

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION**

In re:)	Chapter 11
)	
HARDWICK CLOTHES, INC.,)	Case No. 1:13-bk-16079
)	
Debtor.)	
)	

**OBJECTION OF THE PENSION BENEFIT GUARANTY
CORPORATION TO DEBTOR’S MOTION FOR AN ORDER (A)
AUTHORIZING SALE OF SUBSTANTIALLY ALL ESTATE ASSETS FREE AND
CLEAR OF LIENS, CLAIMS, RIGHTS, INTERESTS AND ENCUMBRANCES;
(B) APPROVING STALKING HORSE EXPENSE REIMBURSEMENTS
AND PROCEDURES, AND (C) AUTHORIZING ASSUMPTION AND
ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Pension Benefit Guaranty Corporation (“PBGC”), a creditor in the abovementioned proceeding, hereby files this objection to the Debtor’s Motion for Order (A) Authorizing Sale of Substantially all Estate Assets Free and Clear of Liens, Claims, Rights, Interests and Encumbrances; (B) Approving Stalking Horse Expense Reimbursements and Procedures, and (C) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases (“Motion”) filed on March 19, 2014 (Docket No. 100).¹ The Motion seeks approval of proposed bid procedures to facilitate an auction of substantially all of the Debtor’s assets, together with approval of an Expense Reimbursement Fee for Jones CapitalCorp., LLC (“Jones”), the proposed stalking horse bidder. The bid procedures outlined in the Motion should not be

¹ While the Motion is unclear as to the extent of the relief being requested at the hearing scheduled for April 10, 2014, the proposed order accompanying the Motion (“Proposed Order”)(Docket No. 100-2) suggests that the Debtor will be seeking approval of bid procedures and the Expense Reimbursement Fee described in the Motion at this hearing. This objection is limited accordingly. PBGC reserves all rights to supplement this objection and/or to file an additional objection to the approval of the sale sought in the Motion at a final hearing to be set by the Court.

approved by the Court because various terms included in the bid procedures will have the effect of chilling the bidding process.

First, the bid procedures require that any Competing Bid exceed the stalking horse purchaser's proposed purchase price by \$100,000.00 plus the amount of the Expense Reimbursement Fee.² But, the Expense Reimbursement Fee is excessive – more than two times that of similar fees approved by courts in the Sixth Circuit – and is not limited to expenses actually incurred, as courts have required. Second, there is no evidence of any efforts to market Debtor's assets, and the bid procedures provide insufficient time to adequately conduct a marketing process prior to the auction. Third, in order to constitute a Competing Bid, the bid must propose to purchase the same assets and assume the same contracts as in the stalking horse purchaser's Asset Purchase Agreement ("APA"). This is unreasonable because, not only has the APA not yet been finalized so as to make it impossible for prospective bidders to submit a Competing Bid, but a prospective bidder may wish to offer a higher purchase price but not assume all contracts or liabilities. Finally, the bid procedures will chill the bidding process by not providing potential purchasers sufficient time to conduct the due diligence necessary to submit a Competing Bid. These flaws in the bid procedures will substantially harm creditors because they will limit the number of prospective bidders, decrease competition at auction, and will result in a lower sale price. Thus, the Court should not approve the proposed bid procedures without first requiring the Debtor to make certain modifications described herein.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

I. BACKGROUND

A. PBGC and ERISA

PBGC is a wholly-owned United States government corporation, and an agency of the United States, that administers and enforces the defined benefit pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”). *See* 29 U.S.C. §§ 1301-1461 (2012). PBGC guarantees the payment of certain pension benefits upon the termination of a single-employer pension plan covered by Title IV of ERISA. When an underfunded plan terminates, PBGC generally becomes trustee of the plan and supplements any assets remaining in the plan with its insurance funds to pay to the retired employees their pension benefits, subject to statutory limits. *See* 29 U.S.C. §§ 1321-1322, 1342, 1361. PBGC’s insurance funds are made up of, among other things, (i) the agency’s recoveries of terminated pension plan’s underfunding and (ii) premiums paid by pension plan sponsors.

