

<p>UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY Caption in Compliance with D.N.J. LBR 9004-1(b)</p> <p>BROWN & CONNERY, LLP Joseph M. Garemore, Esquire Donald K. Ludman, Esquire 6 North Broad Street, Suite 100 Woodbury, NJ 08096 (856) 812-8900 (856) 812-2201 FAX jgaremore@brownconnery.com dludman@brownconnery.com <i>Attorneys for Pollution Control Financing Authority of Camden County</i></p>	
<p>In re:</p> <p>ALUMINUM SHAPES, LLC.,</p> <p>Debtor.</p>	<p>Chapter 11</p> <p>Case No.: 21-16520 (JNP)</p> <p>Hearing Date: October 28, 2021, at 1:00 p.m.</p>
<p>LIMITED OBJECTION AND RESERVATION OF RIGHTS OF POLLUTION CONTROL FINANCING AUTHORITY OF CAMDEN COUNTY TO THE <u>DEBTOR'S MOTION FOR THE SALE OF ITS ASSETS</u></p> <p>Pollution Control Financing Authority of Camden County (the "Authority"), by and through its undersigned counsel, files this limited objection and reservation of rights (the "Limited Objection") to the <i>Debtor's Motion For (I) an Order (A) Approving the Bidding Procedures and Form of Asset Purchase Agreement for the Sale of Certain of the Debtor's Assets Including Approval of Provisions for Designation of a Stalking Horse and Bid Protections, (B) Establishing the Notice Procedures and Approving the Form and Manner of Notice Thereof, (C) Approving Procedures for the Assumption and Assignment of Certain Executory contract and Unexpired Leases, (D) Scheduling a Sale Hearing, (E) Granting Expedited Consideration; and (F) Granting Related Relief, and</i></p> <p>7ER7629</p>	

(II) an Order (A) Approving the Sale of the Debtor's Business or Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto, and (C) Granting Related Relief [Doc. No. 94] (the "Sale Motion). In support of this Limited Objection, the Authority states as follows:

BACKGROUND

The 2008 Settlement Agreement

1. The Authority is a public body corporate and politic and a political subdivision of the State of New Jersey pursuant to N.J.S.A. 40:37C-4.

2. The Authority is a successor in interest to the Pennsauken Solid Waste Management Authority (the "PSWMA") and it owns and operates the Pennsauken Sanitary Landfill (the "Landfill") located at 9600 River Road, Pennsauken, New Jersey.

3. The Authority is subject to an Administrative Consent Order (the "ACO") executed between the New Jersey Department of Environmental Protection (the "NJDEP") and the PSWMA on December 8, 1988 regarding the remedial investigation and cleanup of the Landfill.

4. Under the ACO, the Authority agreed to and has conducted investigation and remediation work at the Landfill.

5. Under New Jersey statutory and common law, including but not limited to N.J.S.A. 58:10-23.11 *et seq.* (the "New Jersey Spill Act"), the Authority has the right to pursue money damages from any person, including but not limited to, all individuals, entities, companies, institutions, and municipalities that discharged a hazardous substance, or that are in any way responsible for any hazardous substances at the Landfill.

6. The Authority was one of three named plaintiffs (collectively, “Plaintiffs”) in an action titled *Pennsauken Solid Waste Management Authority, et al. v. James D. Morrissey, Inc., et al.*, in the Superior Court of New Jersey, Camden County, Law Division, Docket No. CAM-L-13345-91 (the “Litigation”) in which Plaintiffs sought recovery of funds expended to remediate groundwater contamination at the Landfill as required under the ACO.

7. Shapes, LLC, also known as Aluminum Shapes, L.L.C. (the “Debtor”) owns and operates a single location at 9000 River Road, Delair, New Jersey (the “Debtor’s Real Property”), that is immediately adjacent to the Landfill.

