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How to Negotiate and Draft Sale Documents and Pleadings in Chapter 11 Cases

Lynn Lewis Tavenner, Moderator
Tavenner & Beran, PLC; Richmond, Va.

Matthew T. Faga
Markus Williams Young & Hunsicker LLP; Denver

Jennifer B. Kimble
Lowenstein Sandler LLP; New York

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HOW TO NEGOTIATE AND DRAFT SALE DOCUMENTS AND PLEADINGS IN CHAPTER 11 CASES

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Materials Prepared By:

Jennifer B. Kimble, Esq.
Lowenstein Sandler LLP
1251 Avenue of the Americas
New York, New York 10020
Phone: (646) 414-6918
jkimble@lowenstein.com

Lynn L. Tavenner, Esq.
Tavenner & Beran, PLC
20 North Eighth Street, 2nd Floor
Richmond, VA 23219
Phone: (804) 783-8300
ltavenner@tb-lawfirm.com

Matthew T. Faga, Esq.
Markus Williams Young & Hunsicker, LLC
1700 Lincoln Street, Suite 4550
Denver, CO 80203
Phone: (303) 830-0800
mfaga@markuswilliams.com

I. Introduction to Section 363 Sales[1]

When the Bankruptcy Code was amended in 2005, such amendments imposed an accelerated decision process regarding leases of nonresidential real property. *See, e.g.*, 11 U.S.C. § 365(d)(4) (the debtor has until the earlier of (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan to assume or reject a lease of nonresidential real property); *see also Cousin Props. v. Treasure Isles HC, Inc. (In re Treasure Isles HC, Inc.)*, 462 B.R. 645, 650 (B.A.P. 6th Cir. 2011) ("the deadline provisions of 11 U.S.C. § 365(d)(4) are intended to set a 'bright line' regarding how much time the trustee has to decide whether to assume or reject a lease."). Such lease rejection constriction, coupled with the overall shortening of run-time by lenders and the tightening of consumer spending after the financial crisis of 2008, resulted in many cases in the restructuring environment, and in the myriad of retail cases, liquidation sales. DIP financing for the debtors in such environment in many instances involves little more than funding to complete a going out of business sale, with the retailer's current lenders essentially making protective loan advances to foster the liquidation of their prepetition collateral under the protection of Chapter 11. To facilitate the same, debtors negotiate with professional liquidators to assist in the creative funding of such sales. Of course, like everyone else, the liquidator is in the business to make a profit. The debtor should carefully review any sales agreement or other proposed liquidation agreement prior to requesting the approval of the same from the Bankruptcy Court. Communication between the debtor and its creditors prior to the commencement of proceedings is also beneficial to the debtor in the long run, as the renegotiation of leases and executory contracts is more likely to succeed if the creditors feel that they have an active voice in the process. The debtor must have a solid idea of what the exit plan ultimately is, and the necessary time required to accomplish the same. Taking these steps will enable the-debtor-in-possession to move more quickly and efficiently through the bankruptcy process, and if not emerging as a successfully reorganized company, to at least return the greatest possible value to its creditors.

To accomplish its duty to maximize the value of the estate through its exit plan, debtors regularly seek authority for liquidation of certain assets. In the retail scenario, the debtor seeks to sell all the merchandise in one or all its stores to the public pursuant to § 363 of the Bankruptcy Code. The sales are typically advertised with such terms as "going out of business or GOB sale," "store closing," and "liquidation." The typical sale generally lasts between one and 90 days, depending on the number of stores and complexity of the debtor's business operations, although courts will generally allow debtors additional time if necessary. While a debtor can itself conduct a GOB sale, the modern practice, especially for larger businesses, is to employ a court approved liquidating agent that specializes in such sales. Similar to a § 363 auction of a debtor's assets, debtors seeking to conduct a GOB sale often evaluate competitive bids from potential liquidators and submit a stalking horse liquidating agent bid for the court to evaluate with other bids through an auction process.

[1] These materials assume familiarity with the sales process effectuated by 11 U.S.C. § 363.

II. Process

A debtor files a motion seeking approval for the terms of the agency agreement with its stalking horse liquidating agent along with the debtor's proposed sale terms. GOB sales generally seek to liquidate a substantial amount of inventory, much of which may have limited shelf life and be declining in value. GOB sales have the potential to attract more attention from consumers looking for bargains and can be a debtor's best option to maximize the value of its estate. Such sales may conflict with the landlord's desire to protect its other tenants, the lender's desire to maintain the value of its collateral, the interests of neighboring and/or competing businesses, and the state's interest in preventing fraud on customers and unfair competition. When considering motions relating to GOB sales, Courts must balance all of these competing interests. *See, e.g.*, *In re Trilogy Dev. Co., LLC*, 2010 Bankr. LEXIS 5636, at *3–4 (Bankr. W.D. Mo. 2010) (holding that § 363 of the Bankruptcy Code permits the debtor to sell their assets if a sound business purpose exists); *In re Channel One Commc'ns, Inc.*, 117 BR 493 (Bankr. E.D. Mo. 1990) (same); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991) ("Under § 363, the debtor in possession can sell property of the estate . . . if he has an 'articulated business justification.'") (citations omitted); *see also In re Farmland Indus., Inc.*, 294 B.R 855, 881 (Bankr. W.D. Mo. 2003) (holding that courts in this district are reluctant to interfere with corporate decisions unless "it is made clear that those decisions are, inter alia, clearly erroneous, made arbitrarily, are in breach of the officers' and directors' fiduciary duty to the corporation, are made on the basis of inadequate information or study, are made in bad faith, or are in violation of the Bankruptcy Code"); *In re Integrated Res., Inc.*, 147 B.R. 650, 656–57 (S.D.N.Y. 1992) (noting that bidding procedures that have been negotiated by a trustee are to be reviewed according to the deferential "business judgment" standard, under which such procedures and arrangements are "presumptively valid").

