

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Chapter 11
)	
AcuSport Corporation,)	Case No. 18-52736
)	
Debtor.)	Honorable John E. Hoffman, Jr.

**DEBTOR’S REPLY TO OBJECTION OF UNSECURED
CREDITORS’ COMMITTEE TO APPROVAL OF AMENDMENT TO
ASSET PURCHASE AGREEMENT WITH ELLETT BROTHERS, LLC**

AcuSport Corporation, the debtor and debtor in possession (“*Debtor*” or “*AcuSport*”) in this chapter 11 case (the “*Case*”), submits this reply (the “*Reply*”) to the *Objection of the Official Committee of Unsecured Creditors to Approval of Amendment to Asset Purchase Agreement with Ellett Brothers, LLC* [Dkt. No. 210] (the “*Committee Objection*”) of the official committee of unsecured creditors (the “*Committee*”). In support of this Reply, Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. Notably, the Committee Objection does not object to the sale of substantially all of Debtor’s assets. As the Committee Objection itself concedes, the Committee would accept the proposed sale and withdraw its objection if the proposed sale terms were more to the Committee’s liking.¹ But the Committee cannot be allowed to usurp the business judgment of Debtor, particularly when it fails to recognize the practical reality of Debtor’s current financial situation and limited options.

¹ The Committee has attached drafts of their proposed revised forms of amendment to the Original APA (defined herein) and a proposed Transition Services Agreement as Exhibit B and Exhibit C to the Committee Objection.

2. In Debtor's business judgment, a realistic evaluation of Debtor's options indicates that the best course of action involves closing of the current deal with Ellett Brothers, LLC ("**Proposed Buyer**"), including entry into the APA Amendment and the TSA (both as defined below) (collectively, the "**Sale**"). The options suggested by the Committee Objection, such as a renewed round of bidding or an attempt to force Proposed Buyer to close under the Original APA, fail to take into account the significant additional costs of delay and expensive, uncertain litigation, including professional fees of the Debtor's and the Committee's advisors. The Committee also fails to analyze the proposed sale under the proper standard applicable in the Sixth Circuit.

3. Accordingly, for the reasons set forth herein, Debtor respectfully requests approval of the Sale, including acceptance of the APA Amendment and the TSA.

BACKGROUND

A. General Background

4. On May 1, 2018 (the "**Petition Date**"), Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Southern District of Ohio (the "**Court**"). Debtor continues to manage and operate its business as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. No request has been made for the appointment of a trustee or examiner in this case. An official committee of unsecured creditors (the "**Committee**") was formed on May 10, 2018.

B. Sale Process and APA Amendment

6. Additional background of the process by which Debtor's assets were marketed prior to the bankruptcy filing is set forth in Debtor's motion filed May 1, 2018 as Docket No. 19

(the “*Bidding Procedures Motion*”) seeking, among other things, the entry of an order: (i) establishing bidding procedures (the “*Bidding Procedures*”) for the sale of substantially all of the assets of Debtor (the “*Sale Assets*”); and (ii) establishing procedures relating to the assumption and assignment of executory contracts and unexpired leases in connection with the Sale. By the Bidding Procedures Motion, Debtor also sought approval of Proposed Buyer as stalking horse bidder pursuant to that certain Asset Purchase Agreement dated as of April 30, 2018 (the “*Original APA*”).

7. On May 16, 2018, the Court entered an order as Docket No. 109 (the “*Bidding Procedures Order*”) granting certain of the relief sought in the Bidding Procedures Motion, including, among other things, (a) setting a deadline for submitting bids for the Sale Assets of June 12, 2018, at 4:00 p.m. (Eastern Time) (the “*Bid Deadline*”); and (b) approving the form of Original APA with certain modifications. The Bidding Procedures Order contemplated that a hearing to approve the sale of the Sale Assets (the “*Sale Hearing*”) would be held on June 14, 2018 in the event no “Qualified Bids” (as defined in the Bidding Procedures) were received.

8. On May 24, 2018, Debtor filed a motion as Docket No. 140 (the “*Sale Motion*”) seeking, among other things, the entry of an order authorizing the sale of the Sale Assets, free and clear of liens, claims, encumbrances, and other interests, to Proposed Buyer.

9. As set forth in the Supplemental Declaration of Geoffrey Frankel, filed contemporaneously herewith, no Qualified Bids for the Sale Assets were received on or before the Bid Deadline. As a result, Debtor cancelled the Auction that had been scheduled for June 14, 2018. Notwithstanding the cancellation of the Auction, Debtor continued discussions with potential bidders to attempt to solicit bids that, even if they did not satisfy the requirements as Qualified Bids in all respects, could have provided some form of competition to the bid of

Proposed Buyer. Despite that effort, none of the potential bidders that expressed interest in bidding on the Sale Assets indicated that they were willing to submit Qualified Bids for Debtor's assets.