8. In the Litigation, the Authority asserted that the Debtor was responsible for the migration of hexavalent chromium from the Debtor’s Real Property as the presence of hexavalent chromium was detected in Monitoring Well number 6 (“MW-6”); located near the property line between the Landfill and the Debtor’s Real Property.

9. On March 16, 2008, the Debtor and several of its affiliates (collectively, the “2008 Debtors”) filed chapter 11 petitions in the United States Bankruptcy Court for the District of New Jersey, which were jointly administered under case number 08-14631 (GMB).

10. On July 22, 2008, Plaintiffs and the 2008 Debtors entered into a settlement agreement and general liability release (the “Settlement Agreement”).

11. Under the terms of the Settlement Agreement, in exchange for the 2008 Debtors’ agreement to, *inter alia*, assume Plaintiffs’ responsibility for monitoring, clean-up, and removal obligations for any hexavalent chromium having its source in MW-6 and/or demonstrated to have otherwise resulted from the activities of the 2008 Debtors,

Plaintiffs agreed to release the 2008 Debtors, their successors in interest and assigns, from any and all past, present, or future claims of Plaintiffs arising out of the investigation or remediation, of any part or the operation of the Landfill; including claims arising under the New Jersey Spill Act and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603 *et seq.* (“CERCLA”).

12. The Settlement Agreement was incorporated by reference into and approved in its entirety in the July 24, 2008, Order confirming the 2008 Debtors’ plan (the “2008 Confirmation Order”).

13. The Settlement Agreement and the 2008 Confirmation Order, *inter alia*, obligate the Debtor to “address hexavalent chromium issues with respect to Pennsauken Landfill MW-6” which include the continued monitoring of MW-6 and any remedial action should testing reveal the presence of hexavalent chromium above current NJDEP groundwater quality standards.

The Sale Motion

14. On August 15, 2021, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code (the “Code”) in the United States Bankruptcy Court for the District of New Jersey under case number 21-16520 (JNP).

15. On September 14, 2021, the Debtor filed the Sale Motion for the sale of substantially all of the Debtor’s assets which make up its vertically integrated aluminum processing plant.

16. Appended as Exhibit B to the Sale Motion was the form asset purchase agreement (the “APA”) which included the Debtor’s Real Property, together with all

buildings, structures, improvements and other appurtenances, as assets being sold by Debtor. *See* APA § 2.1.

17. Under Section 2.4(h) of the APA, a purchaser of the Debtor’s assets will not assume or be obligated to pay or become liable for certain excluded liabilities, including liabilities “relating to the Seller’s violation of any Environmental Law, Environmental Condition or any pending Environmental Claim existing at the time of Closing.”

18. The APA defines an “Environmental Claim” as “any action, governmental order, lien, fine, penalty, or, as to each, any settlement or judgment arising therefrom, by or from any Person alleging liability of whatever kind or nature (including liability or responsibility for the costs of enforcement proceedings, investigations, cleanup, governmental response, removal or remediation” *See* APA § 1.1.

19. On September 30, 2021, the Court entered the *Order (A) Approving Bidding Procedures and Form of Asset Purchase Agreement in Connection with the Sale of Substantially All of the Debtor’s Assets, (B) Approving Procedures for the Assumption and Assignment of Executory Contracts and Unexpired Leases, (C) Approving Procedures for Selection of a Stalking Horse Bidder and Bid Protections, and (D) Granting Related Relief* [Doc. No. 122] (the “Bid Procedures Order”).

20. On October 1, 2021, Debtor filed the *Notice of Debtor’s Selection of Stalking Horse Bidder for the Sale of Substantially All of the Debtor’s Assets Pursuant to 11 U.S.C. § 363 of the Bankruptcy Code* [Doc. No. 127], which identified CGPN, LLC (the “Stalking Horse Purchaser”) as the stalking horse bidder.

