IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: MTE Holdings LLC, *et al.*, Debtors.	Chapter 11 Case No. 19-12269 (CTG) Jointly Administered **Related Docket No. 2239**

MEMORANDUM OPINION[1]

The debtors conducted an auction for the sale of substantially all of their assets.[2] At the conclusion of the auction, the debtor declared the bidder that made the highest and best offer as the successful bidder. The debtor declared the bidder that made the second-best offer as the backup bidder. Under the terms of the bid procedures order, both the winning bidder and the backup bidder were required to increase the deposits that they had made to ten percent of the cash portion of their final bid.

The winning bidder refused to increase its deposit as the order required. The backup bidder then brought this motion to enforce the bid procedures order. The relief it seeks is either to be declared the winning bidder or to recover damages against the estate on account of losses it claims to have suffered that it says are traceable to the alleged violations of the bid procedures order.

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[1] This Memorandum Opinion sets out the Court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, as made applicable to this contested matter under Fed. R. Bankr. P. 9014(c).

[2] The debtors in these cases, MTE Holdings, LLC, MDC Energy LLC and MDC Texas Operator, LLC, are referred to collectively as "the debtors."

The motion will be denied. The bid procedures order expressly gives the debtor the right to waive the strict enforcement of the order's terms. That is what the debtor has done. The backup bidder also contends that the winning bidder was never a "qualified bidder" and thus was not entitled to participate in the auction in the first place. That argument is unsuccessful. At least in the first instance, the question of which bidders are qualified is left, under the bid procedures order, to the discretion of the debtor (in consultation with its key constituencies). Nothing in the testimony that the backup bidder proffered provides any reason to question the parties' judgment in that regard. Finally, the backup bidder's argument that it is entitled to damages on account of statements made at the auction by the agent bank under a credit facility also fails. Even if the statements by the agent were inconsistent with the order – and as described below, there is good reason to believe that they were not – a violation of the order by the agent would give rise to a claim by an injured party against the agent. The backup bidder is incorrect to argue that such a violation by the agent would give rise to an administrative claim against the estate, which is the only relief the backup bidder seeks on account of the alleged violation.

Factual and Procedural Background

The debtors, which are in the oil and gas exploration, drilling and development business, filed for bankruptcy protection in October 2019.[3] These cases have been challenging and contentious. The three principal creditor constituencies – the lenders

[3] The lead debtor in these cases, MTE Holdings, LLC, filed its petition on October 22, 2019. It is referred to as "MTE Holdings." MDC Energy LLC and MDC Texas Operator, LLC, each a subsidiary of MTE Holdings, LLC, filed their petitions on November 8, 2019. They are referred to, respectively, as "MTE Energy" and "MTE Texas Operator."

under a reserve-based credit agreement issued to Debtor MDC Energy, represented by Natixis, as administrative agent;[4] the lenders under a term loan credit agreement issued to Debtor MTE Holdings, represented by Riverstone;[5] and a group of service providers who assert that they hold liens arising under Texas state law – have been engaged in a series of disputes with each other and with the debtors. The disputes have included motions to displace the debtor's management through the appointment of a chapter 11 trustee, motions seeking relief from stay to permit creditors to foreclose on assets that are critical to the debtors' business, repeated threats to cut off the debtor's access to cash collateral needed to fund these bankruptcy cases, and litigation over the priority of creditors' liens.[6]

1. The bid procedures order

One point on which the principal parties appear to agree is that the path to maximizing the value of the debtors' estates is a going-concern sale of substantially all of the debtors' assets. In September 2020, the debtors moved to establish procedures for such a sale. D.I. 1546. After the parties worked out various matters

[4] Natixis, New York Branch, as Administrative Agent under a prepetition credit facility agreement, is referred to as "Natixis."

[5] Riverstone Credit Management, LLC, is referred to as "Riverstone."

[6] *See, e.g., Motion of Natixis, New York Branch for an Order (I) Appointing a Trustee Pursuant to Section 1104(a) of the Bankruptcy Code, or (II) in the Alternative, Appointing an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code* [D.I. 71]; *Joint Motion to Lift Stay to Pursue Statutory Mechanics' and Materialmen's Claims Against Non-Debtor Working Interest Owners* [D.I. 1975]; *Drillchem Drilling Solutions, LLC's Motion to Lift Stay to Pursue Statutory Mechanics' and Materialmen's Claims Against Non-Debtor Working Interest Owners* [D.I. 1986]; *NOV's Motion to Lift Stay to Pursue Statutory M&M Lien Claims Against Non-Debtor Working Interest Owners* [D.I. 1993]; *Debtors' Emergency Motion for Entry of an Order (I) Authorizing the Use of Cash Collateral for Certain Limited Expenses; (II) Providing Adequate Protection to the Prepetition Secured Parties; and (III) Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 507* [D.I. 2034].

regarding the conduct of the proposed auction, the Court entered an agreed order, in October 2020, setting forth the procedures for the conduct of the auction and matters relating to the potential sale. D.I. 1677. The bid procedures themselves were set out in detail in Exhibit 1 to the order. D.I. 1677-1.

The bid procedures provided for in that order are similar to the kinds of procedures that are common in large chapter 11 cases.[7] The key features of the auction the order contemplated are as follows:

- Potential bidders were asked to submit non-binding indications of interest by September 25, 2020. D.I. 1677-1 at 2, 5. Upon the execution of a confidentiality agreement, a potential bidder could obtain access to due diligence materials maintained in an electronic data room. *Id.* at 4-5.

