of the sale of Debtors' assets. Further, National Lime views the

acquisition of certain assets of Debtors to be a strategic opportunity that deserves serious consideration. Accordingly, National Lime has invested the time and resources necessary to meet the expedited sale time-frame contemplated by the Original Bid Procedures. Specifically, National Lime's senior executives and employees have spent hundreds of hours performing due diligence and investigating the submission of a bid. National Lime has retained investment bankers, corporate counsel, bankruptcy counsel and considered financing alternatives, all with the intent of submitting a bid by the May 28 deadline. However, these efforts will be undermined if the relief requested in the Motion is granted.

A. If Approved The Revised Bid Procedures Give Cement Resources An Unfair Advantage

If approved as the stalking horse bidder, Cement is entitled to certain benefits. However, those benefits do not include creating an unlevel and unfair sale process. At paragraphs 22 and 36 of the Motion, Debtors confirm that Cement's bid is conditioned upon significant modification to the Original Bid Procedures. Specifically, Cement demands that the due diligence, bid and auction sale process be accelerated by 33%. In addition, Cement demands that the structure of the sale be changed so that only the structure that Cement supports can be considered by the Debtors and this Court.

By reducing the time within which competing bids can be submitted by fifteen (15) days Cement seeks to make it more difficult for other bidders to challenge its stalking horse bid. National Lime, for example, will have 33% less time to complete its due diligence and submit a competing bid.

Not satisfied with this time advantage, Cement demands that bids not be allowed on the individual groupings of assets or combinations thereof. Instead, each individual

bid must provide for the purchase of all of Debtors' assets. So, again, a bidder like National Lime must expand its due diligence to include non-core assets and must fashion a bid to include all of Debtors' assets. If granted, the Motion would lead to the absurd result that even if a combination of separate bids on the asset groupings established under the Original Bid Procedures would result in a higher total bid than the Cement bid, Debtors, their creditors and this Court, are prohibited from considering such bids.

If granted, the Motion has the potential to exclude many possible bidders. Such a result only makes sense if the intent is to give Cement, as the stalking horse bidder, an advantage that exceeds any legitimate benefit to which a stalking horse bidder is entitled. Accordingly, this Court should reject Debtors' efforts to give Cement an unfair and unwarranted advantage.

B. Debtor Has Not Demonstrated Cause For The Requested Relief

A review of the procedural posture as recounted in the Motion undermines the very relief requested by Debtors. In paragraphs 12 through 18 of the Motion, Debtors reference the April 5 Cash Collateral Order and the April 15 Cash Collateral Order, and the requirement that Debtors obtain a Compliant Bid and a Commitment to purchase substantially all of its assets no later than April 30.² The Commitment must be free of any financing or due diligence contingencies and in a form satisfactory to the Agent and Pre-Petition Lender. Debtors have confirmed that the Cement bid meets each of these criteria. Thus, the Cement bid has been endorsed by Debtors, the Agent and the Pre-Petition Lenders.

² Unless otherwise indicated, capitalized terms shall have the same meaning as noted in the Motion.

Notwithstanding the fact that the sale process has proceeded exactly as Debtors intended, Debtors now assert that the very procedures which they requested, must be dramatically changed. Why this sudden change? In paragraphs 32 and 33 of the Motion, Debtors point to the value that the negotiated terms of the Cement bid will bring to Debtors' estates and the need to capture this value quickly "in order to ensure the continuation of Debtors' going concern value and the maximization of creditor recoveries." In addition, Debtors reference the savings that will accrue by avoiding the need to hold auctions of Debtors' Non-Core Assets. Debtors suggest that the "shortened, but reasonable, timeline for completing the sale of the Assets" will result in the expenditure of less administrative expenses. Lastly, in paragraph 53 Debtors reference a possible cash collateral fight with the Secured Lenders.

Because Debtors have provided no facts to support the statements noted above, none of these reasons warrant the changes requested by the Motion. The marketing and sale process described by Debtors served its purpose—the submission of a Compliant Bid that, if approved, will be used as a stalking horse.³ In fact, Debtors received 3 Compliant Bids. The fact that the process was successful does not warrant the drastic changes sought by the Motion. The Original Bid Procedures contemplated that Debtors would incur operational costs for the additional 15 days between May 13 and May 28. The Secured Lenders approved the Original Bid Procedures. Debtors have not demonstrated that their ability to use cash collateral will be impaired if the Motion is not granted. Further, Debtors have not demonstrated that the value of the

³ National Lime does not concede that the Cement bid should be approved as the stalking horse bid, nor as referenced hereinafter, that the form of the bid is consistent with the Original Bid Procedures. However, if approved as the stalking horse bid all other bidders will have to exceed that offer; and, accordingly, Debtors' estate will suffer no harm.

