UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
BRENNER TOOL & DIE, INC.	:	
Debtor	:	Bankruptcy No. 03-15070F

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MEMORANDUM

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The chapter 11 debtor in possession, Brenner Tool & Die, Inc., has filed a motion seeking court approval to engage DoveBid, Inc. ("DoveBid") as its auctioneer, pursuant to 11 U.S.C. §§ 327(a) and 1107(a).[1] This request is opposed by the Official Committee of Unsecured Creditors. Essentially, the committee opposes the process by which DoveBid was selected and argues that other auctioneers will offer better terms. Brenner counters that, as DoveBid meets the disinterested requirements of section 327(a) (as defined by section 101(14)), the choice of auctioneer falls within its discretion and the possibility of obtaining better terms from another auctioneer is irrelevant.

For the following reasons, I cannot completely agree with the approach offered by either the committee or the debtor as the appropriate framework for determining whether a request to engage a "professional" should be approved by a bankruptcy court. Before I address that issue, I shall summarize the facts presented at an evidentiary hearing.

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[1]The latter statutory provision grants a debtor in possession the powers of a bankruptcy trustee.

I.

Brenner Tool & Die, Inc. ("Brenner") is an industrial concern which filed a voluntary petition in bankruptcy under chapter 11 on April 2, 2003. At the time of its filing, it was engaged in the tool and die industry and manufactured parts for the airline industry. The debtor has retained a financial consultant, Mr. Jerry Sherman, and is in the process of liquidating all of its assets. Among those assets are various pieces of equipment and machinery. This equipment and machinery is encumbered by a lien held by Wachovia Bank ("Wachovia"). At the time of the hearing, the amount then owed to Wachovia was approximately $4.9 million.

The debtor proposes to dispose of about 80-90% of its remaining equipment and machinery through a public auction process. Its financial consultant and the committee agree that such a method of disposition is likely to generate the highest return for the estate.

The debtor, through its sole remaining officer, Joseph Brenner, testified that it estimates that the auction sale will yield an aggregate sale price between $6 million to $7 million. He is persuaded that the bidders most likely interested in this property will be foreign, with Europe and Asia being the strongest markets. With that in mind, he and the financial consultant sought, on behalf of the debtor, to engage an auction firm with an international scope. In addition, the debtor is persuaded that any such auction sale should take place prior to November 1, 2003 to avoid any holiday distractions, to reduce the estate's obligation on its secured loan as quickly as

possible, and to minimize the risk of market disruptions (due to weather or unforseen events).

Mr. Sherman testified that he met with six to eight potential auction firms and negotiated with one group without yielding an acceptable agreement. Mr. Brenner testified that he spoke with three auction firms (which may or may not have been different from those with whom Mr. Sherman spoke). Ultimately, and in reliance in part upon the recommendation of Wachovia, the debtor entered into a proposed agreement with DoveBid.

DoveBid is based in Illinois and is an industrial auction firm of long-standing experience. It employs about 600 individuals and has conducted more than 500 auctions within the past two years. Its auctions have attracted bids from entities outside of the United States. Recently, it has used the Internet to "webcast" its auctions so that entities may bid without a physical presence at the auction site. It also produces brochures and advertises in trade journals to develop interest in its various auctions.

Wachovia Bank has used DoveBid to liquidate assets in the past and has been well satisfied with its performance and results. The committee acknowledges that Dovebid is a reputable auction firm. There is no suggestion that DoveBid is not capable of performing well the desired liquidation of the debtor's equipment.

After considerable negotiation (estimated to have taken three weeks), the debtor and DoveBid have entered into a proposed exclusive retention agreement. Ex. D-1. Under this agreement (which is conditioned upon the debtor obtaining court approval by September 1, 2003, Ex. D-1 ¶ 1), DoveBid would be engaged upon the

following material terms: the auction would take place at a location mutually agreed upon in not less than 45 days after court approval is obtained;[2] the debtor would pay no commission to the auction firm - the firm would be paid solely from a buyer's "premium;" this premium (the amount of which may, of course, affect the overall bid) would differ depending upon the method of bidding and method of payment, but would not exceed 16% and would not be less than 10%; the debtor would pay certain expenses connected with the auction in the amount of $200,000.00; and the debtor would receive the auction proceeds within thirty days of the sale.

