

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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In re	:	Chapter 11
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USA SYNTHETIC FUEL CORPORATION, <i>et al.</i> , ¹	:	Case No. 15-10599 (MFW)
	:	
Debtors.	:	(Joint Administration)
	:	
	:	RE: D.I. 6, 56
	X	

**DEBTORS’ REPLY IN SUPPORT OF THE BID PROCEDURES MOTION
[DOCKET NO. 6]**

USA Synthetic Fuel Corporation (“USASF”) and certain of its affiliates, the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), through their undersigned proposed counsel, hereby file this reply (the “Reply”) to the objection (the “Objection”) of Global Energy, Inc. (“Global Energy”) [Docket No. 56] to the *Debtors’ Motion For An Order (I) Approving Procedures In Connection With The Sale Of Certain Of The Debtors’ Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests, (II) Authorizing The Debtors To Enter Into An Asset Purchase Agreement In Connection Therewith, (III) Authorizing The Payment Of Stalking Horse Protections, (IV) Setting Bid Deadline, Auction (If Needed) And Sale Approval Hearing Dates, (V) Establishing Notice Procedures And Approving Forms Of Notice, And (VI) Approving Procedures Related To Assumption And Assignment Of*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each entity’s federal tax identification number, are: USA Synthetic Fuel Corporation (5258); Lima Energy Company (5661); and Cleantech Corporation (6023). The corporate headquarters and the mailing address for each entity listed above is 312 Walnut Street, Suite 1600, Cincinnati, OH 45202.

Executory Contracts And Unexpired Leases (the “Bid Procedures Motion”) [Docket No. 6].² In support of this Reply, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

The Debtors were fortunate to enter these chapter 11 cases with the agreement of the Stalking Horse Bidder to purchase substantially all of the Debtors’ assets. By filing the Bid Procedures Motion, the Debtors seek to create a competitive environment and an open and level playing field that will attract as many potential bidders as possible. The Debtors believe the relief requested in the Bid Procedures Motion will ensure that any sale transaction undertaken pursuant to the Bidding Procedures will provide the highest and best available recovery to the Debtors’ stakeholders.

Global Energy – an entity run by Harry H. Graves, the former executive chairman of Debtor USASF and the former chairman of USASF’s board of directors, among other positions with the Debtors – stands alone among stakeholders and asserts three objections to the Bid Procedures Motion. None has merit. In fact, only one objection addresses the relief requested in the Bid Procedures Motion. This objection, however, is based on Global Energy’s erroneous belief that the Bid Procedures require bidders to bid on all of the Debtors’ assets. As the Bid Procedures expressly permit bidders to submit bids for any subset of the Debtors’ assets, this objection is easily rejected.

Global Energy’s other two objections are properly characterized as objections to the sale of the Debtors’ assets pursuant to the Asset Purchase Agreement and are, therefore, premature because the Debtors are not requesting authority to sell any assets at this time. That being said, these objections are contrary to the Bankruptcy Code, the Asset Purchase Agreement

² All capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Bid Procedures Motion.

and basic fundamentals of business transactions and freedom of contract and should be rejected by the Court.

In an apparent attempt to bolster its meritless objections, Global Energy haphazardly accuses the Debtors and the Stalking Horse Bidder of deception, bad faith and collusion without any support. Indeed, there are no facts to support these spurious accusations because they are contrary to the actual facts.

Accordingly, for the reasons set forth in the Bid Procedures Motion and below, the Objection should be overruled and the Bid Procedures Motion granted.

GENERAL BACKGROUND

1. On March 17, 2015 (the “Petition Date”), each Debtor commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code. The Debtors are operating their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On March 19, 2015, the Court entered an order directing procedural consolidation and joint administration of these chapter 11 cases pursuant to Bankruptcy Rule 1015(b). *See* Docket No. 23.

2. No trustee or examiner has been appointed in these cases. The Office of the United States Trustee did not appoint a creditors’ committee in the Debtors’ cases due to insufficient creditor interest. *See Statement That Unsecured Creditors’ Committee Has Not Been Appointed* [Docket No. 53].

3. The Debtors are an environmentally focused, alternative energy company pursuing clean energy solutions based on gasification and other proven Btu conversion technologies. A full description of the Debtors’ business operations, corporate structure, capital structure, and reasons for commencing these cases is set forth in the *Declaration of Dr. Steven C.*

Vick in Support of First Day Relief (the “Vick Declaration”) [Docket No. 2], incorporated herein by reference.