Also, when an underfunded pension plan terminates, the plan sponsor and its controlled group members are jointly and severally liable to PBGC for the pension plan’s underfunding, which is the value of the benefit liabilities owed to all participants and beneficiaries under the plan over the value of the plan’s assets, as of the termination date, together with interest thereon. *See* 29 U.S.C. §§ 1301(a)(18), 1362. The rate of interest is the rate prescribed in 29 C.F.R. § 4062.7(c).

B. The Debtor’s Pension Plan

The Debtor sponsored the Hardwick Clothes, Inc. Pension Plan (“Pension Plan” or “Plan”), a single-employer defined benefit pension plan covered under Title IV of ERISA. On January 30, 2012, the Debtor filed a distress termination application with PBGC, seeking to terminate the Pension Plan pursuant to 29 U.S.C. §1341(c)(2)(B)(iii)(I). On July 31, 2013,

PBGC and the Debtor entered into an Agreement for Appointment of Trustee and Termination of Plan whereby (i) the Pension Plan was terminated pursuant to 29 U.S.C. § 1341(c); (ii) March 31, 2012 was set as the Plan's termination date; and (iii) PBGC was appointed as statutory trustee of the Pension Plan.

The Pension Plan covers approximately 644 of Debtor's employees and was underfunded by \$4,616,587.00. Now, the Debtor's employees, upon retirement, look to PBGC for the payment of their benefits under the Pension Plan, subject to statutory limits.

C. Debtor's Bankruptcy Proceedings and Proposed Bid Procedures

On December 2, 2013, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On March 5, 2014, PBGC filed a proof of claim for (i) the Pension Plan's underfunding in the amount of \$4,616,587.00, (ii) unpaid minimum funding contributions owed to the Plan in the amount of \$180,065.00, and (iii) unpaid premiums owed to PBGC in the amount of \$2,554,925.62.

On March 19, 2014, the Debtors filed the Motion. Paragraph 48 of the Motion contains certain bid procedures that, according to the Proposed Order, the Debtor will seek approval of at the April 10, 2014 hearing. PBGC respectfully requests that the Court not approve the bid procedures because they will chill the bidding process.

Specifically, the bid procedures require that Competing Bids be submitted no later than 21 days after the date this Court enters an order approving such procedures, which provides the Debtor insufficient time to conduct a thorough marketing process and for prospective bidders to complete their due diligence.³ Also, a Competing/Qualified Bid must exceed the stalking horse purchaser's proposed Purchase Price by \$100,000.00 plus the Expense Reimbursement Fee –

³ See Motion, ¶48.2(a).

given that the Expense Reimbursement Fee is unreasonably excessive, it will inflate both the amount of the Initial Overbid and the stalking horse purchaser's ability to credit bid.⁴ The Competing/Qualified Bid must also assume the same assets and contracts that the stalking horse purchaser has agreed to purchase under the proposed APA, the terms of which have not been finalized.⁵

II. ARGUMENT

When selling estate assets, a debtor has a duty to obtain the highest price or greatest overall benefit possible for the estate. *In re Integrated Res.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (citing *Cello Bag Co. Inc. v. Champion Int'l Corp. (In re Atlanta Packaging Prods., Inc.)* 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)). To that end, bidding procedures must “facilitate an open and fair public sale designed to maximize value for the estate.” *In re Nashville Senior Living*, No. 08-07254, 2008 Bankr. LEXIS 3197, at *4-5 (Bankr. M.D. Tenn. Oct. 22, 2008) (quoting *In re Edwards*, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998)) (internal quotations omitted).

1. The proposed bid procedures will chill bidding because the Expense Reimbursement Fee is excessive and not sufficiently limited in a manner that is consistent with similar fees approved by courts in the Sixth Circuit.

