UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
	)	Case No. 09-10384 (CSS)
FLUID ROUTING SOLUTIONS,	)	
INTERMEDIATE HOLDING CORP.	)	Jointly Administered
a Delaware Corporation, et al.	)	
	)	**Hearing Date: March 24, 2009 at 11:30 a.m. (ET)**
Debtors.[1]	)	**Objection Deadline: March 20, 2009 at 4:00 p.m. (ET)**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO MOTION FOR ORDER (I) APPROVING ASSET PURCHASE AGREEMENT AND AUTHORIZING THE SALE OF CERTAIN ASSETS OF DEBTORS OUTSIDE THE ORDINARY COURSE OF BUSINESS, (II) AUTHORIZING THE SALE OF ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS, (III) AUTHORIZING THE ASSUMPTION AND SALE AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (IV) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") of Fluid Routing Solutions Intermediate Holding Corp., *et al.* (collectively, the "Debtors"), by its undersigned proposed counsel, hereby objects to the Debtors' Motion for Order (I) Approving Asset Purchase Agreement and Authorizing the Sale of Certain Assets of Debtors Outside the Ordinary Course of Business, (II) Authorizing the Sale of Assets Free and Clear of all Liens, Claims, Encumbrances and Interests, (III) Authorizing the Assumption and Sale and Assignment of Certain Executory Contracts and Unexpired Leases and (IV) Granting Related Relief (the "Sale Motion", D.E. 28).[2] As discussed below, the Committee requests that the Court deny the Sale

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification numbers are: Fluid Routing Solutions Intermediate Holding Corp. (1438); Fluid Routing Solutions, Inc. (1567); Fluid Routing Solutions Automotive, LLC (f/k/a Mark IV Automotive, LLC) (6301), and Detroit Fuel, Inc. (4910). The address for each of the Debtors is 1955 Enterprise Drive, Rochester Hills, MI 48309.

[2] The Court previously entered the Bid Procedures Order on February 19, 2009.

Motion because, among other things: (a) the proposed sale to an insider of the Debtors and the DIP Lender (defined below) on an extremely expedited basis is not in the best interests of the bankruptcy estates or their creditors, and has in fact chilled bidding; (b) the Stalking Horse Bidder (defined below) is not a good faith purchaser and is not entitled to a good faith purchaser finding under section 363(m) of the Bankruptcy Code; (c) Sun Fluid Routing Finance, LLC ("Sun") should not be entitled to credit bid the amount of its Prepetition Claim (defined below) under section 363(k) of the Bankruptcy Code; and (d) the proposed sale to the Stalking Horse Bidder was not the result of arms' length negotiations, and the terms set forth in the Asset Purchase Agreement are unfair and will not benefit the bankruptcy estate or any creditor other than Sun. In further support of this Objection, the Committee respectfully represents and alleges as follows:

A. The Sale Motion Should Be Denied Because The Sale To An Insider Was Not Proposed In Good Faith And Has Chilled Bidding

1. The Committee requests that the Court deny the Sale Motion because the proposed sale to an insider is not proposed in good faith, was not the result of arms-length negotiations, and was never intended to maximize value for the bankruptcy estates and its creditors. As discussed in more detail below, the Debtors are attempting to push through an expedited sale of their most valuable line of business – the fuel and hose business – to an insider of both the Debtors and Sun. Sun asserts a prepetition secured claim in the amount of $4 million (together with accrued but unpaid interest) (the "Prepetition Claim"), and serves as the debtor-in-possession lender (the "DIP Lender") under the $12 million DIP Facility[3] approved by this

[3] Unless otherwise indicated, all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Committee's objection to the DIP Motion, or the Asset Purchase Agreement, as applicable.

