IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Reliance Insurance Company In Liquidation	:	
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Re: Application for Approval of the Sale of a Note and Equity Interest Belonging to Reliance Development Figueroa, Inc. (and the various applications and answers filed in response thereto)

MEMORANDUM and ORDER

Presently before the Court is the Liquidator's[1] Application for Approval of the Sale of a Note and Equity Interest Belonging to Reliance Development Figueroa, Inc. (RDFI) (Application).[2] Multiple entities have applied to intervene in the matter, including The Milken Institute (Milken), the unsuccessful bidder on the two assets, Net Lease Capital Advisors LLC, the successful bidder for the assets, and RDF Note LLC and RDF Class B Membership LLC (collectively, Net Lease).[3] If permitted to intervene, Milken opposes court approval of the sale, contending that the sale process was unfair, resulted in a

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[1] Teresa D. Miller, Insurance Commissioner of the Commonwealth of Pennsylvania.

[2] Because RDFI is a wholly-owned Reliance subsidiary, court approval of this transaction is required. *See* Court's order dated January 22, 2002 (pertaining to guidelines for subsidiary transactions). All funds remaining in RDFI will be paid to Reliance as dividends.

[3] RDF Note LLC (RDF Note) and RDF Class B Membership LLC (RDF Class B Membership) are entities owned by the principals and affiliated entities of Net Lease Capital Advisors LLC, a real estate investment and advisory firm; RDF Note and RDF Class B Membership were apparently created in connection with the underlying asset purchase. If the sale is confirmed by the Court, RDF Note will purchase the RDFI Note and RDF Class B Membership will purchase the RDFI Equity Interest. *See* Liquidator's Application at 25-26; Application of Net Lease at 1.

denial of due process and put Milken at a competitive disadvantage; Milken requests that the Court deny the Liquidator's Application and set a new bid date or conduct an auction for the assets similar to that provided for in Section 363 of the Bankruptcy Code, 11 U.S.C. § 363. Both the Liquidator and Net Lease oppose Milken's Application to Intervene on the ground that Milken's reasons for opposition lack merit and it is not entitled to any relief.[4]

Initially we note that the financial history and structure of the two assets is complex, cumbersome to detail and not presently disputed or questioned. Moreover, resolution of the instant applications does not require a detailed history and financial description of the assets; therefore, in the interest of expediency, the Court will not provide such unnecessary background. As described, however, the assets are not widely marketable, mostly of interest to a purchaser with a specific tax profile and financial position. As noted by the Liquidator, even after consultation with industry experts and marketed through a network of contacts, only two qualified potential bidders were ultimately considered and engaged, Net

[4] The Liquidator, averring that the terms of the sale agreement provide that closing must occur within five business days of the Liquidator's notice of this Court's approval of the sale, but no later than May 31, 2016, has also filed an Application seeking to expedite resolution of the matter by May 20, 2016. *See* Application of the Liquidator to Expedite Proceedings Concerning the Sale of Assets Belonging to [RDFI], filed April 21, 2016, at 1. While Milken denies the Liquidator's factual averments regarding the manner in which Net Lease submitted its bid, asserting a lack of sufficient information to form an opinion as to the truth of the averments, in its answer to the application to expedite, Milken does not argue that a hearing is required to resolve material issues of fact. Rather, Milken requests that "the Court schedule either a conference or oral argument at the Court's earliest convenience to address the issues listed above." Answer and New Matter of Proposed Intervenor at 7. The issues identified by Milken do not require a hearing, and after a review of the papers filed in this matter, the Court concludes that neither a hearing nor oral argument is required. Accordingly, the Application to Expedite is granted.

Lease (referred to as Bidder One) and Milken (referred to as Bidder Two).[5] Because Milken challenges the final selection process involving these two entities, we will relate the bid process described by the Liquidator in her papers. *See* Application at 21-25.

RDFI first requested offers for the assets to be submitted by March 4, 2016. The solicitation letter stated in pertinent part:

> The Seller reserves the right in its sole discretion to accept or reject any or all Offers, to consider any and all factors in its determination of the most suitable Offer, and to modify or terminate this process at any time without specifying any reasons or giving notice. If the Seller modifies or terminates this process, all costs and expenses incurred by you in connection with said modification or termination, will be borne by you. The Seller reserves the right, in its sole discretion, to deal with any Prospective Purchaser individually or with more than one Prospective Purchaser simultaneously.