The *Great Atlantic & Pacific Tea Company, Inc.* case filed in the Southern District of New York, demonstrates the extent of the use of GOB sales and the importance of liquidators in such process. *See* Motion of Debtors Pursuant to 11 U.S.C. §§ 105, 363, 365 and 554 for Approval of (I) Global Procedures for (A) Store Closings, (B) the Expedited Sale, Transfer, or Abandonment of DE Minimis Assets, and (C) Rejecting Unexpired Nonresidential Real Property Leases, and (II) Entry into a Liquidation Consulting Agreement, Case No. 15-23007-rdd, (Bankr. S.D.N.Y. July 20, 2015), ECF No. 20. Through this all-encompassing motion, A&P sought to enter into a liquidating consulting agreement with a liquidation consulting firm that the Debtors determined in their business judgment proposed the most favorable terms to run a seamless and efficient large-scale store closing process and to maximize the value of assets. As part of the Motion, A&P sought authority for the Liquidation Consultant to facilitate a GOB process, including, at the Debtors direction, to negotiate any particular modifications to the Store Closing Procedures in regards to number and placement of signs or banners and the sale of de Minimis assets. Upon selection, the Debtors and the Liquidation Consultant sought to formulate a comprehensive store closing schedule to begin ten days after the filing of the motion, at the latest.

The A&P Liquidation Consulting Agreement generally provided that the Liquidation Consultant would advise the Debtors with respect to the sale of their Store Closing Assets. Specifically, the Liquidation Consultant will, among other things, (a) provide the Debtors with qualified supervisors as independent contractors to oversee the management of the Closing Stores, (b) determine the appropriate pricing of the Store Closing Assets, staffing levels for the Closing

Stores, and advertising of the Store Closing Sales, (c) coordinate accounting functions for the Closing Stores, including evaluation of the sales of Inventory by category, sales reporting, and monitoring of expenses using the Debtors' infrastructure, (d) coordinate with the landlords and any other tenants or subtenants, as necessary (e) dispose of any unsold Store Closing Assets, and (f) clean the premises to "broom clean" condition. In consideration of the services to be rendered, the Debtors propose to provide the Liquidation Consultant with a fee equal to a percentage of the gross sale proceeds related to the inventory. The Liquidation Consultant would also sell the FF&E in designated shares at the direction of the Debtors, received a commission equal to a percentage of the gross receipts from all sales or other dispositions of FF&E. In addition, the Debtors proposed to reimburse the Liquidation Consultant for certain reasonable out-of-pocket expenses incurred in connection with the sale or other disposition of the store closing assets pursuant to a budget agreed to between the parties. Notably, as authority for the same, A&P reminded the Court that it approved nearly identical procedures in the Debtors' 2010 Chapter 11 Cases. *See also In re Delia's, Inc.*, Case No. 14-23678 (RDD) (Bankr. S.D.N.Y. Dec. 10, 2014). Additionally, the debtor cited to approved store closing or liquidation sales in chapter 11 cases involving retail debtors. *See, e.g.*, *In re Blockbuster, Inc., Case No.* 10-14997 (Bankr. S.D.N.Y. Jan. 20, 2011); *In re Movie Gallery, Inc., Case No.* 10-30696 (Bankr. E.D. Va. Feb. 4, 2010); *In re Finlay Enters., Inc., Case No.* 09-14873 (Bankr. S.D.N.Y. Sept. 25, 2009); *In re Value City Holdings, Inc.*, Case No. 08-14203 (Bankr. S.D.N.Y. Nov. 20, 2008); *In re Circuit City Stores, Inc., Case No.* 08-35653 (Bankr. E.D. Va. Nov. 10, 2008); *In re Steve and Barry's Manhattan LLC*, Case No. 08-12579 (Bankr. S.D.N.Y. Aug. 22, 2008); *In re BFW Liquidation, LLC, f/k/a Bruno's Supermarkets, LLC, Case No.* 09-00634 (Bankr. N.D. Ala. March 2, 2009); *In re Goody's Family Clothing, Case No.* 08-11153 (Bankr. D. Del. June 13, 2008); *In re Sharper Image Corp.*, Case No. 08-10322 (Bankr. D. Del. Mar. 14, 2008); *In re Winn-Dixie Stores, Inc.*, Case No. 05-03817 (Bankr. M.D. Fla. July 27, 2005).

While A&P was liquidated in 2015, courts have continued to authorize such retail liquidation procedures. *See, e.g.*, *In re Gemstone Solutions Group, Inc.*, Case No. 19-30258-KLP (Bankr. E.D. Va. Jan. 18, 2019), ECF No. 104; *In re Toys "R" Us, Inc.*, No. 17-34665 (KLP) (Bankr. E.D. Va. Feb. 6, 2018), ECF No. 1716 (authorizing the debtors to enter into agency agreements and conduct store closings); *In re rue21, inc.*, No. 17-22045 (GLT) (Bankr. W.D. Pa. May 18, 2017), ECF No. 143 (authorizing the assumption of agreement); *In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (SCC) (Bankr. S.D.N.Y. Mar. 2, 2017), ECF No. 68 (authorizing assumption of agreement); *In re Aeropostale, Inc.*, No. 16-11275 (SHL) (Bankr. S.D.N.Y. June 9, 2016), ECF No. 285 (same); *In re Sports Authority Holdings, Inc.*, No. 16-10527 (MFW) (Bankr. D. Del. May 3, 2016), ECF No. 1700 (same); *In re Quiksilver, Inc.*, No. 15-11880 (BLS) (Bankr. D. Del. Oct. 7, 2015), ECF No. 253 (same); *In re Radioshack Corp.*, No. 15-10197 (BLS) (Bankr. D. Del. Feb. 20, 2015), ECF No. 455 (same); *In re dELiA*s, Inc.*, No. 14-23678 (RDD), [Docket No. 98] (Bankr. S.D.N.Y. Dec. 24, 2014) (same); *In re RoomStore, Inc.*, No. 11–37790 (DOT) (Bankr. E.D. Va. Jan. 3, 2012); *In re Blockbuster Inc.*, No. 10-14997 (BRL) (Bankr. S.D.N.Y. Jan. 20, 2011), ECF No. 864 (same); *In re Movie Gallery, Inc.*, No. 10–30696 (DOT) (Bankr. E.D. Va. Oct. 27, 2010); *In re LandAmerica Fin. Grp., Inc.*, No. 08–35994 (KRH) (Bankr. E.D. Va. April 16, 2009); *In re Circuit City Stores, Inc.*, No. 08–35653 (KRH) (Bankr. E.D. Va. Mar. 3, 2009); *In re S & K Famous Brands, Inc.*, No. 09–30805 (KRH) (Bankr. E.D. Va. Feb. 9, 2009); *In re Chesapeake Corp.*, No. 08–36642 (DOT) (Bankr. E.D. Va. Jan. 20, 2009); *In re Bradlees Stores, Inc.*, No. 00-16035 (BRL) (Bankr. S.D.N.Y. Jan. 4, 2001), ECF No. 70 (same).