- The deadline to submit a bid was November 6, 2020. *Id*. at 2, 10.

- The debtors would announce a stalking horse bidder, if they selected one, by November 12, 2020. *Id.* In the event such a stalking horse bidder were selected, the order provided that the debtors would separately seek court approval of the stalking horse bidder, the form of stalking horse agreement, and any bid protections that would be provided to the stalking horse bidder. *Id.* at 2-3.

- In order to be a "qualified bidder," the order required that the bidder: (a) submit documentation identifying the entity that was the bidder as well as its principals, investors, and representatives; (b) deliver an executed confidentiality agreement; and (c) "demonstrate an ability and the financial wherewithal, as determined by the Debtors, in consultation with the consultation parties,[8] to consummate" the transaction contemplated by the bid. *Id.* at 3.

[7] This Court's Rule 6004-1 sets forth certain provisions, including many of those contained in the bid procedures order here, that must be highlighted when included. *See also In re Family Christian, LLC*, 533 B.R. 600, 607-608 (Bankr. W.D. Mich. 2015) (Gregg, J.) (describing bid procedures order containing similar terms).

[8] The "consultation parties" were representatives from each of the debtors' three principal creditor constituencies, subject to the caveat that if any of those entities were itself a bidder, it would not be included as a consultation party. D.I. 1677-1 at 19.

- A "qualified bid" would need to be from a qualified bidder and must expressly state that it is to be irrevocable until the closing of the sale transaction and that the bidder agrees to serve as the backup bidder if the bid is selected as the next highest bid after the successful bid. *Id.* at 6. A qualified bid also needed to be accompanied by a cash deposit of ten percent of the cash purchase price. *Id.* at 8.

- The auction itself would take place, if the debtors received multiple qualified bids, on November 13, 2020. *Id.* at 2.

- The debtors were to determine, in consultation with their legal and financial advisors, as well as the consultation parties, which of the qualified bids would be deemed the initial highest bid. The debtors would make commercially reasonable efforts to disclose to all of the auction participants the value that they placed on the initial highest bid. *Id.* at 11. In deciding which bid was "highest and best," the bid procedures order contemplated that the debtors would take account not only of the cash consideration, but also the obligations the buyer would assume, costs associated with the assumption or rejection of executory contracts, the likelihood that the bidder would be able to close on the proposed transaction, and other similar considerations that would affect both the net value the estate would obtain by the transaction and the likelihood that it would, in fact, obtain it. *Id.* at 12-13.

- Secured creditors would be entitled to credit bid for the purchase of their collateral. But if Natixis was going to credit bid, it was required to inform the debtors of that fact at least two days before the auction. And if Natixis did decide to participate in the auction as a bidder, it would have to forego its right to participate as a consulting party. *Id.* at 11-12. As counsel for the debtor explained the point at the hearing on approval of the bid procedures, Natixis' "consent rights will exist provided that the RBL lenders are not credit bidding. Of course, if they are credit bidders, it would not be a level playing field if they also had consent rights over a process that they were participating in." Oct. 13, 2020 Hearing Tr. at 13.

- The auction itself would be transcribed. D.I. 1766 at 13. *See also* Local Rule 6004-1(c)(ii)(D). The debtors would formally announce the initial highest bid at the beginning of the auction. Subsequent bids were required to be made in increments of at least $500,000. *Id.* at 14. No party may skip a "round" of bidding. To remain in the auction, each qualified bidder was required to submit a bid that was higher and better than the immediately preceding bid. *Id.*

- The auction was to be conducted openly, and auction participants were to be informed of the terms of the pending highest and best bid. The debtors were to review each bid and, in conjunction with its advisors and the consultation parties, determine the value to be placed on items of non-cash consideration in order to provide the participants in the auction with the debtors' assessment of how bids that included different non-cash terms compared on an apples-to-apples basis. *Id.* at 15.

- The "successful bidder" and a "backup bidder" would be announced by November 17, 2020. *Id.* at 2.

- Within one day of the conclusion of the auction, the successful bidder and the backup bidder were required to increase their deposits to ten percent of the successful bid and the backup bid, respectively.

- The sale itself would be subject to court approval at a later hearing. *Id.* at 16. (Though the order also contemplated the possibility that the parties would seek approval of the sale under a plan of reorganization, *see* D.I. 1677 at 17.) The entry of the bid procedures order accordingly did not purport to bar any party from raising objections (other than those based on the propriety of the bid procedures themselves) from objecting either to a motion to approve the sale under section 363 or to a plan of reorganization under which such a sale was to be approved.

- If the successful bidder closed on the sale as approved, the backup bidder's deposit would be returned on the earlier of (a) five days after the closing of the sale or (b) 90 days after approval of the sale. D.I. 1677-1 at 17.

- The debtors were entitled, in their business judgment and after consulting with the consultation parties, to, *inter alia*, (a) determine which parties were qualified bidders, (b) waive the terms of the bid procedures, or (c) modify the procedures or impose, at or before the auction, additional terms or conditions for conducting the auction. *Id.* at 18.