Debtor seeks approval of what is essentially a break-up fee and expense reimbursement for Jones in the amount of \$200,000.00 (the “Expense Reimbursement Fee”),⁶ which represents

⁴ See Motion, ¶¶48.2(c), (h), 48.3. The Purchase Price is \$2,000,000.00. See Motion, ¶48.1. The Expense Reimbursement Fee is \$200,000.00. See Motion, ¶48.5. Thus, the Initial Overbid under the bid procedures must be \$2,300,000.00.

⁵ See Motion, ¶48.2(c), (e); see also APA, Article 2.01, 2.05, 2.07; APA, Exhibit 2.01, 2.05, 2.07.

⁶ See APA, Article 6.01(b) (stating that the Expense Reimbursement Fee is being paid to compensate Jones for the time and effort spent conducting due diligence and in consideration of the fact that its bid may prompt bidding by others).

10% of the \$2,000,000.00 proposed purchase price under the APA.⁷ PBGC recognizes that break-up fees and expense reimbursements are common tools utilized by debtors to induce a party to agree to become a stalking horse bidder, which in turn helps to initiate a competitive sale process. However, the Expense Reimbursement Fee – as currently structured – is so excessive that it will have the opposite effect by chilling the bidding process to the detriment of the estate and creditors.

Specifically, the Expense Reimbursement Fee – in its current, excessive amount – arbitrarily inflates the amount of the Initial Overbid required from Competing and/or Qualified Bids seeking to participate in the auction.⁸ The excessive Expense Reimbursement Fee also makes it more difficult for potential bidders to compete with the stalking horse purchaser who can credit bid the full amount at auction.⁹ The consequence is that the auction will not be as competitive and the maximum value of the estate’s assets will not be realized.

a. The Expense Reimbursement Fee, as a break-up fee, is five times the amount typically approved by courts in the Sixth Circuit.

Bidding incentives such as break-up fees are “carefully scrutinized” in asset sales under Bankruptcy Code § 363(b) to “insure [sic] that the debtor’s estate is not unduly burdened and that the relative rights of the parties in interest are protected.” *In re Hupp Indus.*, 140 B.R. 191, 195-96 (Bankr. N.D. Ohio 1992). Courts must consider whether a break-up fee is “reasonable in relation to the bidder’s efforts and to the magnitude of the transaction[; . . .] if such a fee is too large, it may chill [] bidding to the detriment of creditors.” *In re 995 Fifth Ave Assocs.*, 96 B.R.

⁷ The APA provides for price adjustments. *See* APA, Article 7.05. While it is unclear to what extent the \$2,000,000.00 purchase price will be adjusted if Jones is the successful bidder, it is possible that, as a result of such adjustments contemplated by the APA, the Expense Reimbursement Fee will end up being greater than 10% of the purchase price.

⁸ *See* Motion, ¶48.2(c), (h).

⁹ *See* Motion, ¶48.3.

24, 28 (Bankr. S.D.N.Y. 1989) (internal citation omitted). Allowance of an imprudent break-up fee may “result in a lesser [sic] spirited auction process and may preclude further bidding in instances where the fee is so large that it makes competitive bidding too costly.” *Hupp Indus.*, 140 B.R. at 194. In reviewing break-up fees, courts in the Sixth Circuit have considered, *inter alia*, (i) “whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;” (ii) “whether the subject break-up fee is so substantial that it provides a ‘chilling effect’ on other potential bidders;” and (iii) “whether there exists substantial adverse impact upon unsecured creditors.” *See id*; *Nashville Senior Living*, 2008 Bankr. LEXIS 3197, at *6-7.

Here, the Expense Reimbursement Fee is 10% of the proposed purchase price under the APA. This percentage is well higher than what is generally approved by courts in this Circuit. *See In re AmFin Fin. Corp.*, No. 09-21323, 2010 Bankr. LEXIS 4387, at *4 (Bankr. N.D. Ohio Aug. 31, 2010) (order approving bid procedures relating to sale motion at docket no. 635 with a break-up fee of \$40,000.00, which constituted 1.6% of the proposed \$2,500,000.00 purchase price); *Nashville Senior Living*, 2008 Bankr. LEXIS 3197, at *7-8 (approving a break-up fee of \$500,000.00, which represented approximately 1% of the proposed purchase price); *In re Schwab Indus.*, No. 10-60702, 2010 Bankr. LEXIS 5935, at *10-14, *25 (Bankr. N.D. Ohio May 28, 2010) (approving a break-up fee of \$1,900,000.00, “which [was] inclusive of any expense reimbursement,” and represented just under 4% of the proposed purchase price).

