

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

In re:)	
)	Chapter 11
ORECK CORPORATION, et al)	Case No. 13-04006
)	
565 Marriot Dr., Suite 300)	Judge Lundin
Nashville, TN 37214)	(Jointly Administered)
)	
Debtors.)	

**MEMORANDUM IN SUPPORT OF MOTION OF THE DEBTOR FOR AN ORDER
AUTHORIZING AND APPROVING THE SALE OF ASSETS FREE AND CLEAR OF
LIENS AND OTHER INTERESTS**

Oreck Corporation and the above debtors (the "Debtors" or "Oreck"), as debtors and debtors in possession herein hereby submit this Memorandum in support of their motion for an Order Authorizing and Approving (a) the Debtors' Entry into the Asset Purchase Agreement with Oreck Acquisition Company, LLC ("OAC") and guaranteed by Royal Appliance Manufacturing Company, and (b) the Sale of Assets Free and Clear of Liens and Other Interests.

BACKGROUND

1. On May 6, 2013 (the "Petition Date"), the Debtors filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their business and manage their properties as Debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this case at this time.

2. The Debtors commenced this Chapter 11 case in order to orderly liquidate their assets and pay their liabilities to the furthest extent possible. To ensure that their estate reaps the benefit the Debtors have been engaged in an intensive effort to identify entities that are interested in acquiring or liquidating the Debtors' assets.

3. On May 24, the Court entered the Interim Sale Procedures Order, which provided that Oreck Acquisition Holdings, LLC was the stalking horse bidder (the "Stalking Horse").

4. Prior to the Petition Date, the Debtors began the process to garner interest in a possible sale of their assets in early 2013. In so doing, the Debtors worked with Sawaya Segalas & Co. ("Sawaya") to contact financial and strategic buyers. After the Petition Date, Sawaya continued to contact additional buyers. Non-Disclosure Agreements were signed with approximately 140 companies and financial information was made available to each of these companies.

5. After the Petition Date, the Debtor received significant interest from potential acquirers of its assets and retail merchandise. By the Bid Deadline of July 2, 2013, however, only OAC submitted a timely bid. By Notice filed July 3, 2013, the Debtors, in consultation with the Notice Parties, concluded that OAC's bid was a Qualified Bid.

6. On July 8, 2013, an auction occurred at the law firm of Debtors' counsel. At the conclusion of the Auction, the Debtors, in their business judgment and after consultation with the Notice Parties, determined that OAC was the Successful Bidder. It was further determined that the Stalking Horse was the Back-up Bidder. A copy of the Asset Purchase Agreement between the Debtors and OAC submitted by OAC in connection with its Qualified Bid, as modified following the Auction, is attached hereto as Exhibit A (the "OAC APA")¹.

Sale of Debtors' Assets is Warranted

7. Under Section 363 of the Bankruptcy Code, a debtor in possession may sell property of its estate outside of the ordinary course of its business, subject to the approval of the court after notice and a hearing. See 11 U.S.C. § 363(b)(1). Section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor's assets prior to confirmation of a plan. However, courts have required that the decision to sell assets outside the ordinary course of business be based upon the sound business judgment of the debtor. See Licensing By

¹ Bracketed provisions within the OAC APA are still being negotiated.

Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 387 (2d Cir. 1997) ("A sale of a substantial part of a Chapter 11 estate may be conducted if a good business reason exists to support it."); Comm. of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); In re Chateaugay Corp., 973 F.2d 141, 143 (2d Cir. 1992); Stephens Indus. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) ("bankruptcy court can authorize a sale of all a Chapter 11 debtor's assets under [Section] 363 (b)(1) when a sound business purpose dictates such action."); Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct."); In re Barnhill's Buffet, Inc., 2008 WL 4527829, at * 3 (Bankr. M.D. Tenn. Feb. 28, 2008) (noting that this Court follows the "sound business purpose" test when examining § 363(b) sales).