III. The Bankruptcy Code's Rules on GOB Sales

Section 363 of the Bankruptcy Code governs GOB sales by companies in bankruptcy. 11 U.S.C. § 363 ("trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate"). One of the fundamental policies in bankruptcy is that the trustee or debtor-in-possession should maximize the value of estate assets. Section 363(b) fosters that policy by allowing the sale of all, or substantially all, of the estate's assets where the debtor can show a sound business justification for doing so. *See, e.g.*, *The Official Committee of Unsecured Creditors of LTV Aerospace & Defense Co. v. The LTV Corp (In re Chateaugay Corp.)*, 973 F.2d 141, 145 (2d Cir. 1992); *Stephens Indus., Inc. v. McClung*, 789 F. 2d 386, 390 (6th Cir. 1986); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F. 2d 1303, 1311 n.10 (5th Cir. 1985). Bankruptcy courts regularly authorize GOB sales for retail debtors, holding that such relief is consistent with maximizing the value of the debtor's estate. *See, e.g.*, *In re Borders Group, Inc.*, No. 11–10614, 2011 WL 3022401 (Bankr. S.D.N.Y. July 21, 2011); *In re The Great Atlantic & Pacific Tea Co.*, No. 10-24549 (Bankr. S.D.N.Y. Mar. 10, 2011), ECF No. 1004; *In re Blockbuster Inc.*, No. 10-14997 (Bankr. S.D.N.Y. Jan. 20, 2011), ECF. No. 864, *In re Penn Traffic Co.*, No. 09-14078 (Bankr. D. Del. Jan. 25, 2010), ECF No. 462; *In re Circuit City Stores, Inc.*, No. 08-35653 (Bankr. E.D. Va. Jan 16, 2009), ECF No. 1634. Thus, bankruptcy courts will not enforce lease clauses prohibiting GOB sales. *See, e.g.*, *In re Ames Dept. Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) (holding that an anti-GOB sales clause in a lease was unenforceable); *In re Tobago Bay Trading Co*., 112 B.R. 463, 467 (Bankr. N.D. Ga. 1990) (same); *In re Lisbon Shops, Inc.*, 24 B.R. 693, 695 (Bankr. E.D. Mo. 1982) (same).

IV. State and Local Legislative Restrictions on GOB Sales

Bankruptcy courts generally will allow GOB sales to bypass state and local laws applicable to GOB sales, which were usually passed to combat perceived unscrupulous business practices in GOB sales, such as selling merchandise unrelated to the merchant's pre-sale business. This is because the Bankruptcy Code preempts state and local laws that conflict with the Code's underlying policies. *See, e.g.*, *Aloe v. Shenango Inc. (In re Shenango Group, Inc.)*, 186 B.R. 623, 628 (Bankr. W.D. Pa. 1995), *aff'd*, 112 F.3d 633 (2d Cir. 1997) ("Trustees and debtors-in-possession have unique fiduciary and legal obligations pursuant to the bankruptcy code. WPCL, a state statute, cannot place burdens on them where the result would contradict the priorities established by the federal bankruptcy code."); *Baker & Drake, Inc. v. Pub. Serv. Comm'n of Nev. (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1353 (9th Cir. 1994) ("federal bankruptcy preemption is more likely . . . where a state statute is concerned with economic regulation rather than with protecting the public health and safety."); *Missouri v. U.S. Bankruptcy Court (In re State of Mo.)*, 647 F.2d 768, 776 (8th Cir. 1981) ("Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the § 362(b)(4) exception."); *In re The Great Atlantic & Pacific Tea Co.*, No. 10-24549 (Bankr. S.D.N.Y. Mar. 10, 2011), ECF No. 1004 ("The Debtors shall be entitled to use sign walkers, hang signs, and/or interior or exterior banners advertising the Store Closing Sales . . . without compliance with the Liquidation Sale Laws; provided, however, that the use of banners and sign walkers is done in a safe and responsible manner."); *In re Borders Group, Inc.*, 2011 WL 3022401; *In re Bruno's Supermarkets, LLC*, No. 09-00634 (Bankr. N.D. Ala. Apr. 29, 2009), ECF No. 616 ("state and local licensing requirements, time limits or other restrictions on GOB Sales would undermine the fundamental purpose of § 363(b) . . . by placing constraints on

Debtor's ability to marshal and maximize the value of the Assets"); *Walker v. Maury County (In re Scott Housing Sys. Inc.)*, 91 B.R. 190, 196-97 (Bankr. S.D. Ga. 1988) (holding that automatic stay is broad and preempts state law except for those laws designed to protect public health and safety).

Although the majority of courts have held that lease and statutory restrictions on GOB sales cannot restrict a debtor's ability to conduct a GOB sale, laws relating to public health and safety and consumer protection still apply. Specifically, the Court in *In re Blockbuster Inc.* held:

> Subject to applicable state and local public health and safety laws . . . and any state or local laws, regulations, or police powers of general applicability, including, but not limited to, criminal, traffic, tax, labor, employment, environmental, privacy, and consumer protection laws, including consumer laws regulating deceptive practices and false advertising (collectively, the 'General Laws'), but excluding licensing and other requirements governing the conduct of store closing, liquidation, or other inventory clearance sales, including (but not limited to) federal, state, and local laws, statutes, rules, regulations, and ordinances related to store closing and liquidation sales, establishing licensing, permitting, or bonding requirements, waiting periods, time limits, bulk sale restrictions, augmentation limitations that would otherwise apply to the Store Closing Sales and Bulk Inventory Sales, or restrictions on safe, professional, and non-deceptive, customary advertising, such as signs, banners, and posting of signage solely in connection with Store Closing Sales . . . the Debtors are authorized to take such actions as necessary and appropriate to conduct the Store Closing Sales.

No. 10-14997 (Bankr. S.D.N.Y. Jan. 20, 2011), ECF No. 864; *see also In re Penn Traffic Co*., No. 09-14078 (Bankr. D. Del. Jan. 25, 2010), ECF No. 462 (same).