The Debtor has not cited, and PBGC has not discovered, any case in which a court has allowed a break-up fee that represents 10% of the proposed purchase price, especially when the size of the transaction is comparatively small. While the Debtor did cite two cases, both out of the Second Circuit, in support of its request for approval of the Expense Reimbursement Fee, the

break-up fees approved in those cases constituted no more than 3% of the proposed purchase prices. *See* Motion ¶¶ 45, 46; *see also Integrated Res.*, 147 B.R. at 662-63 (upholding a fee that was “[a]t its maximum . . . only 1.6 percent of the proposed purchase price of \$565 million, or 3.2 percent of [the stalking horse bidders] ‘out-of-pocket’” investment); *995 Fifth Ave. Assocs.*, 96 B.R. at 27-29 (approving a break-up fee of \$500,000.00, which represented less than 1% of the purchase price).

Consequently, the Expense Reimbursement Fee of 10% is not a fair and reasonable percentage of the purchase price. The percentage is so substantial that it would have a chilling effect on prospective bidders, especially where Competing Bids must exceed the purchase price in the APA by the sum of the Expense Reimbursement Fee and \$100,000.00, and where Jones can credit bid the full amount of the Expense Reimbursement Fee at auction. Chilling prospective bids will not maximize the sale of the Debtor’s assets, which in turn will not maximize unsecured creditors’ recovery on their claims. In particular, the amount of PBGC’s recovery on its bankruptcy claim for the Pension Plan’s underfunding may affect the amount of retirement benefits payable to Debtor’s employees upon their retirement. Accordingly, the Expense Reimbursement Fee could have a substantially adverse impact on PBGC and possibly the Debtors’ employees who participate in the Pension Plan.

b. The Expense Reimbursement Fee is not limited to expenses actually incurred and is not capped at 2% of the purchase price, as is customarily required by courts in the Sixth Circuit.

As stated above, courts have generally recognized the reimbursement of expenses to a stalking horse bidder as an incentive designed to facilitate a competitive bidding process. Such expense reimbursements can even be awarded in addition to a break-up fee. However, courts typically limit reimbursement fees to expenses actually incurred by the stalking horse bidder,

subject to a cap. The Court should not approve the proposed bid procedures because the Expense Reimbursement Fee is not explicitly limited to expenses actually incurred by Jones and, as demonstrated below, such reimbursement is not acceptably proportionate to the purchase price. Both factors will have the effect of chilling the bidding process to the detriment of creditors.

The Expense Reimbursement Fee, on its face, is not limited to the reimbursement of actual expenses incurred by Jones in its role as a stalking horse bidder. The APA states:

“It is understood and agreed between the Parties that the Expense Reimbursement Fee is agreed to by and between Seller and Purchaser to compensate Purchaser for the time, effort, and expenses expended and/or incurred by Purchaser used in coming to this Agreement, the total value of which may be difficult to calculate.” APA, Article 6.01(b).

Jones should not be reimbursed for any expenses that it did not actually incur. And, the amount of any fee negotiated by a stalking horse bidder that includes both (i) reimbursement for actual expense incurred and (ii) a break-up fee should not collectively total more than 4% of the purchase price, as already decided by courts in the Sixth Circuit. *See In re Sumner Reg'l Health Sys.*, No. 3:10-bk-04766, 2010 Bankr. LEXIS 6173, at *5, *21-22 (Bankr. M.D. Tenn. May 18, 2010) (order approving bid procedures relating to sale motion at docket no.7, including actual expenses of stalking horse bidder not to exceed \$1,000,000.00 which, when added to break-up fee, constituted a total payment of 2.27% of the \$154,108,687.00 purchase price); *Hupp Indus.*, 140 B.R. at 195 (finding that a reimbursement for actual expenses of stalking horse bidder capped at \$50,000.00 and a break-up fee of \$100,000.00 for a transaction totaling \$4,750,000.00 was reasonable, but denying debtor's motion on other grounds); *AmFin Fin. Corp.*, 2010 Bankr. LEXIS 4387, at *11 (order approving bid procedures contained in sale motion at docket no. 635, including a break-up fee of \$40,000.00 which represented a good faith estimate of the Purchaser's internal and out of pocket costs and which was 1.6% of the total purchase price).

