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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

	: Chapter 11
In re:	:
	: Case No. 24-14727(SLM)
SAM ASH MUSIC CORPORATION, *et al*.,	:
	: Hearing Date: June 5, 2024 at 10:00 a.m.
Debtors.[1]	:
	: The Honorable Stacey L. Meisel

LIMITED OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTORS' MOTION FOR ENTRY OF ORDERS (I) (A) APPROVING BIDDING PROCEDURES AND BREAKUP FEE, (B) APPROVING STALKING HORSE PURCHASE AGREEMENT, (C) SCHEDULING AN AUCTION AND A SALE HEARING, (D) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND (E) ESTABLISHING NOTICE AND PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES AND (II) (A) AUTHORIZING THE DEBTOR TO ENTER INTO AN ASSET PURCHASE AGREEMENT, (B) APPROVING THE ASSET PURCHASE AGREEMENT, AND (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF THE ASSUMED CONTRACTS

The United States Trustee ("U.S. Trustee"), by and through counsel, and in furtherance of his duties pursuant to 28 U.S.C. §§ 586(a)(3) and (5), respectfully submits this limited objection

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Sam Ash Music Corporation (3915); Samson Technologies Corp. (4062); Sam Ash Megastores, LLC (9955); Sam Ash California Megastores, LLC (3598); Sam Ash Florida Megastores, LLC (7276); Sam Ash Illinois Megastores, LLC (8966); Sam Ash Nevada Megastores, LLC (6399); Sam Ash New York Megastores, LLC (7753); Sam Ash New Jersey Megastores, LLC (8788); Sam Ash CT, LLC (5932); Sam Ash Music Marketing, LLC (2024); and Sam Ash Quikship Corp. (7410). The location of debtor Sam Ash Music Corporation's principal place of business is 278 Duffy Avenue, P.O. Box 9047, Hicksville, NY 11802.

("Limited Objection") to the *Motion for Entry of Orders (I)(A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases and (II)(A) Authorizing the Debtor to Enter into an Asset Purchase Agreement, (B) Approving the Asset Purchase Agreement, and (C) Authorizing the Assumption and Assignment of the Assumed Contracts* ("Bid Procedures Motion[2]") (Docket No. 47), and respectfully represents as follows:

1. This Court has jurisdiction to hear and determine this Objection.

2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the issues raised by this Objection.

PRELIMINARY STATEMENT[3]

4. The Bid Procedures Motion seeks to award Tiger Finance, the Debtor's Prepetition Lender and DIP Lender, who has made a stalking horse credit bid, certain bidding

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[2] Capitalized terms not otherwise defined herein shall have the meaning as ascribed in the Bid Procedures Motion.

[3] Capitalized terms in this Preliminary Statement shall have the meaning as defined below.

protections, those being (i) a Breakup Fee to Tiger Finance (as Stalking Horse Bidder) in the amount of $150,000.00, and (ii) payment to Tiger Capital (as liquidation consultant as proposed in the GOB Motion) of any accrued and unreimbursed expenses due under the Consulting Agreement. Under *In re Energy Future Holdings Corp.*, 990 F.3d 728 (3d Cir. 2021), administrative expenses (such as bid protections) cannot be awarded without a record sufficiently demonstrating an actual benefit to the estate. The Bid Procedures Motion posits (at ¶ 51) that availability of breakup fees induce a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely. But there is no explanation nor reason why the secured lender here would need any inducement to research whether to credit bid for its own collateral, the same collateral that is subject to both a pre-petition asset-based loan and a post-petition DIP loan with the same secured creditor. The Court should deny the proposed Bid Protection Payments.

BACKGROUND AND RELEVANT FACTS

5. On May 8, 2024 ("Petition Date"), Sam Ash Music Corporation, *et al*., ("Debtors") ("Sam Ash") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq. See* Dkt. 1.

