

IT IS SO ORDERED.



Dated: March 11, 2010
03:50:45 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

CW LIQUIDATION, INC.,
f/k/a CONCORD STEEL, INC.

Debtor.

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* CASE NUMBER 09-43448
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* CHAPTER 11
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* HONORABLE KAY WOODS
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ORDER (I) DENYING, IN PART, (II) GRANTING, IN PART,
AND (III) REQUIRING EVIDENTIARY HEARING, IN PART,
REGARDING MOTION OF LB STEEL, LLC TO COMPEL COMPLIANCE
WITH ASSET PURCHASE AGREEMENT

The cause before the Court is the Amended Motion of LB Steel, LLC to Compel Debtor's Compliance with Asset Purchase Agreement or for Purchase Price Adjustment, and for an Order Directing JPMorgan Chase Bank as Escrow Agent to Maintain Deposit Pending Further Order of Court (collectively with the Supplement referenced below, "Motion to Compel") (Doc. # 160) filed by LB Steel, LLC ("LB Steel" or "Purchaser") on January 29, 2010. On February 8, 2010, Debtor CW

Liquidation, Inc. f/k/a Concord Steel, Inc. ("Debtor" or "Seller") filed Debtor's Objection to Amended Motion of LB Steel, LLC to Compel Compliance with Asset Purchase Agreement or for Purchase Price Adjustment, for an Order Directing JPMorgan Chase Bank as Escrow Agent to Maintain Deposit Pending Further Order of Court (collectively with the Supplement referenced below, "Debtor's Objection") (Doc. # 168). Pursuant to the Court's request at a telephonic status conference on February 10, 2010, LB Steel and Debtor each supplemented their pleadings. On February 23, 2010, LB Steel filed a Supplement to the Motion to Compel ("LB Steel's Supplement") (Doc. # 189) and on March 2, 2010, Debtor filed a Supplement to its Objection ("Debtor's Supplement") (Doc. # 203).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

For the reasons set forth below, this Court (i) denies the Motion to Compel, in part, (ii) grants the Motion to Compel, in part, and (iii) finds that an evidentiary hearing is required to determine if there should be any adjustment regarding the TKE Order (defined *infra*).

I. FACTUAL BACKGROUND

Debtor filed a voluntary petition pursuant to chapter 11 of Title 11 on September 14, 2009 ("Petition Date"). As of the Petition Date, Debtor described itself as an independent manufacturer of steel counterweights and structural weldments, with manufacturing plants in Warren, Ohio (owned) and Chicago Heights, Illinois (leased). Debtor also leased office space in Warren. Debtor sold its products primarily in the United States to OEMs of certain construction and industrial-related equipment that employ counterweights for stability through counterweight leverage to hoist heavy loads, such as elevators and cranes. Prior to the Petition Date, Debtor had closed an operating facility in Essington, Pennsylvania ("Essington Facility"). As of the Petition Date, Debtor had 131 active, full-time hourly non-union and union employees and 18 salaried non-union office employees.

Debtor determined that it was in the best interest of its creditors and the bankruptcy estate to sell substantially all of its assets. As a consequence, on November 9, 2009, Debtor filed Motion of the Debtor for an (I) Order (A) Approving Bidding Procedures for the Debtor's Assets, (B) Approving Certain Bid Protections and (C) Scheduling Final Sale Hearing and Approving Form and Manner of Notice Thereof, and (II) Order Authorizing and Approving (A) the Sale of Assets Free and Clear of Liens and Other Interests and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases to Successful Bidder at Auction ("Motion to Sell") (Doc.

86). Two days after an expedited hearing held on November 17, 2009, this Court entered Order (A) Approving Bidding Procedures for the Debtor's Assets, (B) Authorizing Debtor to Offer Certain Bid Protections and (C) Scheduling Final Sale Hearing and Approving Form and Manner of Notice Thereof ("Bid Procedures Order") (Doc. # 106).¹

The Court scheduled a hearing on the Motion to Sell for December 8, 2009. Prior to the hearing, the Creditors' Committee filed a limited objection (Doc. # 117) on the basis that Debtor was improperly attempting to sell certain causes of action arising under chapter 5 of the Bankruptcy Code because the Creditors' Committee had previously been given the exclusive right to bring, abandon, or otherwise dispose of such chapter 5 causes of action. D & L Energy, Inc. and Niles Oil & Gas, Inc. filed an objection (Doc. # 123) on the basis that they had an interest in oil and gas rights on the Warren real estate, which could not be eliminated in a "free and clear" sale. Everflow Eastern, Inc. ("Everflow") filed a "precautionary limited objection" (Doc. # 124) asserting that Debtor agreed that it could not sell its assets free and clear of Everflow's interests, but that the parties could not reach an agreement concerning language to be included in any order approving the Motion to Sell. On December 7, 2009, Debtor filed Declaration of John W. Teitz in Support of the Debtor's Proposed Sale of Assets Free and Clear of Liens and Other Interests and (B) [sic] Assumption