- c. *The Expense Reimbursement Fee and the bid procedures must be modified in order to eliminate the chilling effect on the bidding process.*

This Court should not approve the Expense Reimbursement Fee in the proposed amount or as currently structured. The Debtor has not submitted any evidence that would justify this Court approving such a fee that is exponentially higher in proportion to the sale price than what is customary, and it cannot because there is no such evidence.

To the extent the Expense Reimbursement Fee represents a break-up fee only, the Court should not approve the proposed bid procedures unless and until the Expense Reimbursement Fee is lowered to an amount that is 1-2% of the purchase price under the APA – which is between \$20,000.00 and \$40,000.00.¹⁰ The Court should similarly limit the Expense Reimbursement Fee if it represents only an expense reimbursement, and should also require that such reimbursement be limited to expenses actually incurred by Jones in its role as stalking horse bidder up to this amount. If the Expense Reimbursement Fee is meant to be both a break-up fee and an expense reimbursement, it should be lowered to 3 – 4% of the purchase price – which is between \$60,000.00 and \$80,000.00 – and should contain the same limitation on actual expenses described herein. These modifications will adequately compensate Jones in a manner that is commensurate with others who have stood in the same position before courts in the Sixth Circuit.

By lowering the Expense Reimbursement Fee as described herein, the chance of competitive bidding on the Debtor's assets will be increased, given that the Initial Overbid required to participate in the auction will be lowered from \$2,300,000.00 to \$2,180,000.00, at

¹⁰This amount is more than reasonable, especially in light of the fact that – while the Debtor states that the Expense Reimbursement Fee was necessary to induce Jones to become a stalking horse bidder – recent articles quoting representatives for the Debtor and Jones suggest that Jones was going to help the Debtor financially before even considering this sale as an option. *See* http://www.clevelandbanner.com/view/full_story/24780057/article-Jones-bids-for-Hardwick

most.¹¹ Moreover, the auction process will show less favoritism to Jones as the stalking horse by limiting its capacity to credit bid.¹² As a result, modifying the Expense Reimbursement Fee will help to maximize the value of the estate in the auction process.

2. The proposed bid procedures will chill bidding because they provide an unreasonably short time period for the Debtor to market the property.

One way that a debtor can maximize value for the estate through an asset sale is to conduct a proper marketing campaign to ensure that the highest price is obtained for the assets. However, the Motion is void of any evidence that the Debtor has engaged in any marketing activities with respect to its assets. This is problematic, especially in light of the fact that the bid procedures only allow 21 days between the date the Court enters an order approving the bid procedures and the date Competing Bids are due.¹³ Thus, the bid procedures do not afford the Debtor sufficient time to conduct any sort of meaningful marketing of its assets, the effect of which will be to chill bidding – possibly to the extent that no competing bids are submitted.

Some evidence here suggests that additional marketing efforts would inure to the benefit of the estate. The Debtor readily identifies two potential interested parties in the Motion, but summarily dismisses them as being “unlikely to have any interest in [Debtor] at this time.” *See* Motion, ¶26. Similarly, the Debtor asserts in the Motion that the “small group of manufacturers, the most likely interested purchasers, all are well aware of [Debtor’s] bankruptcy” and “no one

¹¹ *See* Motion, ¶48.2(c) (requiring the Initial Overbid to meet or exceed the sum of the Purchase Price (\$2,000,000.00), the Expense Reimbursement Fee, and \$100,000.00).