2. The auction

Prior to the auction, the debtors received bids that they deemed qualified from three bidders: Maple, Chato, and HEXP Resources, LLC. Auction Tr. at 19.[9] The

[9] Maple Energy Holdings, LLC is referred to as "Maple." Maple is an affiliate of Riverstone. Chato Energy, LLC is referred to as "Chato." Chato is an affiliate of Arena Investors, LP. HEXP Resources, LLC is referred to as "HEXP." The transcript of the auction, referred to as

debtors adjourned the auction several times, as paragraph 14 of the bid procedures order permitted. D.I. 1677, ¶ 14. The auction occurred on March 5, 2021, and was conducted by Neil Augustine from Greenhill & Co., the debtors' financial advisor and investment banker. While the debtors did not select a stalking-horse bidder (or otherwise seek to provide any participant in the auction with bid protections), the auction began with the debtor announcing that it had designated HEXP as the initial highest bidder. The debtor thereafter shared the HEXP bid and the proposed asset purchase agreement with the other parties. Auction Tr. at 13.

Natixis did not indicate an intent to credit bid at the auction and was thus attending as a "consultation party." Its representative made the following statement before the auction began:

> Before we commence the auction, we want to thank everyone for their participation, but we did want to place some reservations of right on the record on behalf of the Agent for and on behalf of the lenders that we believe are consistent with discussions with the Debtors as recently as yesterday.
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> So the Agent would like to reserve the following rights with respect to the occurrence of the auction today. For purposes of today's auction, the Agent's reserving its right to participate as a consulting party as that term was defined in the bid procedures order entered in these cases. And as such, and in connection with being a consulting party, the Agent's reserving its right regarding the Debtors' selection of any winning bidder coming out of today's auction that the Debtors may select.
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> …
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> And, finally, to the extent that today's auction does not produce a bid that's otherwise acceptable to the Agent on behalf of the lenders, the Agent is fully reserving its right to continue the credit bid for the assets,

"Auction Tr.," is attached as Exhibit 1 to the *Debtors' Objection to Chato Energy, LLC's Motion to Enforce the Bidding Procedures Order* [D.I. 2295].

> again, only to the extent the auction does not produce [a] bid acceptable to the Agent.

Auction Tr. at 17-18.

Thereafter, Augustine stated (on behalf of the debtors) that each of the three bidders participating in the auction were deemed "qualified" bidders and that each had placed the deposit that the bid procedures order required – ten percent of the cash portion of their initial bid. *Id.* at 19. He then summarized how the auction would be conducted:

> We're going to go initially with increments of [$]500,000. Pretty straightforward given we don't have a [stalking horse] so we're not dealing with any breakup fee or any expense reimbursement. So this will be straight up along the way at $500,000 increments. Per the bid procedures, we do reserve the right to change those increments at any point in time.
>
> When you get up to bid, other than stating that you have not engaged in any level of collusion, what I would like you to state is what your bid is in terms of forming consideration, the total amount of that bid. I'd like you to state what the total consideration is. I'd like you to state any liabilities that you're assuming pursuant to your bid. And I'd like you to state any material changes that you're requiring per your bid off of the HEXP APA given that that is our opening bid.

Auction Tr. at 21-22.

Augustine then explained that HEXP's bid was to purchase the MDC Energy operating assets for $56.3 million. HEXP would not acquire the company's cash or accounts receivable. Augustine also described adjustments to value of the bid based on the proposed effective date of the transaction and other provisions of the proposed agreement. Augustine concluded that Debtors viewed the net value of the proposed transaction to be $63.5 million. *Id.* at 24-25. A representative of HEXP confirmed those bid terms. *Id.* at 26.

Augustine then turned to Chato in order to offer it the opportunity to top HEXP's bid. Chato's counsel then set out the terms of its bid. While Chato's bid involved a lower cash payment ($40.5 million), it included a promissory note for $5 million, a royalty payment, and a later effective date. *Id.* at 26-30. After taking account of other adjustments on account of assumed liabilities, discounting the value of the promissory note, and other matters, Augustine said that the debtors placed a net value on Chato's bid of about $67.8 million, which exceeded the HEXP bid by around $4.3 million. *Id.* at 39-41.[10]

Augustine thereafter turned to Maple, whose counsel set out the terms of its proposed bid, which was for $57.3 million in cash, but also included the purchase of MDC's non-operating assets and involved other assumed liabilities. *Id.* at 41-42. Augustine explained that the debtors' placed a total net value on the Maple bid of $85.7 million, which was about $18 million more than the Chato bid. *Id.* at 46-48.

HEXP determined that it would not top the Maple bid, and thus withdrew from the auction. *Id.* at 52. Chato similarly declined to increase its offer. *Id.* at 53. Augustine thereafter stated that the debtors would declare Maple as the winning bidder and Chato as the backup bidder. *Id.* at 66. Augustine then asked both Maple and Chato to confirm that they would, as the bid procedures order required, increase their deposits to ten percent of the cash portion of their bids. For Maple, Augustine said that this would require it to increase its deposit from $100,000 to $6.7 million.

[10] Note that the Debtors' Disclosure Statement indicates that the Chato bid was about $500,000 less than the figure cited above, which is contained in the auction transcript. *See* D.I. 2257 at 31. That discrepancy is not material to any dispute before this Court.

Id. And for Chato, Augustine said that it was required to increase its deposit from $3.5 million to about $5.6 million. *Id.* at 67.

While counsel for Maple originally indicated that his client would increase its deposit as Augustine requested, *id.* at 66, Chato's counsel indicated that it was not "prepared to wire any additional escrow." *Id.* at 67. When Augustine objected that the bid procedures order required Chato to do so, counsel for the debtors noted that "it's Friday and deposits are not due until Monday," and said that he would "look at the bid procedures and we can caucus before then." *Id.*

After Augustine thanked the bidders and other parties-in-interest for their participation, counsel for Natixis further reserved its rights:

> [T]he agent and the lenders have not consented to it, to the selection of the winning bidder or the backup bidder, because we have not seen final documentation and because there's been no agreement as to the amounts to be paid to the RBL lenders…. [T]he RBL lenders and the agent continue to reserve all of [their] rights, including [their] rights to object to both the winning bid and the backup bid and their selection, and they reserve their right to credit bid at this point.