¹The United States Trustee, the Official Committee of Unsecured Creditors ("Creditors' Committee"), and Bank of America, N.A., each filed limited objections, which were heard and resolved at the November 17, 2009, hearing.

and Assignment of Executory Contracts and Unexpired Leases to Purchaser ("Teitz Declaration") (Doc. # 129). Mr. Teitz, who is a Director of Compass Advisory Partners, LLC, Debtor's financial advisor and investment banker, described the marketing and solicitation process to sell Debtor's assets, as well as the auction conducted on December 7, 2009, at which the only two bidders were AMG Resources Corporation ("AMG") and LB Steel. The Teitz Declaration attested to Debtor's compliance with the Bid Procedures Order in conducting the sales process and the auction (Teitz Decl. ¶ 17), and opined that the bid by LB Steel in the amount of \$10,700,000 was the highest and best offer for Debtor's assets. (*Id.* ¶¶ 14 and 18.)

On December 9, 2009, the Court entered Order Authorizing and Approving (A) The Sale of Assets Free and Clear of Liens and Other Interests and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases ("Sale Order") (Doc. # 133). The Sale Order, among other things, (i) approved the terms of the Asset Purchase Agreement executed by and between Debtor and LB Steel ("LB Steel APA"); (ii) authorized Debtor to transfer the Acquired Assets (as defined in the LB Steel APA) to LB Steel free and clear of all liens; and (iii) authorized Debtor to assume and assign the Assigned Contracts (as defined in the LB Steel APA) to LB Steel. The Sale Order specifically held: "15. The consideration provided by the Purchaser for the Acquired Assets constitutes reasonably equivalent value and fair and reasonable consideration under the Bankruptcy

Code and applicable non-bankruptcy law, and may not be avoided under 11 U.S.C. § 363(n)."² (Sale Order at 13 (emphasis added).) Attached to the Sale Order was a copy of the LB Steel APA.

II. LB STEEL'S ARGUMENTS

In the Motion to Compel, LB Steel makes the following arguments: (i) prior to executing the LB Steel APA, Debtor sold certain equipment without adequate notice and without disclosing the identity of the purchaser, which sale LB Steel alleges was for inadequate consideration and involved self-dealing by Paul Vesey, Debtor's President and Chief Operating Officer, and John Pastor, Debtor's Vice President of Purchasing; (ii) Prior to the Petition Date, Debtor relocated raw material (relating to an existing order) owned by ThyssenKrupp Elevator ("TKE"), one of Debtor's major customers, to a third-party warehouse without disclosing this arrangement to LB Steel; (iii) Debtor failed to provide LB Steel with copies of its employment agreements with Messrs. Vesey and Pastor, which contained confidentiality and non-compete clauses; and (iv) Debtor failed to turn over to LB Steel certain Acquired Assets,

²Section 363(n) is not at issue here. Section 363(n) states:

The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

11 U.S.C. § 363 (West 2009).

namely, three laptop computers that allegedly contain confidential business information regarding Debtor's customers.

Although styled as a motion to compel compliance with the LB Steel APA or, alternatively, for an adjustment in the Purchase Price (as defined in the LB Steel APA), LB Steel devotes little space in the Motion to Compel to items that Debtor has failed to deliver pursuant to the LB Steel APA or any other failure by Debtor to comply with the LB Steel APA. Indeed, most of the Motion to Compel deals with issues extraneous to compliance with the APA. LB Steel's actual motive appears to be to relieve itself from compliance with the LB Steel APA and rewrite such APA to achieve a reduction in the Purchase Price for the Acquired Assets. LB Steel spends approximately 11% of the Motion to Compel describing Debtor's sale of certain equipment from Debtor's Essington Facility as a "Self-Dealing Transaction" by Messrs. Vesey and Pastor. The sale in question was authorized by this Court on November 17, 2009 - well before the LB Steel APA was executed. As a consequence, the sale of the equipment that LB Steel decries is not and was never part of the Acquired Assets. Despite the time and effort LB Steel devotes to this issue, LB Steel acknowledges that it "does not assert that this equipment should have been included in the Acquired Assets." (LB Steel's Supp. at 2, n.7.) Instead, LB Steel postulates that, given the timing of the sale of such equipment and the alleged self-dealing, there can be no conclusion other than that these executives "committed a fraud on the Court[.]" (*Id.*) Because LB Steel

concedes that this equipment was not part of the Acquired Assets, the inclusion of this argument in the Motion to Compel is an irrelevant red herring and will be disregarded by the Court. This issue is properly before the Court in another proceeding.