Finally, and most significant to this dispute, in the proposed agreement, Ex. D-1 ¶ 8(b), DoveBid provided a contractual guarantee of a minimum payment to the debtor from the auction sale in the amount of $4.2 million. This guarantee, however, is not supported by any deposit or other form of security.

There was evidence that other auction firms may offer better terms to the debtor, particularly those concerning the guaranteed minimum payment. At least one firm testified that, if engaged, it would offer the debtor an immediate cash payment of $4.2 million, to serve as a minimum amount of the sales proceeds due the debtor. That same firm expressed a willingness to increase the amount of the debtor's guaranteed return to $4.35 million. See also Ex. CC-1 (letter from a "joint venture" of auction firms proposing to match DoveBid's contractual terms and "increase the 'Guaranteed Minimum' to $4,350,000.00" payable prior to the auction).

[2]The testimony reflected that the sale would take place at the debtor's location and would occur within about 60 to 75 days.

Two other factual issues arose at the evidentiary hearing which deserve some mention.

First, Mr. Ross Pollack from DoveBid was asked about his firm's financial ability to honor the contractual minimum payment guarantee. Mr. Pollack stated that he was unfamiliar with DoveBid's financial performance in the past few years; he was, however, sufficiently confident in the likely results of the auction that he opined that the guarantee provision was unlikely to arise and, if it did, DoveBid would have the necessary funds to honor its commitment.

Second, Mr. Brenner acknowledged that Wachovia recommended DoveBid and claimed, at one point, that the debtor was in default of its post-bankruptcy cash collateral agreement, which assertion was withdrawn around the time that the proposed DoveBid contract was finalized and the debtor's engagement decision was made. He also conceded that he was influenced to some degree by Wachovia's recommendation of an auctioneer, since the bulk of the sales proceeds would likely be paid to this secured creditor.

Thus, Wachovia may have exerted some pressure for the debtor to select its preferred auction firm. I cannot, however, conclude from this evidence that the debtor chose DoveBid solely to placate Wachovia or that the debtor did not exercise any independent judgment on its choice of firm. The negotiations with other auction firms, the position of the financial consultant and length of the negotiations with DoveBid - which ultimately resulted in the provision for a guaranteed minimum payment - suggest otherwise.

II.

I now turn to the various legal contentions of the debtor and the committee.

Section 327(a) of the Bankruptcy Code provides:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(emphasis added). Accordingly, a bankruptcy trustee must obtain court approval before employing an auctioneer. Furthermore, a debtor in possession, which is a bankruptcy fiduciary and has the same rights and duties as a trustee, see 11 U.S.C. § 1107(a); In re University Medical Center, 973 F.2d 1065, 1075 n.12 (3d Cir. 1992); In re Sandy Ridge Oil Co., Inc., 807 F.2d 1332, 1334 (7th Cir. 1986), is similarly constrained. See In re Engel, 124 F.3d 567, 571 (3d Cir. 1997); United States Trustee v. Price Waterhouse, 19 F.3d 138, 141 (3d Cir. 1994); 3 Collier on Bankruptcy ¶ 327.01, at 327-5 n.1 (L. King et al. eds., 15th ed. rev. 2003).

