

Chapter 11 Guidelines

The following guidelines are provided to facilitate presentation and requests for sales and sale procedures motions for Chapter 11 proceedings. These guidelines supplement the Federal and Local Rules of this District. In the event of conflict, the Federal Rules of Bankruptcy Procedure shall control.

Sales and Sale Procedures Motions

- (1) **Sale Motions.** Except as provided herein and/or in the Local Rules, motions to sell property of the estate under 11 U.S.C. § 363(b) (“Sale Motions”) and motions seeking approval of sale, bid or auction procedures in anticipation of or in conjunction with a Sale Motion (“Sale Procedures Motions”), shall be governed by the following guidelines.
 - (2) **Documents and Information for Inclusion.** Except as otherwise provided in the Bankruptcy Code, the Fed. R. Bankr. P., the Local Rules or an Order of the Court, all Sale Motions shall attach or include the following:
 - (a) A copy of the proposed purchase agreement, or a form of such agreement substantially similar to the one the debtor reasonably believes it will execute in connection with the proposed sale;
 - (b) A request, if necessary, for the appointment of a consumer privacy ombudsman under Bankruptcy Code section 332; and
 - (c) **Certain Provisions to be Identified.** The Sale Motion must contain a summary identifying material terms, including but not limited to (a) whether the proposed form of sale order and/or the underlying purchase agreement constitutes a sale or contains any provision of the type set forth below, (b) the location of any such provision in the proposed form of order or purchase agreement, and (c) the justification for the inclusion of such provision:
 - (i) **Sale to Insider.** If the proposed sale is to an insider, as defined in 11 U.S.C. § 101(31), the Sale Motion must (a) identify the insider, (b) describe the insider’s relationship to the debtor, and (c) set forth any measures taken to ensure

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the fairness of the sale process and the proposed transaction.

- (ii) Agreements with Management. If a proposed buyer has discussed or entered into any agreements with management or key employees regarding compensation or future employment, the Sale Motion must disclose (a) the material terms of any such agreements, and (b) what measures have been taken to ensure the fairness of the sale and the proposed transaction in the light of any such agreements.
- (iii) Releases. The Sale Motion must contain a summary identifying any provisions pursuant to which an entity is being released or claims against any entity are being waived or otherwise satisfied.
- (iv) Private Sale/No Competitive Bidding. The Sale Motion must disclose whether an auction is contemplated, and contain a summary identifying any provision in which the debtor has agreed not to solicit competing offers for the property subject to the Sale Motion or to otherwise limit shopping of the property.
- (v) Closing and other Deadlines. The Sale Motion must contain a summary identifying any deadlines for the closing of the proposed sale or deadlines that are conditions to closing the proposed transaction.
- (vi) Good Faith Deposit. The Sale Motion must contain a summary identifying whether the proposed purchaser has submitted or will be required to submit a good faith deposit and, if so, the conditions under which such deposit may be forfeited.
- (vii) Interim Arrangements with Proposed Buyer. The Sale Motion must contain a summary identifying any provision pursuant to which a debtor is entering into any interim

agreements or arrangements with the proposed purchaser, such as interim management arrangements (which, if out of the ordinary course, also must be subject to notice and a hearing under 11 U.S.C. § 363(b) of the Bankruptcy Code) and the terms of such agreements.

- (viii) Use of Proceeds. The Sale Motion must contain a summary identifying any provision pursuant to which a debtor proposes to release sale proceeds on or after the closing without further Court order, or to provide for a definitive allocation of sale proceeds between or among various sellers or collateral.
- (ix) Tax Exemption. The Sale Motion must contain a summary identifying any provision seeking to have the sale declared exempt from taxes under 11 U.S.C. § 1146(a), the type of tax (e.g., recording tax, stamp tax, use tax, capital gains tax) for which the exemption is sought. It is not sufficient to refer simply to “transfer” taxes and the state or states in which the affected property is located.
- (x) Record Retention. If the debtor proposes to sell substantially all of its assets, the Sale Motion must contain a summary identifying whether the debtor will retain, or have reasonable access to, its books and records to enable it to administer its bankruptcy case.
- (xi) Sale of Avoidance Actions. The Sale Motion must contain a summary identifying any provision pursuant to which the debtor seeks to sell or otherwise limit its rights to pursue avoidance claims under chapter 5 of the Bankruptcy Code.
- (xii) Requested Findings as to Successor Liability. The Sale Motion should contain a summary identifying any provision limiting the proposed purchaser’s successor liability.

