

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:)
)
TWG CAPITAL, INC.,) CASE NO. 12-11019-BHL-11
)
Debtors.)

LIMITED OBJECTION TO MOTION FOR ENTRY OF AN ORDER (I) APPROVING ASSET PURCHASE AGREEMENT; (II) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTOR’S ESTATE FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES; AND (III) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF LEASES AND CONTRACTS

LA/Shadeland Station, Inc. (“LA Shadeland”), by counsel, for its limited objection to the *Motion for Entry of an Order (I) Approving Asset Purchase Agreement; (II) Authorizing the Sale of Substantially All of the Assets of the Debtor’s Estate Free and Clear of Liens, Claims, and Encumbrances; and (III) Authorizing the Assumption and Assignment of Leases and Contracts* (the “Sale Motion”), states as follows:

1. TWG filed its voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* (the “Bankruptcy Code”) on September 14, 2012. (*See* Doc. 1.)
2. On September 14, 2012, TWG filed its Sale Motion. (*See* Doc. 14.)
3. As part of the proposed sale of TWG’s assets, TWG has sought authorization to assume certain executory contracts and unexpired leases and subsequently assign such leases and executory contracts to the successful purchaser of TWG’s assets. (Doc. 14, ¶¶ 14, 43-52.)
4. In connection with the proposed sale of TWG’s assets, TWG has also requested that Court to approve certain bidding procedures in connection with the sale. (*See* Doc. 15.)

5. On October 4, 2012, upon motion by TWG, this Court entered an *Order Granting Motion for Entry of an Order (I) Approving Certain Bidding Procedures with Respect to the Sale of Substantially all of the Assets of the Debtor's Estate; (II) Scheduling an Auction and Subsequent Hearing to Consider the Sale of the Debtor's Assets; and (III) Approving the Form and Manner of Notice Thereof* (the "Bidding Procedures Order"). (See Doc. 80.)

6. Pursuant to the Bidding Procedures Order, TWG was to serve notice upon each non-debtor party to a contract or lease that may be assumed by TWG and assigned to the purchaser of TWG's assets. (Doc. 80, ¶ 16.) Such notice was to set forth the cure amount TWG believes necessary to assume such contract or lease pursuant to Section 365 of the Bankruptcy Code and notify each non-debtor party that such party's lease or contract may be designated for assumption and assignment to Carmel Funding, LLC (the "Stalking Horse Bidder") or other successful purchaser of TWG's assets. (Doc. 80, ¶¶ E, 16.) According to the Bidding Procedures Order, any objection to the assumption or assignment of any assumed lease or assumed contract must be filed and served on or before five (5) days before sale hearing on November 8, 2012. (Doc. 80, ¶¶ 15, 16, 18.)

7. As required by the Bidding Procedures Order, on October 5, 2012, TWG served the *Notice of Proposed Cure Amounts and Objection Deadline* (the "Notice") wherein TWG listed LA Shadeland's commercial lease agreement with TWG (the "Lease") as a unexpired lease that may be assumed by TWG and assigned to the Stalking Horse Bidder or other third party in conjunction with the TWG sale. (Doc. 84, Exhibit 1.)

8. Similarly to the Bidding Procedures Order, the Notice indicates that any objections to the "assumption and assignment of the lease or contract and/or to the Cure

Amount” must be made five (5) days before the sales hearing on November 8, 2012. (Doc. 84, ¶ 5.)

9. Pursuant to Section 365(b) of the Bankruptcy Code, a debtor may assume an unexpired lease or executory contract only if the debtor cures any default existing thereunder.

10. According to the Sale Motion, the successful purchaser of TWG’s assets is responsible for paying any cure amounts. (Doc. 14, ¶ 46.)

11. The Notice listed the cure amount for the Lease as \$3,009.27. (Doc. 84, Exhibit 1). While LA Shadeland believes the listed cure amount is currently correct, LA Shadeland nevertheless expressly reserves its right to challenge the cure amount as the closing date for sale has not yet been determined and additional rents and obligations may become due and owing under the Lease prior to the closing.¹

12. Pursuant to Section 365(f)(2) of the Bankruptcy Code, however, TWG may only assign the Lease if adequate assurance of future performance by the assignee of the Lease is provided.

13. While LA Shadeland may be agreeable to an assumption and assignment of the Lease, the assignee of the Lease is unclear at this point – the assignee could be the Stalking Horse Bidder or an unknown third party who successfully outbids the Stalking Horse Bidder at the auction of TWG’s assets.

14. Within the Sale Motion, TWG has indicated that if requested by an appropriate party, the successful purchaser of TWG’s assets will make commercial reasonable efforts to

¹ According to the proposed purchase agreement attached to the Sale Motion, the closing date shall occur “not later than the first Saturday following the day on which the Sale Order . . . becomes a final and non-appealable order under applicable law (but in no event later than December 1, 2012), or (ii) *at such other place and time and/or on such other date as the parties hereto may mutually agree.*” (Doc. 14, Exhibit A, ¶ 2.3 (*emphasis added*)).

demonstrate adequate assurance of future performance under the assumed leases. (Doc. 14, ¶ 49.)
Once the successful purchaser of TWG's assets is determined, LA Shadeland requests that it be provided adequate assurance of future performance under the assumed Lease.

15. In the meantime, however, because the successful purchaser is not yet known and cannot yet be known, LA Shadeland has not yet been provided with adequate assurance as required under 11 U.S.C. 365(f)(2). Therefore, LA Shadeland cannot yet determine compliance with the statutorily required adequate assurance of future performance by the successful purchaser and assignee of the Lease.

16. Accordingly, LA Shadeland is filing this limited objection to reserve all rights accruing to it with respect to the assumption or rejection of the Lease, the cure amount listed within the Notice, cure of all defaults under the Lease, and adequate assurance of future performance by the assignee of the Lease.

Dated: November 2, 2012

Respectfully submitted,

/s/ Kay Dee Baird
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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2012, a copy of the foregoing *Limited Objection to Notice of Proposed Cure Amounts and Objection Deadline* was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties pay access this filing through the Court's system.

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I further certify that on November 2, 2012, a copy of the foregoing *Limited Objection to Notice of Proposed Cure Amounts and Objection Deadline* was mailed by first-class U.S. Mail, postage prepaid, and properly-addressed, or electronically as indicated, to the following:

None.

/s/ Kay Dee Baird

Kay Dee Baird