8. The Sixth Circuit followed the Second Circuit's decision in Lionel Corp. by stating as follows:

We adopt the Second Circuit's reasoning in In re Lionel Corporation, *supra*, and conclude that a bankruptcy court can authorize a sale of all a Chapter 11 debtor's assets under § 363(b)(1) when a sound business purpose dictates such action.

Stephens Indus., *supra* at 390.

The Court went on to hold as follows:

The Bankruptcy Court implicitly found that an articulated business reason justified the sale. The trustee had been unable to operate the radio station at a profit. Since ASC could not meet its payroll and other operating expenses, the trustee faced the prospect of ceasing operations. If the station went off the air for an extended period of time, ASC could lose its FCC licenses. Consequently, we conclude that the Bankruptcy Court did not abuse its discretion in approving the sale of ASC's assets.

Id.

9. Courts typically consider the following four factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale, (b) whether adequate and reasonable notice of the sale was given to interested parties, (c) whether the sale will produce

a fair and reasonable price for the property and (d) whether the parties have acted in good faith. See, e.g., In re Weatherly Frozen Food Group, Inc., 149 B.R. 480, 483 (Bankr. N.D. Ohio 1992); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991); In re Barnhill's Buffet, Inc., 2008 WL 4527829, at * 3 (Bankr. M.D. Tenn. Feb. 28, 2008).

10. Here, each of these four factors have been satisfied. First, the Debtor currently has inadequate liquidity to continue operating. Mike Robbins has testified on two occasions before this Court with a budget that shows the precarious financial condition of the Debtors. His testimony remains the same following operations during June and the first of July.

11. Second, as delineated in the Supplemental Sale Procedures Order [Docket No. 361], the Debtors provided adequate and reasonable notice to interested parties of the opportunity to bid on the Debtors' assets and of the opportunity to object to the sale of those assets. See, e.g., Folger Adam Security Inc. v. DeMatteis/MacGregor, 209 F.3d 252, 265 (3d Cir. 2000) (stating that notice is sufficient if it includes "the time and place of any public sale, the terms and conditions of any private sale, states the time for filing objections and, if real estate is being sold, provides a general description of the property"); In re WBQ Partnership, 189 B.R. 97, 103 (Bankr. E.D. Va. 1995) ("notice is sufficient if it includes the terms and conditions of the sale, if it states the time for filing objections, and if the estate is selling real estate, it generally describes the property") (quoting In re Karpe, 84 B.R. 926, 929 (Bankr. M.D. Pa. 1988)).

12. Third, OAC's bid maximizes the value of the Debtors' estate and provides a significant amount of cash in comparison to the Stalking Horse bid. At the Auction, the OAC bid was determined to be the Starting Bid, and thus the Stalking Horse was the first bidder at the Auction. Following that bid, the Stalking Horse made one other bid that was countered by OAC, pushing the cash offer up to \$17,250,000, upon which the Stalking Horse declined to bid further and OAC was determined to be the Successful Bidder. By increasing the cash component of the Stalking Horse bid by \$2.75 million, the cash flow projections provide sufficient revenues from the sale to pay secured claims in full and cover estimated priority and administrative expensed budgeted to July 19, 2013.

13. Fourth, the Debtors are proceeding in good faith and will make a showing at the Sale Hearing that the OAC has acted in good faith. Courts generally conclude that parties have acted in good faith with respect to a proposed sale if the purchase price is adequate and reasonable and the terms of the sale are disclosed fully. See, e.g., In re Abbotts Dairies of Pa., Inc., 788 F.2d 143, 149-50 (3d Cir. 1986). The Auction was conducted in accordance with the Sale Procedures and each of the Notice Parties attended and participated in consultations with the Debtors. A transcript of the Auction is attached hereto as Exhibit B and will be offered into evidence at the hearing. Accordingly, the sale of assets to OAC should be approved.

