

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

_____)	
In re:)	
TELOGY, LLC, et al.,)	Chapter 11
)	Case No. 10-10206 (MFW)
Debtors.)	(Jointly Administered)
_____)	

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION OF TELOGY, LLC FOR ORDERS: (A)(I) APPROVING BID PROCEDURES IN CONNECTION WITH SALE OF SUBSTANTIALLY ALL OF ITS ASSETS; (II) SCHEDULING HEARING TO CONSIDER SALE OF ASSETS; (III) APPROVING FORM AND MANNER OF NOTICE THEREOF; AND (IV) APPROVING BREAK-UP FEE AND EXPENSE REIMBURSEMENT; (B)(I) AUTHORIZING AND APPROVING SALE OF ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS; AND (II) APPROVING ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (C) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the “Committee”) of Tology, LLC (“Tology”) and e-Cycle, LLC (“e-Cycle” and together with Tology, the “Debtors”), debtors and debtors in possession in the above-captioned cases, hereby objects to the *Motion of Tology, LLC for Orders: (A)(I) Approving Bid Procedures in Connection with Sale of Substantially all of its Assets; (II) Scheduling Hearing to Consider Sale of Assets; (III) Approving Form and Manner of Notice Thereof; and (IV) Approving Break-Up Fee and Expense Reimbursement; (B)(I) Authorizing and Approving Sale of Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; (II) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Granting Related Relief* (the “Motion”).

As set forth herein, the Committee objects at this time¹ to so much of the Motion² that seeks Court approval of: (i) the Break-Up Fee and Expense Reimbursement, and the minimum

¹ As stated therein, in addition to sale and bidding procedures relief sought in the Motion, the Debtors also seek authority to sell all, or substantially all of their assets free and clear of all liens, claims, encumbrances, and interests.

initial overbid amount, individually, and in combination; and (ii) a Bid Deadline, Auction and final Sale Hearing on the proposed sale of Telogy's assets on an abbreviated timeline.

In support of this objection, the Committee respectfully states as follows:

I. Relevant Background and Procedural History

1. On January 24, 2010 (the "Petition Date") the Debtors each filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Since the Petition Date the Debtors have continued in the possession of their assets and in the management of their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107 and 1108.

2. On January 26, 2010, the Court entered an order allowing the Debtors' motions for the joint administration of their respective Chapter 11 cases.

3. On the Petition Date the Debtors filed the Motion, among other substantive requests, and on January 27, 2010 the Court scheduled a hearing on certain relief requested in the Motion for February 5, 2010 at 9:30 a.m. (the "Hearing").

4. On February 3, 2010, the Office of the United States Trustee appointed the Committee pursuant to Section 1102 of the Bankruptcy Code. At the request of the Committee, the Debtors agreed to extend the deadline for the Committee to file and serve its objection to the Motion to 11:00 p.m. on February 4, 2010 p.m.

II. The Relief in Question Requested in the Motion

5. In the Motion the Debtors seek, *inter alia*, approval of:

While the Court has not established a deadline by which the Committee and other parties in interest must file and serve their objections to such a sale, the Committee nonetheless expressly reserves all rights with respect the ultimate relief sought in the Motion, including the Debtors' request that they be authorized to immediately turn over the proceeds of any such sale to one or more of the Debtors' purported prepetition secured lenders.

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

- a. a Qualified Bid in the amount of \$767,240, which is comprised of (x) the Break-Up Fee of \$500,430, (y) an Expense Reimbursement of \$166,810, and (z) an initial overbid amount of \$100,000;
- b. what appears to the Committee to be an exceptionally abbreviated time period for Potential Bidders to conduct reasonable diligence, and to formulate and submit potential Qualified Bids; and
- c. bidding terms and conditions that either exclude the Committee, or otherwise limit its ability to locate and bring additional value to the sale process.

For the reasons stated herein, the Committee asserts that approval of the sale and bidding procedures set forth in the Motion is not in the best interests of the Debtors, their estates, or their creditors, are not otherwise warranted under the circumstances, nor are they likely to create a competitive bidding environment that will achieve the highest and best possible consideration for the Debtors' assets.

III. The Committee's Objections to the Motion

6. The Committee objects to so much of the Motion that seeks approval of (a) the form of the Stalking Horse Purchase Agreement, (b) the Minimum Initial Overbid Amount and its component parts, (c) any Bid Deadline, and any Auction and sale hearing date that do not provide Potential Bidders with a meaningful period of time in which to conduct due diligence and formulate and submit potential Qualified Bids.

