UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

AZON CORPORATION — CASE NO. 02-64368

Debtor — Chapter 11

IN RE:

MEDIA DESIGN CORPORATION — CASE NO. 02-64369
Chapter 11

Debtor — Jointly Administered

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

At issue herein is the Motion, filed July 29, 2002, by Azon Corporation and Media Design Corporation ("Debtors") for Orders (i) Authorizing Sale of Substantially All of Debtors' Assets Pursuant to §§ 363(b)(1) and (f) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") Free and Clear of Liens and Encumbrances, Outside the Ordinary Course of Business; (ii) Approving the Assumption and Assignment of Certain Unexpired Leases and Executory Contracts Pursuant to Code § 365(a). (b), (f) and (k); and (iii) Approving Break-up Fee and Establishing Procedures for Sale of Assets Pursuant to Code § 105(a) ("Motion"). On August 14, 2002, the U.S. Trustee filed an objection to the Motion. A prospective bidder, Mafcote, Inc. ("Mafcote"), also filed an objection to the Motion on August 16, 2002. Following negotiations, the parties convened before the Court in Utica, New York on August 21, 2002, to set forth the progress on their compromise and orally argue their remaining differences. At the close of oral argument, the Debtors and the U.S. Trustee indicated that the objections of the U.S. Trustee had been resolved and would be memorialized in an order to be presented to the Court for signature. While several of Mafcote's objections had been resolved in negotiations, some of the bidding procedure concerns of the prospective bidder remained unsettled.

Having heard the parties' arguments, the Court directed Debtors' counsel to prepare an order reflecting, *inter alia*, the resolved aspects of the objections to Debtors' Motion. With respect to Debtors' challenge to Mafcote's standing, the Court afforded the parties a brief time to file memoranda in support of their respective positions. The Court indicated that a decision

regarding Mafcote's objections to include the issue of its standing would be issued by "the close of business" on Friday, August 23, 2002.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1), (b)(2)(N) and (O).

ARGUMENTS

Mafcote argues that it is unable to make prudent decisions regarding the desirability of purchasing Debtors' assets unless it is privy to certain information regarding Debtors' customers and customer relations. In response, the Debtors argue that the information sought is proprietary in nature, and it would be foolhardy to disclose such information based on Mafcote's current status as one of its major competitors. In general, Mafcote asserts that the overall structure of the Asset Purchase Agreement, dated July 19, 2002, between Debtors and Watermill Ventures Ltd. ("Watermill"), which is at the center of the bidding procedure, constrains other prospective buyers from realistically competing with Watermill in the bidding process. In response to Mafcote's objections, Debtors' counsel asserts that Watermill has had no greater access to "due diligence" materials than any other prospective bidder, including Mafcote, and that because Mafcote is not a creditor in Debtors' bankruptcy, Mafcote is not a party in interest to these proceedings and, consequently, does not have standing to object to the bidding procedures.

DISCUSSION

Code § 1109(b) allows a party in interest to raise and appear and be heard on any issue in a case under chapter 11. Identified in the statute as parties in interest are the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or an indenture trustee. "Whether party in interest status should be afforded an entity is to be determined on a case by case basis." *In re Crescent Mfg. Co.*, 122 B.R. 979, 981 (Bankr. N.D.Ohio 1990) (citation omitted).

In making its determination, the Court must consider whether Mafcote has a legal right or interest that "is within the zone of interests to be protected or regulated by the statute." *See In re The Harwald Co.*, 497 F.2d 443, 444 (7th Cir. 1974) (citation omitted). In addition, Mafcote must establish that the bidding procedures have caused it injury in fact. It is only then that it would have standing.

The Bankruptcy Code is intended to "minimize the injury to creditors arising from the fact of bankruptcy." *Id.* A prospective purchaser that is not a creditor generally has no standing to object to a sale of a debtor's assets. *See Condere Corp.*, 228 B.R. 615, 624 (Bankr. S.D. Miss. 1998) (citations omitted); *In re Karpe*, 84 B.R. 926, 929 (Bankr. M.D.Pa. 1988) (finding that entity which had filed an untimely bid had no standing to object to the sale of estate property); *see generally, Crescent Mfg.*, 122 B.R. at 981(noting that although an interested purchaser of the debtor's assets or business "may increase the res available for distribution to creditors, it will not benefit from this estate" and, thus, has no standing to object to a motion seeking to extend the exclusivity period).

