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6 Proposed General Counsel for the
Official Committee of Unsecured Creditors

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9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION**
11

12 In re
13 **NTD ARCHITECTS, INC., a California**
corporation,
14 Debtor.

Case No. 2:14-bk-16883-BR

Chapter 11

**OPPOSITION TO MOTION OF NTD
ARCHITECTS FOR ORDER
AUTHORIZING SALE OF ARIZONA
ASSETS FREE AND CLEAR OF LIENS**

Hearing:

Date: December 9, 2014

Time: 10:00 a.m.

Place: Courtroom 1668

255 E. Temple Street
Los Angeles, CA 90012

1 **TO THE HONORABLE BARRY RUSSELL, UNITED STATES BANKRUPTCY JUDGE,**
2 **THE OFFICE OF THE UNITED STATES TRUSTEE, THE DEBTOR, ITS COUNSEL**
3 **AND ALL INTERESTED PARTIES:**

4 The Official Committee of Unsecured Creditors (“Committee”) for the bankruptcy estate
5 (“Estate”) of NTD Architects, Inc., a California corporation dba NTD Architecture, the debtor
6 and debtor in possession (“Debtor”), hereby submits this Opposition (“Opposition”) to the
7 Debtor’s Motion for Order Authorizing Sale of Arizona Assets Free and Clear of Liens filed on
8 November 18, 2014, Docket No. 285 (“Motion”). In support of the Opposition, the Committee
9 respectfully represents the following:

10 **I. INTRODUCTION**

11 The Committee supports efforts by the Debtor to liquidate assets and maximize the
12 recovery for creditors. Unfortunately, the Motion suffers from defects which prevent parties
13 from determining whether these goals are being accomplished. The Committee has attempted to
14 evaluate fundamental aspects of the proposed sale, including whether a sound business
15 justification for the sale exists, whether the current offer represents a fair and reasonable price for
16 the assets being acquired, and whether the sale has been proposed in good faith.

17 As currently presented, the Motion and terms of the proposed sale lack the requisite
18 specificity as to material provisions of the agreement. Among other things, (1) the Debtor fails
19 to give accurate and reasonable notice of the hearing on the Motion, (2) the Motion provides
20 insufficient basis to conclude that the proposed sale is based on sound business judgment, (3) the
21 Motion fails to explain adequately the fair market value of the assets being sold, (4) the Motion
22 lacks detail related to the deals with insiders of the Debtor, and (5) the Motion presents terms of
23 the proposed sale contradicted by the term sheet (the “Term Sheet”) attached to the Motion. The
24 Motion also lacks support for a good faith finding in favor of the proposed buyer. For these
25 reasons, and as detailed below, the Committee respectfully requests the Court deny the Motion,
26 or in the alternative, continue the hearing on the Motion unless the Debtor can address the
27 infirmities detailed herein.

28

1 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. The Notice of Motion is Procedurally Improper**

3 Local Bankruptcy Rule 6004-1 states that a motion seeking approval to sell “substantially
4 all of the debtor’s assets in a case under chapter 11” must state, in relevant part: “the name and
5 address of the proposed buyer, a description of the property to be sold, the terms and conditions
6 of the proposed sale...[and] a description of the estimated or possible tax consequences to the
7 estate, if known, and how any liability generated by the sale of the property will be paid.” As
8 conceded in the Term Sheet, the Debtor seeks to sell “its entire Arizona-based operation,” Term
9 Sheet pg. 1. Despite the nature of the proposed sale, the notice provided by the Debtor fails to
10 supply any of the aforementioned information as required by the Local Rules – the practical
11 impact of which deprives creditors of material information necessary to assess crucial facets of
12 the proposed sale. Because the notice fails to comply with the Local Rules, the Committee
13 requests that the Debtor provide amended notice consistent with the Local Rules.

14 **B. The Motion Fails to Provide Adequate Information**

15 Section 363(b) of the Bankruptcy Code permits a debtor, after notice and a hearing, to
16 use, sell, or lease, other than in the ordinary course of business, property of estate. The standards
17 for approval of a sale pursuant to § 363(b)(1) requires the proponent of the sale to establish that:

- 18 (1) a sound business purpose justifies the sale;
19 (2) accurate and reasonable notice of the sale was provided;
20 (3) the price to be paid is adequate, i.e. fair and reasonable; and
21 (4) good faith is present, i.e. the absence of any lucrative deals with insiders.

22 See e.g. In re Industrial Valley Refrig. and Air Cond. Supplies, Inc., 77 B.R. 15, 21 (Bankr. E.D.
23 Pa. 1987). As established below, the Motion fails to provide adequate information to support
24 any of the four factors listed above.