4. On the Petition Date, the Debtors filed the Bid Procedures Motion. Pursuant to the Bid Procedures Motion, the Debtors seek the entry of the Bid Procedures Order and, following the Sale Hearing, the Sale Order. The Court has scheduled a hearing on April 15, 2015 to consider entry of the Bid Procedures Order.

5. The Debtors provided extensive notice of the Bid Procedures Motion and the April 15th hearing. In particular, the Debtors served a copy of the Bid Procedures Motion and notice of the April 15th hearing on their general service list and the Debtors’ entire creditor matrix. *See Notice of Service* [Docket No. 33]. Furthermore, on March 23, 2015, the Debtors filed a Form 8-K with the U.S. Securities and Exchange Commission disclosing, among other things, the commencement of the Debtors’ chapter 11 cases and the Debtors’ entry into the Asset Purchase Agreement (the “Form 8-K”).³ The Form 8-K summarized the terms of the Asset Purchase Agreement and attached the Asset Purchase Agreement as an exhibit. A copy of the Form 8-K is attached hereto as **Exhibit A**.

BACKGROUND REGARDING GLOBAL ENERGY AND MR. GRAVES

6. As discussed in the Vick Declaration, Global Energy incorporated Debtor USASF in 2009. From that date and until August 2014, Harry H. Graves (“Mr. Graves”) served as executive chairman of USASF and chairman of USASF’s board of directors. From June 2010 through December 2012, Mr. Graves also served as chief financial officer of USASF. He also served as the sole director of Debtor Lima Energy Company, Debtor Cleantech Corporation and

³ The Form 8-K also disclosed the Debtors’ entry into the \$765,970 Secured Superpriority Priming Debtor-in-Possession Term Loan Facility (the “DIP Term Sheet”) and summarized the terms of the DIP Term Sheet. A copy of the DIP Term Sheet was attached to the Form 8-K.

non-debtor affiliate Cleantech Energy Company from the dates these entities were created until August 2014. During all of these time periods, Mr. Graves served as the chairman of the board and president of Global Energy. Global Energy and the Debtors entered in various transactions between 2009 and 2014, including the Existing GEI Note and the Stock Purchase Agreement.

7. As discussed in the Vick Declaration, on July 2, 2014, USASF received a subpoena from the U.S. Securities and Exchange Commission (the “SEC Subpoena”). The SEC Subpoena sought information regarding USASF’s accounting practices and internal controls between 2011 and 2014.

8. Following the initiation of the SEC’s investigation, USASF’s board of directors suspended the duties of Mr. Graves and his wife, Lynne Graves, who was serving as USASF’s corporate secretary and executive vice president, until the resolution of the SEC’s investigation. In August 2014, Mr. Graves retired from all his positions with the Debtors. On March 21, 2015, Brad Davis, a member of USASF’s board of directors, received a letter from Mrs. Graves, backdated to February 27, 2015, resigning from all of her positions with the Debtors.

9. Mr. Graves continues to serve as chairman and president of Global Energy.

10. Based on the most recent information available to the Debtors, Mr. and Mrs. Graves own 39.96% of the common stock of USASF, and the Graves’ three children own 11% of USASF’s common stock through a trust. Thus, they are the largest stockholders of USASF.

REPLY

- A. The Debtors Fully Disclosed All Agreements With Third Eye Capital Corporation And Strative Capital Ltd., And Global Energy's Assertions To The Contrary Have No Merit
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11. Global Energy claims that the Debtors failed to disclose all agreements with Third Eye Capital Corporation ("Third Eye") and Strative Capital Ltd. ("Strative").⁴ Contrary to Global Energy's assertions, the Debtors have fully disclosed all agreements with Third Eye and Strative.

12. As discussed at length in the Vick Declaration, the Debtors are parties to three pre-petition agreements with Third Eye and Strative: (1) the Note Purchase Agreement, (2) the Unit Purchase Agreement and (3) the Royalty Agreement (collectively, the "TEC Pre-Petition Agreements").⁵ The Vick Declaration goes on to describe in great detail the terms of the TEC Pre-Petition Agreements. Moreover, the Debtors' Schedules and Statements of Financial Affairs disclose the TEC Pre-Petition Agreements. *See* Docket Nos. 45-51. Additionally, as USASF is a publicly traded company, the Debtors have made numerous, publicly available filings with the U.S. Securities and Exchange Commission regarding the TEC Pre-Petition Agreements, and the TEC Pre-Petition Agreements were filed as exhibits to such filings.⁶

⁴ The Debtors presume Global Energy is concerned with transactions between the Debtors and Third Eye and/or Strative, rather than any agreements solely between Third Eye and Strative. Even if Global Energy is concerned with the latter, the Debtors are not aware of any relevant agreements between Third Eye and Strative.

