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Verne, B. Michael

From: [REDACTED]
Sent: Monday, June 23, 2008 1:17 PM
To: Verne, B. Michael
Subject: Transaction/ Bankruptcy Related Expenses

Mike,

Our client, Company A, has entered into an agreement to purchase substantially all of the assets and assume certain liabilities of Company B and its subsidiary (together the "Sellers"). Sellers filed in U.S. bankruptcy court earlier this year and maintain debtor-in-possession status at this time. This asset acquisition will be made pursuant to a Sale Order under Chapter 11 of the Bankruptcy Code. The aggregate consideration for the acquired assets (the "Purchase Price") is the sum of: (1) \$45,109,379 in cash at the Closing, *plus* assumed liabilities of approximately \$9.2 million, plus approximately \$6.3 million in payment of outstanding revolving loans and cure payments.

In addition Company A will pay certain expenses of the Sellers related to the transaction and/or bankruptcy related expenses. Specifically, Seller will pay: approximately \$1.2 million directly to bankers for services rendered; \$656,000.00 into a segregated escrow account for the benefit of participants under a management incentive program (i.e. incentivizing certain employees to remain during bankruptcy proceedings); \$830,000.00 to be held in the Sellers' general funds to satisfy in part the costs of administration and winding down the Chapter 11 cases for fees and costs incurred by professionals retained by Sellers; *and* approximately \$250,000 to Sellers in additional expense reimbursement. As is typical in other bankruptcy proceedings, these payments were required to be made by the successful bidder.

Based upon informal interpretations issued by the PNO in other matters we understand that as a general rule it is the PNO's view that the seller's transaction expenses in an asset transaction are not included in the "size-of-transaction test," regardless of whether the buyer reimburses the seller for these expenses, or the seller pays these expenses from the deal proceeds (e.g., see <http://www.ftc.gov/bc/hsr/informal/opinions/0805010.htm>). We are of the view that the payments described in paragraph 2 above are transaction expenses that need not be included in the acquisition price. . Accordingly, the acquisition price is the sum of the items included in paragraph 1 above, which equals approximately \$60.6 million Company A also has conducted a fair market valuation and determined that the fair market value does not exceed the purchase price such that the "size-of-transaction" test is not met by either the purchase price or the fair market value.

Our client seeks informal guidance regarding the fact pattern described herein. We greatly appreciate your time in considering this matter. Please feel free to contact me if further clarification or additional facts are needed in order to provide informal guidance.

Best regards,

[REDACTED]

AGREE -
BM
6/23/08

[REDACTED]