In *Certified Associates, Inc. v. Foundation Properties, Inc. (In re Realty Foundation, Inc.)*, 75 F.2d 286 (2d Cir. 1935), the notice of sale solicited bids for the assets of the estate as a whole and also in separate lots. On the day of the sale, however, the referee indicated that he would consider only bids in bulk. The assets were sold in bulk and the sale confirmed by the referee. Prior to the sale, Certified Associates objected to the bulk sale on the ground that the notice had specifically indicated that bids in lots would be received. A creditor also made the same objection at the time of the sale hearing. Certified Associates then sought review of the order of the referee confirming the sale; the objecting creditor did not. The district court reversed the order of the referee "on the ground that the 'restriction to bids in bulk was a clear departure from the notice of sale and had a tendency to chill the bidding.'" The district court ordered a new sale in lots, as well as in bulk. *Id.* at 287.

The Circuit Court of Appeals pointed out that no **creditor** had appealed from the referee's order confirming the sale. The Circuit Court of Appeals agreed with the district court "that the referee, if any creditors objected, should not have changed the terms of bidding so as to prevent bidding in lots." *Id.* The Circuit Court of Appeals viewed the objection of Certified Associates as one by an entity that possessed no legal interest in the premises. *Id.* at 288. The Circuit Court of Appeals noted, "we know of no theory of law upon which such a person has any standing whatever. A contract with a bidder only arises after his bid has been accepted and the sale to him confirmed." *Id.* The Circuit Court of Appeals took issue with the district court, which it felt had treated Certified Associates' objections as if they had been made by a creditor, which Certified Associates was not. The Circuit Court of Appeals reversed the decision of the district court, finding that Certified Associates "had no such interest [in the premises] and could not properly

either object to the confirmation of the sale or review the order of confirmation." *Id.*

In connection with a proposed sale pursuant to Code § 363(b), the "notice and hearing" requirement is intended "'to give creditors who have a vital interest in maximizing realization from the assets of the estate, an opportunity to review the terms of a proposed sale, and to object thereto, if they deem the terms and conditions not to be in their best interests.'" *In re Caldor,* Inc.-*NY,* 193 B.R. 182, 186, quoting *In re Sapolin Paints, Inc.,* 11 B.R. 930, 936 (Bankr. E.D.N.Y. 1981). Mafcote is not a creditor and has no standing to object to the bidding procedures because Mafcote currently has no "'legal right - one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.'" *Harwald,* 497 F.2d at 444, quoting *Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118, 137-138 (1939); *In re Martin Paint* Stores, 199 B.R. 258, 263 (Bankr. S.D.N.Y. 1996) (citations omitted); *see also Caldor,* 193 B.R. at 186 (noting that "[to] have standing a party must assert its own legal rights and interests . . . and the complaint must fall within the zone of interests to be protected or regulated by the statute at issue." (citations omitted)).

Mafcote has the option to bid under the terms as they have been presented by the Debtor. If it is unsuccessful in its bid, it may have standing to appeal the sale to the successful bidder provided it is able to establish that the sale was either fraudulent or unfair. *See In re Colony Hill Associates,* 111 F.3d 269, 274 (2d Cir. 1997). According to the court in *Colony Hill*, the unsuccessful bidder's standing was based on its challenge to the "'intrinsic structure of the sale.'" *Id.*, quoting *In re Beck Industries, Inc.,* 605 F.2d 624, 634 n.13 (2d Cir. 1979). The court in *Colony Hill* went on to identify other courts that had adopted similar rationale in determining standing. *Id.*, citing, e.g., *In re REA Holding Corp.,* 447 F.Supp. 167, 169 (S.D.N.Y. 1978)

(stating that appellate standing for unsuccessful bidder requires "some evidence of fraud, deceit, mistake of fact or other inequitable overreaching."). However, at this stage of the proceedings, the Court concludes that Mafcote has no standing to interpose objections to the proposed bidding procedures.

Based on the foregoing, it is hereby

ORDERED that the objection filed by Mafcote with respect to the bidding procedures is overruled.

Dated at Utica, New York

this 23rd day of August 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge