

GUIDELINES RE SALE ORDERS

A. INTRODUCTION

The bankruptcy judges of the Northern District of California have become increasingly concerned about the orders they are being asked to sign on motions to approve sales of property of the estate under section 363(b) and 363(f). Many of the proposed orders submitted: (a) seek relief beyond the scope of the motion before the court; (b) seek to affect parties not before the court; (c) seek advisory rulings where there is no case or controversy; (d) include findings of fact that should be stated orally or in a separate memorandum; and (e) are so wordy and complex that the court has difficulty determining their meaning.

The crafting of orders is a judicial function. Accordingly, the judges have approved a model order for motions seeking authority to sell property of the estate and motions to sell such property free and clear of liens. The following guidelines are intended to explain how to use the model order, and what provisions the court will and will not generally approve as additions to the model order or where the parties draft their own order. These guidelines do not apply to any separate orders approving bidding procedures, break-up fees or other matters related to the sale of property. In addition, these guidelines do not apply in Chapter 13 cases.

The model order is not mandatory, but the judges will use the model order on their own motion where parties vary from these guidelines without sufficient cause and explanation.

In the event that a party submits a sale order that deviates from these guidelines, the party shall, unless otherwise instructed by the court, submit a declaration to the court in which the party identifies the provisions that vary from these guidelines and sets forth the justification therefore.

B. MOTIONS FOR AUTHORITY TO SELL PROPERTY OF THE ESTATE

1. A motion to sell property of the estate outside the ordinary course of business under section 363(b) merely seeks authority to take such action on behalf of the estate. Accordingly, the order should be very simple and need identify only the property to be sold, the purchaser, and the general terms of sale.

2. Other than as set forth herein, the order should not include findings of fact or conclusions of law. All necessary findings and conclusions should be stated orally on the record or in a separate statement of findings of fact and conclusions of law, memorandum or opinion. Generally, the court will state its findings orally on the record. Accordingly, parties should not prepare separate proposed findings and conclusions unless invited to do so by the court.

3. The court acknowledges that the purchaser may seek to review or approve the form of the sale order and may seek to condition its purchase upon the entry of a sale order that is satisfactory to the purchaser. In general, the court will not permit the purchaser to exercise any such condition to obtain entry of an order that does not comply with these guidelines.

4. The court will generally approve the following in the sale order:
- a. A finding that notice of the motion was proper and adequate given the circumstances;
 - b. A finding that a purchaser is in good faith and entitled to the protections of section 363(m), where such a request is supported by competent evidence, where creditors have been given notice that such a finding will be requested, and where there are no objections to the request or all objections have been overruled;
 - c. A provision approving the sale as the highest and best offer;
 - d. A provision addressing any back-up bids, as necessary or appropriate;
 - e. A provision granting the motion and authorizing the debtor in possession or trustee to enter into the purchase and sale agreement on behalf of the estate;
 - f. A provision authorizing the debtor in possession or trustee to execute the purchase and sale agreement and to undertake such other actions as may be reasonably necessary to complete the sale;
 - g. A provision authorizing the debtor in possession or trustee to pay any closing costs, broker's fees or commissions as requested in the motion;
 - h. A provision authorizing the debtor in possession or trustee to pay the amounts secured by any liens which are not in dispute and authorizing the debtor in possession or trustee to file or record termination statements, instruments of satisfaction, releases of liens and any other documents necessary for the purpose of documenting the release of specified liens;
 - i. A provision that the sale is on an "as is, where is" and "with all faults" basis;
 - j. A provision that the purchase and sale agreement and related documents or instruments may be modified, amended or supplemented by the parties without further order of the court, provided that such modification, amendment or supplement does not have a material adverse effect on the estate;

k. A provision waiving any applicable stay under Rule 6004(h) of the Federal Rules of Bankruptcy Procedure, upon a proper showing of cause; and

l. A provision reserving bankruptcy court jurisdiction to implement the sale, enforce the sale order or to resolve any disputes arising in connection with or related to the sale.

5. Any bidder that intends to request that the court make a finding under Bankruptcy Code section 363(m) that such bidder's purchase of the assets or the assignment to it of an executory contract or unexpired lease is in good faith, shall, by a date established by the court, file with the court and serve as required by the court, a written declaration of a competent witness demonstrating (1) the bidder's good faith and (2) the absence of fraud or collusion between the bidder and any other bidder or between the bidder and the debtor's or the estate's agents or employees. The declaration shall also disclose any facts material to the good faith determination, including:

a. The bidder's pre- and post-petition relationships with (i) any other bidder, (ii) the debtor or the debtor's current or former officers, directors, agents or employees, and (iii) any of the debtor's major creditors or equity security holders;

b. The bidder's anticipated relationship after the sale with any of the debtor's current or former officers, directors, agents or employees;

c. Whether any offers of employment or compensation have been or will be made to any of the debtor's current or former officers, directors, agents or employees; and

d. Whether the bidder has paid or contemplates paying consideration in connection with the sale to any person other than the debtor.

