

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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IN RE :

Reliance Insurance Company  
In Liquidation

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No. 1 REL 2001

RE: Application for Approval of the Sale of a Note  
and Equity Interest Belonging to Reliance Development  
Figueroa, Inc.

**ANSWER OF PROPOSED INTERVENOR MILKEN INSTITUTE  
TO THE APPLICATION OF NET LEASE CAPITAL ADVISORS LLC,  
RDF NOTE LLC AND RDF CLASS B MEMBER LLC TO INTERVENE**

Proposed Intervenor, The Milken Institute (“Institute”), files this Answer to the Application of the Net Lease Capital Advisors LLC, RDF Note LLC and RDF Class B Member LLC to Intervene Pursuant to PA. R. A. P. 3775 and answers the Application as follows:

1. After reasonable investigation, the Institute is without sufficient information to form an opinion as to the truth of the averments of this paragraph, and therefore they are deemed denied.
2. The averments of this paragraph refer to or paraphrase documents, and the documents therefore speak for themselves and no answer is required.

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OF PENNSYLVANIA  
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3. Admitted.

4. Admitted in part; denied in part. It is admitted that the Liquidator has attempted to award the asset purchase contracts to Net Lease. It is denied that a reasonable bidding process was conducted. As set out in the Institute's Application to Intervene and its proposed Answer and Cross-Application for Approval of the Sale of a Note and Equity Interest Belonging to Reliance Development Figueroa, Inc., the bidding process was not fair or reasonable as defined by the established law relating to competitive bidding of this Commonwealth and the statutory law regarding the sale of assets in a liquidation. After setting a firm deadline of March 11, 2016 (Application of Approval of the Sale of a Note and Equity Interest Belonging to Reliance Development Figueroa, Inc. ("Liquidator's Application"), at ¶36) and requiring that documents must be submitted with the bid (Exhibits A and B, Liquidator's Application, page 1 ("ALL OFFERS MUST BE SUBMITTED WITH A BLACKLINED MARK-UP OF THIS AGREEMENT")(emphasis original)), the Liquidator waived all timing and documentation requirements for Net Lease, but did not offer to the Institute the same extension of time. Moreover, as both the Liquidator's Application and Net Lease's Opposition of Net Lease Capital Advisors to the Application of the Milken Institute to Intervene ("Opposition") make clear, the Liquidator and Net Lease discussed the amount Net Lease intended to offer ahead of the bid deadline thus

providing some indication to Net Lease that the bid amount in conjunction with the extension of time meant that, when made, the Net Lease bid would be the highest. Had Net Lease's bid been lower than that of the Institute, it is likely that the Liquidator would not have extended the bid time for Net Lease. The extension of the deadline for one bidder, but not the other, is inherently and fundamentally unfair and unreasonable and a violation of both the spirit and letter of Pennsylvania case law on competitive bidding and the statutory requirements for the sale of assets in a liquidation. Shaeffer v. City of Lancaster, 754 A.2d 719, 723 (Pa. Commw. Ct. 2000) (“[F]airness lies at the heart of the bidding process, and all bidders must be confronted with the same requirements and be given a fair opportunity to bid in free competition with each other.”); Louchheim v. City of Philadelphia, 66 A. 1121, 1122 (Pa. 1907) (Fair and just competition between bidders is the intent behind the statutes regulating competitive bidding); 40 P.S. §221.23(9) (sale of assets must be “fair and reasonable”).

5. Admitted.

6. Admitted that on April 15, 2016, the Institute filed an Application to Intervene in this matter. The remaining averments of this paragraph refer to or paraphrase documents, and the documents therefore speak for themselves and no answer is required.

7. Admitted.

8. It is admitted that Net Lease seeks to file the Opposition attached to its Application to Intervene, but it is denied that Net Lease should be allowed to do so because Net Lease fails to meet the requirements for intervention, and its proposed opposition misstates the applicable case law and is misleading for the following reasons:

a) While Net Lease has an interest similar to the Institute in intervening, it fails to meet all the requirements of Rule 3775, since “the interest of the applicant is already adequately represented,” here by the Liquidator. Pa. R. A. P. 3775(c). Net Lease’s application cites almost exclusively to the averments in the Liquidator’s Application and raises no issues not already raised in the Liquidator’s opposition to the Institute’s intervention application;

