

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

**IN RE: UNITED FURNITURE
INDUSTRIES, INC., et al.¹**

**CASE NO. 22-13422-SDM
CHAPTER 11**

**BNA BANK'S LIMITED RESPONSE TO MOTION FOR ENTRY
OF ORDERS (A) ESTABLISHING BID PROCEDURES RELATING
TO SALES OF REAL PROPERTY; (B) SCHEDULING A HEARING
TO CONSIDER PROPOSED SALES; (C) APPROVING PROPOSED SALES;
AND (D) GRANTING RELATED RELIEF**

BNA Bank ("BNA" or "Bank") files this limited response ("Limited Response") to the MOTION FOR ENTRY OF ORDERS (A) ESTABLISHING BID PROCEDURES RELATING TO SALES OF REAL PROPERTY; (B) SCHEDULING A HEARING TO CONSIDER PROPOSED SALES; (C) APPROVING PROPOSED SALES; AND (D) GRANTING RELATED RELIEF ("Motion") [Dkt. #473] filed by Derek Henderson, Chapter 11 Trustee ("Trustee") for and on behalf of each of the captioned debtors expressly including Furniture Wood, Inc. (collectively referred to as "Debtors"), and in support thereof would show as follows, to-wit:

1. This Court has jurisdiction over the subject matter herein and the parties hereto pursuant to 28 U.S.C. § 1334, 11 U.S.C. §§ 105, 363, 554, 1104 of the Federal Rules of Bankruptcy Procedure, along with other related statutes and rules. This is a core proceeding as defined by 28 U.S.C. §§ 157(b)(2)(A) and (O).

I. Indebtedness Owed to BNA Bank By UFI

2. On October 9, 2013, one of the Debtors, Furniture Wood, Inc. ("Furniture Wood" or ("Debtor")), executed a variable rate Promissory Note in the amount of \$1,425,000.00 payable

¹ These jointly administered Debtors, and the last four digits of their federal tax identification number, are as follows: United Furniture Industries, Inc. (2576); United Furniture Industries NC, LLC (9015); United Furniture Industries CA, Inc. (9966); FW Acquisition, LLC (2133); Furniture Wood, Inc. (9186); United Wood Products, Inc. (1061); Associated Bunk Bed Company (0569); UFI Royal Development, LLC (8143); UFI Exporter, Inc. (6518); UFI Transportation, LLC (9471); and LS Logistics, LLC (7004).

to BNA requiring 143 regular monthly payments of \$12,136.00, beginning November 9, 2013 with one (1) final payment, plus any and all accrued interest and unpaid principal, due on October 9, 2025 ("Note").

3. To secure the indebtedness due BNA pursuant to the Note, Furniture Wood granted the Bank a first valid and perfected lien encumbering real property and improvements thereon located at 210 East Sweet Potato Street, Vardaman, Calhoun County, Mississippi ("Real Property") as more fully described in the deed of trust ("Deed of Trust").

4. To further secure the indebtedness due the Bank, Furniture Wood executed a Commercial Security Agreement ("Security Agreement") granting BNA a first valid and perfected lien encumbering:

"All furniture, equipment and fixtures including but not limited to the Furniture, Fixtures and Equipment listed on attachment (Schedule A); whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and accounts proceeds) to be located in Furniture Wood, Inc. Plant at 210 East Sweet Potato St., Calhoun Co., MS. 38878."

5. To perfect its security interests in, inter alia, Furniture Wood's "...furniture, equipment and fixtures..." ("FF&E"), BNA filed its UCC-1 Financing Statement (#20131168706A) ("UCC") with the Mississippi Secretary of State on October 22, 2013. To continue its lien priority position, BNA subsequently filed its UCC Financing Statement Amendment of its 2013 UCC on February 7, 2012 (#20120621505B) ("Continuation").

II. Relevant Events

6. An involuntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, was filed against UFI on December 30, 2022 ("Involuntary Petition Date"). UFI's case was converted to a voluntary case under Chapter 11 by bench ruling on January 18,

2023 ("Commencement Date"), and by order later entered January 27, 2023 [Dkt. #106] ("Order for Relief"), which order also directed the U.S. Trustee to appoint a Chapter 11 Trustee.

Responsively, Derek Henderson was appointed Chapter 11 Trustee ("Trustee") for the UFI Chapter 11 case on January 23, 2023, and an order approving his appointment was entered in the UFI Chapter 11 case on January 25, 2023 [Dkt. #101]. Additionally, the Trustee was appointed on February 13, 2023, in all remaining cases and subsequent orders approving his appointment were entered on February 14, 2023.

III. Present Motion

7. By previous application, the Trustee sought and obtained from this Court the authority to hire B. Riley Real Estate, LLC ("B. Riley") to market and sell the Debtor's various Mississippi and North Carolina real properties listed on Exhibit "A" to the Motion ("Real Properties"). Since its engagement, B. Riley has, upon information and belief, actively marketed the Real Properties consistent with its national practices. That marketing continues and this Motion seeks to create and implement procedural and substantive mechanisms which will facilitate the sale and closing of various properties as they mature. Given that its pre-petition collateral package consists primarily of the Mississippi real properties, BNA generally supports the Motion, but seeks clarifications of limited issues and any modifications to the proposed order granting the Motion that may be necessary to ensure that the Bank's rights in its collateral are fully preserved.