10. In the meantime, certain unexpected issues arose between Debtor and Proposed Buyer with respect to the Original APA that caused the parties to request an extension of the Sale Hearing, pending a resolution of those items. Those issues included a dispute regarding ownership of certain information technology assets (the "*Connectria IT Assets*") associated with services provided by Connectria Corporation ("*Connectria*").

11. When Proposed Buyer insisted on changes to the Original APA to resolve the disputes regarding the Connectria IT Assets, Debtor faced two alternatives: (a) insist on closing the Sale pursuant to the terms of the Original APA, which would create costly delay and significantly inflate professional fees on all sides; or (b) agree to a reduction of the purchase price for the Sale Assets to resolve the issue and keep the closing of the Sale moving forward, including agreement to terms under a TSA that also provide significant benefit to Debtor on a going-forward basis. The terms of the APA Amendment and the TSA were the result of strenuous, arms-length negotiation between Debtor and Proposed Buyer. After considering the facts and circumstances of the dispute regarding ownership of the Connectria IT Assets in light of the effective reduction in cash to the estate of approximately \$750,000² required to resolve the dispute, which amount was heavily negotiated by the parties, and the risks and costs attendant to failing to close the Sale, in the Debtor's business judgment, entering into the APA Amendment was in the best interests of Debtor's estate.

² The TSA provides for approximately \$250,000 in payments by Debtor for which Debtor receives valuable consideration in return, along with a \$500,000 reduction in the purchase price.

12. Accordingly, and pursuant to the Court's request, Debtor and Proposed Buyer provided notice of the proposed amendment to the Original APA (the "**APA Amendment**") and Transition Services Agreement (the "**TSA**") pursuant to *Debtor and Debtor in Possession's (A) Notice of Filing of Amendment to Asset Purchase Agreement with Ellett Brothers, LLC And (B) Position Statement regarding Lack of Materiality of the Amendment and Why No Further Notice is Required* [Dkt. No. 207] (the "**APA Amendment Notice**").

13. The Court has not yet set a date for the postponed Sale Hearing.

C. The Costs Associated with Delaying a Sale

14. Debtor continues to operate pursuant to the weekly cash collateral budget (the "**Cash Collateral Budget**") approved in connection with, and attached as Exhibit B to, the Court's *Final Order Authorizing Debtor to: (A) Use Cash Collateral; and (B) Grant Adequate Production and Other Relief to Wells Fargo Bank, N.A., as Agent, and to Debtor's Lenders* [Dkt. No. 129] (the "**Final Cash Collateral Order**"). The agreement to use cash collateral under the Final Cash Collateral Order terminates on June 29, 2018. Further delay in approval of the Sale would require approval to extend Debtor's use of cash collateral.

15. As set forth in the Cash Collateral Budget, Debtor incurs an average of approximately \$300,000 to \$350,000 in operational expenses in an average week in bankruptcy.³ This amount does not include restructuring expenses, including Debtor's professionals, the Committee's professionals, and other costs of operating in bankruptcy.

³ It is possible that additional costs could be incurred in connection with insurance-related expenses associated with continuation of Debtor's employees for an additional span of time.

D. The Committee Objection

16. The Committee Objection is organized around five primary points: (a) the materiality of the APA Amendment to notice of the Sale Hearing [Comm. Obj. ¶¶ 4-6]; (b) whether sufficient good faith in seeking approval of the Bidding Procedures justifies the break-up fee and expense reimbursement approved thereby [Comm. Obj. ¶¶ 7-14]; (c) a request to further extend the Debtor’s marketing process [Comm. Obj. ¶¶ 15-17]; (d) whether Proposed Buyer’s refusal to close without execution of the APA Amendment would breach the Original APA [Comm. Obj. ¶¶ 18-21]; and (e) the alleged bad faith of Proposed Buyer [Comm. Obj. ¶¶ 26-28]. The remainder of the Committee Objection proposes terms by which the Committee could accept the APA Amendment and the TSA [Comm. Obj. ¶¶ 22-25].