Court. Sun has completely dominated the Debtors and the sale process from the outset of these cases by attempting to ram through the sale without providing adequate time for qualified parties to conduct due diligence and submit a bid. The schedules to the Asset Purchase Agreement were only filed on Friday, February 27, 2009, and were not made available to potential bidders until Monday March 2, 2009 (a mere 18 days before the Bid Deadline). Several potential bidders informed the Committee's financial advisors that they do not want to spend the time and effort to conduct expedited due diligence because, among other things, it is unclear what assets are subject to the proposed sale and what liabilities would need to be assumed (and thus, require substantial diligence), and Sun has appeared to have already locked up the sale. Furthermore, some potential bidders expressed concern about the true purchase price represented by FRS Holding Corp. (the "Stalking Horse Bidder") since the credit bid essentially resulted in a net purchase price at Closing of zero dollars for Sun, while any other bidder would be responsible for paying significant cash at Closing. It is also unknown whether Sun, the Stalking Horse Bidder or their affiliates may have contacted potential bidders to further chill the bidding process. Additionally, the Debtors' Chief Restructuring Officer advised that the Debtors' customers were directly contacting potential bidders about resourcing the Debtors' products, which further led to uncertainty and chilled bidding by questioning the Debtors' going concern.

2. It is apparent that the expedited sale process has not worked and was never intended to maximize value for creditors. The Debtors, who are managed by Sun Capital Partners Management V, LLC (another Sun affiliate) under a Management Services Agreement, did not do any prepetition marketing of the assets prior to the Petition Date; in fact, the Debtors' Chief Restructuring Officer advised during the weekly sale process that the Debtors' first attempt to contact potential buyers was February 12, 2009, at the earliest. The expedited sale process was

orchestrated by Sun for its sole benefit to enable it to acquire the crown jewel of the Debtors' estates without any viable competition, and without assuming any of the Debtors' liabilities other than the Assumed Obligations. Sun's scheme has been masterfully executed as evidenced by the fact that not a single qualified bid was received by the Bid Deadline. As noted in the Committee's objection (the "DIP Objection") to the Debtors' motion for authorization to enter into debtor-in-possession financing (the "DIP Motion"), the DIP Motion, in conjunction with the expedited sale process, is effectively a *sub rosa* plan. As part of the DIP Motion, the Debtors sought approval of the DIP Credit Agreement which, among other things, (i) required the sale order to be entered within 35 days after the Petition Date, (ii) required liquidation of the Excluded Assets within 120 days after the Petition Date, (iii) provided for $240,000 in exit fees for a DIP Facility that would terminate within 120 days after the Petition Date or earlier in an Event of Default, and (iv) included various milestones which make a sale to the Stalking Horse Bidder a foregone conclusion.

3. Although bankruptcy courts have "broad discretion in determining whether to approve a sale other than in the ordinary course of business[,]" the debtor-in-possession has the burden of showing "that it has obtained the best possible price for the asset." *In re New Era Resorts, LLC*, 238 B.R. 381, 387 (Bankr. E.D. Tenn. 1999) (citing *In re Embrace Sys. Corp.*, 178 B.R. 112, 123 (Bankr. W.D. Mich. 1995)). Bankruptcy courts, in the exercise of their discretion, must make sure that the proposed sale outside the ordinary course of the debtor's business (1) is supported by a sound business reason, (2) is subject to accurate and reasonable notice, (3) results in an adequate purchase price, and (4) is conducted in good faith. *In re Country Manor of Kenton, Inc.*, 172 B.R. 217, 220-21 (Bankr. N.D. Ohio 1994) (citing *In re Plabell Rubber Prods., Inc.*, 149 B.R. 475, 479 (Bankr. N.D. Ohio 1992)). The most critical factor in determining

whether to approve a sale under section 363(b)(1) "is the lack of effort in soliciting other offers." *Kenton*, 172 B.R. at 220-221 (citing *Plabell Rubber*, 149 B.R. at 479).

4. In the instant case, Sun's complete dominion and control over the Debtors raises serious questions about whether the sale process was intended for the sole benefit of an insider. The Debtors' failure to receive a single qualified bid is evidence that the sale process has failed in its purported objective of maximizing value for creditors and the bankruptcy estates and, in fact, has chilled bidding by keeping qualified bidders at bay. It is highly questionable whether the proposed sale to the Stalking Horse Bidder -- an affiliate of the majority equity owner of the Debtors and Sun – is proposed in good faith. Accordingly, the Sale Motion should be denied, and the Debtors and the Committee should have a reasonable opportunity to market the assets in such a manner that would encourage competitive bidding.