Aside from § 363, one of the other potentially relevant federal statutes relating to GOB sales is 28 U.S.C. § 959(b). That section states that a trustee or debtor-in-possession "shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." Read literally, that statute appears to require that local and state laws regulating GOB sales govern the GOB sale process. However, courts have generally held that this statute is only relevant to debtors continuing to operate businesses and not to liquidating entities. *See, e.g.*, *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010) ("Modern courts have followed this reasoning and likewise concluded that § 959(b) does not apply to liquidations."); *Ala. Surface Min. Comm'n v. N.P. Min. Co. (In re N.P. Min. Co.)*, 963 F.2d 1449 (11th Cir. 1992) (same); *Mo. Dept. of Natural Res. v. Valley Steel Prods. Co. (In re Valley Steel Prods. Co.)*, 157 B.R. 442, 447 (Bankr. E.D. Mo. 1993) (same); *In re I.D. Craig Serv. Corp*., 138 B.R. 490, 500 (Bankr. W.D. Pa. 1992) ("The majority view is that § 959 does not apply in chapter 7 cases where the trustee does not operate or manage a business but liquidates assets . . . . It is arguable that liquidation entails management but the cases that espouse this view are in the minority and frequently deal with public welfare."); *but see Lancaster v. Tenn. (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 123 (6th Cir. 1987) ("Nor are we convinced that § 959(b) is inapplicable to liquidating trustees, as respondents argue . . . .

Congress' intentions that the trustee's efforts 'to marshal and distribute the assets of the estate' give way to the governmental interest in public health and safety.").

V. Sources of Contention

A. Signage and Advertising Restrictions

One of the large areas of contention in a retail debtor's GOB sale plan is how the debtor advertises its sale. *See, e.g.*, *In re Crown Books Corp*., 269 B.R. 12, 15 (Bankr. D. Del. 2001) ("Objections were filed by numerous landlords, which raised significant issues regarding the conduct of the GOB sales."). From the number, size, and location of signs to the language employed advertising the sale, parties generally contest how GOB sales can be presented to the public. Inaccurate advertising can lead to consumer confusion and/or deception and inelegant signage can worsen the public image of a shopping district and negatively affect nearby businesses. While disputes still arise relating to a debtor's GOB sale advertising plans, many state and local governments have passed comprehensive GOB sale laws regulating GOB advertising in response to such disputes that reflect a balance of the competing interests of all parties. Of the various types of GOB sale restrictions, signage and advertising restrictions (other than those relating to deceptive business practices) are generally negotiated and subject to modification by the bankruptcy court. While courts and parties often look to the debtor's lease, local and state regulations on GOB sale advertising for guidance as to reasonable restrictions on the process, courts may also allow debtors to avoid compliance with any restrictions on GOB sale advertising other than laws relating to consumer protection. *See, e.g.*, *In re FFW OPCO,* 9 *Ltd*., No. 10–33761, 2010 WL 5209251, at *5 (Bankr. N.D. Tex. Jun. 9, 2010) ("The Sale shall be conducted by FFW and PFP without the necessity of compliance with any federal, state or local statute or ordinance (other than Safety Laws), lease provision, or licensing requirement affecting store closing, going out of business, bankruptcy liquidation or auction sales, or affecting advertising, including signs, banners, and posting of signage"); *In re Nat'l Book Warehouse, Inc*., No. 06-02227 (Bankr. M.D. Tenn. June 2, 2006) (Docket No. 79-3) ("The Debtors shall not place any signs nor distribute handbills, leaflets or other written materials to customers outside of any Store's premises, except as permitted by the lease or otherwise agreed to by the applicable landlord, but may solicit customers in the Stores themselves. The Debtors shall not use flashing lights or any type of amplified sound to advertise the Store Closing Sales or solicit customers, except as permitted by the lease or agreed to by the landlord.").

B. Restrictions on Duration of GOB Sales

Another issue of dispute in GOB sales is the duration within which the sale can take place. A retailer wants maximum flexibility to conduct a sale for as long as is necessary to liquidate its goods. Landlords, lenders, and surrounding businesses, however, can suffer from an extended GOB sale through the diminishment of a store's public image. This is especially true in higher-end shopping districts. Despite lease provisions and laws to the contrary, bankruptcy courts have generally allowed extended GOB sales to the extent necessary to fully liquidate a debtor's inventory. *See, e.g.*, *In re Crawford Furniture Mfg. Corp*., 2011 WL 6325859, at *5 ("the court found that those customers would derive comparatively minimal benefit from a strict limitation of the length of the proposed sale); *In re Borders Group, Inc.*, 2011 WL 3022401, at *9 (holding that the debtor could hold a four-month sale with the option of requesting court approval for further time); *In re Nat'l Book Warehouse, Inc*., No. 06-02227 (Bankr. M.D. Tenn. June 20, 2006) (Docket No. 161) (order authorizing GOB sale set no requirements for length of sale).

C. Restrictions on Augmentation of a Store's Inventory

A very heavily disputed issue in GOB sales is whether a store conducting the sale can augment its inventory with that of its sister stores that are not conducting a GOB sale, with new inventory produced during the GOB sale by the store's suppliers or with inventory from the debtor's liquidating agent. If given free rein to conduct a GOB sale, a multi-store business may find a competitive advantage in pumping inventory into those stores holding GOB sales to boost overall sales at the expense of its competitors. Additionally, liquidation companies often want to take advantage of the heavy customer traffic generated by GOB sales by selling their own inventory through a retailer's GOB sale. These actions by liquidators have attracted scrutiny from state legislatures keen on protecting consumers from dishonest advertising and sales practices. In particular, the states have been concerned about the potential for fraud on the consumer, who may wrongfully believe that the inventory being sold at the GOB sale is the retailer's prior inventory. Bankruptcy courts have taken a mixed approach to augmentation issues. Some courts have refused to permit augmentation, some have allowed multi-store businesses to transfer inventory to the stores holding the GOB sale, and other courts have even allowed the GOB sale liquidating agent to sell its own merchandise through the debtor's sale. *See, e.g.*, *In re Filene's Basement, LLC*, No. 11-13511 (Bankr. D. Del. Nov. 16, 2011), ECF No. 189 ("the Debtors and/or the [liquidating] Agent (as the case may be) are authorized and empowered to transfer Merchandise among the Debtors' distribution centers and/or the Stores . . . . Agent is hereby authorized to supplement the Merchandise in the Stores with goods of like kind and quality as are customarily sold in the Stores, which merchandise shall not exceed $15 million at Agent's cost as an Expense of the sales). The more recent trend among bankruptcy courts allows augmentation if it will result in a higher return for the estate and if the GOB sale is clearly advertised as including goods provided by the liquidating agent.