8. Although Paragraph 21 of the Motion expressly provides that, in the event a "Stalking Horse Purchaser" is or is not named, the Trustee will serve a Notice of Sale of real property consistent with the "Notice of Sale" attached to the Motion as Exhibit "D," the proposed

order granting the Motion and attendant Notice of Sale² are not as clear in this regard. Paragraph J of the order provides that the Trustee will issue a Notice of Sale "in order to initiate the Sale Process for a proposed Sale of the Real Property" in accordance with the Bid Procedures. However, the Notice of Sale expressly references a "Stalking Horse Purchase Agreement; Bid Protections" and related deadlines. Collectively, they suggest that a stalking horse will always be in play and the Notice of Sale isn't configured in such a way to accommodate a sale of real property without a stalking horse component. As such, any order granting the Motion should require the Notice of Sale to be amended in such a way to clearly accommodate a potential sale of real property or properties that does not include a stalking horse.

9. Pursuant to Paragraph 16(e) of the Motion, any "break-up" fee afforded a "Stalking Horse" bidder is to be repaid if the "Stalking Horse" is not the successful bidder. The Motion, as drafted, affords the Trustee the opportunity of setting the amount of a break-up fee "after consultation with B. Riley, the Unsecured Creditors Committee ("UCC"), United Financial Services, Inc. and any holders of valid pre-petition liens on the subject parcels of Real Property." Although the Motion affirmatively provides that a Stalking Horse will receive an unquantified break-up fee, it does not provide a mechanism for BNA to object to the amount of same without objecting to the Stalking Horse's initial designation. Even if BNA fails to prevail with an objection to the Stalking Horse's designation and the Stalking Horse is not the "Successful Bidder," the Bank may wish to continue to preserve and maintain objections to an unquantified break-up amount through any Sales Hearing, particularly since it is potentially to be paid from "the proceeds of a closed Sale" of its collateral. Thus, any order granting the Motion should provide BNA a procedural mechanism to further any objection to an unquantified break-up fee

² Notice of (I) Designation of Stalking Horse Purchaser, (II) Bid Procedures, Dates and Timeline For Auction and (III) Sale Hearing to Approve Sale of Real Property ("Notice of Sale").

up to and including any prospective Sale Hearing and, moreover, seek the Court's determination on this front.

10. Paragraph 6(b) of the "Bid Procedures" attached as Exhibit "B" to the Motion ("Bid Procedures") provides that each prospective "Bid" shall be accompanied by a deposit equal to ten percent (10%) of the bid amount. However, per its terms, it appears that a Stalking Horse need not make a deposit of like amount. If a Stalking Horse is to enjoy a "break-up" fee for an unquantified amount, it is not unreasonable to require a Stalking Horse to provide a deposit of 10% to be held toward an ultimate sales price. As such, the Bid Procedures and any order granting the Motion should be amended accordingly.

11. Paragraph 6(e) of the Bid Procedures requires that each "Bid" specifically contain a purchase price amount which shall "include an amount equal to the due diligence expenses incurred by the Trustee in procuring the Diligence Materials to be provided to Interested Parties in aid of Sales of Real Property." Although it references that these materials include title work, preliminary title commitments, ALTA surveys and Phase 1 environmental surveys, there is no provision for the disclosure of their costs. The costs attributable to the Diligence Materials and its relation to any prospective Bid may prove important information when analyzing offers to purchase various real properties. Further, the Engagement Agreement pursuant to which B. Riley has been engaged to market and sale the Real Properties [Dkt. #274, Exh. A) provides for certain fees and expenses ("Compensation") to be paid to B. Riley from each sale of real property. The amount of such Compensation likewise may provide important information when analyzing offers to purchase various real properties. Further, the amount of any surcharge under section 506(c) of the Bankruptcy ("Surcharge") to be collected from the proceeds of any sale of real property, as authorized by the Final Financing Order [Dkt. #391], is likewise important information when analyzing offers to purchase various real properties. As such, BNA requests

that any order granting the Motion provide some means of disclosure which would afford the Bank information regarding the costs of the Diligence Materials as well as the Compensation and any Surcharge attributable to the real properties securing its pre-petition claims and the subject of any Notice of Sale.

12. Paragraph 6(e) of the Bid Procedures addresses the amount of bids and provides that in the event that there is a Stalking Horse Purchaser, a Qualified Bidder, in order to defeat the bid of the Stalking Horse Purchaser, must make a bid that in the aggregate equals or exceeds the sum of the amount of the purchase price under the Stalking Horse Purchase Agreement plus a yet determined Breakup Fee and the Minimum Overbid Increment, all of which is defined as the "Initial Overbid." In turn, the Initial Overbid is defined as the sum equal to the amount of the purchase price under any applicable Stalking Horse Purchase Agreement plus a yet determined Break-Up Fee and the "Minimum Overbid Increment." However, Paragraph 6(e) of the Bid Procedures is silent as to the amount of a "Minimum Overbid Increment." Thus, at this point, it is impossible for any potential purchaser to determine with any certainty two (2) of the three (3) components of the Initial Overbid formula. Whatever those numbers may be, by definition the Initial Overbid will require a significant financial commitment from any potential purchaser of any of the Real Properties which may substantially chill the interests of any parties who wish to "top" the Stalking Horse. At a minimum, the amount of the "Minimum Overbid Increment" should be incorporated in any order granting the Motion.