Secured Lenders collateral will erode thus creating a super priority claim that will impair the interests of unsecured creditors. Moreover, Debtors provide absolutely no support for the statement that its going concern value will be impaired if the Original Bid Procedures are maintained.

Paragraphs 22 and 36 of the Motion provide the real explanation for the filing of the Motion. Cement, as a condition to entering the APA, demanded that Debtors seek to modify the Original Bid Procedures. Cement's motivation is clear---they seek to make it more difficult for other bidders to compete with their offer. The Court should not countenance such a blatant attempt to control the sale process. Perhaps Debtors felt they had no choice but to accede to Cement's demand. However, this Court, fortunately, has the final say on this matter. The Motion should be denied.

C. National Lime Has Relied On The Original Bid Procedures And That Reliance Must Be Protected

Debtors correctly note that section 363 sales are a fluid process and that a degree of flexibility is necessary. However, Debtors' characterization of the changes sought by the Motion as "...little more than a simple rescheduling" is disingenuous at best. Motion at 49.

In Paragraph F of the Original Bid Procedures, Debtors reserve the right to "cancel or reschedule the Auction for any reason at any time, following consultation with their professionals, the Committee and the Agent". Notwithstanding this reservation, any suggested change must clearly benefit Debtors' estate and present the reasonable prospect that the sale process will be improved, thus enhancing the likelihood that the sale price will increase. The Motion is not intended to and; if granted, will not achieve

these goals. Rather, the Motion is the result of one bidder seeking to get not only a “leg up” on other bidders, but effectively “lock-out” other bidders.

Even a cursory review of the impact of the revised bid procedures makes clear the impact. National Lime (and other bidders) were given the choice of submitting a stalking horse bid by April 28 or submitting a bid prior to May 28 in response to a stalking horse bid if one were designated by Debtors. Further, National Lime could bid on any one of the asset groupings, a combination of the asset groupings or the entirety of the asset groupings. Non-core assets were not part of the assets to be considered for purchase. Now, if the Motion is approved, National Lime is required to bid on all of Debtors’ assets. In conducting its due diligence and otherwise making preparations to submit a bid, National Lime relied upon the Original Bid Procedures. That reliance was implicated when National Lime discovered that certain critical information (e.g. environmental reports) were not initially in the data room or when National Lime’s requests for additional information from Debtors’ investment bankers were not always met with timely response.⁴

The sale process as originally approved was only six weeks long. To shave 33% off an already short time frame—and on such short notice—is more than “simple rescheduling”. Motion at 49. To require that bids be for all of Debtors’ assets further complicates this “simple rescheduling”. This is particularly true when the clear impetus for the change is the demand of a competing bidder seeking to gain an unfair advantage. While flexibility is a hallmark of section 363 sales, the concepts of fundamental fairness and a level playing field are equally important principals. “The

⁴ Even at the time of this submission, not all requests for information necessary for National Lime to complete its due diligence have been responded to.

purpose of procedural bidding orders is to facilitate an open and fair public sale designed to maximize value for the estate.” In re Cornier, 382 B.R. 377, 388 (quoting In re Edwards, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998)). “Finality and regularity of proceedings are significant factors whenever the courts are involved in a sale of property, for devotion to those principles encourages fervent bidding and ensures that interested parties will sincerely extend their best and highest offers at the auction itself.” Id. (quoting Four B. Corp. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.), 107 F.3d 558, 564-65 (8th Cir. 1997)). “An auction sale should be conducted ‘in compliance with the bidder’s reasonable expectations.’” Id. (quoting In re Food Barn Stores, 107 F.3d at 562). “This court, in deciding this contested matter, should be mindful to ‘strike a satisfactory balance between the relevant factors of fairness, finality, integrity, and maximization of assets.’” Id. (quoting In re Food Barn Stores, 107 F.3d at 562.).