Application at 21.[6] Although three potential purchasers had expressed interest in the assets, RDFI did not receive a compliant offer from any of the three prospective purchasers by 5:00 p.m. on March 4. Bidder One called RDFI after 5 p.m. on March 4, indicating that it had executed the relevant agreements with a number of changes and offering $8.6 million for the assets. The executed agreements were emailed that same day. Bidder Two sent a letter later that same day as well offering to purchase the assets for $7,850,000 or, alternatively,

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[5] According to the Liquidator's Application: "These assets were particularly difficult to market because the assets would be valuable to only a select type of purchaser with specific tax attributes and the ability to assume a long-tail risk profile." Application at 2 ("Introduction").

[6] Milken does not take issue with this reservation of rights. *See* Answer and Cross-Application of Intervenor The Milken Institute in Opposition to Liquidator's Application at 8, ¶ 31 (stating: "To the extent that this paragraph attempts to quote or paraphrase from correspondence, the documents speak for themselves.").

$9,520,000, if Associates were to make significant changes to its ownership and management structure and provide additional inducements previously rejected.[7] RDFI and Associates informed Bidder Two that its proposals were unacceptable and that its offer of $7,850,000 was not competitive. Bidder Two then submitted a second offer in the amount of $8,550,000, with unaltered executed agreements.

RDFI decided that a final round of bidding should be conducted between Bidders One and Two and informed the entities of its plans on March 9. Bidder One's final offer requested Associates to change certain representations and warranties, and it forwarded draft language to Associates for review and approval. The two bidders were informed that final offers should be submitted by the close of business on Friday, March 11, 2016. Because Bidder One did not have Associates' approval of the requested changes by the March 11 deadline, it advised RDFI by email on March 11 that it would pay $9,600,000 for the assets as soon as final documents were provided to it for execution. According to the Liquidator, Bidder One's correspondence notified RDFI of all requested document changes as well. Opposition of the Liquidator to the Application to Intervene of The Milken Institute (Opposition of the Liquidator) at 5. Bidder Two did not request any changes to the documents involved and submitted its executed documents on March 11, offering $9,050,001 for the assets.

Bidder One received Associates' changes at some point over that weekend and tendered its offer electronically on Monday, March 14, and provided a hard copy of the papers on Tuesday, March 15. The Liquidator avers that: "Given the circumstances associated with Bidder [One's] offer, which involved delays that were both unforeseen by, and outside the control of, RDFI and Bidder

[7] RDFI is Associates' corporate partner, its "Class B Member." RDFI owns 1% of the voting equity in Associates and 99% of the economic equity. Application at 5, ¶ 6.

[One], RDFI reasonably decided, in its discretion, and to maximize return for the ultimate benefit of Reliance Estate stakeholders, to consider Bidder [One's] offer. . . . Bidder [One] therefore offered $549,999 more than Bidder [Two]. Accordingly, Bidder [One], with a substantially higher bid, was selected." Application at 24-25, ¶¶ 38-39. In addition, according to the Liquidator, the described bidding process was entirely a sealed process, so that the two bidders never knew what the other had offered throughout the bidding process. Opposition of the Liquidator at 4.

Without Milken's opposition, the Court would grant the Application based upon the Liquidator's representations regarding the nature of the assets, the process taken to engage and select a qualified purchaser with an acceptable bid, and the resulting benefit to the insolvent Estate, its policyholders, creditors and the general public. Pursuant to Article V of The Insurance Department Act of 1921 (Act's),[8] the Liquidator has broad discretion in liquidating the assets of the insolvent insurer. Specifically, the Liquidator is empowered to "conduct public and private sales of the property of the insurer," and to "sell, abandon or otherwise dispose of or deal with, any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable." Section 523(7) and (9), 40 P.S. § 221.23(7) and (9). In addition, the enumerated powers of the Liquidator "shall not be construed as a limitation upon [her], nor shall it exclude in any manner [her] rights to do such other acts not herein specifically enumerated, or otherwise provided for, as may be necessary or expedient for the accomplishment of or in aid of the purpose of liquidation."

[8] The Act of May 17, 1921, P.L. 789, *as amended.* Article V was added by the Act of December 14, 1977, P.L. 280, *as amended*, 40 P.S. §§ 221.1 – 221.63.