Id. at 69-70.

After hearing that reservation of rights, counsel for Maple noted that it would, in turn, "have to reserve as it relates to … the additional requests for deposits." *Id.* at 70. Augustine protested that the increased deposit from Maple is "going to be critical given you guys only have a [$]100,000 deposit, given your prior bid structure, … so that's a material consideration," *id.* at 70-71. Maple's counsel responded that "[w]e understand, but you also understand, of course, [Natixis'] position that [its counsel] just outlined on the record." *Id.* at 71. The auction then concluded.

3. Subsequent developments in the bankruptcy case

Negotiations among the parties continued thereafter. At a hearing on March 30, 2021, counsel for the debtor explained that the issue that was holding up progress in the case was that the proposed asset purchase agreement would require the debtor to assume and assign to Maple a contract with Luxe Operating, LLC, one of the debtor's counterparties.[11] That contract required the debtor to indemnify Luxe for any claims that might be asserted against it under Texas law by materialmen who had done work on wells in which Luxe held a working interest, and whose claims remained unpaid. Assumption and assignment of that contract would require that any existing defaults be cured. *See* 11 U.S.C. § 365(b)(1)(A). Maple, however, was unwilling to take on the full cure costs associated with the assumption of the Luxe contract, as its bid had otherwise contemplated, asserting that it was unaware of the exposure to Luxe when it made its bid. And while Maple's failure to proceed with the transaction could force it to forfeit its deposit, counsel for the debtor explained that Maple had only posted a deposit of $100,000. Mar. 30, 2021 Hearing Tr. at 13. Debtor's counsel reported that the parties had recently agreed to engage in mediation in an effort to resolve the issue. *Id.* at 14. Implicit in the debtors' statement that they intended to seek to resolve the dispute through mediation is that they had formed the business judgment that pursuing that path (with the potential of obtaining a consensual resolution) was better for the estate than the alternative

[11] Luxe Operating, LLC is referred to as "Luxe."

litigation route – bringing an immediate motion to enforce the bid procedures motion to require Maple to post the additional deposit.

Over the subsequent weeks, the parties made progress in the mediation. At a hearing on April 27, 2021, counsel for the debtor indicated that the key parties had "coalesced around a frame" for a resolution, but that the "deal remains fragile." Apr. 27, 2021 Hearing Tr. at 11. But as sometimes happens as parties seek to resolve complex and hotly-contested matters, the path towards resolution was bumpy. At a hearing on June 4, 2021, the debtors reported that the "fragile" deal was close to falling apart. Specifically, Debtors' counsel reported that three months after the auction, Maple still had not increased its deposit from the $100,000 it originally posted. June 4, 2021 Hearing Tr. at 5. As a result, the RBL lenders, led by Natixis "have now definitively told us that unless Riverstone puts [up the required] deposit they will no longer negotiate and they're not going to fund the estate to allow the debtors to negotiate." *Id.* at 7.

Notwithstanding that apparent impasse, however, two weeks later, on June 18, 2021, the debtors filed a plan of reorganization, D.I. 2256, which counsel for the debtor explained, at a June 21, 2021 hearing, reflected settlements of disputes between the RBL lenders and the statutory lienholders, as well as a settlement of the Luxe dispute. June 21, 2021 Hearing Tr. at 11-12. Moreover, counsel for the debtor reported that Maple had increased its deposit to ten percent of its purchase price immediately before the filing of the plan.

In its motion, filed on June 17, 2021, Chato contends that in the period of time after the conclusion of the auction, in light of the then-ongoing uncertainty regarding the course of the bankruptcy case, it received an inquiry from "a broker looking for participants to invest in a transaction aimed at closing the Debtor's sale." D.I. 2239 at 8. Chato contends that all of this occurred because Maple either was not a "qualified bidder" or because it refused to increase its deposit, and that the time and energy it spent in addressing such inquiries constitute damages it suffered as a result of the violation of the bid procedures order. July 12, 2021 Hearing Tr. at 49, 54. While Chato proposed to put on evidence at the hearing that it contended would support those allegations, this Court determined to exclude that evidence on the grounds that (for the reasons set forth below) those facts would not be material to the disposition of this motion. *Id.* at 58-59, 63-64.

In its opposition to the motion, the debtor represented that it would be prepared to return Chato's deposit if Chato would drop its claim seeking to recover damages from the estate. D.I. 2295 at 1. At the July 12, 2021 hearing, however, Chato made clear that it was rejecting that offer and determined to press forward with its motion. July 12 Hearing Tr. at 60-63.

Jurisdiction

This Court has subject-matter jurisdiction over the motion under 28 U.S.C. § 1334(b). This is a core matter under 28 U.S.C. § 157(b).