VI. Example of a Common GOB sale – S&K Famous Brands

The going out of business sales in the S&K bankruptcy case is an example of the current trend in GOB bankruptcy sales – one that generally favors the debtor. In that case, the debtor moved on an expedited basis for authority to conduct a GOB sale through the use of a liquidating agent. On shortened notice, the Court approved an expansive GOB sale order that allowed the debtor and its designated liquidating agent to conduct a GOB sale for retail stores located in several states. The sale order: (1) permitted the debtor to forgo compliance with all GOB sale laws; (2) required the debtor to comply with health, safety and false advertising laws; (3) expanded the scope of the property subject to the sale to augmented merchandise; and (4) placed a small number of restrictions on the permitted signage and advertising and allowed sign walkers. This sale order is extremely instructive, in that unlike other more well-known cases, several attorneys general and local governments objected to the terms and actually presented argument at hearing on the same. Additionally, several of the debtor's landlords objected to the debtor's GOB sale motion, requesting revisions to the debtor's proposed GOB sale order in order to conform it to the various leases. The Court focused its ruling on balancing value maximization to the potential harm and ruled in favor of the debtor. The Court did revise the language of the proposed order upon consent of debtor and committee to allow for several one-off side agreements with individual landlords though the terms of the same were not put on the record. *In re S&K Famous Brands, Inc.*, No. 09-30805 (Bankr. E.D. Va. Feb. 26, 2009), ECF No. 178.

Though a small case when compared to the many recent mega retail cases, S&K serves as a reminder that a retail debtor has a relatively free hand to conduct a GOB sale. Rather than attempting to control the process through objecting to the sale, interested parties are likely to be better off working with the debtor, as many of the landlords and governmental entities did, to craft the GOB sale plan. If left to discretion of the bankruptcy court, the debtor may be successful in obtaining court approval for almost all of its proposed terms over its creditors' objections. *See* Karen Cordry, *Going-Out-of-Business Sales and State Law: No More Mister Nice Guy*, 21-Jun Am. Bankr. Inst. J. 8, 41 (2002) ("if liquidators and debtors are aware of the operational concerns . . ., it should be possible to structure the sales procedures to meet those concerns—and to do so before the bids are taken, rather than afterward. Notably, Karen Cordry, on behalf of the National Associations of Attorneys General, did object and spent many hours on the phone and in person with the Debtor and its professionals and the unsecured creditors committee in an attempt to address many concerns.

Indeed, Bankruptcy courts are generally inclined to allow retail debtors to sell their inventory in GOB sales subject to reasonable restrictions. Because retailer debtors are often burdened by time constraints for a multitude of circumstances, courts are inclined to grant debtors the authority to conduct GOB sales on an expedited basis. Debtors should take care, however, to negotiate strong agreements with the inventory sale agent, who obviously seeks to make as much as possible from the engagement. The Debtor and the liquidator should also encourage communication between all interested parties, including the landlords, state attorneys general, local governments, and other interested parties to ensure that the GOB sale process reflects the interests of all parties.

VII. Is the Sky the Limit in Section 363 Sales?

A. Owner/Insider Participation.

It is important to note that the § 363 sales process is malleable and can be utilized to sell any type of assets of a debtor. While GOB sales are extremely prevalent for retail debtors, the same § 363 concepts and principles are utilized by debtors in other industries to liquidate estate assets. The approval of a sale of assets outside the ordinary course of business, pursuant to § 363(b)(1) of the Bankruptcy Code, is left to the court's discretion, giving due consideration to the sound business judgment of a debtor. *See e.g.*, *Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (concluding that a sale of assets may be authorized if a "sound business purpose dictates such action"); *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983). Courts consider a variety of factors in determining whether a proposed sale satisfies this standard, including: (i) whether the debtor exercised its business judgment in deciding to enter into the transaction, (ii) whether adequate and reasonable notice of the sale was given to interested parties; (iii) whether the sale will produce a fair and reasonable price for the property, and (iv) whether the parties have acted in good faith. *See e.g.*, *Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991).

B. Special Rules for Insiders?

There are no special rules promulgated for a sale to insiders. Indeed, neither the Bankruptcy Code nor fiduciary duty laws proscribe the sale of a distressed company's assets to an insider. Nonetheless, a proposed sale of a struggling company's assets to its directors, officers or shareholders often results in long and critical inspection by unsecured creditors and bankruptcy trustees, and sometimes by courts. The underlying reasoning for the increased scrutiny is based upon the insider bidders' possession of increased information about the company that other bidders may not have. Accordingly, the insider bidder may be in a position to take advantage of that information and acquire the company's assets—and potentially escape the company's liabilities—for less than the price the assets may garner in the marketplace.

While this advantage is usually well-founded, it is precisely because of the wealth of information about the company that an insider is often in the best position to deliver the best value for the assets of the distressed company. This is especially true in smaller markets and in closely held corporate transactions where finding potential outside purchasers or investors can be time-consuming, costly and difficult. Even though there is a potential for an unfair advantage which will be detrimental to the company's creditors, the law governing the disposition of distressed assets has built-in standards which can protect the economic interests of all constituents. And while there likely will be a layer of increased costs for strict compliance with these standards, all parties involved with insider transactions—the company, the company's creditors, and the insiders themselves—have a vested interest in expending the extra compliance effort.

It is also important to note that whether a sale takes place inside or outside of the bankruptcy context, the corporation itself must consider the duties imposed by corporate law with respect to interested party transactions. While beyond the scope of this section of the materials, by way of example, Delaware law provides a good benchmark in determining to what standards insider corporate transactions will be measured. Section 144 of the Delaware General Corporate Law provides that a transaction between a corporation and its directors or officers (or a company in which such directors or officers have a financial interest) is permissible if (1) after full disclosure, a majority of disinterested directors of the board, in good faith, ratifies the transaction; (2) after full disclosure, a majority of the shareholders, in good faith, approves the transaction; or (3) the transaction is fair to the corporation. While these requirements seem straightforward, it is not uncommon for a closely held or smaller corporation to have no disinterested directors or shareholders. In such circumstances, the corporation must rely solely on the requirement that the insider sale is fair to the corporation. This type of evidence usually requires the insider to establish that the transaction was the product of fair dealing and resulted in a fair price, meaning that the price accepted was the highest value reasonably available under the circumstances. While not mandated, the best way to show fairness is to actively seek other bidders in the context of an established auction process.

C. Good Faith

As delineated by § 363 of the Code, prior to approving the insider sale transaction, the bankruptcy court must make findings including that the sale is necessary, within the sound exercise of the debtor's business judgment and in good faith. Selling assets in a bankruptcy can provide substantial protection for the insider purchaser, including the opportunity to purchase assets free and clear of liens, claims, interests, and encumbrances. Also, the purchaser has the comfort of a court order, which cannot be invalidated even if there is a subsequent appeal as long as the Court finds that the purchaser (even an insider purchaser) acquired the assets in good faith.