B. The Court Should Not Make a Good Faith Purchaser Finding Under Section 363(m)

5. In the event that the Court is inclined to grant the Sale Motion and approve the sale, the Committee requests that the Court refrain from making a good faith purchaser finding under section 363(m) of the Bankruptcy Code because the Debtors and the Stalking Horse Bidder have not met their burden of proof to support such a finding. In general, fraud, collusion, or an attempt to take grossly unfair advantage of other bidders destroys a purchaser's good faith status. *In re Abbott Dairies of Penn., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)). Good faith is also lacking when there is not a "fair and open sale process." *See In re Summit Global Logistics, Inc.*, 2008 WL 819934 at * 12 (Bankr. D. N.J. Mar. 26, 2008).

6. The purchaser's good faith determination is subject to heightened scrutiny when a sale of substantially all of a debtor's property is "proposed during the beginning stages of the

case." *In re Medical Software Solutions*, 286 B.R. 431, 445 (Bankr. D. Utah 2002). The purpose of the heightened scrutiny is to ensure that the transaction has been negotiated at arms-length, a significant risk in insider transactions. *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 842 (Bankr. C.D. Cal. 1991). Although it is not bad faith *per se* for an insider with fiduciary duties to the estate to purchase property from the estate, good faith requires that insider transactions must be fully disclosed from the beginning of the proceedings. *Id.*

7. Here, the Sale Motion and DIP Motion were filed concurrently with the Chapter 11 petitions on February 6, 2009, and the Debtors sought to sell the estates' most valuable assets on an extremely expedited basis. The insider status of the Stalking Horse Bidder is buried in footnote 2 of the Sale Motion, which only provides that "FRS Holding Corp., a Sun Capital affiliate, is the intended 'stalking horse' bidder for the fuel assets." Sale Motion, at 8, n. 2. This disclosure is inadequate, and does not afford the Court, the Office of the Untied States Trustee, creditors and other parties in interest sufficient information regarding the relationship between the Stalking Horse Bidder and the Debtors. For example, the Sale Motion provides that FRS Inc. was formed on May 25, 2007, when an affiliate of Sun acquired the assets and liabilities of a division of Dayco, a Mark IV Industries, Inc. *Id.* at 3. The Sale Motion also provides that FRS, Inc. is a wholly owned subsidiary of FRS Intermediate Holding Corp., which is a wholly owned subsidiary of Fluid Routing Solutions Group, LLC ("FRS Group"). *Id.* However, there is no discussion about how FRS Group is owned by various Sun-related entities. Based upon the organizations chart provided by Sun's counsel, a copy of which is attached hereto as **Exhibit A**, it appears that Sun Capital Partners IV, LP. and Sun Capital Partners V, L.P. are the ultimate owners of the Debtors. This is not disclosed in the Sale Motion. It is also unclear from the Sale Motion whether and how the Stalking Horse Bidder is affiliated with the Debtors and Sun, and

whether any directors, officers, shareholders, or employees of Stalking Horse Bidder are also directors, officers, shareholders, or employees of any of the Debtors. Disclosure in a footnote regarding the insider status of the Stalking Horse Bidder is not sufficient.

