

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

San Jose Division

GUIDELINES FOR EARLY DISPOSITION OF ASSETS IN CHAPTER 11 CASES

PRE-PACKAGED PLANS

THE SALE OF SUBSTANTIALLY ALL ASSETS UNDER § 363

The following guidelines are promulgated as a result of the increasing use of pre-packaged plans or § 363 sales to dispose of substantially all assets of a Chapter 11 debtor shortly after the filing of the petition. The court will consider all requests to modify the guidelines to fit the circumstances of a particular case.

PRE-PACKAGED PLANS

1. **Declaration of Counsel for Debtor-In-Possession** -- In connection with any request for the special setting of a hearing to approve a disclosure statement or a combined hearing to approve a disclosure statement and confirm a plan, in addition to any other required papers, counsel for the debtor-in-possession should submit a declaration covering the following points:
 - a. Retention of counsel. The date counsel was retained by the debtor, the approximate number of hours of professional time expended pre-petition, compensation paid to counsel pre-petition including source of payment and the approximate amount of accrued but unpaid compensation.
 - b. Communications with creditors. A description of any written communications of the debtor with creditors during the pre-petition reorganization process. Copies of letters should be attached. If letters contain confidential information, they need not be attached but the court may require in-camera inspection.
 - c. Communications with shareholders or partners. A description of any written communications with shareholders or partners of a partnership during the pre-petition reorganization process. Copies of letters should be attached. If letters contain confidential information, they need not be attached but the court may require in-camera inspection.
 - d. Creditors' Committee. If a Creditors' Committee existed pre-petition, indicate the date and manner in which the committee was formed.

- e. Counsel for Committee. If the pre-petition Creditors' Committee retained counsel, indicate the date counsel was engaged and the selection process.
- f. Position of United States Trustee. It is expected that the United States Trustee will be consulted prior to, or simultaneously with, the filing. Set forth the position of the United States Trustee regarding the request for a special setting, if known.

2. **Declaration of Counsel for Creditors' Committee** -- Where counsel has represented a pre-petition Creditors' Committee and anticipates representing the Official Creditors' Committee when appointed, counsel should submit a declaration covering the following points:

- a. Retention of counsel. The date counsel was retained by the Committee, the approximate number of hours of professional time expended pre-petition, compensation paid to counsel pre-petition including source of payment and the approximate amount of accrued but unpaid compensation.
- b. Investigation of Committee and Counsel. A description of the scope and results of any investigation into the debtor's affairs conducted by the Committee and/or its counsel.
- c. Communication with creditors. A description of any written communications of the Committee or its counsel with creditors during the pre-petition reorganization process. Copies should be attached. If letters contain confidential information, they need not be attached but the court may require in-camera inspection.
- d. Involvement in formulation of plan and disclosure statement. A description of the Committee's and counsel's involvement in the formulation of the plan and disclosure statement.

THE SALE OF SUBSTANTIALLY ALL ASSETS UNDER § 363 WITHIN 60 DAYS OF THE FILING OF THE PETITION

3. **Declaration of Counsel for Debtor-In-Possession** -- In connection with any hearing to approve the sale of substantially all assets within 60 days of the filing of the petition, the request for the special setting of a hearing or the sale motion itself when regularly noticed, should be supported by a separate declaration by counsel for the debtor-in-possession covering the following points:

- a. Retention of counsel. Same as ¶ 1.a. above.
- b. Communications with creditors. Same as ¶ 1.b. above.
- c. Communications with shareholders or partners. Same as ¶ 1.c. above.
- d. Creditors' Committee. Same as ¶ 1.d. above.

- e. Counsel for Committee. Same as ¶ 1.e. above.
- f. Sale Contingencies. Statement of all contingencies to the sale agreement together with a copy of the agreement.
- g. Creditor Contact List. If no committee has been formed, a list of contact persons together with fax and phone numbers for each of the largest 20 unsecured creditors.
- h. Administrative Debts. Assuming the sale is approved, an estimate of administrative debts to be incurred prior to closing and the source of payment for such debts.
- i. Proceeds of sale. An estimate of the gross proceeds anticipated from the sale together with an estimate of the net proceeds coming to the estate with an explanation of the items making up the difference.
- j. Debt Structure of debtor. A brief description of the debtor's debt structure including the amount of the debtor's secured debt, priority claims and general unsecured claims.
- k. Disposition of Proceeds. A statement setting forth, to the best of declarant's knowledge, the likely distribution of proceeds to secured claimants, administrative claimants, priority claimants and general unsecured creditors.