25 **1. Due to the Debtor’s Failure to Provide Critical Information, the Motion does not**
26 **Evidence a Sound Business Purpose for the Proposed Sale**

27 The Ninth Circuit BAP in *In re Walter*, 83 B.R. 14 (9th Cir. BAP 1988), adopted a
28 flexible, case-by-case test to determine whether the business purpose for the proposed sale

1 justifies disposition of the property of the estate under § 363 (b). In *Walter*, the court articulated
2 the criteria a bankruptcy court is to consider in deciding to approve or disapprove the use or sale
3 of estate property under § 363(b). The court stated that a bankruptcy judge might, for example,
4 look to such relevant facts as the proportionate value of the asset to the estate as a whole, the
5 amount of elapsed time since the filing, the likelihood that a plan of reorganization will be
6 proposed and confirmed in the near future, the effect of the proposed disposition on future plans
7 of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the
8 property, and most importantly whether the asset is increasing or decreasing in value. *Id.* at 19;
9 see also *In re Continental Airlines, Inc.* 780 F.2d 1223 (5th Cir. 1986); *In re Lionel Corp.*, 722
10 F.2d 1063 (2d Cir. 1983). “This list is not intended to be exclusive, but merely to provide
11 guidance to the bankruptcy judge.” *Id.* at 20. The Motion cites verbatim the same non-
12 exhaustive list of factors a bankruptcy court may consider to ascertain whether a proposed sale is
13 based upon a sound business judgment – however, the Motion fails to apply same to the facts
14 underlying the Debtor’s proposed sale. Motion 7:24-28. Rather, the Motion provides a cursory
15 analysis that “Debtor has met the [statutory] criteria. A more expansive argument is simply
16 unnecessary, under the circumstances.” Motion 7:13-14.

17 The Debtor should be able to give a more expansive explanation as to the business
18 judgment underlying the proposed sale. The Motion lacks facts, information, or analysis as to
19 whether the Debtor could realize a higher return on its assets if it wound down its business
20 operations and collected its own receivables. Such information would enable the Committee to
21 consider whether the Debtor’s underlying business judgment is sound and whether the proposed
22 sale is in the Estate’s best interest. Further, the Motion offers no evidence or information as to
23 the estimated tax implications of the proposed sale. The Debtor’s failure to provide evidence
24 that the proposed sale price is reasonable and that the assets have been adequately marketed,
25 precludes a finding that the proposed sale is based on the Debtor’s sound business judgment. See
26 e.g. *In re Crowthers McCall Pattner, Inc.*, 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990)(“Business
27 justification would include the need to close a sale to one of very few serious bidders where an
28 asset has been marketed and a delay could jeopardize the transaction.”(emphasis added)).

1 Absent an explanation or analysis by the Debtor on these points, it is difficult for the Committee
2 to determine whether the proposed sale is based on sound business judgment.

3 2. The Motion does not Provide Accurate or Reasonable Notice

4 As stated above, the Debtor's notice of hearing fails to comport with the Local Rules.
5 First, the notice fails to describe the property to be sold beyond referring to it collectively as the
6 "Purchased Assets." Notice 2:12. The absence of a sufficient description of the assets to be sold
7 creates a challenge for any interested party served with notice to ascertain what assets are at
8 issue. The notice fails to provide the "terms and conditions" of the proposed sale beyond the
9 amount of "consideration." The notice also fails to describe or estimate the possible tax
10 consequences of the proposed sale and how tax liability would impact, if at all, the net return to
11 the Estate. The Committee assumes the Debtor will request a finding in the sale order that notice
12 was reasonable and sufficient. The notice should be amended if that is in fact the Debtor's goal.

13 3. There is No Evidence the Proposed Sale Price is Fair and Reasonable

14 Courts have interpreted the Section 363(b) requirement that a fair and reasonable price be
15 obtained for the property as a price equaling at least 75% of the fair market value of the property.
16 See In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143 (3d Cir. 1986)("Traditionally,
17 courts have held that "fair and valuable consideration is given in a bankruptcy sale when the
18 purchaser pays 75% of the appraised value of the assets."); *In re Willemain*, 764 F.2d 1019 (4th
19 Cir. 1985); *Fearing v. Seror (In re Fearing)*, 143 Fed. Appx. 744, 746 (9th Cir. Cal. 2005); *In re*
20 *Ewell*, 958 F.2d 276, 281 (9th Cir. Cal. 1992) (Fair value is generally found when the purchaser
21 pays 75% of the appraised value of the assets). Implicit in the requirement that the purchase
22 price be fair and reasonable are three interrelated concepts: (1) establishment of an asset's fair
23 market value; (2) clear indication of the purchase price; and (3) the nexus between the asset's fair
24 market value and the proposed sale price. The Motion needs to provide more detail in
25 connection with all three elements.