A. The Components of the Qualified Bid Requirements Are Unjustified and Will Chill Competitive Bidding

7. The Court should not approve the Qualified Bid requirements because, whether separately in its component parts or in combination, it will not confer a benefit upon the Debtors' estates, and will otherwise discourage a Potential Bidder from exploring the possibility of

submitting a bid or attempting to participate in the Auction. The determination of the amount of required overbids in sales conducted under Section 363 of the Bankruptcy Code belongs to the bankruptcy court. See In re Mama's Original Foods, Inc., 234 B.R. 500, 505 (Bankr. C.D. Ca. 1999). Minimum overbids that are unduly low delay proceedings, while those that are excessive discourage competition. Id. An appropriate overbid amount is one that advances the sale proceeding through robust competition toward the highest bid for the subject assets. Id. In this case, the Qualified Bid requirements do not qualify as an appropriate overbid amount because they will chill competitive bidding to the benefit of the Potential Purchaser at the expense of the Debtors and their creditors.

8. First, while the Break-Up Fee and Expense Reimbursement, at first glance, may not appear excessive or disproportionate to the Purchase Price, the reality is that under the terms of the Stalking Horse Purchase Agreement the actual amount of Cash Consideration to be paid by the Potential Purchaser is unknown, and therefore not capable of being measured against the Break-Up Fee and Expense Reimbursement. More specifically, the Stalking Horse Purchase Agreement provides that the Cash Consideration shall be reduced on a dollar for dollar basis to the extent that the Estimated Net Account Receivables Amount is less than the Target Net Account Receivable Amount. The Cash Consideration is subject to further downward adjustment to the extent that Estimated Rental Equipment Sales Amount exceeds the Estimated Rental Equipment Purchases Amount. Such estimated amounts, however, will not be established until three days prior to the Closing Date. Finally, the Cash Consideration may be reduced by an amount up to \$110,000 if the Telogy Employee Incentive Plan is not approved by the Bankruptcy Court. If the Committee's fears are realized, the Cash Consideration may be substantially less than the \$16,681,000. Moreover, the Expense Reimbursement component of

the Qualified Bid requirement demonstrates that the Break-Up Fee is more than simply a reimbursement to the Purchaser for its diligence costs if its transaction is lost to the bankruptcy process. See In re EWI, Inc., 208 B.R. 885, 888 (Bankr. N.D. Ohio 1997). The “allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party’s ability to show that the fees were actually necessary to preserve the value of the estate.” Calpine Corp. v. O’Brien Env’tl. Energy, Inc. (In re O’Brien Env’tl. Energy, Inc.), 181 F.3d 527, 535 (3d Cir. 1999). As such, the Break-Up Fee amounts to a flat fee to be paid to the Potential Purchaser by the Debtors’ estates to be their stalking horse bidder, and, worse yet, under circumstances (as discussed below) that do not truly generate a competitive bidding environment in return for that Break-Up Fee. Consequently, the Court should not approve the Break-Up Fee.

9. In addition to the excessive and unjustified nature of the Break-Up Fee under the circumstances, the Expense Reimbursement component of the Qualified Bid requirement does not appear to be limited to the *actual and reasonable* expenses incurred by the Potential Purchaser in anticipation of the proposed transaction. As such, even if the Court approves the Expenses Reimbursement, it should do so only on the conditions that such an entitlement be limited to the actual, necessary, and reasonable costs of Potential Purchaser in conducting its diligence and negotiating the Stalking Horse Purchase Agreement, and that its reimbursement be subject to review and verification by the Debtors and the Committee. Any reimbursement to the Purchaser for other than actual, necessary, and reasonable expenses would not be in the best interests of the Debtors and their estates, and would not otherwise create a competitive Auction.