REPLY

17. Nowhere in the Committee Objection does the Committee directly oppose approval of the Sale under the relevant legal standard. On the contrary, the Committee Objection fails to effectively refute any of the elements Debtor must satisfy to win approval of the Sale, which were cited in the Sale Motion as the legal basis for the relief sought thereon. *See* Sale Mot. ¶¶ 15-16 (citing *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986)). This Court has explained that “the sound-business-purpose test requires ‘1) [a] sound business reason; 2) accurate and reasonable notice; 3) [an] adequate price; and 4) good faith.’” *In re Nicole Energy Servs., Inc.*, 385 B.R. 201, 231 (Bankr. S.D. Ohio 2008) (quoting *In re Country Manor of Kenton, Inc.*, 172 B.R. 217, 220 (Bankr. N.D. Ohio 1994)) (alterations in original).

18. Instead, the Committee:

- a. misinterprets the APA Amendment Notice filed at the Court’s request regarding whether a new twenty-one day notice period was required by the APA Amendment Notice and Federal Rules of Bankruptcy Procedure

2002(a) and 6004, but fails to consider the relevant standard for accurate and reasonable notice and adequate price for a sale under § 363(b);

- b. analyzes a hypothetical motion for reconsideration of the Bidding Procedures Order without considering the legal cost and impact of delay on Debtor's estate;
- c. requests yet another round of bidding for Debtor's assets without citing any legal authority for such a remedy or considering the costs to Debtor's estate in additional fees and delay;
- d. analyzes a hypothetical effort to force Proposed Buyer to close the Sale at the original price or resist repayment of any deposit to Proposed Buyer without considering the legal cost and impact of delay on Debtor's estate; and
- e. questions the good faith of Proposed Buyer on the basis of mere speculation.

19. Most importantly, all of the Committee's proposed alternatives to approval of the Sale would be substantially likely to harm the Debtor and its estate far more than the disputed \$750,000 change in consideration. As set forth above, continued operation of the Debtor for only two to three additional weeks, without more, would require Debtor to incur more in marginal operational expenses than the decrease in purchase price Committee opposes—even if Debtor incurs no marginal litigation expenses during that time. Although Debtor would strongly prefer to close the Sale at the original price, to do so would require winning an uncertain, expensive, and fact-specific legal dispute against Proposed Buyer which would delay the sale for weeks, if not more, and would generate significant additional legal fees and costs. Under any of the Committee's proposed alternatives to the Sale under the terms of the APA Amendment and the TSA, the likely increased costs of payroll, ongoing operating expenses, and professional fees, including Committee's professional's fees, would quickly eat up the potential \$750,000 to be gained.

20. As the evidence and argument at the Sale Hearing will show, the Sale satisfies all elements of the sound-business-purpose test for approval of a sale under § 363(b) of the Bankruptcy Code. Debtor has a sound business reason for proposing the Sale to Proposed Buyer subject to the terms of the Amended APA. Debtor has undergone a robust marketing process that has ensured that any and all parties interested in Debtor's assets had a full and fair opportunity to come forward and participate in the sale process. The Sale to Proposed Buyer is the highest and best bid for Debtor's assets resulting from that process—in fact, no other bidder submitted a Qualified Bid for the Sale Assets. The Original APA and APA Amendment have been negotiated at arm's length and in good faith as between Debtor and Proposed Buyer. The Sale also has the benefit of preserving jobs for a substantial number of Debtor's employees. Accordingly, the Committee Objection should be overruled and the Sale should be approved.

21. Although Debtor seeks approval of the Sale under the standard set forth in section 363(b) of the Bankruptcy Code as a sale of its assets outside the ordinary course of business, Debtor's judgment that a sale to a consensual buyer is more valuable to its estate than uncertain litigation could also be analyzed as a form of compromise. Many courts, including this Court, have analyzed proposed transactions under the standards applicable to both sales and compromises. *See, e.g., In re Nicole Energy Servs., Inc.*, 385 B.R. 201, 210 (Bankr. S.D. Ohio 2008). Viewing Debtor's proposal to close the Sale subject to the APA Amendment and TSA rather than attempting to litigate to force closing under the Original APA in this light, Debtor's proposed sale satisfies the fair-and-equitable standard applied by courts in the Sixth Circuit to approval of compromises.

A. A Sound Business Reason Exists for the Sale.

22. The Committee Objection fails to rebut the sound business reason for the Sale, incorporating the APA Amendment and the TSA. “In determining whether or not to approve the sale . . . the Court must determine whether such sale is in the best interest of the estate.” *In re Nicole Energy Servs., Inc.*, 385 B.R. 201, 231 (Bankr. S.D. Ohio 2008) (quoting *In re Planned Sys., Inc.*, 82 B.R. 919, 923 (Bankr. S.D. Ohio 1988)). The issue before the Court is not whether the APA Amendment improves or reduces the distributions to general unsecured creditors, but whether the Sale as a whole is in the best interests of the estate and creditors compared to their prospects in the absence of a sale. Relevant considerations include, among other things, the timing and certainty of the benefit to the estate of the proposed sale. *See Nicole Energy Servs.*, 385 B.R. at 232-33.

