

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

	)	
In re:	)	
SULPHCO, INC.	)	Case No. 11-37949-H4-7
	)	
Debtor	)	(Chapter 7)
	)	
	)	

United States Courts  
Southern District of Texas  
FILED

MAY 10 2012

David J. Bradley, Clerk of Court

**BSONIC AND MÄRKISCHES' LIMITED OBJECTION  
TO TRUSTEE'S MOTION FOR ORDER ON AUCTION,  
SALE PROCEDURES AND SETTING HEARING ON SALE**  
(Hearing Requested for May 31, 2012 at 2:00 p.m.)

**NOTICE PURSUANT TO LOCAL RULE 9013**

**This Limited Objection seeks an order that may adversely affect you. If you oppose the Limited Objection you should immediately contact the Objecting party to resolve the dispute. If you and the moving party cannot agree, you must file a response and send a copy to the moving party. You must file your response within 21 days of the date it was served on you. Your response must state why the Limited Objection should not be granted. If you do not file a timely response, the limited objection may be sustained without further notice to you. If you oppose the Limited Objection and have not reached an agreement you must attend the hearing. Unless the parties agree otherwise, the Bankruptcy Court may consider evidence at the hearing and may decide the Limited Objection at the hearing.**

**Represented parties should act through their attorneys.**

TO THE HONORABLE JEFF BOHM UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Bsonic GmbH and Märkisches Werk GmbH (collectively the "Parties") hereby submit this limited objection to the Trustee's Motion for Order (A) Scheduling Auction for the Sale of Assets, (B) Approving Procedures for the Submission of Qualifying Bids, and (C) Setting Hearing for Approval of Sale of Assets Free and Clear of Liens, Claims and Encumbrances to the Highest Bidder (the "Motion"), which was filed with the Bankruptcy Court on April 20, 2012. The Parties' objections are limited to (1) the Trustee's right under the

proposed bidding procedures to unilaterally suspend or terminate the sale, and/or seek the Court's approval of such sale, (2) the lack of notice of whether the auction will be conducted via sealed written bids or "open cry", and (3) the proposed sale and transfer of assets free and clear of Märkisches Werk's licensee and intellectual property rights.

In support of this Limited Objection, the Parties respectfully state as follows:

#### **Jurisdiction**

1. This Court has jurisdiction over this Limited Objection under 28 U.S.C. §§ 157 and 134. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Limited Objection is proper in this District under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicts for the relief requested herein are Sections 105(a), 363(b), (e) and (f).

#### **Summary of Relief Requested**

3. By this Limited Objection the Parties request an amendment to the Trustee's proposed order granting the Motion, and the Trustee's proposed Bidding Procedures which:

(a) eliminates the Trustee's right to suspend or terminated the sale, and the trustee's right to not seek approval of the sale to the Successful Bidder;

(b) clarifies the Auction Rules such that bidding shall follow an "open cry" format, and that sealed bids will not be allowed or entertained; and

(c) notifies all interested and qualified bidders that the sale will be free and clear of all liens, claims and encumbrances, other than licensee rights held by Märkisches Werk GmbH ("MWH") and intellectual property rights owned by MWH.

### Background

4. On September 16, 2011 (the "Petition Date"), Sulphco, Inc. (the "Debtor") filed a voluntary petition for bankruptcy under Chapter 7, Title 11 of the United States Code.

5. The Bankruptcy Court appointed Lowell T. Cage as trustee of the Debtor's estate (the "Trustee").

6. Thereafter, with the Bankruptcy Court's authorization, the Trustee engaged Pluritas, LLC (the "Broker") to market and sell the Debtors intellectual property assets and a prototype (the "Assets").

7. On April 20, 2012 the Trustee filed the Motion. As part of the Motion the Trustee submitted proposed Bidding Procedures (the "Bidding Procedures"), and asked the Bankruptcy Court to approve them.

8. Under the terms of the Bidding Procedures (i) in Section I(2)(ii), the Trustee may unilaterally, and in his sole discretion, may not proceed with a sale to the Successful Bidder (as defined in the Bidding Procedures), (ii) in Section O(ix), the Trustee may adjourn or cancel the Auction in open court without further notice and (iii) in Section O(x), the Trustee may withdraw the Motion at any time with or without prejudice.

9. In Section G, entitled "Auction", and Section H, entitled "Auction Rules", of the Bidding Procedures it does not state whether the auction sale will be by sealed bid or an "open cry" format.

10. The proposed sale is pursuant to 11 U.S.C. § 363(b), free and clear of all liens, claims and encumbrances. Prior to the Petition Date, on June 27, 2008, MWH and the Debtor entered into a Development and Manufacturing Agreement (the "Agreement"). On January 19, 2011, MWH and the Debtor entered into an Addendum to Development and Manufacturing

Agreement, which amended terms in the Agreement (together with the Agreement, collectively the "Development Agreement").

11. Under the Development Agreement MWH holds a license to market and use some of the Assets. Additionally, MWH holds a process patent that is used in the operation of some of the Assets to be sold.

**Eliminate the Right to Suspend or Terminate the Auction**

12. The Parties intend to submit the required paper work and documents in order to qualify as a bidder at the Auction. Additionally, the Parties will travel from Germany to attend the Auction on July 24, 2012, at the Trustee's office in Houston, Texas.

13. The Parties will spend a significant amount of time and money to comply with the Bidding Procedures, qualify as a Bidder and attend the Auction. If the Parties are the Successful Bidder for some, or all of the assets they need to know that the Trustee will seek approval of the Parties' successful bid, as well as seek authorization to transfer title of the Assets consistent with the terms of the proposed asset purchase agreement identified in the Bidding Procedures.