LB Steel alleges that it has been damaged in the amount of \$63,141.05 for processing and freight costs to complete work for TKE ("TKE Order") at the price Debtor originally quoted. LB Steel alleges that Debtor failed to disclose the actions Debtor took prior to the Petition Date regarding removal and storage of certain TKE-owned raw materials. LB Steel acknowledges that Debtor disclosed that \$258,304.28 received from TKE was booked as a liability representing unearned revenue and that TKE had taken possession of its material. LB Steel asserts that Debtor represented that there "would be no future obligations or liabilities for LB Steel regarding the matter." (*Id.* ¶ 10.) Debtor counters that the "material facts relating to the TKE [O]rder were disclosed to LB Steel prior to the auction[,]" and that "[i]f LB Steel did not want to complete the TKE [O]rder, it was free to do so." (Debtor's Supp. ¶ 11.) Based upon the Motion to Compel and Debtor's Objection, it is not clear to the Court whether LB Steel was obligated to fulfill any pre-sale TKE Order. This Court requires more information concerning this allegation before it can determine if Debtor is contractually liable to LB Steel for any amount relating to the TKE Order and/or if Debtor should be compelled to do anything to comply with the LB Steel APA. As a consequence, an evidentiary hearing is

required to determine if LB Steel's allegations concerning disclosure (or lack thereof) regarding the TKE Order have merit.

LB Steel's next argument concerns Debtor's failure to disclose employment agreements that cover Messrs. Vesey and Pastor. LB Steel's argument appears to be that Messrs. Vesey and Pastor have violated the terms of their employment agreements and that such alleged violations harmed LB Steel. As a result, LB Steel argues that the Purchase Price should be adjusted because LB Steel "overbid" \$2,180,962 for the Acquired Assets, which allegedly included a "premium" for the goodwill of Debtor's business as a going concern. At all times, Debtor sought to sell its assets on a going-concern basis. Goodwill was an element of the Acquired Assets in the AMG Stalking Horse APA, prior to the auction, as well as the LB Steel APA. There is no basis for the Court to find that the amount of LB Steel's "overbid" was in any way attributable only to Debtor's goodwill. LB Steel argues that it believed it would acquire all of Debtor's goodwill and general intangibles at closing (LB Steel's Supp. ¶ 1), which is precisely what LB Steel did acquire. LB Steel purchased the Acquired Assets on an "as is, where is" basis. Debtor did not make any representations or warranties, express or implied, at law or in equity, with respect to any of the Acquired Assets, including its goodwill. (LB Steel APA at 28, ¶ 4.18.) This Court specifically found that the Purchase Price was fair and reasonable. (Sale Order ¶ 15.) As a consequence, despite any disappointment on the part of LB Steel concerning the goodwill

it purchased, LB Steel received all goodwill that it was entitled to receive pursuant to the LB Steel APA. Having received Debtor's goodwill as it existed on the closing date, there is no basis to adjust the Purchase Price.

However, the Acquired Assets include: "all rights under non-disclosure or confidentiality, non-compete or non-solicitation agreements with employees and agents of the Seller or with third parties, including non-disclosure or confidentiality, non-compete or non-solicitation agreements entered into in consideration with the Auction[.]" (LB Steel APA at 2.) If, indeed, there has been a breach of the non-compete and/or confidentiality provisions of either the Vesey or Pastor employment agreements,³ LB Steel's remedy is to bring a breach of contract action against the offending individuals - not obtain a reduction in the Purchase Price. To the extent there may be or have been a breach of contract by Messrs. Vesey and/or Pastor, any damages arising from, relating to, or in connection with such breach are properly payable by the breaching party or parties rather than Debtor or Debtor's secured creditor (who received the net Purchase Price).

LB Steel's last argument is that Debtor has failed to comply with the LB Steel APA by failing to turn over three laptop computers. Debtor insists that there are only two computers at issue and believes reference to the third computer may relate to a

³This Court currently is not in a position to determine if there has been any breach of contract by either Mr. Vesey or Mr. Pastor and nothing contained herein should be deemed to indicate any such finding.

computer at the Essington Facility, which would be an Excluded Asset (as defined in the LB Steel APA). Debtor contends that "arrangements regarding the two previously identified computers (one in the possession of Mr. Pastor in Florida and the other in the possession of Mr. Vesey) had been made with LB Steel."⁴ (Debtor's Supp. at 3, ¶ 5.) Debtor represents that all confidential information was deleted from the third laptop computer before it was abandoned to the person assisting in the clean-up of the Essington Facility. (*Id.* at 4, ¶ 6.) To the extent Debtor retains any computers, these are part of the Acquired Assets and need to be turned over to LB Steel.

III. CONCLUSION

This Court hereby denies the Motion to Compel to the extent that it: (i) purports to seek any relief on the basis of the alleged self-dealing sale of equipment prior to the execution of the LB Steel APA; and (ii) seeks a reduction in the Purchase Price on the basis that LB Steel "overbid" for the goodwill of Debtor or for any other reason. This Court hereby grants the Motion to Compel with respect to any and all laptop computers that were part of the Acquired Assets and orders Debtor to deliver such computers to LB Steel no later than fourteen (14) days after entry of this Order. With respect to the TKE Order, this Court requires additional information and will conduct a telephonic status conference on

⁴Debtor does not further describe and the Court has no information concerning the alleged "arrangement" regarding the computers.

March 15, 2010, at 11:00 a.m. to schedule an evidentiary hearing on this limited issue.

IT IS SO ORDERED.

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