Analysis

While the Bankruptcy Code requires court approval of a sale of estate property outside the ordinary course of a debtor's business, 11 U.S.C. § 363(b)(1), it does not

by its terms require an auction.[12] In order to ensure that the bankruptcy estate in fact obtains the highest and best value for its assets, however, public auctions are a common feature of chapter 11 practice.[13]

The Second Circuit has commented on the "difficult balancing act a bankruptcy court must perform when it conducts an auction of the debtor's assets," which requires it to "walk a tightrope between, on the one hand, providing for an orderly bidding process, recognizing the danger that absent such a fixed and fair process bidders may decline to participate in the auction, and on the other hand, retaining the liberty to respond to differing circumstances so as to obtain the greatest return for the bankruptcy estate."[14]

It bears note, however, that although the Second Circuit described the "balancing act" as one performed by the bankruptcy court – and while there are jurisdictions in which public auctions are performed by the court itself – the typical practice in this jurisdiction, for good and sound reason, is for the debtor to conduct the auction. As commentators have observed, "many bankruptcy judges believe they should not be involved in auctions and allow the debtor to conduct the auction outside the presence of the judge. These judges believe that they should limit their involvement in the case to ruling on legal disputes, as opposed to becoming involved

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[12] Indeed, Federal Rule of Bankruptcy Procedure 6004 expressly provides that a sale may be "by private sale or public auction." Fed. R. Bankr. P. 6004(f)(1).

[13] *See generally* James H.M. Sprayregen and Jonathan Friedland, *Legal Considerations of Acquiring Distressed Businesses: A Primer,* 11 Journal of Bankruptcy Law and Practice 3, at *8 (November/December 2001) ("private sales generally are disfavored in the bankruptcy context").

[14] *In re Financial News Network Inc.*, 980 F.2d 165, 166 (2d Cir. 1992).

in the actual administration or operation of the debtors' estate."[15] Indeed, this view is certainly in keeping with a central purpose of the Bankruptcy Reform Act of 1978, which sought to separate the administrative functions of bankruptcy courts from the judicial tasks, "leaving the bankruptcy judges free to resolve disputes untainted by knowledge of administrative matters unnecessary and perhaps prejudicial to an impartial judicial determination." H.R. Rep. No. 764, 99th Cong., 2d Sess., *as printed in* 1986 U.S.C.C.A.N. 5230, 5241.

Accordingly, at least in this Court, the judgment about how much flexibility ought to be retained is typically exercised by the debtor, which will propose bid procedures that retain more or less flexibility to change the terms of the auction based on how it strikes the balance between providing comfort to potential bidders that strict rules will be enforced and retaining discretion to change course as events unfold. An order that contains more rigid requirements that will be enforced by the court may send a signal to the market that the waters are safe for swimming. An order that leaves the debtors a great deal of discretion provides the debtor more flexibility to make real time decisions to address developments in sometimes fluid circumstances. Generally speaking, courts will defer to the debtor's exercise of business judgment on how to strike that balance, so long as it reflects a considered judgment about the best interests of the estate.[16] Once that decision is made and bid

[15] Sprayregen and Friedland, 11 Journal of Bankruptcy Law and Practice at *10.

[16] *In re Filene's Basement, LLC*, No. 11-13511, 2014 Bankr. LEXIS 2000, at *39-40 (Bankr. D. Del. Apr. 29, 2014) (citing *In re MF Global*, 467 B.R. 726, 730 (Bankr. S.D.N.Y. 2012) ("Where the debtor articulates a reasonable basis for its business… courts will generally not

procedures are approved by order of the court, however, a bid procedures order is enforceable like any other court order.

As further described below, Chato's motion to enforce the order suffers from three basic analytic flaws. *First*, the premise of Chato's motion is that the bid procedures order is essentially a contract between the debtors and the participants at an auction. To the extent a party violates the order in a way that imposes burden or expense on another party, Chato believes that the "injured" party can assert an administrative claim against the estate.[17] That, however, is not the law. Rather, an order approving bid procedures is an order of the court.[18] Violations of the order, like violations of any court order, can be enforced by the court through its power to sanction violators.[19] In the bankruptcy context, that authority is likely codified in 11

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entertain objections to the debtor's conduct…[and] a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate.")).

[17] *See* D.I. 2239 at 11 ("the Debtors have breached their agreement (as set forth in the Bid Procedures Order circulated to all bidders and parties in interest), and therefore are liable to harmed parties, with the damages caused considered administrative expense of the Debtors' estate"); July 12, 2021 Hearing Tr. at 57 (counsel for Chato arguing that there has been "a default on the bid procedures order" and that "parties that rely [on an order of the court] and are damaged are entitled to claims").

[18] *See, e.g., Zamias v. Fifth Third Bank*, No. 3:17-cv-153, 2018 WL 3448160, (W.D. Penn. July 17, 2018) ("a court order is not a contract"); *Ketab Corp. v. Mesriani Law Grp.,* No. CV 14-07241-RSWL-MRWx, 2016 WL 5920291, at *9 (C.D. Cal. Jan. 29, 2016) ("a Settlement Order is not a contract, but, rather, a court order."); *Cavadi v. Bank of Am., N.A.*, No. 07-cv-244-PB, 2008 WL 901403, at *3 (D.N.H. Apr. 1, 2008) ("the court order was a court order, not a contract," therefore "the appropriate method for dealing with a party's alleged violation of a court order is not to seek contract damages … but rather to [seek sanctions for the violation]").

[19] *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 831 (1984); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

U.S.C. § 105(a).[20] A motion to enforce a court order, however, should be brought against the party that has allegedly violated the order. To the extent a party other than the debtor violated an order of the court, there is no reason that such a violation should give rise to an administrative claim against the debtor's estate.