4. **Declaration of Responsible Individual for Debtor-In-Possession** -- Counsel's declaration referred to in ¶ 3 above should be accompanied by a declaration from the responsible individual covering the following matters:

- a. Alternatives to Sale. A description of the efforts, if any, to pursue other alternatives such as financing, capital infusion, etc., including the period of time involved and the results achieved.
- b. Marketing of Assets. A description of the manner in which the assets were marketed for sale including the period of time involved and the results achieved.
- c. Decision to Sell. The date on which the debtor accepted the offer to purchase the assets.
- d. Asset Valuation. Disclosure of the debtor's prior valuations, within the last year, of the assets to be sold, if any. (i.e., book value, appraisals, financial statements, etc.)
- e. Relationship of Buyer. A statement identifying the buyer and setting forth, to the best of declarant's knowledge, all of the buyer's (including its officers, directors and shareholders) connections with the debtor, creditors, any other party in interest, their respective attorneys, accountants, the United States Trustee or any person employed in the office of the United States Trustee.

- f. Post Sale Relationship with Debtor. A statement setting forth, to the best of declarant's knowledge, any relationship or connection the debtor (including its officers, directors, shareholders, and employees) will have with the buyer after the consummation of the sale, assuming it is approved.
 - g. Relationship with Secured Creditors. If the sale involves the payment of all or a portion of secured debt(s), a statement of all connections between debtor's officers, directors, employees or other insiders and each secured creditor involved (for example, release of insider's guaranty).
 - h. Insider Compensation. Disclosure of current compensation received by officers, directors, key employees or other insiders pending approval of the sale.
5. **Declaration of Counsel for Creditors' Committee** -- Where counsel has represented a pre-petition Creditors' Committee and anticipates representing the Official Creditors' Committee when appointed, counsel should submit a declaration covering the following points:
- a. Retention of counsel. Same as ¶ 2.a. above.
 - b. Investigation of Committee and Counsel. Same as ¶ 2.b. above.
 - c. Communication with creditors. Same as ¶ 2.c. above.
 - d. Involvement in sale. A description of the Committee's and counsel's involvement in the negotiation of the sale.
6. **Hearing and Notice Regarding Sale** -- Unless the court orders otherwise, all sales governed by these guidelines, including auctions or the presentation of competing bids, will occur at the hearing before the court.
- The notice sent to creditors and other parties in interest regarding the sale should contain the information required by ¶¶ 3. h - k and 4. a - g above, in addition to any other matters normally set forth in a notice of sale.
7. **Proposed Order Approving Sale** -- A proposed order approving the sale should be provided to chambers 24 hours prior to the hearing.
8. **Good Faith Finding** -- There must be an evidentiary basis for a finding of good faith under § 363(m). Evidence can be presented in the form of a declaration from the prospective purchaser.
9. **Competing Bids** -- Unless the court orders otherwise, competing bids can be presented at the time of the hearing.

10. **Financial Ability to Close** -- Unless the court orders otherwise, any competing bidder must be prepared to demonstrate to the satisfaction of the court its ability to consummate the transaction if it is the successful bidder.
11. **Overbids** -- Unless the court orders otherwise, each overbid must be at least 5% more than the amount of the original offer. The amount of the original offer is determined without regard to any commission or payment to a broker or agent.
12. **Damages Payable to Prospective Purchaser** -- Whether denominated liquidated damages, breakup fee, topping fee or other designation, no damages of any kind are payable to a prospective purchaser or its agents absent approval of the court.

If a provision for damages is contained in the original purchase agreement, and the parties intend to seek court approval for the provision separately, the provision should provide that it can be approved separately from the agreement itself.

A request for the approval of a damage provision shall be supported by, in addition to any other required papers, a declaration from counsel for the debtor-in-possession setting forth the precise conditions under which damages would be payable and the factual basis on which the seller determined the provision was reasonable. Counsel for the proposed buyer may, but is not required to, submit a similar declaration.