14. Given the Trustee's rights under Sections I(2)(ii), O(ix) and O(x) of Bidding Procedures, the Trustee may unilaterally postpone the auction, terminate the auction, and/or withdraw the Trustee's motion seeking approval of a sale, at any time and without prejudice.

15. The Parties will be unfairly harmed if they spend the time and money to qualify to bid at auction and attend the auction, and at any time during the process the Trustee suspends or terminates the auction sale.

16. In order to avoid the harm and loss the Parties may suffer they respectfully request that the Bidding Procedures be amended such that if one or more parties qualify to bid at the Auction, the Trustee shall conduct the auction as scheduled, and seek approval of the winning bid.

**Establish an “Open Cry” Format for the Auction**

17. The Bidding Procedures cover virtually all of the mechanics to qualify for bidding, as well as the actual auction sale and post auction approval process. The Bidding Procedures, however, are silent on the method of bidding.

18. Historically, trustees have solicited offers in a sealed bid format, or conducted a live auction where bids are called out publicly by qualified bidders, also known as an “open cry” format.

19. The Parties assert that the open cry format is a more efficient use of time, is more transparent, and prevents the submission of qualified or conditional bids.

20. An open cry auction can be concluded within hours. Sealed bids may cause the Trustee to review, compare and reconcile potentially different bids, which can cause the auction to last more than one or two days. The Parties prefer the faster and more efficient open cry auction process.

21. An open cry auction makes the auction process more transparent. Each qualified bidder will submit the exact same bid, other than the bid amount. This allows each bidder to adjust their strategy, if necessary, based on their interest in the asset for sale. This will result in higher bids and a greater return for the Debtor’s estate.

22. An open cry auction also eliminates the ability to submit qualified or conditional written bids. Such a strategy can be used to gain an unfair advantage in the sale process, which could impair the Trustee’s ability to obtain the highest value for one or more assets sold. Additionally, the Trustee will spend more time reviewing and analyzing written bids, which slows the sale process, and forces the Trustee and qualified bidders to incur more fees and costs.

23. In order to maintain a fair, efficient and transparent auction, that will yield the highest return for the Debtor's estate the Bidding Procedures should be amended so that the auction sale is conducted in an "open cry" format.

**Sale of the Assets Should Not Be Free and Clear of  
Licensee and Intellectual Property Rights**

24. Pursuant to the Motion and the Bidding Procedures, the Trustee seeks to sell and transfer the Assets free and clear of all claims, interests and encumbrances. MWH asserts that the sale, and the Bankruptcy Court's order approving the sale, shall remain subject to MWH's rights as a licensee under 11 U.S.C. § 365(n), as well as MWH's rights to its patent of a process used to operate some of the Assets.

25. Before the Petition Date the Debtor and MWH entered into the Development Agreement, which granted the Debtor the right to use assets and process' developed by MWH for eliminating sulphur in oil through ultra sonic radio waves. In partial consideration the Debtor granted MWH licenses to use some of the Debtor's assets, including intellectual property, throughout world markets not serviced by the Debtor.

26. The Development Agreement is an executory contract under 11 U.S.C. §365. If the Parties do not purchase the Assets at the Auction, the winning bidder must decide whether it wants the Trustee to assume and assign the Development Agreement. If it is assumed and assigned, MHW will comply with all of its terms and conditions. If, however, it is rejected MWH intends to exercise its rights under 11 U.S.C. § 365(n) as a licensee of intellectual property. MWH also intends to assert its patent rights to a process integral to the operation of some of the Assets.

27. A sale of assets in a bankruptcy case free and clear of claims, interests and encumbrances, does not eliminate or remove a licensee's rights under 11 U.S.C. §365(n). Nor

does a Section 363 sale eliminate or remove a patent holder's rights to a process that is part of and integral to the operation of the assets sold.

28. In order to protect MWH's rights as a licensee under the Development Agreement, and as the holder of a process patent, the order approving the Motion and the Bidding Procedures should be amended so MWH's rights are protected, and all interested bidders are aware of MWH's rights in the Assets.

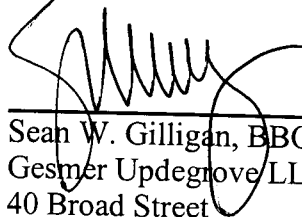
WHEREFORE, Bsonic GmbH and Märkisches Werk GmbH respectfully request that the Bankruptcy Court amend the order approving the Trustee's Motion for Order (A) Scheduling Auction for the Sale of Assets, (B) Approving Procedures for the Submission of Qualifying Bids, and (C) Setting Hearing for Approval of Sale of Assets Free and Clear of Liens, Claims and Encumbrances to the Highest Bidder, such that (i) if one or more parties qualify to bid at the Auction, the Trustee shall conduct the auction as scheduled and seek approval of the winning bid. (ii) the auction sale is conducted in an "open cry" format and (iii) all interested bidders are made aware of the Development Agreement and the sale will be subject to MWH's rights as a

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licensee and patent holder; and that such other and further relief be granted as is just.

Respectfully submitted,

BSONIC, GmbH and MÄRKISCHES  
WERK GmbH  
By their attorney



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Dated: May 9, 2012



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 9<sup>th</sup> day of May, 2012, a copy of the foregoing LIMITED OBJECTION, was served via first class mail, postage pre-paid, upon the following:

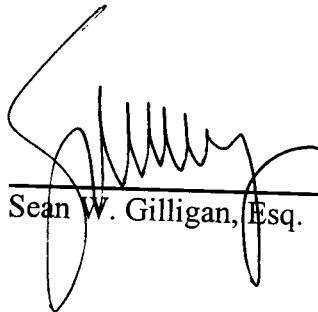
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