Clearly, if the debtor in possession seeks to engage an auctioneer (or other professional) who is not "disinterested" due to a conflict of interest, the request to employ should be denied. See United States Trustee v. Price Waterhouse, 19 F.3d at 141; see generally In re Marvel Entertainment Group, Inc., 140 F.3d 463, 475-76 (3d Cir. 1998). Moreover, section 327(a) refers to the engagement of a professional to assist the trustee in carrying out his duties. Thus, the engagement request may be

denied when hiring a professional is not reasonably necessary for the administration of the bankruptcy case. See, e.g., In re Jarvis, 53 F.3d 416, 420 (1st Cir. 1995); 3 Collier on Bankruptcy, supra, ¶ 327.02[1], at 327-8. Implicit in the "reasonably necessary" requirement is consideration of the competency and integrity of the professional to be engaged. See Matter of Arkansas Co., Inc., 798 F.2d 645, 648 (3d Cir. 1986).

Brenner contends - and the committee does not dispute - that DoveBid is disinterested and fully competent to perform the auction services required by the debtor. Moreover, these liquidation services are acknowledged by all to be necessary and appropriate. Thus, the debtor argues that its decision to engage DoveBid must be respected and approved by this court as it meets all of the requirements of section 327(a), regardless of the willingness of other auction firms to offer better terms.

I appreciate that "wide latitude is generally afforded to the trustee or debtor in possession in the selection of professional persons to be employed." 3 Collier on Bankruptcy, supra, ¶ 327.01, at 327-5. "Trustees may select their own attorneys, accountants and other professional persons without interference from creditors." Id. ¶ 327.04, at 327-28. Such discretion is consistent with the nature of a debtor in possession, its fiduciary duty to creditors and interest holders, as well as its presumed expertise in overseeing the chapter 11 reorganization process. See generally Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434, 458-59 (D. Utah 1998).

Brenner's legal position, however, goes too far by failing to consider section 328(a). In relevant part, that subsection permits a bankruptcy trustee to employ a professional "on any reasonable terms and conditions of employment."

Based upon section 328(a), a court may disapprove a trustee's proposed retention of a professional if the terms of engagement are not reasonable. See In re Kurtzman, 220 B.R. 538, 542 (S.D.N.Y. 1998) (trustee's choice of counsel not approved because counsel's fee would be unreasonably high); In re Computer Learning Centers, Inc., 272 B.R. 897, 905 (Bankr. E.D. Va. 2001):

> There are two aspects to the review in this case. The first is whether retaining an attorney engaged in a specialized area of the law, at higher rates, is necessary. The second is whether the proposed contingent fee is reasonable. While the selection of a particular lawyer is within the sound business judgment of the trustee and will not normally be upset, it must be balanced with his duties to properly manage the estate's assets and to efficiently and expeditiously resolve the bankruptcy proceeding. Simply stated, the trustee must be sensitive to the cost of professional services. He should seek counsel who can competently represent the estate at a reasonable rate, which will usually be the prevailing market rate. If counsel is not available in the local community, the trustee may expand his search beyond the local area. If specialized counsel is necessary at higher rates, the prevailing rate of the specialized bar will be a factor in setting a reasonable rate.

(citations omitted). Thus, the debtor's position that it has the statutory right to engage DoveBid without regard to the reasonableness of the terms of the engagement - an issue which may involve comparison to the prevailing market for such services - understates the reviewing function of this court.

The committee's counter-position is also too extreme to be persuasive. It likens the intended auction liquidation to the sale of the debtor's assets under section 363. If one prospective purchaser is willing to pay more for assets than another, it is improper for a chapter 11 debtor to insist upon taking the lower bid. Without distinguishing between the engagement of a professional auctioneer and the

actual sale of assets, the committee maintains that the debtor has the obligation to consider competing bids of other auctioneers - preferably via a contested bidding process - and is required to choose the one with the best terms (so long as that auction firm is competent to handle the engagement). As a result, the committee argues that Brenner has acted improperly by refusing to engage an auction firm willing to offer a higher minimum payment guarantee and to secure that minimum with an advance cash payment.

