

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

IN RE: § **CASE NO. 11-37949-H4-7**
§
SULPHCO., INC. § **(Chapter 7)**
§
DEBTOR §

**TRUSTEE'S RESPONSE TO THE LIMITED OBJECTION TO MOTION TO
SCHEDULE AUCTION, ESTABLISH BIDDING PROCEDURES AND SET
HEARING FOR THE SALE OF ASSETS TO THE HIGHEST BIDDER
(Responds to Docket 57)**

NOTICE PURSUANT TO LOCAL RULE 9013

This Motion seeks an order that may adversely affect you. If you oppose the Motion, you should immediately contact the moving 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 and serve your response within 21 days of the date this was served on you. Your response must state why the motion should not be granted. If you do not file a timely response, the relief may be granted without further notice to you. If you oppose the motion and have not reached an agreement you must attend the hearing. Unless the parties agree otherwise, the court may consider evidence at the hearing and may decide the motion at the hearing.

Represented parties should act through their attorneys.

**A HEARING HAS BEEN SET ON THIS MATTER ON MAY 31, 2012 AT 8:30 A.M. IN
COURTROOM 600, 515 RUSK AVE., HOUSTON, TX**

TO THE HONORABLE JEFF BOHM UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Lowell T. Cage, Trustee ("Trustee") of the estate of SulphCo, Inc. ("Debtor"), and hereby files this his response to the Limited Objection to the Motion to Schedule Auction Establish Bidding Procedures and Set Hearing for the Sale of Assets to the Highest Bidder (the "Objection") and respectfully represents as follows:

Background

1. On September 16, 2011, the Debtor filed a voluntary petition for bankruptcy under chapter 7 of the Bankruptcy Code. The Trustee was appointed as chapter 7 Trustee on the same day.

2. The Debtor was in the business of developing methods to mechanically de-sulpherize oil and gas. Property of the estate includes patents, trade secrets, know-how, hardware/prototypes, trademarks, and copyrights (the "Auction Property") that relate to various methods created by the Debtor to mechanically de-sulpherize oil and gas.

3. The Trustee hired Pluritas, LLC ("Pluritas") to act as broker to market and sell the Auction Property. After fully investigating the extent and value of the Auction Property as well as the market for interested buyers, the Trustee, on the advice of Pluritas, determined that an auction would likely achieve the highest and best value for the Auction Property.

4. On April 20, 2012 the Trustee filed a motion seeking Court authority to sell the Auction Property at auction, to establish bidding procedures and to hold a hearing approving the sale of the Auction Property to the highest bidder.

5. On May 10, 2012 Bsonic GmbH and Markisches Werk GmbH (collectively, the "German Companies") filed a limited objection to the Trustee's motion. The three objection are that: (a) the Bidding Procedures allow the Trustee to unilaterally cancel or terminate the auction; (b) the Bidding Procedures do not establish whether the auction would be conducted under a sealed bid or open cry procedure; and (c) the sale is to be free and clear of the German Companies alleged interest in the Auction Property.

6. The German Companies alleged that a Development and Manufacturing Agreement grants the German Companies a license to use the Auction Property. After the objection was filed, the Trustee, both in writing and verbally, requested a copy of the Development and Manufacturing Agreement between the Debtor and the German Companies. The German Companies produced the requested documents at 2:30 p.m. on May 30, 2012. A true and correct copy of the Development and Manufacturing Agreement is attached as Exhibit “A.” After searching through the Debtor’s records, the Trustee could not locate the Development and Manufacturing Agreement but discovered the Addendum to the Development and Manufacturing Agreement (the “Addendum”). A true and correct copy of the Addendum is attached as Exhibit “B.”

7. Schedule G lists an executory contract and addendum between the Debtor and the German Companies. The contract expires by its own terms on June 26, 2013.

8. Since the Objection was filed, the Trustee learned that in 2006 the CEO of Markisches Werk GmbH joined the Debtor’s board of directors. The Trustee is still investigating the relationship between the German Companies and the Debtor.

Approving the Bidding Procedures Will Protect the Value of the Auction Property

9. A Court cannot grant a Trustee authority to sell property of the estate unless a Trustee can explain a business justification for the sale. *See Institutional Creditors of Continental Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir 1986) discussing *Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp)*, 722 F.2d 1063 (2nd Cir 1983). The Trustee also has a duty to maximize the value of assets liquidated for the benefit of the estate. *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (5th Cir 2010).