23. Here, there is no dispute that a closing of the Sale pursuant to the terms of the APA Amendment and TSA in a consensual process would bring the quickest resolution of this bankruptcy case and earliest distributions to creditors. Every alternative proposed by the Committee would extend the bankruptcy and reduce the certainty of returns to the estate. As stated above, only a two or three week delay in closing the Sale would likely require Debtor to incur more than \$750,000 in marginal operational expenses required to continue operating. The Committee’s proposal to reopen bidding yet again in the hope that a higher and better bid will materialize is particularly speculative. The Committee points to no evidence that such an effort would be fruitful and has offered no alternative buyer that would provide a higher offer.

24. Furthermore, the Committee’s prediction that “even in a forced liquidation, the Prepetition Lenders will be paid in full” is not guaranteed. [Comm. Obj. at 3]. The proceeds of a forced liquidation depend not only on the liquidation value that can be realized for Debtor’s

assets, but also on the timing of such a transaction, carrying costs, administrative expenses, and employee costs.

25. As further evidence for the sound business purpose for a proposed sale, this Court has also considered whether “[t]he proposed distribution to creditors, in fact, exceeds the Committee’s expectations.” *Nicole Energy Servs.*, 385 B.R. at 232. In that case, the specific expectations that were relevant to the Court were the expectations of the Committee *at the outset of the case*. *Id.* The Committee’s objection to this comparison between initial distributions and distributions under a proposed sale [Comm. Obj. at 4] are entirely inappropriate given that this Court has cited such a comparison in approving a sale under § 363(b).

26. The Committee’s insistence that the relevant comparison is the Original APA vs. the APA Amendment and the TSA, in addition to being an incorrect application of the sound-business-purpose test, shows that the Committee has failed to consider the totality of the facts and circumstances. Any attempt at forcing a closing of the Sale under the price set forth in the Original APA would increase cost, delay, and uncertainty into Debtor’s sale process, likely more than the \$750,000 reduction in cash to the estate to which the Committee is objecting. No matter how much the Committee—or the Debtor, for that matter—would prefer things to be different, the only option that avoids such delay and expense involves closing the deal under the APA Amendment and TSA.

B. Notice of the Sale was Fair and Reasonable

27. Debtor’s marketing efforts, both prepetition and postpetition, have been described in detail in the Bidding Procedures Motion, the related Declaration of Geoffrey Frankel in support of the Bidding Procedures Motion [Dkt. No. 20], and the Notice of APA Amendment. Debtor has thoroughly exposed its assets to the marketplace. No Qualified Bids were received

by the Bid Deadline other than the bid of Proposed Buyer. Accordingly, Debtor submits that all reasonable opportunities have been given to allow the world to outbid Proposed Buyer for the Sale Assets.

28. The Committee misinterprets the purpose of, and argument contained in, the APA Amendment Notice, *see Comm. Obj. ¶¶ 4-6*, which was requested by the Court as a statement of the Debtor's position with respect to the notice obligations under the APA Amendment. *Cf. APA Amendment Notice ¶ 14*.

29. The Committee seeks to reopen the bidding based on its speculation that "it is possible that parties that previously submitted non-qualifying bids, or other parties that elected not to submit a bid, may be willing to re-engage in the sale process." [Comm. Obj. ¶ 16]. However, Debtor specifically attempted to solicit such potential bids during the bidding process, and specifically requested that potential bidders who may be able to meet a reduced minimum bid amount submit their bids for consideration in case such bids were needed. No such bidder did so. Indeed, the specific terms of the APA Amendment and TSA are now public, yet no other potential bidder has made a revised offer.⁴

30. The Committee complains that Debtor failed to send notices by overnight mail of cancellation of the Auction in accordance with the Bid Procedures. [Comm. Obj. ¶ 17]. However, Debtor failed to do so specifically because it hoped to solicit a bid that, although it would not be a Qualified Bid under the Bid Procedures, might have qualified if the minimum bid amount had been reduced in light of the APA Amendment. There is no reason to conclude that Debtor's failure to cancel the Auction hindered the bidding process.

