UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-25461
	)	
DEACONESS HOSPITAL, LLC, *et al.*,	)	Chapter 11
	)	(jointly administered)
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The debtors Deaconess Hospital, LLC, Pearlview Square, Inc., and Indoga, Inc. move for approval to sell their assets to MetroHealth Systems for $3.8 million.[1] The unsecured creditors committee and the secured creditors support the sale. The only objection is raised by U.S. Representative Kucinich as *amicus curiae.*[2] For the reasons stated below, the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

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[1] Docket 342, 386.

[2] The court granted Representative Kucinich leave to appear as *amicus curiae* in support of parties who sought to reopen Deaconess as a full service hospital. (Docket 37, 41). There are no remaining parties who take that position, which raises the question of whether it is appropriate for the *amicus curiae* to carry on alone. Given the time constraints of this case, the court has considered Representative Kucinich's position on the merits rather than detouring to have the parties brief this issue.

FACTS[3]

The debtors filed these chapter 11 cases with the hope of reorganizing and remaining in operation as a full service hospital. That hope disappeared when Deaconess shut down operations and transferred its few remaining patients several days after the filing.[4] The quest from that point to this has been to sell the debtors' assets to a third party. This has not been easy.

The debtors retained an investment banker, MelCap Partners LLC, to maximize value for the estate through an asset sale. On December 19, 2003, the court granted the debtors' motion to approve sale procedures. The procedures contemplated marketing the business nationally to potential buyers through MelCap's efforts, permitting interested parties to view the premises and receive financial information under a confidentiality agreement, soliciting qualified bids (as defined in the order), analyzing the bids to try to compare "apples to apples", and holding an auction to determine the highest and best bid.[5] MelCap partner Albert Melchiorre, working closely with the debtors, headed these efforts.

After following these procedures, the debtors moved the court to approve an asset sale to Hospital Partners of America, Inc. for $3 million. Hospital Partners was not only the highest and best bidder, but had stated it intended to reopen Deaconess as a full service hospital. The court

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[3] The court held a hearing on April 16, 2004. The debtors presented their case through Albert Melchiorre, a partner in the investment banking firm MelCap Partners LLC, and exhibits. Representative Kucinich presented his case through cross-examination.

[4] The facts relating to the closing are discussed in detail in this court's memorandum of opinion ruling on the United States trustee's motion to convert. (Docket 87, 88).

[5] Docket 122.

granted that motion on February 24, 2004 with a March 15, 2004 closing date.[6] Hospital Partners, however, breached the agreement and refused to close the transaction.[7]

In the meantime, the debtors had been keeping Deaconess in a ready-to-reopen condition at a weekly cost of $107,000.00 with no corresponding income. They initially sought to compel Hospital Partners to carry out the transaction, but soon agreed to accept a $500,000.00 settlement from Hospital Partners to resolve the dispute.[8] The debtors then turned back to finding a buyer for the assets.

The debtors again sought and received court approval for sale procedures.[9] Albert Melchiorre again took the lead. MelCap contacted buyers (both strategic and financial) who had expressed an interest during the first auction process and provided information as needed. To expedite the process and help compare the offers, MelCap gave a draft purchase agreement to the potential bidders so that they could mark it up with contingencies and the like and return it, if they wished to do so. The debtors received eight qualified bids. A qualified bid was one where the bidder submitted a written bid, deposited 5% of the bid amount, and provided evidence of financial ability to close the deal. Four entities bid on the land, buildings, and equipment and four bid on the equipment only. Some, but not all, provided marked-up purchase agreements.

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[6] Docket 289.

[7] The suggestion was that Hospital Partners could not negotiate insurance reimbursement rates high enough to make the venture profitable.

[8] Docket 337; docket entry 3/31/04.

[9] Docket 370.

Melchiorre conducted the second auction. At an event lasting several hours, MetroHealth Systems eventually bid $3.8 million for the land, buildings, and equipment. Because MetroHealth did not wish to purchase the medical records, Melchiorre indexed this bid down to $3.6 million, estimating that it would cost the debtors approximately $200,000.00 to store the records off site for the next seven years.[10] Having determined that this was the highest monetary bid, Melchiorre next considered whether it was also the best bid. The critical factors here were the amount of time needed to close (given the $107,000.00 weekly cash drain) and the certainty of getting to closing (given the problem with Hospital Partners). MetroHealth was prepared to close within two weeks and had the financial ability to do so. Melchiorre concluded that this made MetroHealth's offer both the highest and best bid. The debtors, the secured creditors, and the unsecured creditors committee agree.

The court order approving the auction gave the debtors the option of identifying a next best offer if the MetroHealth offer somehow fell through. The second highest bidder was not interested in playing this role. The third highest bidder, Med-XS Solutions agreed to do so, with a stated bid of $3.3 million. This bid was also indexed down by $200,000.00 to store the medical records, leaving an indexed bid of $3.1 million. The debtors then moved this court to approve a sale to MetroHealth with approval of Med-XS Solutions as the back up.