As the Liquidator notes, the Order of Liquidation also empowers her to dispose of Estate property in a manner benefitting the designated interest groups, stating: "The Liquidator or her designees (the "Liquidator") are directed immediately to take possession of Reliance's property, business and affairs as Liquidator, and to liquidate Reliance in accordance with Article V of the Insurance Department Act of 1921 . . . and to take such action as the interest of the policyholders, creditors or the public may require." Order dated October 3, 2001, ¶ 3. The Court will defer to the Liquidator's authority and discretion in administering the Estate unless there is an abuse of discretion. *Koken v. Colonial Assurance Co.*, 885 A.2d 1078, 1095 (Pa. Cmwlth. 2005) (single judge op.). *See also Foster v. Mut. Fire Ins. Co.*, 614 A.2d 1086, 1093 (Pa. 1992) (noting in the context of judicial review of a rehabilitation plan that "great deference in favor of the Insurance Commissioner and the resulting narrow scope of review for the courts are in recognition of the expertise of the administrative agency or individual officer assigned the task of regulating a given industry."), *quoted in In re Penn Treaty Network Am. Ins. Co.*, 119 A.3d 313, 322 (Pa. 2015) (discussing deference due to statutory rehabilitator in context of plan of conversion). As described in the Application, the proposed sale meets the goals of the Act, achieves a sale price that either represents market value or provides terms that are fair and reasonable, and clearly does not demonstrate an abuse of discretion. Therefore, the Court is inclined to approve the sale. However, before reaching a final decision, the Court will consider whether Milken is entitled to intervene and, if it is, whether it presents concerns warranting denial of the Application.

Intervention in formal proceedings is allowed "if the proven or admitted allegations of the application establish a sufficient interest in the

proceedings, unless the interest of the applicant is already adequately represented or intervention will unduly delay or prejudice the adjudication of the rights of the parties." Pa. R.A.P. No. 3775(c). In support of intervention, Milken avers: "[Milken] lacks any legal recourse to redress the violation of the terms of the bidding process that Reliance required and both [Milken] and Bidder One accepted and the competitive disadvantage that it created. Accordingly, intervention is appropriate in these circumstances." Application of [Milken] to Intervene at 5, ¶ 16. The Liquidator opposes intervention primarily on substantive grounds, but also asserts that allowing intervention will unduly delay and prejudice the matter given the tight timeframe required for completion of the sale under the offer accepted.

Although the underlying sale is more similar to that which occurs during the sale of a debtor's assets under the federal Bankruptcy Code, in which case a disappointed bidder on assets usually lacks standing to challenge the sale,[9] than that of a public bid situation under the Commonwealth Procurement Code (Code), 62 Pa. C.S. §§ 101 – 4509, which provides a disappointed bidder with a statutory right to protest,[10] we will grant limited intervention to address Milken's contentions.[11]

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[9] *See In re Gulf States Steel, Inc. of Alabama*, 285 B.R. 739, 742 (N.D. Ala. 2002) [stating: "A competing bidder normally lacks standing to even challenge a sale, much less seek reconsideration of an order approving sale." (internal quotation and citation omitted)]. *But see In re Colony Hill Assoc.*, 111 F.3d 269 (2nd Cir. 1997) (disappointed bidder had standing to challenge bankruptcy sale where it alleges successful bidder engaged in collusion, calling into question intrinsic fairness of the sale).

[10] *See* Section 11.1 of the Code, added by the Act of December 3, 2002, P.L. 1147, 62 Pa. C.S. § 1711.1 (providing, *inter alia*, that a bidder, offeror, prospective bidder or offeror that is aggrieved in connection with the solicitation or award of a contract may protest to the head of the purchasing agency).

[11] Consequently the Application to Intervene by the Net Lease entities is granted as well.

Here, the bidding instructions imposed a bid submission deadline of 5 p.m. on March 11; Milken avers it submitted its bid by the imposed deadline and Bidder One did not, submitting its bid three days late. Milken further avers that it was not advised that Bidder One submitted a late bid or that the bid deadline had been extended; nor was it given the opportunity to submit a later bid. Noting that Pennsylvania law requires the competitive bid process to be fair, such that all bidders are confronted with the same requirements in order to bid in free competition with one another and to avoid placing one bidder at a competitive advantage over another, Milken argues that the deadline extension for Bidder One violated these principles of fairness, deprived it of due process and gave Bidder One a competitive advantage. Milken also avers that the deadline extension provided to Bidder One violates the Act's requirement that the Liquidator conduct asset sales "upon such terms and conditions as are fair and reasonable." *See* Section 523(9), 40 P.S. § 221.23(9). If additional bids are entertained, Milken states that it will increase its bid to $9,900,000.[12] To support its contention that the alleged irregularities warrant that the Application be denied and new bidding entertained, Milken relies on principles applicable to the solicitation of bids by a public entity.[13]

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[12] As the Liquidator points out, however, this averment has no binding effect, so that if the bidding process were reopened, it would not be required to do so.