⁴ One party who learned of modifications to the APA contacted the Debtor to indicate a potential interest in bidding at the lower purchase price, but that party has not reconfirmed its interest level or timeline and has done very little due diligence on the assets. [Frankel Decl. ¶ 11.]

C. Debtor and Proposed Buyer Negotiated at Arm's Length and in Good Faith.

31. Debtor seeks a finding that Proposed Buyer is entitled to the protections of section 363(m) of the Bankruptcy Code due to its “good faith.” *Cf. Nicole Energy Servs.*, 385 B.R. at 235. “In assessing the good faith of a purchaser, courts have considered factors such as: (1) whether the sale was negotiated at arm's length; (2) whether any officer or director of the debtor holds any interest in or is otherwise related to the potential purchaser; and (3) whether fraud or collusion exists among the prospective purchaser, any other bidders or the trustee.” *Id.* (citations omitted).

32. As set forth in the cases cited by the Committee, lack of good faith requires a showing of “fraud or collusion between the purchaser and the seller or the other bidders, or that the purchaser’s actions constituted an attempt to take grossly unfair advantage of other bidders.” *Comm. Obj.* ¶ 27 (citing *255 Park Plaza Assocs. v. Conn. Gen. Life Ins. Co. (In re 255 Park Plaza Assocs.)*, 100 F.3d 1214, 1218 (6th Cir. 1996)). In *255 Park Plaza*, the Sixth Circuit held that “nothing in the record indicates that such allegations would be warranted” given a competitive bidding process, a purchase for value, and a lack of collusion. *255 Park Plaza*, 100 F.3d at 1218.

33. There is no allegation that Proposed Buyer is colluding with Debtor or other potential bidders.⁵ Nor does the Committee allege that Proposed Buyer has taken “grossly unfair advantage of other bidders,” as required by the applicable standard. Although Debtor would rather have avoided the price adjustment embodied in the APA Amendment, it is difficult to see how Potential Bidder would be taking grossly unfair advantage of other bidders by demanding a

⁵ Debtor disputes the Committee’s statement that it has “incurred millions of dollars of fees for the benefit of Ellett,” [*Comm. Obj.* at 12], both with respect to the amount of fees incurred by Debtor and the implication that Debtor has incurred such fees for the benefit of any person other than its estate.

purchase price adjustment as a result of a \$750,000 dispute over certain assets, or entry into a TSA that provides significant benefits to Debtor's estate.

D. The Sale Satisfies the Fair-and-Equitable Standard for Approval of a Compromise.

34. As addition to approval under § 363(b) of the Bankruptcy Code, Debtor's judgment to consummate the Sale instead of pursuing uncertain and costly litigation against Proposed Buyer satisfies the fair-and-equitable standard articulated by the Sixth Circuit for approval of a compromise. *See Nicole Energy Servs.*, 385 B.R. at 238. Courts evaluate "the fairness and equity of a proposed compromise" and "consider such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors." *Id.* (quoting *Fishell v. Soltow (In re Fishell)*, 47 F.3d 1168 (6th Cir. 1995) and *Bauer v. Commerce Union Bank, Clarksville, Tennessee*, 859 F.2d 438, 441 (6th Cir. 1988)). "The Court must ultimately canvass the issues in order to determine whether the settlement falls below the lowest point in the range of reasonableness." *Id.* (quotation marks omitted) (quoting *In re Carson*, 82 B.R. 847, 852 (Bankr. S.D. Ohio 1987)).

35. Here, the complexity of expense of litigation to force Proposed Buyer to close the Original APA or to defend against Proposed Buyer's claim to the return of its deposit outweigh the \$750,000 reduction in cash proceeds resulting from the Sale, regardless of the probability of success on the merits. The range of reasonable outcomes from the Debtor's proposed litigation strategies includes failure to consummate a sale at all, along with increased operational expenses and legal fees to the Debtor. Such an outcome would be worse, perhaps much worse, than the proposed Sale.

CONCLUSION

Accordingly, because (a) all parties previously received notice of the Sale, (b) the proposed modifications thereto are appropriate and warranted under the circumstances, (c) all primary parties in interest (including the Committee and the Agent) were provided with and given the opportunity to review and respond to the APA Amendment and had sufficient time to assert objections, and (d) Debtor is receiving substantial consideration and additional value under the Transition Services Agreement, Debtor submits that no further notice or delay of the continued Sale Hearing is needed. As such, Debtor requests a final Sale Hearing on the proposed Sale on the earliest date the Court may be available and that the Court approve the Sale.

Date: June 21, 2018

Respectfully submitted,

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