Courts will find a lack of good faith in situations of collusion between the purchaser and other bidders and/or collusion between the purchaser and the debtor, if the purchaser or trustee attempts to take a grossly unfair advantage over the process or other bidders, or if the purchaser pays less than fair value for the assets. Parties to an insider sale transaction must make sure to avoid even the appearance of these elements of bad faith. For example, all parties (the debtor, purchaser, and various creditor constituencies) should be represented by separate counsel, all of whom engage in open negotiations. Ensuring the presence of noninsider bidders can also be helpful. Ultimately, the court will be more likely to approve an insider sale transaction if there is evidence that the price paid is commensurate with the market value for such assets.

D. Avoid Collusion at All Costs

Section 363(n) of the Bankruptcy Code provides: The trustee may void a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from the party to such agreement any amount by which the value of property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

In *Boyer, Tr. v. Gildea* 475 B.R. 647 (N.D. Ind. 2012), the bankruptcy trustee claimed that a group of insiders, including the company president and sole owner as well as other family members, colluded with the purchaser of the debtor's assets at a § 363 auction to control the sale price. An agreement controls the price where the objective is to influence the price, and the price is actually controlled by the agreement. If an effect on the sale price is an unintended consequence of an agreement, it is not an agreement to control within the meaning of § 363(n). Because the insiders ultimately purchased the winning bidder very soon after sale closing and the only other bidder was a partial credit bid, the court ultimately found that there was an inference of collusion from evidence that the [insiders] discontinued their vigorous pursuit of financing to purchase the assets of the Debtor only after beginning to meet with Defendant Arlington Capital, and with evidence that the [insiders] had the possibility of obtaining financing sufficient to submit a competitive bid."

E. Inequitable Conduct/Denial of Credit Bid for Cause

As a general proposition, secured creditors with valid liens and "clean hands" are allowed to credit bid to the extent of the value of their secured lien. Recent case authority has confirmed that while not sacrosanct, as long as the secured party is proceeding in good faith and with clean hands, it likely will be allowed to credit bid pursuant to 11 U.S.C. § 363(k) in any valid sale process. *In re CS Mining, LLC*, No. 16-24818, 2017 Bankr. LEXIS 2097, at *49-51 (Bankr. D. Utah July 27, 2017) (quoting 11 U.S.C. § 363(k)):

Under the Bankruptcy Code, credit bidding at a sale under § 363(b) is a right for secured lenders. That right is provided in § 363(k), which states:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

Credit bidding, however, is not an absolute right without limits. *See In re Antaeus Tech. Servs., Inc.*, 345 B.R. 556, 565 (Bankr. W.D. Va. 2005). Indeed, this was further articulated and applied by the Bankruptcy Court in Delaware, which admonished that while "[i]t is beyond peradventure that a secured creditor is entitled to credit bid its allowed claim . . . [t]he law is equally clear, as § 363(k) provides, that the Court may 'for cause order otherwise.'" 11 U.S.C. §363(k). *See, e.g.*, *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014) (stating, "the right to credit bid is not absolute") (*quoting In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 315 (3d Cir. 2010), as amended May 7, 2010). In fact, generally, "a court may deny a lender the right to credit bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment." *Philadelphia Newspapers,* 599 F.3d, at 316, n.14.

First, the right applies to "the holder of a lien securing an *allowed* claim." Collier on Bankruptcy ¶ 363.09 (Richard Levin & Henry J. Sommer eds., 16th ed.) (emphasis added). If there is a bona fide dispute with regards to a secured creditor's lien, credit bidding rights do not become automatic. *See id.* ¶ 363.09 ("The right of a lienholder whose lien was not in bona fide dispute to bid at a sale free and clear of liens was generally recognized under prior law, and this right is continued by § 363(k)." (*citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 132 S. Ct. 2065, 2070 n.2, 182 L. Ed. 2d 967 (2012)).

Further, Congress amended credit bidding rights in 1984 to prevent a credit bid for "cause". *See* 11 U.S.C. § 363(k); Collier, ¶ 363.09 LH. Cause is not defined by the Code but left to the court to determine on a case-by-case basis. *See In re: Aéropostale, Inc.*, 555 B.R. 369, 414 (Bankr. S.D.N.Y. 2016) (citing cases discussing "cause"). The Court has discretion in its determination of cause. 555 B.R. at 415 (courts should not act "freewheeling" but rather courts should "balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors") (citations and internal quotations omitted).

Cause may be found to deny credit bidding if allowing lien holders to bid at a sale would benefit an insider, impede, or delay a successful reorganization strategy, chill the bidding process, and reduce the overall benefits to the estate. *See In re Philadelphia Newspapers*, LLC, 599 F.3d at 315) (citing a "variety of cases" where the court found cause to deny credit bidding). This list is non-exhaustive.

Inequitable conduct may also serve as a basis to limit a creditor's right to credit bid the full amount of its claim at a bankruptcy auction under § 363 of the Bankruptcy Code. *See generally In* *re Free Lance-Star Publ'g Co. of Fredericksburg, VA*, 512 B.R. 798 (Bankr. E.D. Va. 2014) (limiting secured creditor's credit bid by over half based upon a variety of factors, including 1) the secured creditor's less than fully secured status; 2) its "overly zealous" loan to own strategy; and 3) the negative impact of its misconduct on the auction process); *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014) (finding that "cause" existed under § 363(k) to limit secured creditor's right to credit bid where creditor had chilled the bidding process by inequitably pushing the debtor into bankruptcy so that it could short-circuit the bankruptcy process to purchase the debtor's assets).

Judge Huennekens weighed in on credit bid limitations and opined that a court certainly can prevent a secured creditor from credit bidding when doing so would enable the maximum value to inure to the estate though fair and competitive bidding, rather than freezing the sale process, and when preventing credit bidding is determined to be in the best interest of the estate. "The confluence of (i) less than fully-secured lien status; (ii) [the creditor's] overly zealous loan-to-own strategy; and (iii) the negative impact[the creditor's] misconduct has had on the auction process has created the perfect storm, requiring curtailment of [the creditor's] credit bid rights." *In re Free Lance-Star Publ'g Co.*, 512 B.R. 798, 804-07 (E.D. Va. 2014), *appeal denied*, 512 B.R. 808 (E.D. Va. 2014).