8. In addition, the DIP Motion required that the sale order be entered within 35 days after the Petition Date. Although Sun agreed to extend that deadline, the sale process is still unreasonably short. The Bid Deadline and Lien/Claim Challenge is a mere 42 calendar days after the Petition Date. The Debtors have not even filed the Schedules or Statement of Financial Affairs, and indeed have sought additional time to do so. Therefore, the Debtors have not yet identified under penalty of perjury all property of the bankruptcy estates or the value of that property. This is not a "melting ice cube" where a sale in less than two months is required. The Debtors have not adequately articulated a reason why a sale on such an expedited basis is necessary. Due to the expedited sale process, and the insider status of both Sun and the Stalking Horse Bidder, the Court must carefully scrutinize the proposed sale and determine whether it is fair and has been negotiated at arms' length. *See Wilde Horse*, 136 B.R. at 842. As discussed herein, the Debtors have done no prepetition marketing of the assets and have scheduled a sale process on an expedited basis which did not enable prospective bidders to conduct proper due diligence. The Committee suggests that the expedited sale process, along with the unreasonably short milestones set forth in the DIP Credit Agreement, were intended at the outset to chill bidding and to enable Sun (through the Stalking Horse Bidder) to acquire the most valuable assets for a song. If the Court is inclined to grant the Sale Motion, the Committee requests that the Court refrain from making a good faith purchaser finding under section 363(m) because the Debtors and the Stalking Horse Bidder have not presented sufficient evidence to support such a finding.

C. The Court Should Exercise Its Discretion To Deny Sun's Right To Submit A Credit Bid

9. The Stalking Horse Bidder intends to submit a credit bid (apparently assigned to it by Sun) to acquire the assets related to the fuel routing business, effectively leaving the unsecured creditors without any possibility of recovery. In accordance with the terms of the statute, in applying section 363(k) of the Bankruptcy Code,[4] courts have uniformly held that secured creditors do not have an absolute entitlement to credit bid, and may be prevented from credit bidding "for cause." *See, e.g.*, *In re Theroux*, 169 B.R. 498, 499 n.3 (Bankr. D. R.I. 1994); *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 536 (Bankr. E.D. Va. 2004) ("section 363(k) permits credit bids in general, but they may be denied for cause"); *In re Diebart Bancroft*, 1993 WL 21423 at * 5 (E.D. La. Jan. 26, 1993) (cause existed to deny credit bid). "Cause" is not defined in section 363 of the Bankruptcy Code, "but it is intended to be a flexible concept enabling a court to fashion an appropriate remedy on a case-by-case basis." *In re Affordable Homes Corp.*, 2006 WL 2128624 at * 16 (Bankr. D. N.J. June 29, 2006). In addition, a bankruptcy court is not prohibited from "placing conditions upon a secured creditor's ability to credit bid." *Id.* As Collier on Bankruptcy notes, a Court may decline to permit a secured lender to credit bid its claim if permitting the bid would chill the bidding process. 3 L. King, Collier on Bankruptcy, at ¶ 363.09[1].

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[4] Section 363(k) of the Bankruptcy Code provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, ***unless the court for cause orders otherwise*** the holder of such claim may bid at such sale and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property. (emphasis added)

11 U.S.C. § 363(k) (emphasis added).

10. Here, the Court should deny Sun's right to submit a credit bid in connection with the Prepetition Claim because (a) Sun is an insider of the Debtors and directly or indirectly manages or otherwise controls the Debtors, (b) the Debtors did not conduct any prepetition marketing of the assets, and the expedited post-petition sale process has discouraged competitive bidding, and (c) the right to credit bid has effectively chilled the sale process and the estates' ability to generate competitive bidding.

11. In addition, one of the Debtors, Fluid Routing Solutions, Inc. ("FRS, Inc.") entered into a Management Services Agreement dated May 25, 2007 with Sun Capital Partners Management V, LLC ("SCPM") pursuant to which FRS, Inc. agreed to pay SCPM management fees for certain management and consulting services related to FRS, Inc. including advice regarding improvements to financial reporting, accounting and management information systems and staffing. The Committee is informed and believes that the Debtors paid SCPM approximately $1,371,000 under the Management Services Agreement, of which $671,496.10 was paid within one year prior to the Petition Date. The Committee believes that such payments may be avoided as a fraudulent transfer under 11 U.S.C. §§ 544 and 548, and applicable Delaware law.[5] In addition, the Debtors have not yet filed their Schedules or Statement of Financial Affairs, and have sought additional time to do so. Such required information signed under penalty of perjury may reveal additional claims against Sun or its affiliates unrelated to the