National Lime submits that fairness and integrity demand that the revised bid and auction procedures requested by the Motion be denied. National Lime’s ability to submit a fully informed bid will be impaired if the Motion is granted. Such impairment may have a detrimental effect on Debtors’ estate. National Lime has not completed its due diligence. Further, until the Motion was filed, National Lime had not focused on the Non-Core Assets. Moreover, as National Lime considered financing alternatives, it proceeded with the expectation that it had until May 28 to complete that process.

When a competing bidder that was equally aware of the sale terms submits a bid conditioned on a change that clearly puts other bidders at a disadvantage, and such request is supported by the debtor and secured creditor, the underlying sale itself comes into question. In that regard, “factors for the Court to consider in whether to

approve the sale include: (1) any improper or bad faith motive, (2) price is fair and the negotiations or bidding occurred at arm's length, (3) adequate procedures, including proper exposure to the market and accurate and reasonable notice to all parties in interest." In re Jillian Entertainment Holdings, 327 B.R. 616, 617 (Bankr. W.D.Ky. 2005); In re Gulf States Steel, Inc. of Alabama, 285 B.R. 497, 514 (Bankr. N.D. Ala. 2002); In re Castre, Inc., 312 B.R. 426, 428 (Bankr. D. Col. 2004).

III. THE AMOUNT OF THE PROPOSED BREAK-UP FEE IS NOT NECESSARY TO PRESERVE THE ESTATE BECAUSE (1) DEBTORS HAVE NOT SHOWN IT IS NECESSARY TO PRESERVE THE ESTATE, (2) THE MAGNITUDE OF THE FEE CHILLS BIDDING RATHER THAN ENCOURAGING IT AND (3) IT IS IRRELEVANT WHETHER DEBTORS' "BUSINESS JUDGMENT" IS THAT THE PROPOSED BREAK-UP FEE IS WARRANTED.

The appropriate test for approving a proposed break-up fee is whether doing so is necessary to preserve the estate. E.g., Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527, 536-37 (3d Cir. 1999). As with all requests for allowance of administrative expenses, the burden is on the applicant to establish that a break-up fee is a necessary cost of preserving the estate. Id. at 533 (describing burden as a "heavy burden"). In In re Hupp Industries, Inc., 140 B.R. 191 (Bankr. N.D. Ohio 1992) (Baxter, J.), another court in this District considered seven factors to determine whether a break-up fee was necessary to preserve the estate:

- 1) Whether the fee requested correlates with a maximization of value to the debtor's estate;
- 2) Whether the underlying negotiated agreement is an arms-length transaction between the debtor's estate and the negotiating acquirer;
- 3) Whether the principal secured creditors and the official creditors committee are supportive of the concession;

- 4) Whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
- 5) Whether the dollar amount of the break-up fee is so substantial that it provides a “chilling effect” on other potential bidders;
- 6) The existence of available safeguards beneficial to the debtor's estate;
- 7) Whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break-up fee.

Hupp Indus., 140 B.R. at 194. The proposed Break-Up Fee should be denied.

A. Debtors Have Not Borne Their Burden

Debtors have not borne the “heavy burden” of demonstrating that the proposed Break-Up Fee is a necessary cost of preserving the estate.

First, the Motion is misplaced in its conclusory statement that denying the proposed Break-Up Fee would risk losing the Cement bid. Motion at 17. But the purpose of granting bid protections to a stalking horse bidder is not to bribe the bidder into making a bid it otherwise would not make in an open auction; it is to compensate the bidder for making the *first* bid. By protecting the first bidder, the argument goes, the debtor protects the bidder from the risk that the debtor will shop around the first bid to another bidder who would take advantage of the first bidder's due diligence. Hupp Indus., 140 B.R. at 194. The argument that a windfall should go to the highest bidder – the “bird in the hand” to which the Motion refers – is false.

Second, the fact that Cement has expressly conditioned the APA on approval of the Break-Up Fee is not determinative. True, other courts have denied administrative expense treatment where the bidder simply asked for, rather than insisted on, approval of a break-up fee. E.g., In re Reliant Energy Channelview LP, 594 F.3d 200, 207 (3d Cir. 2010) (“it is clear beyond doubt that Kelson did not condition its bid on the presence

of a provision for a break-up fee, although it did condition the bid on the Debtors' promise to seek authority to pay such a fee"). But demanding a break-up fee, instead of requesting one, does not increase the benefit to the estate.

Third, the Motion identifies no basis in the record for its assertion that the sale of all of the Assets would result in a higher return than selling the Assets in four lots. Cf. Motion at ¶ 46.