6. Also on May 8, 2024, the Debtors filed the *Declaration of Jordan Meyers, Chief Restructuring Officer of the Debtors, in Support of Debtors' Chapter 11 Petitions and First Day Motions* ("Meyers Declaration"). *See* Dkt. 17.

7. On May 10, 2024, this Court entered an Order directing that these cases be jointly administered. *See* Dkt. 39.

8. The Debtors continue to operate their business(es) as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

9. No trustee or examiner has been appointed in these chapter 11 cases.

10. On May 21, 2024, the Office of the United States Trustee filed a Notice of Appointment of Official Committee of Unsecured Creditors (the "Committee"). *See* Dkt. 107.

The Bid Procedures Motion & Tiger Finance as Stalking Horse Bidder:

11. On May 9, 2024, the Debtors filed the Motion. By way of the Motion, the Debtors seek authorization to proceed with a going concern business sale.

12. Pursuant to the Bid Procedures Motion, the Debtors have engaged Capstone Partners to serve as the Debtors' Investment Banker in connection with a going concern sale process. *See* Bid Procedures Motion, ¶¶ 12,17. The Bid Procedures Motion states that "the Debtors believe there is interest in some or all of the Business Units," and that "35 parties had executed nondisclosure agreements, indicating their interest to further explore a potential transaction with the Debtors, and 3 parties in the process of negotiating a nondisclosure agreement." *Id.* at ¶ 19.

13. The Bid Procedures Motion and the proposed Bidding Procedures Order filed therewith, establish Tiger Finance, the Prepetition Lender and DIP Lender, as the Stalking Horse Bidder. The Bid Procedures Motion and the proposed Bidding Procedures Order further propose pay certain bidding protections, those being (i) a Breakup Fee to Tiger Finance (as a Stalking Horse Bidder) in the amount of $150,000.00, and (ii) payment to Tiger Capital (as Consultant under the GOB Motion[4]) of any accrued and unreimbursed expenses due under the Consulting Agreement (the "Tiger Capital Payment") (the Breakup Fee and Tiger Capital Payment collectively referred to herein as the "Bid Protection Payments"). *See*, Stalking Horse APA, section 5.3(a).

[4] Defined below.

Tiger Finance as Prepetition Lender and DIP Lender:

14. On May 9, 2024, the Debtors filed the *Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Post-Petition Financing; (II) Authorizing the Use of Cash Collateral and Affording Adequate Protection; (III) Granting Liens and Providing Superpriority Administrative Expense Status; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* ("DIP Motion"). *See* Dkt. 15.

15. On May 10, 2024, the Court entered the Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, 506, and 507 and Fed. R. Bankr. P. 2002, 4001, 6003, 6004 and 9014 *(I) Authorizing the Debtors to Obtain Post-Petition Financing, (II) Granting Liens and Superpriority Claims, (III) Authorizing the Use of Cash Collateral, (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* ("Interim DIP Order"). *See* Dkt. 49.

16. The DIP Motion states that pursuant to the Prepetition ABL Loan Agreement dated February 21, 2024, by and among Tiger Finance, LLC ("Tiger Finance") as Prepetition Lender and the Debtors as borrowers, Tiger Finance provided an asset-based loan (the "Prepetition ABL Facility") to the Debtors to finance their business operations. *See*, DIP Motion, ¶ 10. The DIP Motion further states that as of the Petition Date, the aggregate principal amount outstanding under the Prepetition ABL Facility was at least $18.125 million. *Id*.

17. Pursuant to the Interim DIP Order, The Debtors are authorized to borrow $18,425,000 from Tiger Finance during the Interim Period[5], in accordance with the terms and conditions of the DIP Credit Agreement[6]. *See*, Interim DIP Order, ¶ 4. The stated purpose for

[5] This term shall have the meaning as defined in the DIP Motion.
[6] This term shall have the meaning as defined in the DIP Motion.

this first draw under the DIP Facility[7] is to pay the entire outstanding balance of the Prepetition Debt[8] under the Prepetition Financing Documents[9], as a "Final Roll-Up." *See*, Interim DIP Order, ¶ (I)(A)(i).