¹² *See* Motion, ¶48.3 (allowing Jones to credit bid the Expense Reimbursement Fee at auction).

¹³ Typically, a debtor will conduct an adequate and extensive marketing process *before* filing its motion seeking to sell assets at auction via Bankruptcy Code §363 and explicitly details such efforts in the motion. *See, e.g., Schwab Indus.*, 2010 Bankr. LEXIS 5935, at *18-20.

has expressed any interest to date” in acquiring the Debtor’s assets.¹⁴ *See id.* It is unreasonable for the Debtor to speculate that a group of potential purchasers will not be interested in the business without actually testing the market, and to then summarily conclude that “no further active marketing of the Business should be required beyond the approximately 42 days necessary to obtain final Court approval of the sale contemplated by this Motion.” *See* Motion, ¶29.¹⁵

Given that the Debtor’s efforts to market the business thus far are insufficient at best, the bid procedures’ inclusion of a short 21 day timeframe for the auction is unreasonable because the Debtor will not be able to conduct a legitimate marketing process in that short timeframe – especially when it will (theoretically) be engaging in due diligence with potential purchasers at the same time. The bid procedures should therefore provide sufficient time for the Debtor to market the assets appropriately. If not, the bid procedures will stifle interest in the Debtor’s assets, decrease the pool of potential bidders, chill bidding, and, in turn, harm the interests of creditors in this bankruptcy proceeding.

¹⁴ At the outset of this bankruptcy proceeding, representatives of the Debtor were active in the press, touting the Debtor’s sound financial position and ability to survive through the bankruptcy process. Such statements likely dissuaded any potential purchasers from considering an acquisition of the Debtor in the bankruptcy proceeding. *See, e.g.,* <http://northgeorgia.timesfreepress.com/news/2013/dec/04/hardwick-clothes-files-for-bankruptcybgc-orders/>; <http://northgeorgia.timesfreepress.com/news/2013/dec/03/hardwick-clothes-cleveland-files-petition-chapter-/?breakingnews>; <http://www.chattanooga.com/2013/12/3/264733/Hardwick-Clothes-Files-Bankruptcy.aspx>.

¹⁵ The 42 day time period likely includes the 21 days between when the Motion was filed and the April 10, 2014 hearing.

3. The proposed bid procedures will chill bidding because they require all Competing Bids to conform to the terms of the APA, and such terms have not been finalized and are not clearly defined therein.

The proposed bid procedures require a potential bidder to purchase all assets and assume all contracts in the APA entered into between Jones and the Debtor, but the APA does not list those assets or contracts with specificity. Provision 2(e) of the bid procedures provides that:

“A Competing Bid must provide for all of the Purchased Assets, and must include a commitment to assume the ‘Assumed Contracts’ and ‘Assumed Liabilities’ (as defined in the Asset Purchase Agreement) and to perform under such contracts and leases.”

Motion, ¶48.2(e).¹⁶ The definition of the Debtor’s assets contained in the APA is extremely broad. *See* APA, Article 1.02(b). Therefore, the APA refers the reader to Exhibit 2.01 for a specific list of assets to be purchased by Jones – yet this exhibit simply states “The Parties agree to work together, in good faith, to finalize this exhibit as soon as practicable after the Effective Date.” *See* APA, Article 2.01, Exhibit 2.01. The APA contains similar language with respect to the excluded assets and contracts to be assumed pursuant to the agreement. *See* APA, Articles 2.05, 2.07; Exhibits 2.05, 2.07. Furthermore, the definition of “Assumed Liabilities” in the APA references those liabilities listed in Article 2.06 – but Article 2.06 lists “Excluded Liabilities” only. *See* APA, Article 1.02(d), 2.06.