Sale of Assets Free and Clear of Liens, Claims, and Encumbrances

14. Pursuant to Section 363(f) of the Bankruptcy Code, a debtor in possession may sell property "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied:

- (a) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
- (b) such entity consents;
- (c) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (d) such interest is in bona fide dispute; or
- (e) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

15. To facilitate the sale of their assets, the Debtors propose that any liens, claims, and encumbrances asserted against the assets be transferred, and attach, to the sale proceeds, except to the extent a purchaser agrees to take title to such assets subject to such liens. All liens on the assets will be satisfied or will attach to the proceeds of the sale of the assets with the same force, effect, and priority as such liens have on the assets, subject to the rights and defenses, if any, of the Debtors and any party in interest with respect thereto. The Debtors assert that there will be sufficient

proceeds from the sale to pay all such secured claims in full. Accordingly, the Debtors submit that the sale of assets free and clear of liens, claims, and encumbrances satisfies the statutory prerequisites of Section 363(f)(3) of the Bankruptcy Code.

**Section 363(b)(1) Does Not Require an Ombudsman
under Section 332 for this Sale**

16. Section 363(b)(1) imposes the following restrictions on the sale of assets under that section:

. . . if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless— (A) such sale or such lease is consistent with such policy; or (B) after the appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease-- . . .

17. This Section does apply to the Debtors in that the Debtors have sold consumer products directly to individuals and accordingly the Debtors have a "policy prohibiting the transfer of personally identifiable information about individuals." Nevertheless, under the terms of the OAC APA, OAC will purchase the assets of the Debtors and will maintain the policies previously established by the Debtors. Accordingly, the Debtors assert that no appointment of an ombudsman is necessary.

**Sale of the Debtors' Assets Shall Satisfy the Good-Faith
Requirement of Section 363(m) of the Bankruptcy Code**

18. Section 363(m) provides, in pertinent part:

The reversal or modification on appeal of an authorization under [Section 363(b) or (c)]. . . of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

19. A bankruptcy court is not required to make an explicit finding of good faith in order to authorize a sale under the Bankruptcy Code. See Harbison-Fischer Mfg. Co. v. Zinke (In re Zinke), 97 B.R. 155, 156 (E.D.N.Y. 1989) (finding that a duty to make an explicit finding of good faith before permitting a sale "has not been imposed by the Second Circuit or the United States Supreme Court"). Although the Bankruptcy Code does not define "good faith purchaser," courts interpreting Section 363(m) of the Bankruptcy Code have held that "to show lack of good faith [a party] must show fraud, collusion . . . or an attempt to take grossly unfair advantage of other bidders." Marin v. Coated Sales, Inc. (In re Coated Sales, Inc.), No. 89 Civ. 3704 (KMW), 1990 WL 212899 (S.D.N.Y. Dec. 13, 1990). See, e.g., In re Sasson Jeans, Inc., 90 B.R. 608, 610 (S.D.N.Y. 1988) (quoting In re Bel Air Assocs., Ltd., 706 F.2d 301, 305 (10th Cir. 1983)). Yet, because there is no bright line test, courts examine the facts of each case by concentrating on the "integrity of [an actor's] conduct during the sale proceedings." In re Pisces Leasing Corp., 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting In re Rock Indus. Machinery Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)).

20. Furthermore, the Debtors will be prepared to present evidence of such good faith at the Sale Hearing.

Relief Under Bankruptcy Rules 6004(g) and 6006(d)

21. Bankruptcy Rule 6004(g) provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." Additionally, Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease . . . is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise."

22. Under the terms of the OAC APA, the Closing will be July 24, 2013. In order to minimize operating expenses, it is important to close the sale as soon as possible. Accordingly, the Debtors request that any order approving the sale of their assets and in connection therewith be effective immediately by providing that the 10-day stays under Bankruptcy Rules 6004(g) and 6006(d) are waived.

CONCLUSION

23. For the reasons stated herein, the Debtors respectfully request that the Court enter an order granting the relief requested herein that is substantially in the form annexed hereto as Exhibit C, and such other and further relief to the Debtors as the Court may deem proper.

Dated: July 14, 2013

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