

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

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| In re: | § | Chapter 11 |
| | § | |
| Cobalt International Energy, Inc., <i>et al.</i> , | § | Case No. 17-36709 (MI) |
| | § | |
| Debtors. | § | Jointly Administered |

**CHEVRON U.S.A. INC.’S LIMITED OBJECTION
TO DEBTORS’ MOTION TO APPROVE BIDDING PROCEDURES, ET AL.**
(this relates to Docket No. 15)

Chevron U.S.A. Inc. (“Chevron”), a creditor and party in interest in these cases, pursuant to Bankruptcy Code sections 363 and 365, and Bankruptcy Rules 6004, 6006 and 9014, files this Limited Objection to the Debtors’ motion seeking entry of an order (a) approving proposed bid procedures, (b) approving the selection of one or more Stalking Horse¹ bidders, if any, and the bid protections, (c) scheduling an auction, (d) approving the form and manner of notice thereof, (e) scheduling dates and deadlines in connection with the approval of the Disclosure Statement and confirmation of a Plan, and (f) granting related relief (the “Bid Procedures Motion”) (Docket No. 15), as follows:

SUMMARY

The Debtors identified four domestic assets they seek to sell during these cases which include the Anchor Prospect – a deep water Gulf of Mexico prospect that is in the development phase. The Debtors have a 20% working interest in the Anchor Prospect, Chevron holds the majority working interest, and is the operator (there are 2 other working interest owners in addition to the Debtors). The Debtors’ first day filings stated that they owed approximately \$2.5 million to Chevron for unpaid joint interest billings, and owed approximately \$19 million under

¹ Capitalized terms not defined herein shall have the same definition as set forth in the Bid Procedures Motion.

existing authority for expenditures related to Anchor and anticipated a total of \$20 million additional uncommitted expenditures will become due and payable within a year following the petition date. As is typical in these types of capital intensive projects, the Debtors' working interest is subject to extensive agreements including the Anchor Prospect Offshore Operating Agreement dated effective November 26, 2013 (as amended) and the Anchor Prospect Unit Operating Agreement dated effective February 1, 2014 (as amended) (collectively the "Anchor Unit Agreements") which set forth the relative rights and liabilities of the working interest owners. The Anchor Unit Agreements have been filed of public record. Among other issues, the Anchor Unit Agreements contain clear and well-defined preferential right of purchase provisions (the "Pref Right") governing any party, including the Debtors, seeking to sell their working interest. The Pref Right has nothing to do with an insolvency or bankruptcy case and is therefore not the type of *ipso facto* clause that is unenforceable by operation of Bankruptcy Code section 365(b)(2).

For purposes of the Bid Procedures Motion, while Chevron does not have an objection, generally-speaking, to the Debtors seeking approval of typical bid procedures governing the process for sale of their assets under a plan of liquidation, including the sale of the Debtors' Anchor Prospect working interest and assumption and assignment of their interests in the Anchor Unit Agreements, Chevron has identified four issues with either the proposed form of order or the bid procedures themselves. These issues can be resolved to properly balance the Debtors' desire to sell their assets with other parties' rights in the assets and contracts, and compliance with the requirements of the Bankruptcy Code. Chevron has reached out to the Debtors in an attempt to resolve these issues and is hopeful they can be fully resolved prior to the January 11, 2018 scheduled hearing.

The four issues are: (1) removing the current language in paragraph 19 of the proposed form of order which eliminates and determines preference rights and replacing it with language preserving preference rights (including the Pref Right) and all parties' arguments (including without limitation Chevron) in connection with any preference right; (2) protecting commercially sensitive information and property rights of third parties like Chevron; (3) permitting contract counter-parties like Chevron to attend the auction, even if they are not bidders; and (4) including in the bid procedures, a typical process for the Successful Bidder and Backup Bidder to provide adequate assurance of future performance information to each contract counter-party included in their respective bids.

BACKGROUND FACTS AND LIMITED OBJECTION

1. The Debtors filed their Bid Procedures Motion on the petition date, December 14, 2017. However, as reflected in this and other pleadings, the Debtors intend to sell their assets pursuant to a plan of liquidation, which they have indicated will be filed on or about January 15, 2018, after the date of the hearing on approval of the proposed bid procedures.

2. As set forth in the summary above, Chevron understands and does not object to the Debtors' desire to establish a set of normal bid procedures for parties to submit bids for the Debtors' assets along with the basic guidelines for the auction. And, while the proposed bid procedures largely follow a typical bid and auction process, Chevron has identified four objections that need to be resolved to protect the rights of parties, like Chevron, whose interests and property rights, including but not limited to the Pref Right, are affected by the bid and auction process.