21. On October 4, 2021, Debtor filed *Debtor's Expedited Motion for an Order Approving Bid Protections Pursuant to an Asset Purchase Agreement for the Sale of Substantially All of the Debtor's Assets* [Doc. No. 132] which appended as Exhibit B an executed copy of the APA between the Debtor and the Stalking Horse Purchaser.¹

LIMITED OBJECTION

22. A sale pursuant to § 363(f) of the Code does not release the Stalking Horse Purchaser, or any other purchaser of the Debtor's Real Property, from prospective environmental obligations resulting from the purchaser's ownership and use of the Debtor's Real Property.

23. While property may generally be sold free and clear of liens, claims or encumbrances under § 363(f) of the Code, bankruptcy courts have recognized a distinction between the environmental obligations of the seller and the purchaser's environmental responsibilities starting the day it acquires the property. *See, e.g. In re Gen. Motors Corp.*, 407 B.R. 463, 508 (Bankr. S.D.N.Y. 2009), *enforcement granted in part sub nom. In re Motors Liquidation Co.*, 585 B.R. 708 (Bankr. S.D.N.Y. 2018) ("purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility").

24. This distinction follows the rationale of the Supreme Court which, in reviewing whether to allow the abandonment of environmentally encumbered property under § 554 of the Code, held that "a trustee may not abandon property in contravention

¹ The Debtor provided the Authority with a copy of the executed APA that included a schedule of assumed contracts. The Settlement Agreement was not included in that schedule.

of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.” *Midlantic National Bank v. N.J. Dep’t of Environmental Protection*, 474 U.S. 494, 507 (1986).

25. New Jersey’s Industrial Site Recovery Act, N.J.S.A. 13:1K-6 *et seq.* (“ISRA”) provides that obligations imposed under ISRA may not be limited or discharged in bankruptcy proceedings. N.J.S.A. 13:1K-12. Upon information and belief the sale contemplated herein triggers ISRA and, further, the Debtor appears to be seeking ISRA approvals. *See* APA § 3.7 and Schedule.²

26. The transfer of the Debtor’s Real Property via a § 363(f) sale does not absolve the ultimate purchaser from compliance with the New Jersey Spill Act (or other environmental laws) going forward; thus, the purchaser cannot obviate its obligation to respond to any future environmental obligations. *See In re Oldco M Corp.*, 438 B.R. 775, 785 (Bankr. S.D.N.Y. 2010).

27. Notably, if the Debtor were to assume and assign the Settlement Agreement to the purchaser pursuant to § 365 of the Code, the Authority would be bound to perform its prospective obligations with respect thereto in addition to the releases granted to the Debtor with respect to the Debtor’s Real Property.³

² Despite requests, Debtor has not provided documents pertaining to the “ISRA Cases” referenced in Schedule 3.7 to the APA.

³ The Authority’s obligations include the provision of documents and materials related to MW-6; providing access to the Landfill to Debtor in order to perform sampling, investigation, remediation and access to groundwater and related data relating to Debtor’s obligations under the Settlement Agreement; providing access to the Authority’s environmental professionals relating to Debtor’s obligations under the Settlement Agreement; executing reasonably required documents relating to the Debtor’s obligations under the Settlement Agreement; and providing written notice to the Debtor of communications from the NJDEP relating to Debtor’s obligations under the Settlement Agreement.

28. While the release in the Settlement Agreement benefits the Debtor and its successors in interest and assigns, absent assumption and assignment of the Settlement Agreement a purchaser of the Debtor's Real Estate is neither a successor in interest nor an assignee and thus would not be entitled to the benefit of that release.⁴

WHEREFORE, Pollution Control Financing Authority of Camden County respectfully requests that this Court deny approval of the Sale Motion, the APA, and any other asset purchase agreement to the extent that it seeks to release the ultimate purchaser of any prospective environmental obligations, including, but not limited to, future monitoring or remediation obligations as a result of the presence of hexavalent chromium incurred after the closing date; and grant such other relief that is just and proper.

Dated: October 26, 2021

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⁴ While the purchaser cannot fully avoid possible future environmental liability, it can limit some aspects of that liability by agreeing to take an assignment of the Settlement Agreement.