Second, Chato's motion fails to grapple with the very substantial discretion that this bid procedures order gives to the debtors. The order says expressly that the debtors may determine which bidders are qualified, D.I. 1677-1 at 3; that the debtors have the authority to waive the terms and conditions set out in the bid procedures, *id.* at 18; and that the debtors may extend any of the deadlines set out in the procedures. *Id.* As the Second Circuit observed in *Financial News Network*, a less elastic set of bid procedures might have provided potential bidders greater confidence in how the auction would be conducted and thus generated greater interest in the auction. But doing so would have tied the debtor's hands. Here, Chato chose to participate in this auction notwithstanding the flexibility the bid procedures afforded the debtor. Notwithstanding the terms of the order, an argument could be made that a bankruptcy court would retain a residual authority to grant relief if doing so were necessary to protect the basic fairness and integrity of the auction process, and by extension the sale the bankruptcy court would ultimately be asked to approve. But

[20] *See Law v. Siegel*, 571 U.S. 415, 420-421 (2014) ("A bankruptcy court has statutory authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11] … and may also have the "inherent power…to sanction 'abusive litigation practices.'") (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375-376 (2007)*; see also In re Ross*, 858 F.3d 779, 783 (3d. Cir. 2017) (same); Adam Levitin, *Towards a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L. J. 1, 7 (2006) ("Bankruptcy Acts specifically gave bankruptcy courts enforcement powers equal to those sitting in courts of equity.").

whatever the scope of that residual authority may be, there is no suggestion that the circumstances here provide reason to exercise it.

Third, Chato fails to appreciate that certain of the provisions it seeks to enforce, such as the requirement that the successful bidder increase its deposit to ten percent of the cash portion of its winning bid, are ones that are intended to protect the estate rather than to protect other bidders. It is a familiar maxim of bankruptcy law that a disappointed bidder lacks standing to challenge a sale except for matters relating to the fundamental fairness of the process. And while, as described below, the vocabulary of "standing" may have been overtaken by developments in the law, the basic principle still holds. Chato is thus unable to assert a claim arising out of Maple's failure to increase its deposit.

I. At least in the absence of exceptional circumstances, the court will not second guess the debtor's determination of a bidder's qualifications.

Chato contends that Maple "did not meet the requirements to qualify as a Qualified Bidder as defined by the Bid Procedures Order." D.I. 230 at 2. Chato further contends that the fees it incurred for counsel and other consultants are "damages" that are caused by the violation of the order. Chato's theory is that had Maple been a "qualified bidder," the transaction would have proceeded to close promptly, and Chato would not have been approached by a broker that was apparently seeking to put together an alternative to the proposed sale to Maple, leading Chato to spend money on lawyers and consultants. *Id.* at 7.

The argument that Maple was not a "qualified bidder" fails on the merits. The order leaves the question of which bidder was "qualified," at least in the first instance,

to the discretion of the debtor.[21] While the debtor's ordinary exercise of its business judgment in connection with an asset sale is of course subject to review (though a deferential one) by the bankruptcy court,[22] any role in superintending the details of how the auction is administered must come from either (a) the terms of the procedure order, or (b) perhaps in exceptional cases, a residual authority to protect the fundamental integrity of the bankruptcy process.[23]

There is nothing in the language of the order itself that would provide a reason to second guess the judgment of the debtor and the consultation parties. To the contrary, the order leaves the question of which bidders are qualified to their discretion. Paragraph six of the bid procedures provides that "[t]he debtors, in consultation with the Consultation Parties, shall determine whether a competing bid that meets the above requirements constitutes a Qualified Bid." D.I. 1677 at 30. In addition, paragraph 20(a) of the bid procedures gives the debtors the express authority, in their reasonable business judgment, to "(i) determine which bidders are

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[21] For this reason, the testimony that Chato proposed to present at the hearing that, it was argued, would tend to demonstrate that Maple was not a qualified bidder would not have been material to the disposition of this motion. Even accepting as true the testimony that Chato proffered, Chato would not be entitled to relief. In view of the concern that such testimony might have been prejudicial to Maple's business interests, and because the Court concluded that such testimony was immaterial to this dispute, the Court determined not to permit the presentation of the proffered testimony. July 12, 2021 Hearing Tr. at 91. *See also* Fed. R. Evid. 401(b), 403.

[22] *See, e.g., In re Extraction Oil & Gas*, 622 B.R. 608, 620 (Bankr. D. Del. 2020) (explaining in the context of a debtor's decision-making, "business judgment" means the debtor "explored their options, thought through the alternatives, and made a rational decision based on the information available.").

[23] *See In re Food Barn Stores, Inc.*, 107 F.3d 558, 562 (8th Cir. 1997) ("we reject any intimation that a bankruptcy court should prequalify bidders before conducting a sale of the estate's property").

Qualified Bidders [and] (ii) determine which bids are Qualified Bids". D.I. 1677-1 at 20. Fairly read, this language leaves it to the debtors and the consultation parties to decide which bidders have submitted a qualified bid.[24]

But even taken for all that it may be worth, none of that excludes the possibility that a court could take appropriate action to address conduct in an auction that was profoundly unfair or prejudicial. After all, a bankruptcy court always has authority to amend an interlocutory order (such as one approving bid procedures) if circumstances required such action to protect the integrity of the bankruptcy process.[25] But nothing in Chato's motion or in the testimony that it proffered provides even a hint of the kind of conduct that would warrant such relief. The Court accordingly will not second guess the judgment of the debtor and the consultation parties regarding Maple's qualification to participate in the auction.