The committee's position is problematic, in that it would eliminate any discretion on the part of a bankruptcy trustee or debtor in possession in choosing a professional under section 327(a).[3] It also fails to recognize in this instance that the auctioneer's "guaranteed" minimum distribution is not the equivalent of a purchase price. The guarantee does not become important unless the auction sale yields results well below expectation. Accordingly, it is more important to the bankruptcy estate (and its creditors) to engage an auctioneer which will market these particular assets timely and most effectively, thereby increasing the likelihood of achieving a total sales price far greater than any promised minimum return, than it is to have a somewhat greater minimum return accompanied by a lower overall sale price.

In a somewhat analogous context, the Third Circuit Court of Appeals has established a balance between the positions now advocated by the debtor and the committee.

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[3]I doubt the committee would suggest that a competitive bidding process is required whenever any bankruptcy fiduciary (i.e., trustee, official committee, debtor in possession) engages a professional such as an attorney or an accountant.

In re Cendant Corporation Litigation, 264 F.3d 201 (3d Cir. 2001), cert. denied sub nom. Mark v. California Public Employees' Retirement System, 535 U.S. 929 (2002), involved, in part, consideration of the appropriate method of engagement of lead counsel in a securities fraud class action governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The engagement of such counsel requires court approval, and the District Court had required a competitive bidding or auction process in approving lead counsel. Under the circumstances of that case, the Court of Appeals determined that required use of a competitive bidding process to choose an attorney undermined the discretion and responsibilities of the lead plaintiff to select counsel who would best represent the plaintiff class.

The Third Circuit did not state that a competitive bidding process could never be utilized by the lead plaintiff; nor did it hold that such a process could never be a requirement for court approval. It did conclude, however, that the PSLRA did not empower a court to always condition the use of competitive bidding in order to obtain court approval.

At the outset, the Third Circuit looked to the language of the statute and its legislative history to determine that the choice of lead counsel by the lead plaintiff was discretionary:

> The second sentence of the above-quoted language emphasizes that the choice belongs to the lead plaintiff, and the third is significant for two reasons. First, it confirms that the court's role is generally limited to "approv[ing] or disapprov[ing] lead plaintiff's choice of counsel;" and that it is not the court's responsibility to make that choice itself. Second, it indicates that the court should generally employ a deferential standard in reviewing the lead plaintiff's choices. It is not enough that the lead plaintiff selected counsel or negotiated a retainer agreement that is different

> than what the court would have done; the question is whether judicial intervention is "necessary to protect the interests of the plaintiff class."

Id. at 274.

The discretion afforded the lead plaintiff in engaging counsel is, however, subject to a standard of reasonableness:

> [W]e think that the Reform Act evidences a strong presumption in favor of approving a properly-selected lead plaintiff's decisions as to counsel selection and counsel retention. When a properly-appointed lead plaintiff asks the court to approve its choice of lead counsel and of a retainer agreement, the question is not whether the court believes that the lead plaintiff could have made a better choice or gotten a better deal. Such a standard would eviscerate the Reform Act's underlying assumption that, at least in the typical case, a properly-selected lead plaintiff is likely to do as good or better job than the court at these tasks. Because of this, we think that the court's inquiry is appropriately limited to whether the lead plaintiff's selection and agreement with counsel are reasonable on their own terms.

Id. at 276.

Finally, the appellate court established a framework for determining whether the choice of lead class counsel by the lead plaintiff was reasonable:

> In making this determination [of reasonableness], courts should consider: (1) the quantum of legal experience and sophistication possessed by the lead plaintiff; (2) the manner in which the lead plaintiff chose what law firms to consider; (3) the process by which the lead plaintiff selected its final choice; (4) the qualifications and experience of counsel selected by the lead plaintiff; and (5) the evidence that the retainer agreement negotiated by the lead plaintiff was (or was not) the product of serious negotiations between the lead plaintiff and the prospective lead counsel. See, e.g., In re Nice Sys. Sec. Litig., 188 F.R.D. 206, 223 (D.N.J.1999) ("Not only should the proposed counsel fees be the result of hard-bargaining, but

> the initial selection of counsel should be the result of independent decision-making by the lead plaintiff.").
>
> We do not mean for this list to be exhaustive, or to intimate that district courts are required to give each of these factors equal weight in a particular case; at bottom, the ultimate inquiry is always whether the lead plaintiff's choices were the result of a good faith selection and negotiation process and were arrived at via meaningful arms-length bargaining. Whenever it is shown that they were not, it is the court's obligation to disapprove the lead plaintiff's choices.