Courts have also limited the right to credit bid when the validity of a creditor's lien is in dispute. *See In re Daufuskie Islands Props., LLC*, 441 B.R. 60, 64 (Bankr. D.S.C. 2010); *Nat'l Bank of Commerce v. McMullan (In re McMullan)*, 196 B.R. 818, 835 (Bankr. W.D. Ark. 1996), aff'd, 162 F.3d 1164 (8th Cir. 1998)). Other cases look to whether the party seeking to credit bid has failed to comply with the procedural requirements established by the court for the sale of the collateral. *See Greenblatt v. Steinberg*, 339 B.R. 458, 463 (N.D. Ill. 2006) (denying right to credit bid due to failure to comply with sale procedures order).

The decision of whether to deny credit bidding based on cause is within the discretion of the court. *See In re Olde Prairie*, 464 B.R. at 348. But this "discretion does not give the bankruptcy court the authority to act arbitrarily or to be freewheeling. In other words, the standard is not standardless." *In re RML Dev., Inc.*, 528 B.R. 150, 155 (Bankr. W.D. Tenn. 2014) (quoting *In re Davis*, 237 B.R. 177, 182 (M. D. Ala. 1999)). "Intrinsically, acting 'for cause' looks to the court's equity powers that allow the court to balance the interests of the debtor, its creditors, and the other parties of interests in order to achieve the maximization of the estate and an equitable distribution to all creditors." *In re RML*, 528 B.R. at 155 (citations omitted). But "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Id.* (quoting *Law v. Siegel*, 134 S. Ct. 1188, 1194-95, 188 L. Ed. 2d 146 (2014)). The "modification or denial of credit bid rights should be the extraordinary exception and not the norm." *In re RML*, 528 B.R. at 156.

More recently, a decision from the *Aéropastle* case follows more closely the pre-2014 case law on § 363(k), which defined "cause" to limit credit bid rights to situations involving egregious conduct (*i.e.*, collusion). After an eight day, 14 witness trial, Judge Lane rejected the debtors' attempts to limit credit bidding in reliance on *Free Lance-Star* and *Fisker*, among others, and ruled that the secured creditor group could credit bid up to the full amount of its $150 million pre-petition secured loan. *See generally In re Aéropastle, Inc.*, 555 B.R. 369 (Bankr. S.D.N.Y. 2016). Judge

Lane recognized that the right to credit bid is not absolute. *See In re Free Lance-Star*, 512 B.R. at 808; *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014). Specifically, § 363(k) of the Bankruptcy Code provides that a party may credit bid "unless the court for cause orders otherwise." 11 U.S.C. § 363(k). The term "cause" is not defined by the Bankruptcy Code, and it is left to the court to determine whether cause exists on a case-by-case basis. *See In re Olde Prairie Block Owner, LLC*, 464 B.R. 337, 348 (Bankr. N.D. Ill. 2011) (citing *In re N.J. Affordable Homes Corp.*, 2006 Bankr. LEXIS 4498, 2006 WL 2128624, at *16 (Bankr. D. N.J. June 29, 2006) (stating that cause is "intended to be a flexible concept enabling a court to fashion an appropriate remedy on a case-by-case basis"); *In re River Road Hotel Partners, LLC*, 2010 Bankr. LEXIS 5933, 2010 WL 6634603, at *1 (Bankr. N.D. Ill. Oct. 5, 2010) ("Section 363 gives courts the discretion to decide what constitutes 'cause' and the flexibility to fashion an appropriate remedy by conditioning credit bidding on a case-by-case basis."), *aff'd*, *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642 (7th Cir. 2011)).

Ultimately after a multi-day and multi-witness trial, the *Aéropostale* court defined "cause" to limit credit bid rights in situations involving egregious conduct such as collusion and rebuffed the debtors' attempts to limit credit bidding in reliance on *Free Lance-Star* and *Fisker* in the absence of misconduct. Instead Judge Lane ruled that the secured creditor group could credit bid up to the full amount of its $150 million pre-petition secured claim. *See generally In re Aėropastle, Inc.*, 555 B.R. 369 (Bankr. S.D.N.Y. 2016).

It is clear from the more recent case authority that the results of any challenge to limit credit bids of such funds will depend on the facts of each case. In particular, the good faith of the lenders (including the stealth attempts to rectify lien position infirmities and the degree to which they attempt to direct the bankruptcy process) and the "arm's-length" nature of the loan transaction as a true debt deal will be tested in connection with potential attacks on credit bids on recharacterization and equitable subordination grounds. With the decisions in *Fisker* and *Free Lance-Star* as a backdrop, equity should keep a watchful eye on the actions of its lenders and bring any infirmities to the attention of the creditors committee and the courts. Equity should recognize, however, that the right to credit bid will not be taken away or limited without legitimate good cause. The *Aéropostale* case reminds us of the same.

VIII. Key Issues in Negotiating and Drafting Sale Documents

A. <u>Focus on Deal Terms in Negotiations with the Stalking Horse</u>

Negotiating an asset purchase agreement with the stalking horse should primarily be focused on deal terms, not price. On the most fundamental level, APAs serve as the legal instrument necessary to transfer ownership, in addition to other transfer documents such as bills of sale, assignment and assumption agreements, intellectual property assignments, and real property transfer documents. Representation and warranty provisions are needed, but bankruptcy attorneys should primarily focus on the substance of the sale terms.

Negotiations with the stalking horse provide the debtor with the best opportunity to craft a favorable deal since other bidders are often forced to accept the stalking horse agreement. If the deal terms are being negotiated as part of a DIP financing package, it becomes even more important to focus on the stalking horse purchase terms. The initial stalking horse deal terms will play a vital role throughout the sale process.

For the bankruptcy attorney, primary deal terms for an APA include break-up fee and expense reimbursement provisions, credit bid issues, and termination rights that are routinely tied to negotiated milestones. Also important is to clearly identify all purchased assets and the location of said assets, and all assumed liabilities, such that all parties to the transaction understand what assets will be sold and what liabilities will be excluded from the sale. In the stalking horse context, the buyer can assume any or all liabilities, but the initial APA will be subject to better offers. Stalking horse APAs can become more attractive with increased assumed liabilities without any adjustment to purchase price, a consideration for determining best and highest bids in an auction. Stalking horse APAs should not contain blank schedules to be completed later.