26 a. The Motion Fails to Provide the Fair Market Value of the Assets

27 Ideally, the Motion would include an appraisal of the assets to be sold accompanied by
28 competent evidence in the form a declaration to support the proposed sale transaction. Instead,

1 the Motion is silent as to the estimated value of the assets. The Motion simply presents the
2 amount of “consideration” provided by the prospective buyer and summarily concludes that it
3 “maximizes the value of the Purchased Assets” without actually detailing the assets’ value.
4 Motion 4:22-23. This is troublesome because the Debtor is not seeking to sell the Arizona assets
5 subject to overbids, thus precluding a determination that a spirited overbid auction will ensure
6 that the assets are sold at a fair and reasonable price. Motion 8:14-15. See e.g. In re Abbotts
7 Dairies, 788 F.2d 143, 149 (3d Cir. Pa. 1986)(“Generally speaking, an auction may be sufficient
8 to establish that one has paid ‘value’ for the assets of a bankrupt. In the present case, on the other
9 hand, we reject the assertion that the "auction" conducted for Abbotts' assets necessarily
10 establishes that ADC paid ‘value.’”). Because the Motion fails to present evidence of, or
11 otherwise indicate, fair market value for the assets – it is impossible for the Committee to
12 conclude that the proposed sale price is fair and reasonable.

13 **b. The Proposed Sale Price Contradicts that Stated in the Term Sheet**

14 The Motion states that “[t]he value of the proposed sale lies in the relief it will provide
15 the estate from liability in accrued post-petition vacation of approximately \$28,000.” Motion
16 5:27-28. The Debtor’s representation has two flaws. First, the Debtor fails to substantiate the
17 amount of its alleged post-petition vacation liability. Without this information, the Committee is
18 unable to ascertain with any level of certainty the actual benefit to be derived by the Estate.¹
19 Second, the Term Sheet does not include any provision related to the buyer’s assumption of the
20 Debtor’s post-petition vacation liability. Rather, the Term Sheet expressly provides the exact
21 opposite, evident by the following: “Liabilities Assumed – None...Seller shall be responsible for
22 all deferred compensation, and all earned and accrued salary and employee benefits as of the date
23 of closing...Seller agrees to assume responsibility for all accrued “vacation.” Term Sheet pg. 1-2
24 (emphasis added). Without information as to how the Estate will be relieved from the Debtor’s
25 “accrued vacation” liability, it is unclear what benefit, if any, the Estate will receive by and

26 ¹ The Debtor should also explain why there is any material post-petition liability in a case that
27 was filed only recently and the Debtor should also explain why it is appropriate for the Debtor to
28 accrue large post-petition obligations. If in fact the primary benefit to the Estate is assumption of
employee debt and the underlying business has no value, the Debtor should explain why so many
employees were retained for such a worthless business.

1 though the proposed sale. As such, without additional information the Committee cannot
2 determine whether the amount of consideration offered for the assets is fair and reasonable.

3 c. The Nexus Between the Assets' Value and the Proposed Purchase Price
4 Cannot be Determined

5 The Motion fails to adequately value the assets to be sold and fails to clearly articulate
6 the actual amount of consideration to be provided by the prospective buyer. Based on the
7 numbers presented in the Motion and Term Sheet, the proposed \$100 purchase price is likely to
8 be well below the roundly accepted "75% of value" threshold espoused in *Abbots Diaries* and its
9 progeny. Further, the Motion fails to inform this Court of any potentially disadvantageous
10 consequences of the proposed sale. In particular, the Term Sheet provides that: (1) "[p]urchaser
11 will not assume the operating leases for the Arizona...offices"; and (2) "Seller will utilize best
12 efforts to secure tail E&O insurance covering all services completed prior to Closing." The
13 Motion fails to discuss any potential impact of these provisions – both of which may cost the
14 Estate more than the prospective amount to be received through the proposed sale. The
15 Committee requires clear information about the Debtor regarding its intention (and that of the
16 proposed buyer) regarding purchase of tail coverage in connection with the existing errors and
17 omissions insurance policy. A lapse in coverage could result in additional claims against the
18 Estate. For these reasons, the infirmities of the Motion preclude the Committee or the Court
19 from determining whether the proposed sale price is fair and reasonable.