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- (xiii) Sale Free and Clear of Unexpired Leases. The Sale Motion must contain a summary identifying any provision by which the debtor seeks to sell property free and clear of a possessory leasehold interest, license or other right.
- (xiv) Credit Bid. The Sale Motion must contain a summary identifying any provision by which the debtor seeks to allow, disallow or affect in any manner, credit bidding pursuant to 11 U.S.C. §363(k).
- (xv) Relief from Fed. R. Bankr. P. 6004(h). The Sale Motion must contain a summary identifying any provision whereby the debtor seeks relief from the fourteen-day stay imposed by Fed. R. Bankr. P. 6004(h).

(3) Sale Procedures Motions. A debtor may file a Sale Procedures Motion seeking approval of an order (a “Sale Procedures Order”) approving bidding and auction procedures either as part of the Sale Motion or by a separate motion filed in anticipation of an auction and a proposed sale. The Court will only schedule a hearing to consider approval of bidding and sale procedures in accordance with the notice procedures set forth in Fed. R. Bankr. P. 2002 and 6004, unless the requesting party files a motion to shorten notice which may be heard at the first hearing in the case and presents evidence at that hearing of compelling circumstances.

- (a) Certain Provisions to Be Identified. The Sale Procedures Motion should contain a summary identifying the following provisions in any Sale Procedures Order:
 - (i) Provisions Governing Qualification of Bidders. Any provision governing an entity becoming a qualified bidder, including but not limited to, an entity’s obligation to:
 - (A) Deliver financial information by a stated deadline to the debtor and other key parties (ordinarily excluding other bidders).
 - (B) Demonstrate its financial wherewithal to

consummate a sale.

- (C) Maintain the confidentiality of information obtained from the debtor or other parties or execute a non-disclosure agreement.

- (D) Make a non-binding expression of interest or execute a binding agreement.

- (ii) Provisions Governing Qualified Bids. Any provision governing a bid being a qualified bid, including, but not limited to:

- (A) Any deadlines for submitting a bid and the ability of a bidder to modify a bid not deemed a qualified bid.

- (B) Any requirements regarding the form of a bid, including whether a qualified bid must be (a) marked against the form of a “stalking horse” agreement or a template of the debtor’s preferred sale terms, showing amendments and other modifications (including price and other terms), (b) for all of the same assets or may be for less than all of the assets proposed to be acquired by an initial, or “stalking horse”, bidder or (c) remain open for a specified period of time.

- (C) Any requirement that a bid include a good faith deposit, the amount of that deposit and under what conditions the good faith deposit is not refundable.

- (D) Any other conditions a debtor requires for a bid to be considered a qualified bid or to permit a qualified bidder to bid at an auction.

- (iii) Provisions Providing Bid Protections to “Stalking Horse” or Initial Bidder. Any provisions providing an initial or “stalking horse” bidder a form of bid protection, including,

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but not limited to the following:

- (A) No-Shop or No-Solicitation Provisions. Any limitations on a debtor's ability or right to solicit higher or otherwise better bids.
- (B) Break-Up/Topping Fees and Expense Reimbursement. Any agreement to provide or seek an order authorizing break-up or topping fees and/or expense reimbursement, and the terms and conditions under which any such fees or expense reimbursement would be paid.
- (C) Bidding Increments. Any requirement regarding the amount of the initial overbid and any successive bidding increments.
- (D) Treatment of Break-Up and Topping Fees and Expense Reimbursement at Auction. Any requirement that the "stalking horse" bidder receive a "credit" equal to the break-up or topping fee and or expense reimbursement when bidding at the auction and in such case whether the "stalking horse" is deemed to have waived any such fee and expense upon submitting a higher or otherwise better bid than its initial bid at the auction.
- (E) Modification of Bidding and Auction Procedures. Any provision that would authorize a debtor, without further order of the Court, to modify any procedures regarding bidding or conducting an auction.
- (F) Closing with Alternative Backup Bidders. Any provision that would authorize the debtor to accept and close on alternative qualified bids received at an auction in the event that the bidder selected as the

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“successful bidder” at the conclusion of the auction fails to close the transaction within a specified period.

- (b) Provisions Governing the Auction. Unless otherwise ordered by the Court, the Sale Procedures Order shall:
- (a) Specify the date, time and place at which the auction will be conducted and the method for providing notice to parties of any changes thereto.
 - (b) Provide that each bidder participating at the auction will be required to confirm that it has not engaged in any collusion with respect to the bidding or the sale.
 - (c) State that the auction will be conducted openly and all creditors will be permitted to attend.
 - (d) Provide that bidding at the auction will be transcribed or videotaped.