APAs should also clearly identify any potential contracts and unexpired leases to be assumed and assigned to the potential buyer, including negotiating whether the buyer or seller will pay for cure costs. Section 365 of the Bankruptcy Code provides the debtor with the right to assume or reject contracts and leases, along with imposing a duty for the debtor to pay cure costs for assumed contracts and leases. Payment of cure costs is the debtor's responsibility under the Code, but a stalking horse or other buyer may increase the value of its bid by assuming cure costs. In addition, notice provisions in any APA are crucial to any successful sale. Absent adequate notice, a proposed sale will be subject to heavy judicial scrutiny prior to entry of a sale order. As related to assumed and assigned contracts and leases, a key APA provision for negotiation is notice and procedures for addressing cure costs with counter-parties to a contract or lease.

Other essential deal terms for consideration and negotiation include material adverse condition provisions, particularly at the stalking horse phase which will set a ceiling on any subsequent provisions in an alternative APA from a competitive bidder. For example, debtor's counsel should attempt to negotiate for a reduction or removal of financing, due diligence, or other closing conditions. With a favorable APA negotiated, the bankruptcy auction will provide an opportunity to focus on the price. However, practitioners are cautioned that the negotiated APA should be consistent with the final sale order, even though many sale orders contain a conflicts provision with the order controlling.

B. Create a Framework That Builds as Much Time into the Process as Possible

While sales processes are often driven by a multitude of factors, the debtor should aim to build as much time into the sale process as possible to afford the maximum number of interested parties the opportunity to participate. Certainly time is a luxury most debtors do not have with pressures from creditors, committees, and other stakeholders. However, time affords a sufficient marketing process, as well as broadening the pool of potential bidders at the outset can yield more bids and may increase participation at the auction. Therefore, it is important to create a process that allows interested parties the opportunity to conduct due diligence. Time for diligence during the process also lends to the debtor's ability to eliminate diligence as a condition to closing.

C. Negotiate for Minimal Bid Protections

The stalking horse serves a critical role in many distressed auctions by setting a floor for competitive bidding. However, high breakup fees and expenses reimbursements can have a chilling effect on additional bidders expending the necessary resources to participate in the auction and challenge the stalking horse. Committees and other parties in interest will likely push back on bid protections. In addition, each dollar of a break-up fee is ultimately one less dollar received by the debtor.

D. Know Your Prospective Buyer

An often overlooked concept during APA negotiations with a stalking horse bidder or other qualified bidder is examining who the buyer really is. This is also relevant in the context of NDAs that result in access to data rooms to conduct due diligence. In the excitement to consummate a sale, debtors and counsel do not typically ask who is behind the entity purchasing property of the bankruptcy estate. While requests for buyer financial statements for qualification reasons are commonplace, requests for information regarding ownership interests in a potential buyer are not. This can be problematic, particularly in the context of a debtor that owns sensitive intellectual property and cutting edge technology. Bankruptcy sales create an opportunity for foreign investors to circumvent protections otherwise afforded by the United States government by purchasing assets through shell company, which could lend to the unintentional sale of protected assets or even national security-related technology and intellectual property to a foreign entity vis-à-vis a bankruptcy sale order. Focusing solely on closing a sale, with creditors in support of maximizing recovery on claims, could lead to the unknowing or unintentional sale of sensitive technology and intellectual property to entities that would otherwise be prohibited from purchasing such assets.

E. Qualified Bids

Ensure that your bid procedures detail the necessary requirements for a bid to be deemed a qualified bid. Make sure the bidding procedures allow for time between when bids are due and the date of the auction to allow time for the parties to address any issues that may prevent a bidder from being qualified.

F. Structure the Auction in a Way That Yields the Best Deal Terms

Lower bidding increments may engage more bidders in the auction process and provide a greater opportunity for unsuccessful bidders to negotiate over other deal terms. Build flexibility into the Bid Procedures that allow the Debtor (with the consent of the Committee) to modify/ enlarge the bidding increments, if necessary, to speed up a robust auction.

G. Provide Buyers a Menu of Options If There Are Multiple Assets to Be Sold

When auctioning multiple businesses or assets, debtors should allow the assets to be marketed separately and running separate auctions, or at a minimum, fashion bid procedures which allow for bids on individual assets or a combination of assets. While this can result in a more complex and complicated auction, it allows the debtor to explore different variations of "highest and best" bid. The debtor should be cautioned to have a framework in place to compare bids at the auction that may not be "apples to apples" in order to determine if a bid is higher and better.

H. The Auction

It's important to know and understand how the Bid Procedures work so that the auction can be run efficiently and effectively – especially if there are multiple parties bidding on the same assets. Be mindful that any changes to the auction process mid-auction could chill the bidding. Create a framework to compare bids and make sure you have appropriate counsel to understand and react to APA changes made during the bidding process.

I. Cash Is (Often but Not Always) King

A buyer willing to offer the greatest amount of cash is typically the best bid at auction. Deal terms are important, but bidders are wise to carefully consider the amount of cash they are willing to bid for an asset at auction. Bidders should consider their available cash as compared to other competitive bidders at the auction and look for ways to sweeten the consideration they are offering.

J. Non-Cash Consideration

Bidders are often well-advised to consider non-cash consideration – particularly if faced with potentially lower cash availability than other competitive bidders. In the scenario where all bidders provide some form of non-cash consideration (such as take back paper), the Debtor should be prepared to analyze the value of non-cash consideration.

K. Assumption of Liabilities Plays an Important Role

What liabilities are being assumed by the stalking horse? Are there additional liabilities that a buyer could assume to increase the value of its bid? Assumption of liabilities can be a distinguishing factor in comparing bids and determining the highest and best bid. This analysis should also be performed in light of the likely recovery for or impact on the estate. If a bidder is willing to pay certain prepetition or administrative liabilities as part of the assumption of a contract, then the bid may have greater value to the debtor's estate than a competing bid.

L. Highest and Best Bid

The "best" bid can be the highest cash consideration. It could also be one that assumes the greatest liabilities, or on which is most certain to close. The debtor should evaluate whether one bid presents a lower risk profile than other bids in making this determination.

M. Documenting the Sale

In a case where the stalking horse bidder is the winning bidder at auction, the form sale order may be sufficient (subject to a few modifications following the auction). If the winning bidder at the auction is a third party, the sale order will need to be substantially modified to reflect what actually happened at the auction. Parties are cautioned to specifically detail various concessions made at the auction – such as assumption of specific liabilities, creation of certain escrow accounts and the like – in the sale order. Relying on the APA can cause important deal terms to get lost in the shuffle.