10. Finally, the \$100,000 initial overbid, above and beyond the sum of the Break-Up Fee and the Expense Reimbursement, is excessive, and will in all likelihood chill competitive bidding, particularly when viewed alongside the \$25,000 incremental increases required for

subsequent bidding if an Auction is conducted. Unlike so much of the overbid requirement that equals the sum of the Break-Up Fee and the Expense Reimbursement, which bears a demonstrable relationship to those components, the only purposes for the remainder of the minimum initial bidding increment are perhaps to reimburse the Debtors' estates for the administrative costs of the Auction, and rendering a competing Qualified Bid a higher and better offer than the Potential Purchaser's stalking horse bid. In neither case is \$100,000 a reasonable increment requirement, and requiring Potential Bidders to top the stalking horse bid by such a lofty premium will serve only the Potential Purchaser by discouraging competitive bidding. The Court should therefore deny the Motion and instead require the Debtors to qualify Potential Bidders that submit bids that would make the estates whole for closing a transaction with a party other than the Potential Purchaser, and foster bidding by providing the Debtor's estates with a *reasonably* higher value than required by the Motion.

B. The Compressed Marketing and Sale Period Does Not Permit Meaningful Diligence to Occur and Will Not Create a Competitive Bidding Environment

11. The Court should not approve the sale process duration proposed by the Debtors and the Potential Purchaser because it will not permit time for a truly competitive Auction. When a debtor seeks to auction bankruptcy assets pursuant to Bankruptcy Code § 363, the process must be fair and give each potential bidder adequate opportunity to bid. See In re Mama's Original Foods, Inc., 234 B.R. at 505; see also In re Barnhill's Buffet, Inc., 2008 WL 4489687, *2 (Bankr. M.D. Tenn., Feb. 11, 2008). The Committee submits the truncated process before the Court -- likely as few as 16 but no more than 21 bidding days -- falls well short of this standard, and that additional time is needed to ensure that the Auction is robust, and that the Telogy's assets are optimally marketed both to strategic and financial buyers. The Committee can and will play a productive role in ensuring that a comprehensive marketing process --

including both strategic and financial buyers – is undertaken prior to the Auction if allowed sufficient additional time to adequately contact and solicit the participation of Potential Bidders and to facilitate the marketing of the assets to a wider audience.

12. Assuming, optimistically, that the Debtors manage to deliver notice of a Bid Deadline to all Potential Bidders to the postal service on February 8, 2010, the Monday after the Hearing, that timeline would afford the Debtors, the Committee insufficient time to make contact with all Potential Bidders. Moreover, even those Potential Bidders with which contact is made will have little, if any time to conduct diligence of any quality with respect to Telogy's operations and assets, thereby discouraging Potential Bidders from participating.³

13. The Committee submits that an appropriate extension of time to allow for proper marketing will strike a fair and reasonable balance between the desire of the Debtors and their lenders for an expeditious resolution of the Debtors' cases and the need for an open and thorough marketing process that will produce a robust Auction generating the highest and best value for Telogy's assets. By insisting on a sale timeline that does not provide Potential Bidders with sufficient diligence time, the Potential Purchaser can hardly be said to have conferred a benefit upon the Debtors' estates in exchange for the Break-Up Fee, insofar as such consideration is only warranted for creating an *actual* process that has a real prospect of attracting Potential Bidders to a *truly* competitive Auction. Therefore, the Court should deny the Motion and not authorize any Bid Deadline that does not generate a competitive bidding environment.

IV. Notice

³ The Committee is particularly concerned about the length of time it will take for Potential Bidders to obtain, organize, and analyze due diligence materials. If the Committee's experience is any indication of what Potential Bidders will encounter, given the tight bid deadline proposed, they will be effectively excluded from the sale process. This may be desirable from the perspective of the Potential Purchaser, which has had the luxury of conducting its due diligence unfettered by arbitrary deadlines, the same will not be true of Potential Bidders the Committee hopes to attract.

14. Notice of this objection has been served, via electronic mail, upon: (i) counsel to the Debtors; (ii) counsel to the United States Trustee; (iii) counsel to the Agent; (iv) counsel to the Potential Purchaser. The Committee respectfully submits that, in light of the nature of the issues identified herein, such notice is good and sufficient under the circumstances, and that no other or further notice is required.

15. The Committee reserves the right to raise any further and other objections to the Sale Motion and the Bidding Procedures at any hearing or hearings scheduled thereon.

WHEREFORE, the Committee respectfully requests that this Court enter an order: (i) sustaining the Committee's objection, and denying the Motion to the extent it seeks approval of (a) the Qualified Bid amount and (b) any Bid Deadline that does not provide Potential Bidders with a meaningful period of time to conduct reasonable diligence and formulate and submit Qualified Bids; and (ii) granting to the Committee such other and further relief as the Court deems proper and just.

Dated: February 4, 2010

Respectfully submitted,

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