Id. at 276.

In deciding whether a bankruptcy court should approve the engagement of a professional by a bankruptcy fiduciary under sections 327 and 328, I find the Third Circuit's approach under the PLSRA helpful. It provides a balance which recognizes the function of the fiduciary and the discretion accorded it in choosing a professional, the limited oversight responsibilities of the court, and the underlying goal of benefit to the estate.

Applying this approach to the facts presented, I agree with the United States trustee that the debtor's choice of DoveBid, on the terms proposed, is not unreasonable.

First, Brenner has, in general, acted responsibly as a debtor in possession since the inception of this chapter 11 case. There has been no suggestion of any dereliction of duties, and it will shortly propose a plan of reorganization which, I was informed, will be endorsed by the committee. Second, Brenner has retained competent counsel and a competent financial advisor in this reorganization case. Third, its decision to sell some of its assets at public auction is supported by all creditors. Fourth, prior to choosing an auctioneer, it met with a number of reputable

firms and negotiated with some of them. Fifth, its auctioneer of choice is by all accounts highly reputable and competent. Sixth, Brenner's selection of DoveBid is supported by its financial advisor and by Wachovia, a creditor holding one of the largest claims; indeed, Wachovia is likely to receive the bulk of the sale proceeds. Seventh, the terms of the proposed engagement were the product of lengthy negotiation. Eighth, the negotiated terms were tailored to the specific needs of the debtor. And ninth, there was insufficient evidence that the debtor abdicated its fiduciary responsibilities in favor of Wachovia.[4]

Finally, to the extent that other auctioneers might offer better terms of engagement, such terms may not be material to the outcome of the sale[5] or the outcome of the reorganization effort and could involve firms which - while competent - may not have the expertise or reputation of the debtor's choice.

Accordingly, while I understand that some debtors in possession elect to use the competitive bidding process in selecting an auctioneer, and while the use of that process may be appropriate in some instances, I cannot agree with the committee that the absence of such a process in this situation requires that I disapprove the debtor's choice. Given the discretion afforded a debtor in possession, I cannot conclude that such discretion was abused in this instance.

An appropriate order shall be entered.

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[4]While the unsecured creditors have a stake in the outcome of the auction, so does Wachovia. It was not improper for Brenner to consider the bank's recommendation. Cf. In re Kearns, 162 B.R. 10 (Bankr. D. Kan. 1993) (it was appropriate for a trustee to communicate with creditors in the administration of the bankruptcy case).

[5]Indeed, the fact that a number of firms are willing to make the same minimum payment guarantee in roughly the same amount suggests that they all anticipate sale proceeds far in excess of the minimum.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 11
BRENNER TOOL & DIE, INC.	:	
Debtor	:	Bankruptcy No. 03-15070F

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ORDER

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AND NOW, this 18th day of August, 2003, for the reasons stated in the accompanying memorandum, it is hereby ordered that the debtor's motion is granted and the objection thereto overruled. The debtor may engage DoveBid, Inc. as auctioneer, pursuant to the terms of Ex. D-1. See 11 U.S.C. §§ 327(a), 328.

BRUCE FOX
Chief Bankruptcy Judge

IN RE: Chapter 11
BRENNER TOOL & DIE, INC. Bankruptcy No. 03-15070F

Copies of the Bankruptcy Judge's Memorandum and Order dated

August 18, 2003, were mailed on said date to the following:

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