10. The Trustee has determined that selling the Auction Property will most likely achieve the highest price for the Auction Property. However, the Trustee has also recognized that under certain circumstances an auction would achieve less than the highest price. The Bidding Procedures were crafted in such a way as to protect against the risk that a sale at auction would achieve a less than the highest price for the Auction Property. If the Bidding Procedures are not approved and an unforeseen event occurs, the Trustee may not believe that he has maximized the value to the estate and therefore will not be able to articulate a business justification for selling the Auction Property to the highest bidder.

11. An unforeseen event may occur just prior to or during the auction that would chill the bidding process and greatly reduce the sales price of the Auction Property. For example, extreme inclement weather may prevent bidders from attending the auction thus reducing the number of potential buyers. With less buyers competing, the price achieved at the auction would be greatly reduced. By giving the Trustee the authority to unilaterally cancel the auction, he can mitigate against any unforeseen risks by cancelling and rescheduling the auction. Any potential bidders who are concerned that travelling costs would be lost in the event of a cancelled auction may attend the auction telephonically.

12. The Trustee believes that conducting the auction through an “open cry” method will likely be the best way to conduct the auction. However, he does not wish to preclude any potential bidder from presenting an unconditional written bid from a Qualified Bidder, especially if such a method would allow the estate to sell the Auction

Property at a higher price. The terms of such a bid would be disclosed to other Qualified Bidders to allow them to submit a higher bid.

13. The Trustee believes that an auction would generate the highest and best price for the Auction Property. However, unforeseen events may serve to change this determination. The Bidding Procedures were drafted in such a way as to protect the value of the Auction Property and the estate in the event an unforeseen event arises that chills bidding at an auction. Therefore, the Court should approve the Bidding Procedures as in the best interest of the estate and its creditors.

Without a Copy of the Development Agreement, There is Not Enough Information to Determine Whether Sale Should Be Free of All Liens, Claims and Encumbrances

13. The Trustee has not had sufficient time to review the Development and Manufacturing Agreement. However, the Trustee has reviewed the Addendum. Based on the Trustee's review of the Addendum and an analysis of the Addendum provided by Pluritas, the Trustee has determined that the German Companies may have paid less than reasonably equivalent value for the rights granted in the Addendum. At the time the Addendum was signed, the Debtor was insolvent. The Trustee believes that the Addendum is voidable as a fraudulent conveyance.

14. Without the opportunity to review the Development and Manufacturing Agreement, an adversary to avoid the Addendum as a constructively fraudulent conveyance is premature. The Trustee requests that the Court continue the hearing to allow the Trustee sufficient time to review the Development and Manufacturing Agreement to determine whether it would be appropriate to file an adversary avoiding the agreements pursuant to 11 U.S.C. §548(a)(1)(B).

15. After the agreements are produced, the Trustee can determine whether a sale of the Auction Property should be sold subject to the agreements or free and clear of the agreements pursuant to 11 U.S.C. §363(f)(4).

WHEREFORE the Trustee respectfully requests that the Court enter an order: (a) approving the Bidding Procedures for the submission of offers for the Auction Property, (b) setting a hearing to determine whether the sale of the Auction Property should be free and clear of all liens, claims and encumbrances pursuant to 11 U.S.C. §363(f)(4), and (c) setting a hearing to approve the sale to the highest bidder.

Respectfully submitted,

/s/ Elizabeth Medley

ELIZABETH MEDLEY
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ATTORNEYS FOR LOWELL T.
CAGE, TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that on or before the 31st day of May, 2012 a true and correct copy of the foregoing Trustee's Reply to Limited Objection to Bidding Procedures has been served via electronic mail or via United States mail, postage prepaid, upon the creditors and parties-in-interest whose names appear on the attached service list and those parties requesting notice whose names appear below:

Harris County
c/o John P. Dillman
Linebarger, Goggan, Blair & Sampson,
LLP
PO Box 3064
Houston, Texas 77253

American Express Travel
Related Services Co., Inc.
c/o Beckett & Lee, LLP
PO Box 3001
Malvern, PA 19355
notified via regular mail

houston_bankruptcy@publicans.com

notified via BK/ECF

Bsonic GmbH and Markisches Werk GmbH

c/o Sean Gilligan

Gessmer Updegrove, LLP

40 Broad Street

Boston, MA 02109

sean.gilligan@gessmer.com

notified via electronic mail

/s/ Elizabeth Medley

ELIZABETH MEDLEY