[5] The Committee's right to challenge any payments received by SCPM under the Management Services Agreement is not a Prepetition Lien / Claim Challenge as defined in Paragraph 11 of the Final Order (I) Authorizing and Approving Debtors' Post-Petition Financing; (II) Granting Liens and security Interests and Providing Superpriority Administrative Expense Status; and (III) Modifying Automatic Stay (the "DIP Order") entered on March 13, 2009. Such Management Services Agreement was entered into prior to the Debtors' execution of the Prepetition Second Lien Note on June 16, 2008. Any claims related to payments made to SCPM under the Management Services Agreement are unrelated to the Prepetition Second Lien Note, and thus, are not released under the DIP Order in the event that a Prepetition Lien / Claim Challenge with respect to the Prepetition Second Lien Note is not made by the Committee.

Prepetition Second Lien Note. Similarly, the Debtors have only provided to the Committee audited financial statements through April 2008. It is unknown at this time whether additional claims may exist against Sun or its affiliates unrelated to the Prepetition Second Lien Note.[6] Given this uncertainty, and the lack of arms' length negotiations involving an insider of the Debtors, the Court should exercise its discretion to deny Sun the right to credit bid the Prepetition Claim.

D. The Proposed Sale to the Stalking Horse Bidder on the Terms Set Forth in the Asset Purchase Agreement are Unfair and Will not Benefit the Bankruptcy Estates

12. In addition, numerous terms of the Asset Purchase Agreement are designed to saddle the estates with significant liability while enabling Sun to "cherry pick" the most valuable assets without paying adequate consideration. For example, the Committee notes that the following provisions in the Asset Purchase Agreement are improper and do not benefit the bankruptcy estates, or need further clarification:

- Purchase Price. Section 3.1(a) provides that the Closing Purchase Price is $11 million less Cure Amounts less Prorated Taxes, minus/plus the Closing Net Assets Shortfall/Surplus. Most notably, all Cure Amounts are the responsibility of the Debtors (through a reduction in the Purchase Price), and the Buyer has the right to add contracts that "significantly relate to the business," with the Debtors bearing the Cure Costs (again, through a reduction in the Purchase Price). The Committee asserts that the amount of Cure Costs to be paid by the estates should be capped because they are a downward adjustment to the Purchase Price. It is currently unknown what the Cure Amounts will be. Additional Cure Amounts will also increase Sun's deficiency claim, thereby diluting any recovery for unsecured creditors and threatening the estate with administrative insolvency.

- Closing Net Assets. The Buyer is purchasing all Accounts Receivable, but is only responsible for paying for Accounts Receivable which are less than 30 days old. The Committee is advised that the Debtors' Accounts Receivable are paid on average within 52 days. Because the Buyer will get all Accounts Receivable, the

[6] The Committee does not intend to file a Prepetition Lien / Claim Challenge as that term is defined in the DIP Order, but reserves the right to assert claims against Sun and/or its Representatives unrelated to a Prepetition Lien / Claim Challenge.

Buyer is effectively receiving 22 days of good Accounts Receivable without paying any additional consideration. This is improper.

- Closing Net Assets Shortfall. The Buyer has set a target of $22,791,000 (the "Target") to represent the estimated Net Assets at Closing. The Committee is unable to determine whether the forecasted value that went into this calculation is the same as the value that will go into the actual closing Net Assets for purposes of calculating the Purchase Price. For example, it is unclear whether the Target would exclude Accounts Receivables greater than 30 days.

- Acquired Assets. The Committee asserts that the Acquired Assets as defined in the Asset Purchase Agreement should be modified as follows:

  (a) Section 2.1(a)(iii) – The Debtors should retain any tax refunds, rebates, credits or similar items that relate to pre-Closing time periods.

  (b) Section 2.1(a)(xiii) - The Debtors should retain any prepayments, prepaid expenses, advances, cash deposits, and other cash current assets used in, useful for or otherwise associated with the Business.

