

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

In re: SHERWIN ALUMINA COMPANY, LLC, et al., <p style="text-align: center;">Debtors</p>	§ § § § § § § § §	Chapter 11 Case No. 16-20012 (Jointly Administered) Judge David R. Jones
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LIMITED OBJECTION OF NASHTEC, LLC, TO DEBTORS’ PROPOSED FINAL FINANCING ORDER AND THE PROPOSED BIDDING PROCEDURES ORDER
(Relates to Doc. Nos. 345 and 362)

Nashtec, LLC (f/k/a Nashtec L.P.), a Delaware limited liability company (“Nashtec”), a creditor and counter party to executory contracts, hereby objects on a limited basis to the request of Sherwin Alumina Company, LLC, *et al.* (“Debtors”) (Doc 345 and 362) for entry of the Proposed Final Financing Order and the Proposed Bidding Procedures Order (collectively the “Orders”), which are set for a hearing on March 9, 2016 at 9:00 a.m. (“Hearing Date”). The grounds for this objection are as follows:

Factual Background

1. The Debtors filed a motion on February 26, 2016 seeking a status conference and scheduling of a hearing and objection deadlines (Doc. No. 345) (“Status Motion”) with respect to the financing motion (Doc. No. 26) and Bidding Procedures Motion (Doc. No. 25) (collectively, the “Motions”)¹. The Status Motion included proposed orders for the Motions which were substantially different from the prior relief sought by the Motions.

¹ To the extent applicable, the Objection filed by Nashtec, LLC is hereby incorporated as if set forth herein. See Doc. No. 272.



2. The Court held a status conference on March 1, 2016 at 11:00 a.m. and set the Hearing Date.²

3. Several of the key parties were scheduled to engage in a mediation with the Debtors on March 4, 2016. There was some discussion at the March 1, 2016 status conference that an update on the mediation may be provided on Friday, March 4, 2016 and/or would be provided on March 7, 2016 (today's date).

4. Nashtec has two members. The majority (51%) member is Nabaltec AG, a German stock company formerly known as Nabaltec GmbH ("Nabaltec"). The minority (49%) member is Allied Alumina, LLC, a Delaware limited liability company ("Allied"). Allied is the parent of the Debtor. Sherwin Alumina Company, LLC, a Delaware limited liability company formerly known as Sherwin Alumina, LP ("Sherwin"). Prior to December 31, 2009, Sherwin was the 49% minority member of Nashtec. On December 31, 2009, Nabaltec consented to the substitution of Allied in place of Sherwin as the minority member of Nashtec. Allied is not a debtor.

5. Nashtec is the counter-party to Sherwin under a Raw Material Supply Agreement dated March 31, 2005 ("Supply Agreement"), and a Management Services Agreement dated March 31, 2005 ("Services Agreement", and together with the Supply Agreement, the "Agreements").

6. Nashtec owns an aluminum trihydrate production plant which is located on real property in Gregory, Texas ("Nashtec Plant"), which is immediately adjacent to Sherwin's plant ("Sherwin Plant"). Under the Supply Agreement, Sherwin supplies alumina to Nashtec. Under the Services Agreement, Sherwin provides services and other items to Nashtec in connection with the operation of Nashtec's plant. Sherwin also leases labor to Nashtec.

² The hearing date has been changed to March 9, 2016 at 9:00 a.m. in Houston, Texas.

7. Physical access to the Nashtec facility and the transportation of finished products from the Nashtec plant are made across Sherwin's property under easements of record held by Nashtec.

8. Between February 2005 and October 2015, Nashtec executed a number of purported demand promissory notes to the order of Sherwin ("Nashtec Notes"). The aggregate principal amount of the Nashtec Notes is \$10 million.

9. In July 2007, the then-members of Nashtec – Sherwin (the Debtor) and Nabaltec – adopted an agreement regarding the distributions of cash from the ongoing operations of Nashtec. The members agreed that payment of interest under the Nashtec Notes and the repayment of principal on the Nashtec Notes issued would occur only when and if the cash flow of Nashtec would allow for such repayment after paying other debts deemed to take priority ahead of the Nashtec Notes.

10. The Sherwin bankruptcy has caused Nashtec to have to reevaluate whether it may need to sell some its assets and/or business, shrink or shut down operations, and/or whether it can continue to operate without the existing connections with Sherwin.