20 4. The Motion Fails to Present Evidence of Good Faith Related to the Absence of
21 Any Deals with Insiders

22 The Term Sheet states that "[p]urchaser believes that Scott Beck, [Seller's] Principal, is a
23 key contributor to the Business...As such, Purchaser and Seller will enter into an Employment
24 Agreement in form and substance satisfactory to Purchaser...Purchaser may also consider
25 entering into an Employment Agreement with one or more employees of Seller." Term Sheet pg.
26 1-2. Further, the Term Sheet states that "[p]urchase[r] agrees that it will interview all exempt
27 employees of Seller, and will offer employment to those exempt employees." Term Sheet pg. 3.
28 What is not addressed in the Motion is whether the prospective buyer currently has any

1 agreement with the Debtor's employees, officers, directors, or principals for post-sale
2 employment, retention, or compensation. Without declarations or other evidence to this effect,
3 all interested parties are incapable of determining whether the proposed sale is entered into in
4 good faith as it pertains to deals with insiders.

5 **C. The Debtor has Not Provided Competent Evidence to Support Section 363(m)**

6 In *In re M. Capital Corporation*, 2003 D.J.D.A.R. 3639 (9th Cir. BAP 2003), the BAP
7 determined that a purchaser alleging that he had purchased property in good faith actually bears
8 the burden of showing that good faith. In *M. Capital Corporation*, the purchasers offered no
9 affirmative evidence of their good faith, only arguing that no bad faith had been shown. The
10 BAP found that the record's silence as to the purchasers' bad faith was insufficient to infer good
11 faith, as an inference of good faith drawn from a lack of evidence of bad faith would improperly
12 shirk the burden of proof. *Id.* at 3640. Further, in *In re Fitzgerald*, 428 BR 872 (9th Cir. BAP
13 2010), the court found that there was "no evidence in the record to support a 'good faith' finding
14 under section 363(m)." *Id.* at 881. "While the trustee noted in the sale motion that the sale was
15 entered into in good faith...the trustee [did not] submit a declaration or any other evidence
16 supporting this fact." *Id.* The *Fitzgerald* court further found that a "boilerplate 'good faith'
17 finding in the sale order does not suffice under section 363(m), and the Bankruptcy Court should
18 not have signed such an order without an evidentiary foundation. *Id.* Beyond stating that the
19 proposed sale was negotiated at arms-length, the Motion – and the declarations affixed thereto –
20 fails to provide any support for a finding that the proposed buyer is a good faith purchaser for
21 purposes of Section 363(m).

22 Additionally, "The requirement that a purchaser act in good faith . . . speaks to the
23 integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that
24 would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between
25 the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of
26 other bidders." *In re Abbotts Dairies*, 788 F.2d 143, 147-148 (3d Cir. Pa. 1986); see also *In re*
27 *Rock Indus. Mach. Corp.*, 572 F.2d at 1198; *Taylor v. Lake (In re Cada Invs.)*, 664 F.2d 1158,
28 1162 (9th Cir. 1981). Further, "[t]hough the Bankruptcy Code does not provide a definition of

1 good faith, this court has defined a good faith purchaser as ‘one who buys in good faith and ‘for
2 value.’” *Id.* (emphasis added). Because at this juncture it cannot be determined whether the
3 proposed sale price is fair and reasonable, a determination that the proposed buyer bought “for
4 value” cannot be made.

5 **III. CONCLUSION**

6 Based upon the foregoing, the Committee respectfully requests that the Court deny the
7 Motion, or in the alternative, continue the hearing on the Motion to allow the Debtor to resolve
8 the infirmities in the Motion and the notice of motion.

9 Respectfully submitted,

10 **SHULMAN HODGES & BASTIAN LLP**

11 Dated: November 25, 2014

/s/ Mark Bradshaw

12 _____
13 James C. Bastian, Jr.
14 Mark Bradshaw
15 Ryan D. O’Dea
16 Proposed General Counsel for the
17 Official Committee of Unsecured Creditors for the
18 bankruptcy estate of NTD Architects, Inc., a Corporation

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: **8105 Irvine Center Drive, Suite 600, Irvine, California 92618**

A true and correct copy of the foregoing document entitled (*specify*): **OPPOSITION TO MOTION OF NTD ARCHITECTS FOR ORDER AUTHORIZING SALE OF ARIZONA ASSETS FREE AND CLEAR OF LIENS** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) **November 25, 2014**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:

On (*date*) **November 25, 2014**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Debtor

NTD Architects, Inc., a Corporation
Attn President
955 Overland Court, Ste 100
San Dimas, CA 91773

Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) **November 25, 2014**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Served by Personal Delivery

US Bankruptcy Court
Attn: Hon. Barry Russell
Bin outside of Suite 1660

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

November 25, 2014

Steven P. Swartzell

/s/ Steven P. Swartzell

Date

Printed Name

Signature

NEF SERVICE LIST

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