18. Pursuant to the Interim DIP Order, certain out-of-pocket costs and expenses of Tiger Finance will be paid by the Debtors (irrespective of the Breakup Fee), including without limitation the following:

> reasonable legal, accounting, collateral examination, monitoring and appraisal fees and disbursements, financial advisory fees, fees and expenses of other consultants, indemnification and reimbursement obligations with respect to fees and expenses, and other out of pocket expenses, whether or not contained in the Approved Budget and without limitation with respect to the dollar estimates contained in the Approved Budget

Interim DIP Order, ¶ 47.

Tiger Capital as Liquidation Consultant:

19. On May 9, 2024, the Debtors filed the *Motion for the Entry of a Final Order (I) Authorizing the Debtors to Assume and Perform under the Consulting Agreement Related to the Sale of Inventory, (II) Approving Procedures for the Sale of Inventory, (III) Approving Modifications to Certain Customer Programs, and (IV) Granting Related Relief* ("GOB Motion"). *See* Dkt. 14.

20. Pursuant to the GOB Motion, the Debtors seek to assume on a final basis the Consulting Agreement[10] with Tiger Capital Group, LLC ("Tiger Capital") and Gordon Brothers Retail Partners, LLC ("Gordon Brothers") (Tiger Capital together with Gordon Brothers, collectively, the "Consultant"). The Consultant Agreement states that "[Tiger Capital] shall have

[7] This term shall have the meaning as defined in the DIP Motion.
[8] This term shall have the meaning as defined in the DIP Motion.
[9] This term shall have the meaning as defined in the DIP Motion.
[10] This term shall have the meaning as defined in the GOB Motion.

the right, in its discretion, to syndicate this transaction with [Gordon Brothers].” *Addendum to Consulting Agreement*, ¶ 9.

21. On May 10, 2024, the Court entered the *Interim Order (I) Authorizing the Debtors to Assume and Perform under the Consulting Agreement Related to the Sale of Inventory, (II) Approving Procedures for the Sale of Inventory, (III) Approving Modifications to Certain Customer Programs, and (IV) Granting Related Relief* (“Interim GOB Order”). *See* Dkt. 48.

22. The Interim GOB Order granted certain relief regarding the Motion, on an interim basis. The Interim GOB Order requires objections to entry of the Final Order to be filed by May 28, 2024. *Id.*, ¶ 2. The Interim GOB Order further requires Consultant to file a declaration disclosing connections to the Debtors, their creditors, and other parties in interest in these chapter 11 cases not later than ten (10) days prior to the objection deadline, making such disclosures due on May 20, 2024. *Id.*, ¶ 41.

23. The Consulting Agreement provides that Tiger Capital “will serve as [Sam Ash Music Corporation’s] sole and exclusive consultant for the Sale[11] throughout the Sale Term[12].” *Id.*, ¶ 1.(A).

24. Tiger Capital’s role in liquidating the Debtors’ inventory has great breadth and depth, as the Consulting Agreement details that Tiger Capital will provide, among other things, the following services:

- provide qualified, full time Supervisors, to assist in conducting the Sale;
- oversee the Sale of Merchandise form the Stores;
- solicit bulk and wholesale offers for the Merchandise from retailers and other potential buyers that do not go through the Stores;

[11] This term shall have the meaning as defined in the GOB Motion.
[12] This term shall have the meaning as defined in the GOB Motion.

- recommend appropriate advertising;
- recommend appropriate pricing, display, and discounting of Merchandise;
- provide such other related services deemed necessary or prudent by Sam Ash Music Corporation and Consultant under the circumstances giving rise to the Sale.

See, Consulting Agreement, ¶¶ 2.2 (a) – (f).