b. All of the parties and intervenors agree that the process relating to the sale of assets must be “fair and reasonable” as required by 40 P.S. §221.23(9), and that the procedure employed by the Liquidator was a competitive bid process. Net Lease (and the Liquidator) argue that the case law regarding competitive bids does not apply to this sale process. However, the policy underlying the case law governing competitive bids is based on basic principles of fairness and transparency. Louchheim v. City of Philadelphia, 66 A. 1121, 1122 (Pa. 1907) (Fair and just competition between bidders is the intent behind the statutes regulating competitive bidding). It is therefore, illogical and contrary to the

statutory requirements of fairness of 40 P.S. §221.23(9) to conclude that the basic principles of fairness applied to state and local governments do not similarly apply to the Liquidator, who is the head of a state agency and appointed by the state to liquidate the company;

c. Net Lease attempts to distinguish the cases that hold that a mandatory filing deadline in the bid specifications cannot be waived on the basis that those cases turned on whether the late bidder was “negligent.” Net Lease again misstates Pennsylvania law. Those cases turn solely on whether the bid specifications had a mandatory bid filing date that was not met, not whether a bidder was negligent in meeting the deadline. See Dunbar v. Downingtown Area School Dist., 901 A.2d 1120, 1126-27 (Pa. Commw. Ct. 2006) (Bids accepted after a mandatory deadline are a violation of Pennsylvania law); Glasgow, Inc. v. Pa. Dept. of Trans., 851 A.2d 1014, 1017 (Pa. Commw. Ct. 2004) (Failure to submit required documents by bid deadline was fatal to bid and not waivable). The Liquidator’s Application makes clear, and Net Lease does not dispute (nor does the Liquidator), that a mandatory deadline for final bids was imposed on Net Lease and the Institute. Liquidator’s Application, at ¶ 36 (“The two finalists were informed that final offers were to be submitted by the close of business on Friday, March 11, 2016”). Regardless of what the Liquidator may have been thinking (and not communicating) about the reason for the deadline, a final mandatory deadline

was communicated to the bidders. Accordingly, basic fairness, reasonableness, and long-standing Pennsylvania case law require the rejection of the award of a bid to Net Lease under these circumstances;

d. Net Lease also wrongfully asserts that the cases cited by the Institute also turn on whether an actual bargaining advantage was gained because late bidders submitted bids after bids had been opened and therefore could use the knowledge of the existing bids to their advantage. Net Lease cites McCloskey v. Independence Cablevision Corp., 460 A.2d 1205, 1208 (Pa. Commw. Ct. 1983) as an example. Again, Net Lease misstates the case law. McCloskey involved the failure to provide all of the ancillary bid documents (not the amount of the bid) by the bid deadline. The Court specifically found that the late filing was to correct a documentary defect and did not involve a revised bid occasioned by the ability to view the opened bid. 460 A.2d at 1209, n. 12. The Court further found that if there had not been a provision in the RFP that specifically permitted the correction of inadvertent errors, it would have applied the rule invalidating the award of contracts when the winning bidder failed to meet the required bid deadline. Id. at n. 14. Because of the ability to correct inadvertent defects was permitted by the RFP and the lack of any evidence that the late filed bid was an attempt to take advantage of knowledge of the opened bids, the Court concluded it would be unfair to the late bidding party to exclude it. The Court, therefore, extended the bid

deadline and allowed the compliant party to file by the new deadline any part of the bid that was being filed late by the late bidder. Id. at 1209. Here all of Net Lease's bid unquestionably was filed after the mandatory bid deadline and no provision for the correction of mistakes was provided in the bid documentation or instructions. Accordingly, under established Pennsylvania case law, the Institute would have strong support for the position that Net Lease's bid should be rejected and the Institute should be awarded the bid. However, the Institute agrees that given these circumstances in which the delays in approval of Net Lease's agreement language was occasioned by third parties, it would be unfair to exclude the late bid and yet equally unfair to extend the deadline for only one bidder, Net Lease. Because Net Lease filed its whole bid late, the Institute respectfully requests that the Court, as in McCloskey, require the extension of the mandatory bidding deadline and allow both parties to file new bids;

e. In its proposed Opposition, Net Lease cites (as did the Liquidator) to the language of the February 26 letter that permitted the Liquidator to modify the bid process "at any time without specifying any reason or giving notice." However, it would be fundamentally unfair and inherently unreasonable to modify the bid process as to only one bidder to provide them with a bidding advantage.