11. Because the Debtor is an affiliate of the minority member of Nashtec (Allied) and the Agreements provide Sherwin with information from Nashtec which includes sensitive trade information and/or proprietary information, Nashtec asserts it should be a party to any disclosure agreements. Nashtec should be notified of any potential interested buyers that will receive access to such information in the Debtors' data room or which was supplied to the investment bankers hired to market the assets.

12. As explained above, Nashtec's business is heavily dependent on Sherwin. Nashtec should have a right to access all of the sale marketing materials and be privy to anyone who shows

an interest in order to mitigate damage to Nashtec whether from release of records related to its operations. In order to facilitate the potential to mitigate rejection damages and synergy given the existing Agreements, Nashtec should be afforded the opportunity to engage with potential buyers to discuss a possible go-forward business arrangement given the potential impact of a Sherwin sale on the business and operations of Nashtec.

13. As such, it appears the Debtors are attempting to sell the easements as part of its proposed sale of assets. A copy of the Special Warranty Deed granting Nashtec's easements is attached to Doc. No. 272.

Grounds for Objection

14. The Debtors are requesting to sell all or potentially all of the Debtors' assets and specifically contemplate that executory contracts may be assumed or rejected without any further clarity.

15. This is a limited objection. Nashtec does not oppose a sale process in general, but believes the Debtors should work cooperatively with Nashtec due to the connections in the parties' businesses.

Objection Regarding Nashtec Easements

16. Nashtec **does not consent** to the sale of Sherwin's Real Property, free and clear of Nashtec's easements. Easements which are duly recorded are "covenants running with the land". See *Hidalgo v. Maverick*, 349 A.D.2d 768 (Tex. Civ. App. – San Antonio, 1961); *McWhorter v. City of Jacksonville*, 694 A.D.2d 182 (Tex. Civ. App. – Tyler, 1985). As such, a purchaser of the Sherwin Real Property may not escape them by a purchase under Section 363(f) of the Bankruptcy Code. See *Silverman v. Ankari (In re Oyster Bay Cove, Ltd.)*, 196 B.R. 251, 255-56 (Bankr. E.D.N.Y. 1996).

Objection Based on Disclosure of Proprietary Information

17. Section 6.1 of the Management Services Agreement requires Sherwin to maintain the confidentiality of Nashtec's confidential information by referring to Section 10.1 of the Nashtec Operating Agreement. Section 10.1 of the Nashtec Operating Agreement prohibits the sharing of such information with a third party. Hence, the bid procedures should include a requirement that prohibits Sherwin from producing any Nashtec confidential information to any potential purchaser unless such a purchaser executes a confidentiality agreement satisfactory to Nashtec to ensure that all of Nashtec's confidential information held by or available to Sherwin is protected. Nashtec reserves all rights that it may have against Sherwin or its affiliates in the event that Sherwin acts in violation of the Management Services Agreement.

18. Nashtec should be a party to any confidentiality agreement to insure it has a right to enforce the agreement if there is a breach.

19. In addition, Nashtec should be informed of any potential bidders which are looking at the assets given its data is part of the base of documents subject to a mutually agreeable non-disclosure agreement and asserts that the sale should not be free and clear of Nashtec's easements.

Objection Regarding Transfer of the Nashtec Notes

20. Nashtec understands that the assets to be offered by sale by Sherwin include the Nashtec Notes. The principal of the Nashtec Notes has not been repaid as of the date of this limited objection.

21. As explained above, the Nashtec Notes are subject to an agreement by Sherwin (as the original payee) acknowledging and agreeing that repayment is subject to Nashtec's cash flow and that any payment is subject to Nashtec's repayment of certain other obligations.

22. Accordingly, the prospective buyers of the Nashtec Notes shall be informed that the sale is not free and clear of such deferral agreement or any other defenses, claims, interests or rights that Nashtec has related to the Nashtec Notes.

Reservation of Rights

23. Nashtec reserves the right to supplement this objection and to take such other or further positions as may be appropriate based on the submissions of other parties, the further course of the sale process, and the course of the case and further proceedings before the Court.

WHEREFORE, Nashtec prays that the Court deny the motion to the extent that it requests or would result in: (i) a sale free and clear of Nashtec's Easements; (ii) a sale or transfer of Allied's interests in Nashtec and the Sherwin Plant that violate the Nashtec Operating Agreement; or (iii) that the transfer of the Nashtec Notes shall be subject to all rights, claims, agreements, interests and/or defenses that Nashtec has related to the notes.

DATED: March 7, 2016

Respectfully submitted,

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ATTORNEYS FOR NASHTEC, LLC

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, the foregoing Objection was served via the Court's ECF notification system to the parties listed below at the email addresses listed.

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