⁵ As discussed in the Vick Declaration, the Debtors are also a party to other agreements that are related to the TEC Pre-Petition Agreements. *See* Vick Declaration, ¶¶ 27-35.

⁶ It is puzzling why Global Energy chose to raise this complaint. As discussed above, Mr. Graves was USASF's executive chairman and chairman of USASF's board of directors at the time the Debtors entered into the TEC Pre-Petition Agreements. In fact, Mr. Graves negotiated and signed the TEC Pre-Petition Agreements on behalf of the Debtors.

B. Global Energy's Complaint That The Existing GEI Note Must Be Assumed Under The Asset Purchase Agreement Is, At Best, An Issue To Be Considered At The Sale Hearing

13. Global Energy claims that the Stalking Horse Bidder must agree in the Asset Purchase Agreement to assume the Debtors' liabilities under the Existing GEI Note (as defined in the Objection). As a threshold matter, this objection has nothing to do with the *procedures* that the Debtors should implement to maximize the value of their estates for the benefit of all constituencies. Rather, it is an objection to the proposed sale of the Debtors' assets to the Stalking Horse Bidder and, thus, is not properly before the Court at this time. Indeed, the Asset Purchase Agreement proposed by the Stalking Horse Bidder is subject to higher and better offers, and if the Debtors' receive such an offer, they will seek approval of that alternative agreement at the Sale Hearing. Additionally, Global Energy and Mr. Graves are free to participate in the sale process and submit a bid that assumes the Existing GEI Note.⁷ Accordingly, Global Energy's objection to the terms of the Asset Purchase Agreement is premature and, therefore, should be overruled.

14. More fundamentally, Global Energy's objection is based on an apparent misunderstanding of the principles of business transactions, freedom of contract and the Bankruptcy Code.⁸ As a third-party buyer, the Stalking Horse Bidder has the right to choose which of the Debtors' assets it wishes to purchase and which, if any, of the Debtors' liabilities it wishes to assume. *See Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *6

⁷ On April 7, 2015, the Debtors sent a proposed confidentiality agreement to the attorney for Global Energy and Mr. Graves, and encouraged Global Energy and Mr. Graves to participate in the Debtors' sale process. As of the filing of this Reply, neither Global Energy nor Mr. Graves has executed the confidentiality agreement.

⁸ By filing this Reply, the Debtors are reserving and not waiving any other responses they may have to the objections raised by Global Energy, including, but not limited to, the right to supplement or amend any response contained in this Reply. Furthermore, the Debtors reserve all rights against Global Energy, Mr. Graves and any of their affiliates, related persons and the like.

(Del. Ch. July 23, 2010) (“Delaware law respects the freedom of parties in commerce to strike bargains and honors and enforces those bargains as plainly written.”). The Stalking Horse Bidder validly exercised this right and agreed to assume certain of the Debtors’ liabilities, including the Debtors’ obligations under the TEC Pre-Petition Agreements and certain taxes, contractual obligations and cure costs owing to third parties, among other liabilities.

15. Despite attaching hundreds of pages of agreements to its Objection, Global Energy fails to cite a single provision that would require the Stalking Horse Bidder to deviate from this fundamental principle of freedom of contract and force it to assume the obligations under the Existing GEI Note. Rather, Global Energy contends that because the Subordination Agreement does not expressly subordinate the Existing GEI Note to the Royalty Agreement, if the Stalking Horse Bidder assumes the Royalty Agreement, it must also assume the Existing GEI Note. This argument is based on nothing more than Global Energy’s mere *ipse dixit*, and the Court should reject Global Energy’s transparent attempt to rewrite the applicable agreements.

16. Global Energy also fails to cite any provision of the Bankruptcy Code or any case law to support this argument. Of course, there is no section of the Bankruptcy Code that forces a purchaser of a debtor’s assets to assume any particular liability. Instead, the Bankruptcy Code and Third Circuit precedent expressly authorize a debtor to sell assets free and clear of liabilities. *See* 11 U.S.C. § 363(f); *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003).

17. In an apparent attempt to bolster its meritless objections, Global Energy haphazardly accuses the Debtors and the Stalking Horse Bidder of deception, bad faith and collusion. Global Energy’s spurious accusations are baseless and contrary to the facts. As discussed in the Vick Declaration, the Stalking Horse Purchaser negotiated the Asset Purchase Agreement with the Debtors in good faith and at arm’s length. These negotiations were lengthy,

extensive and conducted while the Debtors pursued a variety of alternative transactions. *See* Vick Declaration, ¶¶ 44-51. Additionally, the Asset Purchase Agreement is subject to the Bidding Procedures whereby other Qualified Bidders are invited to make superior offers. At all times, the Debtors have acted in the best interests of their estates and their various stakeholders, and in accordance with their business judgment to maximize value and enhance recoveries for all parties in interest.