25. On May 20, 2024, in support of the GOB Motion, Tiger caused to be filed the *Declaration of Disinterestedness* by Mark P. Naughton ("Tiger Disclosures"). *See* Dkt. 103.

26. The Tiger Disclosures state that Tiger Finance is a wholly owned subsidiary of Tiger Capital. *Tiger Disclosures* at ¶ 9.(a).

27. The Tiger Disclosures further state that Tiger Capital was advanced an aggregate "Special Purpose Payment" of $600,000 as security for reimbursement of expenses and payment of fees set forth in the Consulting Agreement. *Id*. at 13. Upon completion of the sale process under the GOB Motion, Tiger and Gordon Brothers will reconcile expenses and fees payable under the Consulting Agreement, and any unapplied funds will be returned to the Debtors. *Id*.

28. The Tiger Disclosures further clarify that Tiger Capital has been and shall remain the lead liquidation firm, interfacing directly with the Debtors in connection with the Consulting Agreement. *Id*. at ¶ 14.

OBJECTION

29. The Bid Protection Payments requested in the Motion should be denied because such payments are not necessary to induce Tiger Finance to credit bid for their collateral. Moreover, there is no basis for Tiger Finance in its role as Stalking Horse Bidder to seek a payment on behalf of Tiger Capital in connection with Tiger Capital's role as liquidation consultant.

30. Bid protections such as break-up fees and expense reimbursements must be sought and analyzed under Section 503(b). *See Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) ("[A] bidder must seek a break-up fee under 11 U.S.C. § 503(b)[.]") (citing *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999)).

31. The analysis of break-up fees and expense reimbursements under Section 503(b) "must be made in reference to general administrative expense jurisprudence. In other words, the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate." *O'Brien*, 181 F.3d at 535; *see also In re Energy Future Holdings Corp.*, 904 F.3d 298, 313 (3d Cir. 2018) ("[T]ermination fees are subject to the same general standard used for all administrative expenses under 11 U.S.C. § 503[.]").

32. An administrative expense's benefit to the estate "must be *actual*, not hypothetical." *In re Energy Future Holdings Corp.*, 990 F.3d at 742 ("*EFH II*") (citing *In re Continental Airlines, Inc.*, 146 B.R. 520, 526 (Bankr. D. Del. 1992)).

33. A break-up fee or expense reimbursement can provide a benefit to the estate where (1) assurance of the bid protection promotes more competitive bidding, such as by inducing a bid that otherwise would not have been made, (2) availability of the bid protection induces a buyer to perform diligence and set a floor price; or (3) the bid protection induces a bidder adhere to its bid through an auction process. *See In re Energy Future Holdings Corp.*, 904 F.3d at 313-14.

34. But even if a break-up fee or expense reimbursement would benefit the estate, the Court is not required to approve it. *See id.* at 314 ("We have never held that bankruptcy courts must allow fees whenever they find that [a break-up fee confers a benefit on the estate.]"). The

Court must determine, based on the totality of the circumstances of the case, "whether the proposed fee's potential benefits to the estate outweigh any potential harms, such that the fee is actually necessary to preserve the value of the estate." *Id.* (citing *O'Brien*, 181 F.3d at 535) (quotation marks omitted).

35. The Court cannot award bid protections simply because no one objects. *See In re Reliant Energy Channelview LP*, 594 F.3d at 208-09 ("Clearly, section 503(b) does not give the Bankruptcy Court the authority to award [break-up] fees solely because there is no objection to them from a party-in-interest. That section requires that for fees to be awarded they must be part of 'the actual, necessary costs and expenses of preserving the estate,' and does not suggest that that standard is met merely because there is no objection to the application for the fees.").

36. In addition, Section 105(a) is not a basis to award an administrative expense. *See In re Women First Healthcare, Inc.*, 332 B.R. 115, 120-21 (Bankr. D. Del. 2005).

37. The party requesting a break-up fee has the burden of showing that the fee is actually necessary to preserve the value of the estate. *See O'Brien*, 181 F.3d at 535.

38. In *EFH II*, the United States Court of Appeals for the Third Circuit considered, in the context of a motion to dismiss based upon the sufficiency of the pleading, an unsuccessful bidder's administrative expense application. Initially, the unsuccessful bidder argued that the lower courts erred in measuring whether its bid had conferred a benefit using hindsight (as opposed to measuring the benefit at the time the bid was submitted). *See EFH II* at 743-44. The Third Circuit rejected that argument and concluded that, consistent with the well-established Bankruptcy Code policy of limiting administrative expenses, it was "entirely appropriate to consider" the asserted benefit "through the rearview mirror." *Id.*

39. The unsuccessful bidder in *EFH II* also asserted two potential benefits to the process: that it served as a "stalking horse" bidder, and that its unsuccessful efforts provided a "roadmap" for other viable bids that were later submitted, including the successful bid. *Id*. at 744. The Third Circuit rejected the argument that the unsuccessful bidder had stated a plausible argument for allowance of an administrative expense on a theory that its bid served as a catalyst for the submission of other bids, as it was the only bid at the time it was submitted. *Id.* While the bid did not technically establish a "floor" because the estates ultimately accepted a substantially lower offer after the unsuccessful bid fell through, the Third Circuit found that the argument that the bid had provided a "roadmap" for other bids post-termination was a plausible argument in favor of benefit to the estate. *Id.* at 744-45. The Third Circuit remanded so that a sufficient record could be developed to enable the Bankruptcy Court to determine, in hindsight, the extent to which the unsuccessful bidder's participation had actually benefitted the estate more than it had harmed the estate. *Id.* at 747-48.

40. Here, the Debtors have not carried their burden of establishing that Tiger Finance needs any inducement to credit bid for its own collateral. There is no showing that paying any of the proposed Bid Protection Payments is an actual, necessary expense of preserving the Debtors' estates. There is no suggestion that Tiger Finance is unfamiliar with its collateral or needs to invest significant resources to perform (further) diligence on the Debtors' assets. Tiger Finance was the lender in the Prepetition ABL Loan Agreement, which was an asset-based loan Tiger Finance issued to the Debtors prepetition. Tiger Finance again issued lending to the Debtors as DIP Lender. As outlined above, Tiger Finance will have significant expenses paid by these estates, including lawyers fees, as established in the Interim DIP Order. Tiger Finance is already

fully informed in connection with credit bidding for its collateral without any proposed bid protection payment of any kind.

41. Moreover, Tiger Finance's parent company, Tiger Capital, is already holding the $600,000 Special Purpose Payment as security for proposed amounts payable to Tiger Capital under the Consulting Agreement.

42. If a competing bidder ultimately prevails at auction, then the proceeds of the winning bid would presumably go toward paying down the debt owed to Tiger Finance, thereby benefitting Tiger Finance. Adding any of the proposed Bid Protection Payments to the amount a competing bidder must offer to compete for the assets would only tend to chill potential bids. In the circumstances presented, awarding the Bid Protection Payments to Tiger Finance, an entity that has repeatedly studied and already well knows the Debtors' assets in its repeated roles as lender (which include extending to the Debtors a pre-petition asset-based loan), and to Tiger Capital, an entity already holding the $600,000 Special Purpose Payment, would tend to harm, rather than benefit, the estates.

43. Moreover, Tiger Finance should not be permitted to apply leverage against the estate in its role as Stalking Horse Bidder to obtain the Tiger Capital Payment, as a bid protection, on behalf of its affiliate Tiger Capital in connection with Tiger Capital's role as liquidation consultant under the GOB Motion.

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WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Bid Protection Payments sought in the Motion and grant such other relief as the Court deems appropriate.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 & 9

/s/ Peter J. D'Auria
Peter J. D'Auria
Trial Attorney

Dated: May 28, 2024