6. The court generally will not approve any of the following.

a. Any provision that incorporates the terms of any written or oral agreement into the order, or directs the debtor in possession or trustee to perform any act, except as provided in paragraph 4, f. As noted above, an order under section 363(b) merely authorizes the debtor-in-possession to act.

b. Any provision that purports to exempt the transaction from transfer taxes under section 1146(c). By its own terms, that section applies only to a sale pursuant to a plan of reorganization, not a sale outside of a plan under section 363(b).

c. Any provision that purports to grant a purchaser an administrative claim with respect to a breach of the purchase and sale agreement by the debtor in possession or trustee. Though a purchaser may be entitled to an administrative claim for any damages resulting from such breach, the court is unwilling to give an advisory ruling on the potential recourse available to a purchaser in the event of a breach.

d. Except as otherwise provided herein, any provision that purports to grant declarative or injunctive relief.

e. Any provision that purports to excuse any party from complying with applicable state or federal law.

C. MOTIONS FOR SALE FREE AND CLEAR OF LIENS, CLAIMS, AND INTERESTS

1. A motion to sell free and clear of liens, claims, or interests pursuant to section 363(f) may be added to a motion for authority to sell under section 363(b).

2. The motion must identify each lienholder or other party claiming a property right in the assets to be sold, must be served on each lienholder or party that is to be affected, and must expressly state the grounds for relief under section 363(f) with respect to each lien, claim, or interest to be affected, and must comply with B.L.R. 6004-1.

3. The court will grant a motion to sell free and clear only where there is a genuine case or controversy. That is, there must be evidence that the party to be affected actually asserts a lien, claim, or other interest that would follow the property into the hands of the purchaser absent an order from the court. This requirement is generally satisfied by any written instrument purporting to be a security interest, whether recorded or not, and generally will be satisfied with respect to all scheduled creditors who do not assert a security interest or lien in the property to be sold and any party that has filed a proof of claim or a request for notice and who does not assert a security interest or lien in the property to be sold. Other types of liens, claims, and interests may require more detailed proof.

4. An order for sale free and clear of liens must identify with particularity the parties to be affected and the liens, claims, and interests to be affected. The order must also provide that any affected property interest such as a lien or other interest is transferred to the proceeds of the sale with the same force, effect, validity and priority that such property interest had against the assets sold.

5. The court will generally not approve a blanket order that purports to provide for a sale free and clear of all liens, claims and interests, or free and clear of all liens, claims and interests of all parties that were served with the motion. Where adequate notice is served, the court will, however, approve an order providing for the sale free and clear of the claims of all creditors that do not assert a lien or security interest in the assets who (a) are listed on the schedules, (b) have filed a proof of claim, or (c) filed a request for notice.

6. An order authorizing a sale free and clear of liens may contain language providing that pursuant to the order and Bankruptcy Code section 363(f), completion of

the sale will vest the property in the purchaser free and clear of the liens, claims, and interests of the affected parties, and providing that the affected parties are barred from asserting their affected liens, claims and interests against the purchaser or the property.

7. The court will generally not approve any of the following in an order for sale free and clear.

a. Any provision that purports to disallow a lien, claim, or interest (as opposed to ordering sale free and clear with the lien, claim, or interest to attach to the proceeds).

b. Any provision that purports to bar successor liability claims without a showing of a specific threat of such a claim by an identified party.

c. Any provision for injunctive relief.

D. MOTIONS TO VALUE SECURED CLAIMS

1. Not all courts allow a debtor-in-possession to sell overencumbered property free and clear of liens under section 363(f). An alternative basis to sell overencumbered property is a motion to value claims secured by lien on property under Fed. R. Bankr. P. 3012 to the extent the liens exceed the fair market value of the property to be sold.

2. A motion to value claims secured by lien on property under Fed. R. Bankr. P. 3012 to the extent they exceed the sale price may be added to a motion for authority to sell the property under section 363(b) and a motion to sell free and clear of liens under section 363(f).

3. The motion must be served on each affected lienholder, must identify the relief sought regarding that lienholder, and must state grounds for relief under Fed. R. Bankr. P. 3012 regarding that lienholder.

E. MOTIONS TO ASSUME AND ASSIGN EXECUTORY CONTRACTS OR UNEXPIRED LEASES

1. The hearing on a motion to assume and assign executory contracts or unexpired leases pursuant to Bankruptcy Code section 365 may be combined with a separate motion for authority to sell under section 363(b) and must comply with B.L.R. 6006-1.

2. The motion must be served on each affected party to the contract, unexpired lease or other agreement to be assumed and assigned.

3. The court will generally approve the following:

a. A provision identifying the contracts, leases or other agreements that are the subject of the motion;

b. Provided that proper notice has been given and the other requirements of section 365 are satisfied, a provision determining the cure amount for each such contract, lease or other agreement or establishing a procedure for the determination of such cure amounts;

c. A provision that relieves the estate from any liability for any breach or an assigned contract, lease or other agreement that occurs after the assignment in accordance with Bankruptcy Code section 365(k); and

d. A provision waiving any applicable stay under Rule 6006(d) of the Federal Rules of Bankruptcy Procedure, upon a proper showing of cause.