C. Similarly, Global Energy's Complaint Regarding Any Equity Interest It May Have Pursuant To The Stock Purchase Agreement Is, At Best, An Issue To Be Considered At The Sale Hearing

18. Global Energy asserts that the Debtors must modify the Asset Purchase Agreement to disclose that the Acquired Assets do not include Global Energy's ownership of a "50% interest in GAS 1." *See* Objection, p. 4. Contrary to Global Energy's assertions, the Asset Purchase Agreement clearly states that the Debtors are not selling what they do not own, including any interest that may be owned by Global Energy. Specifically, the definition of Excluded Assets provides in relevant part as follows:

Notwithstanding anything to the contrary in this [Asset Purchase Agreement], the Acquired Assets are the only properties, rights and assets transferred to, or otherwise acquired by, Buyer under this Agreement. Without limiting the generality of the foregoing, the Acquired Assets do not include (i) any right, title, or interest of any Person other than Sellers in any property or asset (ii) the properties and assets of Sellers listed or described below in this Section 1.2 (all properties and assets not being acquired by Buyer are herein collectively referred to as the "Excluded Assets"):

Asset Purchase Agreement, § 1.2 (emphasis added).

19. Furthermore, the definition of Excluded Assets specifically states that the Debtors are not selling "the stock and any other equity interests or securities, including promissory notes, issued by each Subsidiary." *See id.* at § 1.2(k). The Asset Purchase Agreement defines the term "Subsidiary" to include Lima Energy Company. *See id.* at Recitals. These provisions should not

be a surprise to Global Energy, as the Debtors are proposing to sell their assets and not any equity issued by the Debtors.

D. The Bidding Procedures Permit Bidders To Submit Bids For All Or A Portion Of The Debtors' Assets

20. Global Energy contends that the Bidding Procedures do not allow bidders to bid separately on the "Coal Asset" and the "Lima Asset." *See* Objection, p. 4.⁹ Contrary to Global Energy's assertions, the Bidding Procedures expressly allow bidders to bid on whichever assets they choose.

21. Pursuant to the Asset Purchase Agreement, the Stalking Horse Bidder is acquiring the Bid Assets, which includes, among other things, the Coal Asset and the Lima Asset. The Bidding Procedures allow bidders to submit bids on all or a portion of the Bid Assets. In particular, the Bidding Procedures provide in relevant part as follows:

The Bid shall propose a contemplated transaction involving substantially all the Bid Assets and Assumed Liabilities under the Asset Purchase Agreement, and shall contain substantially all of the material terms and conditions contained in the Asset Purchase Agreement, provided, however, that any variations from one or more material terms (*including, but not limited to, an offer to purchase less than substantially all the Bid Assets*) must, in the aggregate constitute an improvement, as determined by Seller, upon such term or terms as set forth in the Asset Purchase Agreement.

See, Bidding Procedures, p. 4 (emphasis added).

22. Furthermore, the Bidding Procedures permit the Debtors to aggregate multiple bids when determining the highest and best bid for the Debtors' assets. *See* Bidding Procedures, pp. 8-9.

⁹ In the Objection, Global Energy uses the term "Lima Asset," however, that is not a defined term in the Asset Purchase Agreement. The Debtors presume Global Energy is referring to the Debtors' real property located in Lima, Ohio.

23. Therefore, the Bidding Procedures expressly allow the flexibility that Global Energy claims is lacking. Accordingly, Global Energy's objection is based on a misreading of the Bidding Procedures and should be overruled.

CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court: (a) overrule the Objection; (b) enter the Bidding Procedures Order; and (c) grant such other and further relief to the Debtors as the Court may deem proper.

Dated: April 10, 2015
Wilmington, Delaware

Respectfully submitted,

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Andrew R. Remming

Robert J. Dehney (No. 3578)

Andrew R. Remming (No. 5120)

Matthew R. Koch (No. 6048)

1201 N. Market St., 16th Flr.

PO Box 1347

Wilmington, DE 19899-1347

Telephone: 302-658-9200

Facsimile: 302-658-3989

rdehney@mnat.com

aremming@mnat.com

mkoch@mnat.com

*Proposed Counsel for Debtors
and Debtors in Possession*

9052033