[13] In *McCloskey v. Independence Cablevision Corp.*, 460 A.2d 1205 (Pa. Cmwlth. 1983), one of the cases cited by Milken, this Court stated:

> Due to the expenditure of public funds in the execution of a government contract, the courts traditionally have respected and preserved the sanctity of the competitive bidding process. Laws requiring the competitive bidding of public contracts serve "the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts . . ." *Conduit and Foundation Corp. v. City of Philadelphia*, [ ] 401 A.2d 376, 379 [(Pa. Cmwlth. 1979)].

The Court agrees with the Liquidator that the standards applicable to competitive bidding on public contracts do not apply here. The Liquidator is not a public body. Rather, the Liquidator stands in the shoes of Reliance, an insolvent insurer. As this Court noted in *Foster v. Monsour Medical Foundation*, 667 A.2d 18, 20 (Pa. Cmwlth. 1995) (single judge op.):

> [In liquidation], the Statutory Liquidator steps into the shoes of the insurer and recoups its assets in order to protect the rights of its creditors, policyholders and shareholders. Any actions commenced by the Liquidator are on behalf of the insurance company and its creditors and policyholders. In effect, the Liquidator's action against the officers and directors of the insurance company [in this case] seeks to enforce the rights of the company and other interested individuals. The Liquidator's claims are not premised upon any rights asserted by the Insurance Department or the Insurance Commissioner.

By failing to understand the Liquidator's position vis-à-vis Reliance, Milken has misconstrued Section 523(9)'s authorization to sell the insurer's property "at its market value or upon such terms and conditions as are fair and reasonable." This provision is describing the permissible terms of the transaction, not the process involved in the sale. Thus, if the Liquidator cannot dispose of property for its market value, she is authorized to negotiate a deal that is "fair and reasonable." The goal is to achieve a fair return or result for the insolvent Estate.

Notwithstanding this focus, inasmuch as this sale requires court approval for consummation, the Court cannot approve a deal that achieves a "fair and reasonable" result if the sale process was tainted by substantial irregularities

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Id. at 1207.

such as fraud, misrepresentation, collusion or mistake.[14] Such irregularities are not alleged here, however. The process described did not favor either bidder. The bidding was sealed, neither bidder was aware of the terms and amount of the other's offer, and Bidder One provided the Liquidator with the essential terms of its offer by the bid deadline. The Liquidator merely allowed Bidder One a reasonable time for completion of paperwork. Such discretion was clearly provided for in the bid solicitation, which allowed the Seller to modify the process at any time and without notice and to deal with any prospective purchaser individually. Accordingly, in these circumstances, while we allow intervention so that all interested parties' views may be considered, the Liquidator's Application is granted.

Based upon the foregoing, the Court orders as follows this 12th day of May, 2016:

1. The Application of the Liquidator to Expedite Proceedings Concerning the Sale of Assets Belonging to Reliance Development Figuero, Inc. (RDFI) is GRANTED.

2. The Application of The Milken Institute to Intervene Pursuant to Pa. R.A.P. 3775 is GRANTED.

3. The Application of Net Lease Capital Advisors LLC, RDF Note LLC, and RDF Class B Member LLC to Intervene Pursuant to Pa. R.A.P. 3775 is GRANTED.

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[14] In *Corporate Assets, Inc. v. Paloian*, 368 F.3d 761 (7th Cir. 2004), the court noted that in approving the sale of assets through auction, the court should balance the need to preserve the integrity and finality of the auction process with the goal of securing the highest price for the bankruptcy estate. Once confirmed, a sale will be set aside if the auction was tainted by fraud, mistake or a comparable defect. *Id.*

4. The Application for Approval of the Sale of a Note and Equity Interest Belonging to RDFI is GRANTED.

5. The Liquidator is authorized to direct RDFI to sell the note issued by Reliance Figueroa Associates, LLC and the Class B membership interest in Reliance Figueroa Associates, LLC to RDF Note LLC and RDF Class B Membership LLC, respectively, or their designees (collectively, "Purchasers") in accordance with the terms of the Note Purchase Agreement dated March 17, 2016, and the Membership Interest Purchase Agreement dated March 17, 2016, by and among RDFI, Reliance Figueroa Associates LLC and Purchasers.

6. The Note Purchase Agreement attached to the Application as Exhibit A is approved.

7. The Membership Interest Purchase Agreement attached to the Application as Exhibit B is approved.

Bonnie B. Leadbetter

BONNIE BRIGANCE LEADBETTER,
Senior Judge

Certified from the Record

MAY 12 2016

and Order Exit