The proposed bid procedures will chill bidding because they require a potential bidder to commit to the purchase of assets and assumption of contracts that have not been adequately defined under the APA. No potential bidder could – or should be expected to – make such a blind commitment. The Debtor and Jones must finalize the APA by detailing all assets, contracts, leases, and liabilities to be assumed by Jones with accuracy and specificity before the bid procedures can be approved by this Court. This is necessary to remove ambiguity from the

¹⁶ Note that the term “Purchased Assets” is not defined in the Motion or the APA.

bidding and auction process and to help facilitate an environment where potential bidders are drawn to participate. And, the Bid Procedures should not require that a Competing Bid purchase the same assets and assume the same contracts and liabilities as the stalking horse bidder. It is possible that a prospective bidder may wish to offer a higher purchase price for the assets but not assume certain contracts and liabilities. Otherwise, the bid procedures will certainly chill the bidding process by turning away prospective bidders.

4. The proposed bid procedures will chill bidding because they provide only a 21 day window for potential purchasers to conduct their due diligence.

As stated above, the bid procedures require a potential bidder to adopt the terms of the APA in order to participate in the auction – even though the APA is incomplete. Nonetheless, the bid procedures provide potential bidders with only 21 days from the date the Court enters the order approving the bid procedures to conduct their due diligence and submit a Competing Bid. *See* Motion, ¶48.2(a). Given the lack of clarity with respect to what assets, contracts, and liabilities the stalking horse bidder is purchasing and assuming, it is unlikely that a potential purchaser could conduct the due diligence necessary to consummate a deal within the 21 day timeframe afforded by the proposed bid procedures.

The bid procedures must provide prospective bidders with more time to conduct due diligence. Even Jones, who has been negotiating with the Debtor for – presumably – more than 21 days, has not yet finalized its offer, as evidenced by the incomplete APA that was filed with the Motion. The APA also implies that Jones conducted extensive, time consuming due diligence. *See* APA, Article 6.01(b)(describing need for Expense Reimbursement Fee). It is therefore not unreasonable to assume that prospective bidders will need to do the same. The 21 day timeframe included in the bid procedures will most assuredly chill bidding, bar potential bidders from participating if their due diligence is not far enough along for them to feel

comfortable submitting a serious bid for the Debtor's assets, or will result in the submission of incomplete or ambiguous bids that present a higher chance that the sale will not close – all of which will result in a sale process where maximum value is not realized to the detriment of creditors.

III. CONCLUSION

This Court should not approve the bid procedures – as currently proposed by the Debtor – because they will chill bidding, fail to maximize value of the estate, and cause substantial harm to creditors. Instead, the bid procedures must be modified before they can be approved by this Court.

First, the Debtor must clarify what purpose the Expense Reimbursement Fee is to serve – if it is either a break-up fee or an expense reimbursement – and the bid procedures should be modified to reduce the Expense Reimbursement Fee to 1 - 2% of the purchase price, and, if applicable, should further clarify that the reimbursement is for actual expenses incurred up to this amount. If the Expense Reimbursement Fee is meant to be both a break-up fee and an expense reimbursement, the bid procedures should be modified to reduce the Expense Reimbursement Fee to 3 - 4% of the purchase price and must contain the same limitation on actual expenses. Second, the bid procedures should be modified to allow the Debtor more time to adequately market the assets for sale. Third, the APA should be finalized so that it details all assets and contracts being purchased or assumed by Jones with specificity and clarity before the Debtor

begins soliciting Competing Bids. Finally, the bid procedures should allow potential purchasers more time to conduct the due diligence necessary to submit a Competing Bid.

DATED: April 3, 2014
Washington, D.C.

Respectfully submitted,

By: /s/ Courtney L. Hansen
ISRAEL GOLDOWITZ
Chief Counsel
CHARLES L. FINKE
Deputy Chief Counsel
ANDREA WONG
Assistant Chief Counsel
COURTNEY L. HANSEN (MD 9856)
KIRSTEN BENDER
Attorneys
Office of the Chief Counsel
**PENSION BENEFIT GUARANTY
CORPORATION**
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020, ext. 3738
(202) 326-4112 (fax)
hansen.courtney@pbgc.gov and
efile@pbgc.gov

*Attorneys for Pension Benefit Guaranty
Corporation*