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[24] The Administrative Procedures Act is in some sense analogous. Despite the general authority the APA gives to courts to review agency action, there is an exception for "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 501(a). *See generally Heckler v. Chaney,* 470 U.S. 821 (1985). Where a statute authorizes an agency to take (or refrain from taking) action based on its own subjective judgment, courts will find that the statute intended to commit the matter to the agency's discretion, rather than subject to judicial review. *See, e.g., Webster v. Doe*, 486 U.S. 592 (1988) (where statute authorized director of the CIA to terminate an employee where the director "shall deem it necessary or advisable," APA did not permit judicial review of the decision to terminate). The bid procedures here define a "qualified bidder" as being, among other things, one that the debtors have determined has the "financial wherewithal" to consummate a transaction. D.I. 1677-1 at 3. Unlike a standard that is more subject to judicial measurement (such as a particular net worth, available liquidity, or ability to raise a particular amount of capital), this requirement does not provide a manageable standard by which a court may assess the debtors' exercise of their subjective judgment. *See Heckler*, 470 U.S. at 830.

[25] *See United States v. Jerry*, 487 F.2d 600, 604 (3d Cir. 1973) (courts may reconsider interlocutory orders whenever "consonant with equity").

II. Chato is not entitled to relief on account of Maple's failure to increase its deposit.

Chato also claims an entitlement to relief on account of Maple's failure to increase its deposit. D.I. 2239 at ¶¶ 20, 29.[26] Paragraph 20(b) of the bid procedures provides, however, that the debtors may "waive terms and conditions set forth in these Bid Procedures with respect to all potential bidders" and paragraph 20(c) explains the debtors may "modify these Bid Procedures or impose, at or before the Auction, additional terms and conditions for conducting the Auction[.]" *Id.*

Chato argues that the debtor's decision to engage in continued negotiations with Maple, despite the fact that it never increased its deposit as the bid procedures required, is a "modification" of the bid procedures that under the terms of paragraph 20(c) can only be made "at or before the Auction." Properly understood, however, the decision not to seek to enforce strict compliance with the deposit requirement, but instead to continue discussions on the terms of the transaction, is better understood as a decision to "waive" the terms of the procedures (covered by paragraph 20(b)) rather than a decision to "modify" the bid procedures. Because the bid procedures

[26] It is true that Maple did increase its deposit between the time of the filing of Chato's motion and the hearing. But, notwithstanding the debtors' and Maple's arguments, D.I. 2295 at 7; D.I. 2286 at 3, that does not moot the issue. The relief Chato seeks is damages arising from the failure to make the deposit when required, not an injunction directing that the deposit be increased. That relief, while, for the reasons described, is not available on the merits, is not mooted by the posting of the required deposit. *See, e.g., Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442 (1984) (holding a claim is not moot where there are viable damages claims); *Jersey Cent. Power & Light Co. v. New Jersey*, 72 F.2d 35, 41 (3d Cir. 1985) ("[t]he availability of damages or other monetary relief almost always avoids mootness…[.]"); *see also In re Murff*, No. 13-B-44431, 2015 WL 4585167 (Bankr. N.D. Ill. July 28, 2015) (finding a claim is not moot because "[i]f a plaintiff is seeking damages, the case is not moot even if the underlying misconduct that caused the injury has ceased.") (internal quotations omitted).

expressly grant the debtors that authority, their decision to exercise it cannot form the basis of a claim by Chato.

In any event, it is by no means clear that the requirement that the winning bidder increase its deposit is even one that a disappointed bidder has "standing" to enforce. It is well established in the law that a plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties, and that a plaintiff may only seek relief for an injury that is within the scope of the provision the plaintiff seeks to enforce. In the context of bankruptcy sales, this principle has for decades fallen under the rubric that a disappointed bidder lacks standing to challenge the outcome of an auction, except for matters regarding the integrity of the auction process.[27] And while the Supreme Court has more recently suggested that the vocabulary of "standing" may be best reserved for circumstances that bear on the court's subject-matter jurisdiction,[28] the basic notion remains fully applicable. Aside from circumstances that bear on the integrity of the auction process, a disappointed bidder is thus outside the "zone of interests" protected by Section 363 of the Bankruptcy Code.[29] The same might be said

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[27] *See generally Dick's Clothing and Sporting Goods v. Phar-Mor, Inc.*, 212 B.R. 283, 288-289 (N.D. Ohio 1997) (describing consensus view to this effect).

[28] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (rejecting the language of "prudential standing" because matters of a party's "standing" are jurisdictional requirements that are not left to courts' "prudential" judgments). *See also Maher Terminals, LLC v. Port Authority of New York and New Jersey*, 805 F.3d 98, 105-106 (3d Cir. 2015) (applying the Supreme Court's reasoning from *Lexmark*, finding the district court erred in linking the "zone of interests" test to the doctrine of standing).

[29] *In re Karpe*, 84 B.R. 926, 929-931 (Bankr. M.D. Pa. 1988) (disappointed bidder cannot challenge outcome of the sale because the bidder lacks an interest in the estate and thus was outside the "zone of interests" protected by section 363 of the Bankruptcy Code).

of the provision of the bid procedures order requiring an increase in the deposit. The self-evident purpose of the deposit in question is to provide security for the bidder's obligations to the estate in connection with the asset sale transaction. It could certainly be argued that it is the debtors and their bankruptcy estates, not other bidders in the auction, who are within the "zone of interests" protected by this provision. On the other hand, had Chato itself increased its deposit as the order required, it is also possible that Chato could plausibly contend that Maple's failure to do so raised questions about the basic fairness of the auction process. At the very least, however, Chato's own refusal to do so disentitles it from challenging the debtor's decision with respect to Maple.[30]

III. Natixis' alleged violation of the bid procedures order does not give rise to a claim against the debtors.

Finally, Chato argues that Natixis' comments at the auction, where it purported to reserve its right to credit bid, were a violation of the bid procedures order. The order provides "[t]he Agent will notify the Debtors of its intention to potentially submit a Credit Bid no later than two days prior to the Auction. To the extent the Agent indicates … it intends to submit a Credit Bid at the Auction, it shall not receive the consent or consultation rights described in the … Bid Procedures." D.I. 1677 at 9.