13. BNA holds pre-petition liens encumbering a substantial amount of FF&E located in the Debtor's real property located in Vardaman, Mississippi. As such, the liquidation of BNA's collateral package will be largely driven by any order granting the Motion which, in turn, will dictate the formula and substance of any prospective sale of any of the Debtor's Mississippi real property holdings. Thus, any objection to a Notice of Sale contemplated by Paragraph 24 of

the Motion should similarly be given to aphillips@mitchellmcnutt.com, counsel for BNA.

Similarly, the same parties should receive notice of any objections to the designation of a Stalking Horse Purchaser, the Break-Up Fee or any other Bid Protections as contemplated by the last paragraph of page 2 of the proposed Notice of Sale.

14. The Bid Procedures and Order granting the Motion are unclear as to the disposition of inventory, equipment or other personal property ("Personal Property") located in any of the Real Properties to be sold and, in fact, provides that any sale of Real Property will be "as is, where is" which implies that the Successful Bidder will be responsible for disposition of any such Personal Property which remains on or within the Real Properties as the time of delivery of possession.. Further, no procedure(s) exist regarding the determination of what constitutes a "fixture" and their disposition in conjunction with the sale of any of the Real Properties. Given that closing of any sale is to occur within two (2) days of all conditions having been met, it is unclear whether those precedent events include a deadline for the removal of the Personal Property and, if so, what party bears the burden of doing so and any attendant expenses attributable to same?

15. The Motion, order granting same and Bid Procedures contemplate that the "Backup Bidder" must remain willing and able to close until the earliest of twenty-five (25) days after the date of the Sale Hearing, or the Closing of the transaction with the "Successful Bidder." If the latter is unable to close, the Bid Procedures contemplates that the Trustee may designate the Backup Bidder as the Successful Bidder is authorized, but not required, to consummate the transaction with the Backup Bidder "without further order of the Bankruptcy Court." However, neither the Bid Procedures nor order granting the Motion provide BNA or any other creditor or party in interest a procedural means in which to lodge an objection to a Backup Bidder. Any order granting the Motion should provide a procedural mechanism to object to the consummation

of a sale of any of the Real Properties to a "Backup Bidder."

16. As a whole, it is unclear from the Motion, proposed order granting same and Bid Procedures how competitive bidding will be handled if multiple tracts are the subject of a bid submitted by a Stalking Horse and particularly how the Trustee will select a winning bid. Presumably in order to maximize value to the Debtors' respective bankruptcy estates, the Real Properties will be offered as a whole, but would also be opened to overbidding on a per tract basis, but the Motion and Bid Procedures are unclear on this front. Neither provide certainty whether a potential bidder can condition its bid on being a "Successful Bidder" as to multiple tracts or a bidding party is irrevocably committed to purchasing a particular tract for which it is the high bid? The Motion and Bid Procedures provide an expedited procedural format for the sale of particular tracts of the Real Properties but any order granting the Motion should provide clarity as to multi-tract sales.

17. Although they contemplates that a Secured Creditor with "a valid and perfected lien on any of the Real Properties" will have a right to credit bid all or a portion of the value of "such Secured Creditor's claim within the meaning of §363(k)" and exempt such a Secured Creditor from the requirement of a Good Faith Deposit and otherwise provides that any such Credit Bid will be a "Qualified Bid notwithstanding the requirements of the Bid Procedures", the Motion and Bid Procedures fail to address certain issues pertaining to the foregoing such as the procedural mechanism for determining that the Secured Creditor has a valid and perfected lien, the allowed amount of such Secured party's claim, whether the Secured Creditor will be required to include a cash payment for the Diligence Materials, Compensation, or Surcharge as part of its Credit Bid, and whether a Credit Bid will be revocable or irrevocable. Any order granting the Motion should provide clarity as to these issues involving Credit Bids by a Secured Creditor.

18. For other good and sufficient reasons to be assigned at a hearing regarding this matter. BNA reserves the right to amend this pleading up to and including any hearing regarding the Sale Motion.

WHEREFORE, BNA respectfully requests that any order granting the Motion be consistent with this Limited Response and, moreover, specifically provide the Bank any relief sought herein. BNA prays for such other good and sufficient relief as this Court may deem just.

THIS, the 15th day of May, 2023.

Respectfully submitted,

BNA BANK

/s/ D. Andrew Phillips

D. ANDREW PHILLIPS (MSB #8509)

LAURA ELIZABETH N. FISHER (MSB #106477)

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2023, a copy of the foregoing was served electronically on all parties who has consented to electronic notice in addition to the following parties:

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This, the 15th day of May, 2023.

/s/ D. Andrew Phillips