Consequently, any such action to benefit a single party to the negotiations would be a violation of the statutory requirements of 40 P.S. §221.23(9) that the terms

and conditions of the sale process be “fair and reasonable.” Therefore, the language of the February 26 letter does not provide any support for the award of the bid by the Liquidator to Net Lease;

f. Finally, in another misstatement of fact, Net Lease argues that if a new bidding process is ordered by the Court, it will put the Liquidator at a potential disadvantage, since Net Lease could withdraw the bid and decide not to participate. However, the Institute has repeatedly informed the Liquidator and the Court that it offered to pay a minimum of \$9,900,000 for certain of the assets<sup>1</sup>. The offer was made specifically to counsel for the Liquidator and has been repeated in the applications and responses filed by the Institute with the Court. Net Lease refers to these offers as an “empty promise.” Net Lease draft Opposition at 15. If Net Lease was correct that these offers were no more than an indication of what the Institute’s future offer might be, then it is no different than what Net Lease informed the Liquidator on March 11 that it’s offer might be, which the Liquidator found adequate to extend the bidding date for Net Lease. According to the Liquidator’s Application, “Bidder One advised RDFI by email (sic), on March 11, of the amount that it would offer as soon as documents were provided to it for execution.” Liquidator’s Application, at ¶36 (emphasis supplied). No firm offer

<sup>1</sup> The original bid instruction contained in the February 26, 2016 letter (attached as Exhibit A to Net Lease’s proposed opposition) offered bidders the option to purchase: a) the Note only; or b) both the Note and the Membership Interest. While the Institute’s original offer included the purchase of the Membership Interest, it has since concluded that it no longer wishes to purchase the Membership Interest. Accordingly, the Institute’s minimum bid is for the Note only.



was provided by Net Lease.<sup>2</sup> However, here the Institute has informed counsel for the Liquidator that its minimum offer of \$9,900,000 is firm, and has explicitly informed the Court of the this offer on multiple occasions. The Institute is prepared to make a deposit with the Liquidator in an amount acceptable to the Liquidator and allow the Liquidator to use the executed Note Purchase Agreement (in which it required no changes) submitted as part of its last bid to serve as proof of its firm minimum bid. No disadvantage exists for the Liquidator in extending the time for bids.

WHEREFORE, the Institute respectfully requests that it be allowed to intervene regarding the Liquidator's Application, that Net Lease's Application to Intervene be denied, that the Institute be permitted to file the Answer and Cross-Application attached as Exhibit A to the Application to Intervene, and that the Court schedule either a conference or oral argument at the Court's earliest

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<sup>2</sup> In fact, Exhibit D to Net Lease's proposed Opposition establishes that no offer or proposal was provided to the Liquidator on March 11, 2016. Rather the e-mails show that at 3:58 pm on March 11, 2016, Net Lease (Don Blough) sent to the Liquidator's representative screen shots of the funds in its bank accounts along with an e-mail stating: "Per Dan's [counsel to the Liquidator] e-mail to Jack [counsel for Net Lease] *we will hold off on submitting our final offer until we hear from Dan.*" (Emphasis supplied.) At 5:23 pm on March 11, 2016 (after the bid deadline) in the same e-mail string, Art Mullins, the Liquidator's representative, states: "Please advise whether we can get your offers tonight or tomorrow." There is nothing in the e-mails provided by Net Lease as proof of an offer that even vaguely resembles an offer.

convenience to address the issues listed above, as well as any other issues that the Court may direct.

Dated: May 11, 2016

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

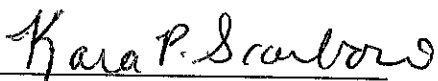
The undersigned hereby certifies that a true and correct copy of the *Answer of Proposed Intervenor Milken Institute to the Application of Net Lease Capital Advisors LLC, RDF Note LLC and RDF Class B Member LLC to Intervene* has been served upon the persons indicated below by electronic mail:

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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IN RE :

Reliance Insurance Company  
In Liquidation

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No. 1 REL 2001

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RE: Application for Approval of the Sale of a Note  
and Equity Interest Belonging to Reliance Development  
Figueroa, Inc.

**ORDER**

AND NOW, in consideration of the Application of Application of the Net  
Lease Capital Advisors LLC, RDF Note LLC and RDF Class B Member LLC to  
Intervene Pursuant to PA. R. A. P. 3775, and the answers thereto, the Application  
is hereby denied pursuant to PA. R. A. P. 3775(c) as the interests of the proposed  
intervenors are already adequately represented by the Liquidator.

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Bonnie Brigance Leadbetter, Judge