  (c) Section 2.1(a)(xiv) - The Debtors should retain all pre-Closing claims, warranties, guarantees, causes of action, rights of set-off and rights of recoupment of every kind and nature (whether or not known or unknown or contingent or non-contingent) used in, useful for or otherwise associated with the Business. For example, to the extent the Debtors are sued for pre-Closing actions, they need to be able to pursue warranty claims against a supplier.

  (d) Section 2.1(a)(xxiii) - The Debtors should retain all pre-Closing insurance proceeds, if any.

- Assumed Liabilities. The Committee asserts that the following liabilities should be assumed by the Buyer:

  Section 2.2(a)(ii) - The Buyer should assume all post-petition trade payables. If the Buyer is purchasing the Debtors' Accounts Receivable, it should assume the costs incurred in generating those receivables, which would arguably be entitled to administrative status.

  Section 2.2(a)(iii) - The Buyer should assume all post-petition obligations for Rehired Employees. The Buyer will benefit from the services rendered by the Rehired Employees. For example, the Rehired Employees' efforts will have generated significant Accounts Receivable. The Buyer should also assume the post-petition, pre-Closing obligations of these employees which may otherwise be an administrative expense to be borne by the bankruptcy estates.

- Warranty Claims - The Buyer is purchasing all Accounts Receivable, but is not assuming the Warranty Claims relating to the assets being sold. The Buyer should assume all liability for the Warranty Claims because the bankruptcy estates will not be able to perform if such Warranty Claims are asserted in connection with the business. The Buyer should not get the benefit of the Accounts Receivable without the attendant burden of Warranty Claims related to those Accounts Receivable.

- Excluded Assets. In addition to the Excluded Assets in the Asset Purchase Agreement, the Debtors should retain the following:

  All pre-Closing tax claims;

  All claims against third parties relating to the Excluded Assets;

  All commercial tort claims;

  All claims against directors and officers of the Debtors; and

  All rights under insurance policies for Excluded Assets, or that are otherwise unassignable.

- Excluded Liabilities. Similarly, the Committee asserts that the definition of Excluded Liabilities is too broad, and that the Buyer should assume certain Excluded Liabilities as follows:

  Section 2.4(a)(iii) – the Excluded Environmental Liabilities should only be those which arose pre-Closing.

  Section 2.4(a)(xiii) - The Buyer should assume all trade payables arising after the Petition Date.

- Cure Amounts. In addition to a reasonable cap on the paid Cure Amounts (see above), the Purchase Price should only be adjusted upwards in the event the Cure Amounts of the Assumed Contracts exceeds the cap. In the event of any post-Closing assignment of executory contracts or unexpired leases, the Buyer should be responsible for any Cure Amounts.

- Transfer/Transaction Taxes. The Debtors are responsible for any transfer or transaction taxes. The Committee needs a better understanding to determine what these costs are.

- Access to Employees. In order to effectively wind-up the estates, the Debtors should be granted reasonable access to the Rehired Employees.

13. In addition, the Debtors' insolvency analysis which was presented to the Court on March 13, 2009 and which formed the basis for the Court granting Sun a waiver under Section 506(c) of the Bankruptcy Code, may be materially incorrect because of additional Assumed Contracts added by the Stalking Horse Bidder after the Final DIP Hearing. The Committee notes that the additional cure costs associated with the assumption of these contracts could significantly increase Sun's deficiency claim, further diluting any recovery to unsecured creditors. Such costs should be quantified in order to determine whether the proposed sale will render the estates administratively insolvent.

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WHEREFORE, the Committee respectfully requests that the Court deny the Sale Motion for the reasons set forth herein. Alternatively, the Committee requests that the Court deny Sun's right to credit bid, refrain from making a finding that Sun is a good faith purchaser entitled to protections afforded to good faith purchasers under section 363(m), and modify the Asset Purchase Agreement and require the Debtors to provide sufficient clarification of the substantive concerns raised by the Committee set forth herein. The Committee requests all other relief that is just and proper.

Dated: Wilmington, Delaware
March 20, 2009

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