[30] Contrary to Chato's suggestion, nothing in the debtor's decision to waive enforcement of the requirement that Maple increase its deposit entitles Chato to a return of its previously posted deposit before the time provided in the order – the earlier of (a) five days after the closing of the sale or (b) 90 days after approval of the sale. D.I. 1677-1 at 17.

The bid procedures clearly required any party that sought to credit bid at the auction to disclose this intention prior to the Auction. *Id.* Natixis did not do so and therefore was not entitled to credit bid at the auction. Chato points to Natixis' comments both before and after the auction, in which it purported to reserve its right to credit bid, as violations of the bid procedures order.

Natixis' comments at the beginning of the auction, however, make clear that it was not reserving its right to credit bid at the auction that was about to take place. Rather, the reservation of rights made clear that for the purposes of the auction in question, Natixis intended to participate as a "consulting party" and not a bidder. Natixis' counsel further stated that "to the extent that today's auction does not produce a bid that's otherwise acceptable to the Agent," it thereafter reserved its right to credit bid. Auction Tr. at 19. That qualification makes it clear that what Natixis was reserving was its right to credit bid in the event of some *future* auction, whether that was because the debtors chose not to select a winning bidder at the auction in question or because Natixis (which had properly reserved its right to object to a sale transaction if it were not satisfied with the proposed terms) succeeded in an objecting to a proposed sale to the buyer who prevailed at the current auction. Accordingly, those comments at the beginning of the auction were in no way inconsistent with the bid procedures order.

Natixis added a further reservation at the end of the auction, stating that "the agent continue[s] to reserve all of its rights, including [its] rights to object to both the winning bid and the backup bid and their selection, and [it] reserve[s] [its] right to

credit bid at this point." Auction Tr. at 69-70. At the hearing on the motion, counsel for Natixis said that this reservation was intended to make the same point as the earlier one – that it was not reserving the right to credit bid in the *current* auction (which had largely concluded, in any event), only in a potential *subsequent* auction if a sale to the successful bidder from the present auction were not consummated.

> Now, we did make a decision not to participate as a bidder at the auction and as part of the sale order. So, perhaps, my comments at the very end of a very long auction weren't clear enough.
>
> But what I meant to say was, we were asked by the successful bidder's counsel, you know, do we consent[] to everything that the debtor had said, I mean, did we consent to the sale, the selection of the successful bidder, and to the backup bidder? And I said, no, we … reserve our right[s]. . . .
>
> I also went on to say that we reserve our rights … to credit bid, but what I meant by that is that if this sale process falls apart, we may very well one day have to credit bid. We haven't credit bid. We did not credit bid at the auction.
>
> If the plan fails for whatever reason, we may very well have to take these assets back, and that's all I was trying to get a point across, is that one day, if this sale process is not successful, that we may, as lenders, may eventually have to take these back.

July 12, 2021 Hearing Tr. at 83-84.

While the language used in the "reservation" might be read to suggest that Natixis was purporting to "reserve" a right that was precluded by the bid procedures order, the explanation Natixis provided for it is a persuasive one.[31] In any event,

[31] It bears note, also, that the Supreme Court has recently made clear that a court should not exercise its authority to enforce a prior order in a circumstance in which there is "reasonable ground for doubt" about whether a party's conduct comports with that order. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019). There is, at the very least, such "ground for doubt" here.

however, there is an even more basic reason why Natixis' comments do not provide a basis to grant relief to Chato, which is that Chato is not seeking relief against Natixis. As described above, *supra* at 16 & n.18, Chato's motion proceeds on the assumption that the proposed bid procedures are a form of "contract." Chato's theory is that the debtor's made, in effect, a legally enforceable post-petition promise to potential bidders that the auction would be conducted in the manner specified in the bid procedures. Accordingly, Chato argues, to the extent the actual conduct of the auction varied from those procedures (in breach of that contract), Chato is entitled to an administrative claim against the debtors and their estates for its "expectation damages."

But as described above, that way of thinking about the bid procedures order is incorrect. The bid procedures order is an order of this Court, which is enforceable like any other court order – by way of a motion seeking to enforce it against a party that is alleged to have violated it. It is by no means obvious that Natixis' conduct at the auction (in light of the explanations provided for its purported reservation of the right to credit bid) violated the terms of the order. Indeed, the Court believes that the better view is that Natixis' comments were consistent with the terms of the bid procedures order. For purposes of the current motion, however, it is sufficient to observe that no claim has been asserted against Natixis, and that even if Natixis *had* violated the bid procedures order, such a violation would not provide a basis for granting Chato an administrative claim against the debtors or their estates, the only relief it seeks on account of that alleged violation.

Conclusion

For the reasons described above, a separate order will issue denying Chato's motion.

Dated: August 17, 2021

CRAIG T. GOLDBLATT
UNITED STATES BANKRUPTCY JUDGE