B. The Size of the Break-Up Fee Would Invert the Proper Use of a Break-Up Fee by Discouraging Bidding

The purpose of bid protections for a stalking horse bidder is to encourage a first bid, not discourage subsequent bids. See Hupp Indus., 140 B.R. at 194. When properly used, a break-up fee shelters the first bidder from performing substantial due diligence, only to have a subsequent bidder make its bid without having incurred the costs of doing its own, equivalent due diligence. Id. But a break-up fee can also be used corrosively; "[a] break-up fee may discourage an auction process and preclude further bidding when the fee is so large as to make competing bids too expensive." In re Integrated Resources, Inc., 135 B.R. 746, 750 (Bankr. S.D.N.Y. 1992). Debtors' proposed Break-Up Fee, possibly consisting of four percent of the sale proceeds plus \$750,000 in expenses, is large enough that it jeopardizes competition in the auction for Debtors' assets.

Contrary to Debtors' representations, the Break-Up Fee is not "well within (or potentially below) the range of bidder protections approved by bankruptcy courts." Cf. Motion at ¶ 47. In fact, courts in this circuit have noted that, "[e]xcept in extremely large transactions, break-up fees ranging from one to two percent of the purchase price have been authorized by some courts." Hupp Indus., 140 B.R. at 194; see In re Nashville

Senior Living, LLC, 2008 WL 5062366, *2 (Bankr. M.D. Tenn. 2008) (quoting same and approving break-up fee of one percent).

Moreover, for every reported case that has approved a break-up fee of more than three percent, several more have approved lesser fees. In 2004, the U.S. Bankruptcy Court for the Northern District of Iowa conducted a nearly exhaustive survey of prior decisions. See In re Tama Beef Packaging Inc., 312 B.R. 192, 194 n.1 (Bankr. N.D. Iowa 2004), rev'd, 290 B.R. 90 (B.A.P. 8th Cir. 2003). That court cited more than 20 cases either approving or rejecting break-up fees, only three of which approved fees equal to or exceeding the proposed Break-Up Fee.

C. The Court Should Not Defer to Debtors' Purported Business Judgment In Approving a Request for Administrative Expense

The Debtors wrongly ask the Court to defer to their “business judgment.” See Motion at ¶ 46. In the case cited by Debtors for the standard for approving break-up fees, the U.S. Court of Appeals for the Third Circuit rejected use of the “business judgment rule” in the break-up fee context. O'Brien, 181 F.3d at 535. Far from requiring deference to a debtor’s business judgment, Section 503(b) of the Bankruptcy Code puts a “heavy burden” on the party seeking approval of a break-up fee.

IV. THE INVOLVEMENT OF INSIDERS REQUIRES THAT THE CEMENT RESOURCES BID AND THE MOTION BE SUBJECTED TO CLOSE SCRUTINY

Debtors are effectively controlled by four members of the Schwab family (the “Insiders”). Motion ftn. 5. The Motion confirms that discussions are ongoing between Cement and Insiders regarding their “going-forward” role with the business should Cement be the successful purchaser. Apparently, those discussions include possible

management positions, a potential minority equity stake and the purchase of physical assets owned by the Insiders. Cf. Motion at 49.

As these discussions are ongoing and the details have yet to be revealed, National Lime is not suggesting that anything inappropriate has or will occur. However, courts must closely scrutinize a sales process involving an insider stalking horse. In re Crown Village Farm, LLC, 415 B.R. 86, 93 (Bankr. D. Del. 2009); In re Summit Global Logistics, Inc., 2008 WL 819934 *9 (Bankr. D.N.J. 2008) (heightened scrutiny for insider transactions). “Insider transactions are more closely scrutinized ... because insiders ‘usually have greater opportunities for ... inequitable conduct.’” In re Autostyle Plastics, Inc., 269 F.3d 726, 745 (6th Cir. 2001).

As noted previously, National Lime has experienced delays in response to certain due diligence requests. National Lime is unaware if Cement had greater access than other bidders to the information necessary to formulate its bid. But even if that has not been the case, the Court and parties in interest are entitled to full disclosure and understanding of the role that the Insiders will play post-sale.

V. CONCLUSION

For the foregoing reasons, National Lime requests that the Motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 10th day of May 2010 the above and foregoing was served via the Court's ECF system, upon the following:

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