THE POSITIONS OF THE PARTIES

The debtors and unsecured creditors committee urge the court to approve the sale under bankruptcy code § 363. Representative Kucinich argues that the sale should not be approved

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[10] This cost estimate was made based on information provided by George Saad, M.D., the CEO of Deaconess. This is not the value of the medical records (there was no testimony on that issue), just the cost of storing them.

because MetroHealth did not offer the highest and best bid and because the auction was tainted by a conflict of interest. He asks the court to reopen the auction with MetroHealth, Diamond Healthcare Holdings Corporation, and Med-XS Solutions being invited to participate. The motivation for this is Representative Kucinich's belief that Diamond would reopen Deaconess as a full service hospital, while MetroHealth has not stated a similar intention.

DISCUSSION

Under bankruptcy code § 363, a debtor may sell estate assets outside of the ordinary course of business after notice and hearing. 11 U.S.C. § 363(b)(1). A sale of substantially all of the debtor's assets may be approved when the debtor has a sound business reason for the action. *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 389-90 (6th Cir. 1986) (adopting test set out in *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corporation)*, 722 F.2d 1063 (2d Cir. 1983)).

The debtors in this case have proven that they have a sound business justification for the proposed sale in general and for the sale to MetroHealth in particular. Since late November 2003, the facilities have generated little income while incurring considerable expenses, all of which comes out of the creditors' pockets. The only option at this point is for the debtors to sell their assets to a third party and distribute the proceeds to creditors. The debtors gave notice to all parties of their intention to sell the assets, they marketed the assets to a broad array of potential buyers, they obtained a court order with clear bidding procedures, they followed those procedures, and they adequately explained why they believe that MetroHealth made the highest and best bid.

Against this, the court considers the objection interposed by Representative Kucinich. The objection has two parts: (1) he states that another bidder, Diamond Healthcare Holdings Corporation, apparently doing business as Fulcrum (Diamond), offered within $100,000.00 of the MetroHealth bid and would have reopened Deaconess as a full service hospital, which would benefit the community; and (2) the bidding was tainted through the involvement of Calfee Halter & Griswold, LLP which had multiple competing stakes in the auction. Calfee Halter denies any improprieties.

A. Diamond

No one from Diamond attended the hearing and there was little evidence about its bid. Diamond apparently bid $100,000.00 less than MetroHealth and then withdrew from the bidding, so it was not the highest bidder in terms of dollars. Another drawback was that Diamond did not provide a marked-up copy of the purchase agreement disclosing its desired contingencies. As Melchiorre explained, a bidder can say that it will close in 30 days, for example, but if it has multiple contingencies that cannot be resolved within 30 days, the stated time frame becomes meaningless. The committee also had serious doubts about Diamond's ability to close a deal. All of this made the Diamond bid far less desirable than MetroHealth's.

Representative Kucinich contends that Diamond's commitment to reopen Deaconess should outweigh these factors. He argues that a reopened facility will offer employment, permit patient access to records, and provide sales opportunities to vendors, all of which will benefit the unsecured creditors to a greater degree than will the MetroHealth sale. There are many problems with this argument; first among them is that there was no evidence that Diamond would reopen Deaconess or had the ability to do so. Stating a general interest in operating a facility is an easy

thing to do; establishing the technical ability and financial wherewithal to carry that out is far different. It is interesting that Diamond itself did not file an objection to the sale or appear at the hearing. It chose instead to throw stones at the deal by trying to make accusations through Representative Kucinich that it was not treated fairly. This court will always listen to an argument that a party has not been afforded due process in any proceeding, but it has no sympathy for a disappointed bidder who cries foul from afar without having the commitment to stand up in court and make its case. The possibility that Diamond might be able to carry out a deal that might allow Deaconess to reopen on terms that might be comparable to those offered by MetroHealth is not a reason to disapprove the sale.

B. The Involvement of Calfee Halter & Griswold, LLP

Representative Kucinich points out that Calfee Halter & Griswold, LLP is involved in this case in three ways: it is an unsecured creditor, it represented MelCap in its efforts to be retained as the debtors' investment banker, and it represents MetroHealth in the purchase agreement. While he concedes there was no evidence of any actual conflict of interest, he argues that this creates an appearance of impropriety that tainted the auction process and requires that it be reopened.

Representative Kucinich did not seek to disqualify Calfee from representing MetroHealth in such a new auction and it is hard to see how anything would be any different in a third auction than it was in the second one. Calfee disclosed its interests through a filing made before the auction took place and no party objected to the auction going forward, even with that information.[11] Calfee's involvement with MelCap was limited to helping it negotiate the terms

[11] Docket 377.

under which it would be approved as the debtors' investment banker. Melchiorre testified without contradiction that he had no client contact with Calfee other than this. There was no evidence that MelCap gave MetroHealth any sort of favorable treatment. And there was no evidence that Calfee violated the bankruptcy code, ran afoul of the ethical rules that govern attorneys in Ohio, or behaved improperly in any way. This objection is without merit.

CONCLUSION

For the reasons stated, the debtors' motion to approve the sale of its assets to MetroHealth System is approved. The request to approve Med-XS Solutions as the back up buyer is also approved.

A separate order reflecting this decision will be entered. The debtors are to present the court with a proposed supplemental order governing the terms of the sale.

Date: 19 April 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**JUDGMENT**

For the reasons stated in the memorandum of opinion filed this same date, the debtors' motion to approve the sale of their assets to MetroHealth Systems is granted. The request to approve Med-XS Solutions as the back up buyer is also granted. (Docket 342, 386).

IT IS SO ORDERED.

Date: 19 April 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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