Bid Procedure Order

3. Chevron has identified a problem with paragraph 19 of the proposed form of order. The current, as filed version, states that preferential rights of purchase are “deemed” to have been satisfied. Initially, as a matter of the clear contract language, the proposed bid procedures do not comply with the Pref Right as set forth in the Anchor Unit Agreements. Further, and significantly, Chevron is not aware of any legal basis for this language or determination, especially in the form of an order related to bid procedures. By definition, approval of bid procedures should not and cannot determine party’s substantive rights. While the Debtors’ Bid Procedure Motion makes a passing reference to preference rights, there are reported cases that uphold and enforce such rights. See *In re Olsen*, 563 B.R. 899 (Bankr. E.D. Wisc. 2017); *In re Capital Acquisitions & Management Corp.*, 341 B.R. 632 (Bankr. E.D. Ill. 2006). Critically, here, there is no proper pleading that brings this issue before the Court for a ruling, and in any event, it is not yet ripe for determination. Moreover, the Pref Right is one of the material terms of the Anchor Unit Agreements and assignment of those agreements must, as a matter of law, be of the contract as a whole, including all contract terms. At a minimum, the Pref Right will be binding on whatever party is the contract assignee. 11 U.S.C. §365(f). Again, the only request before the Court is for approval of a process for submission of bids and governance of the auction. Substantive rights of parties cannot be determined and certainly not eliminated, in any bid procedures or order approving bid procedures.²

4. Specifically, paragraph 19 of the current order should be deleted and the following language used as a replacement:

² Chevron expressly reserves all its rights in connection with the Pref Right in the Anchor Unit Agreements, as well as all other rights, claims and defenses in the event of sale of the Debtors’ working interest in Anchor and/or any assumption and assignment of the Anchor Unit Agreements.

“Nothing in this Order waives or limits the ability of parties to assert rights of preferential purchase (or similar rights) (“Pref Rights”) in connection with the sale of any of the Debtors’ assets and/or the assumption and assignment of any leases or executory contracts. The Debtors and parties asserting Pref Rights reserve all such rights and reserve all arguments regarding the existence and/or enforceability of any alleged Pref Right, and any dispute as to Pref Rights will be determined in connection with the approval of the sale(s) of the Debtors’ assets pursuant to the plan.

Bid Procedures

5. As noted above, in addition to the change in the bid procedure order, Chevron has identified three issues in the proposed bid procedures. First, Bid Procedure subparagraph 4-“Due Diligence”- notes that the Debtors reserve the right to withhold commercially sensitive diligence materials, notwithstanding an entity’s execution of a confidentiality agreement, if that interested party/bidder is a competitor of the Debtors. The existing Anchor Unit Agreements contain confidentiality provisions and similar restrictions on the Debtors’ access and use of Anchor-related confidential information or materials including, without limitation providing any such information or material to third parties. Any confidentiality agreement the Debtors execute with interested bidders needs to cover and be consistent with the Debtors’ current confidentiality obligations under the Anchor Unit Agreements.

6. Second, subparagraph 7(a) – Auction- currently provides that in addition to the Debtors, secured lenders, Committee, and bidders, no other parties are permitted to attend the auction. Chevron is not aware of any legal basis for restricted access to an auction of a bankruptcy debtors’ assets, which is part of a public proceeding. More importantly, Chevron’s rights and property interests, including without limitation the assumption and assignment of the Debtors’ interests in the Anchor Unit Agreements, are directly involved in the auction. As such, pursuant to Bankruptcy Code sections 363, 365 and 1109, Chevron has the right to attend the

auction if it chooses to do so and expressly reserves such right. This language should be modified so that, at a minimum, contract counter-parties can attend the auction, even if they are not bidders.

7. Third, the current bid procedures omit the normal process or procedure for (i) notifying contract counter- parties that their contract rights are involved in the final bids and any contract cure amounts, and (ii) the Successful Bidder and Backup Bidder providing proper information to satisfy their affirmative obligations under Section 365 to demonstrate adequate assurance of future performance. This omission can be fixed by adding a new subparagraph that requires the Successful Bidder and Backup Bidder, within 24 hours after conclusion of the auction, to provide to contract counter-parties by overnight delivery the required adequate assurance information. Such notification is easy as the contracts and contract parties will have been identified in each of those bids, so getting the required adequate assurance information sent by overnight delivery to affected parties will be straight forward. While any issues regarding the substantive rights related to contract assumption and assignment can be dealt with in the sale approval pursuant to the plan, here the issue is one of proper procedures, and those procedures should be amended to include the Bankruptcy Code-required notice and adequate assurance information to contract counter-parties which is normal in a bid procedures context.

CONCLUSION

8. Based upon the foregoing, Chevron respectfully requests that the Court include these changes in both the order approving any bid procedures, along with the bid procedures themselves. Specifically, Chevron requests that (i) the current order paragraph 19 be removed and language added, as set forth above, that preserves all parties rights and arguments in connection with preference rights; (ii) confirming that the Debtors' confidentiality agreements

are consistent with their confidentiality obligations under the Anchor Unit Agreements; (iii) modifying the auction procedures so that contract counter-parties like Chevron are permitted to attend the auction even if they are not bidders; and (iv) adding a notice provision to contract counter-parties whose contracts are included in both the Successful Bid and Backup Bid along with requiring each of those bidders providing proper information on their ability to demonstrate adequate assurance of future performance, by overnight delivery, within 24 hours after conclusion of the auction. Chevron requests such other and further relief which the Court deems proper.

Respectfully submitted this 4th day of January, 2018.

KING & SPALDING, LLP

By: /s/ Edward L. Ripley_____

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ATTORNEYS FOR CHEVRON U.S.A. INC.

CERTIFICATE OF CONFERENCE

Undersigned counsel for Chevron certifies that he has been in communication with the Debtors in a good faith attempt to resolve this Limited Objection, and that those communications continue, however, as of the date of filing, the matter remains unresolved.

/s/ Edward L. Ripley
Edward L. Ripley

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Chevron's Limited Objection to Debtors' motion for approval of bid procedures, et. al, was served electronically upon the parties eligible to receive service by the Clerk's Office ECF facilities, on this 4th day of January, 2018.

/s/ Edward L. Ripley
Edward L. Ripley