

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

THE HUNTINGTON NATIONAL)
BANK, AS TRUSTEE)

Plaintiff)

v.)

SAINT CATHARINE COLLEGE, INC.,)
et al.)
Defendants)

CASE NO.: 3:16-CV-465-DJH

RESPONSE OF INTERVENING DEFENDANT, FARMERS NATIONAL BANK OF LEBANON, KENTUCKY, TO EXPEDITED MOTION OF THE RECEIVER FOR AN ORDER (I) APPROVING SALE PROCEDURES AND BIDDING PROTECTIONS TO BE EMPLOYED IN CONNECTION WITH THE PROPOSED SALE OF SAINT CATHARINE COLLEGE, INC.'S REAL ESTATE AND OTHER ASSETS, (II) SCHEDULING AN AUCTION AND HEARING TO CONSIDER APPROVAL OF THE SALE OF THOSE ASSETS, (III) APPROVING NOTICE OF THE DATES, TIMES, AND PLACES FOR AN AUCTION AND FOR HEARING ON APPROVAL OF (A) SALE OF ASSETS, AND (B) OTHER RELATED RELIEF

Comes the Intervening Defendant, Farmers National Bank of Lebanon, Kentucky (hereinafter "FNB"), and files this as its Response and Objection to the Expedited Motion of the Receiver for an Order (I) Approving Sale Procedures and Bidding Protections to be Employed in Connection with the Proposed Sale of Saint Catharine College, Inc.'s Real Estate and Other Assets, (II) Scheduling an Auction and Hearing to Consider Approval of the Sale of Those Assets, (III) Approving Notice of the Dates, Times, and Places for an Auction and for Hearing on Approval of (A) Sale of Assets, and (B) Other Related Relief.

Essentially, the Receiver, with the acquiescence of the Plaintiff, The Huntington National Bank, as Trustee, proposes to offer a multi-million dollar property¹ for bids to a limited audience with 21 days, or likely less, for prospective bidders to perform due diligence, arrange financing and deliver a "qualifying bid" for the property. Respectfully, FNB objects. The objection of FNB is based on three primary concerns, as follows:

1. **The Proposed Sale is Not a "Public Sale" as Contemplated by 11 U.S.C. §2001, and Does Not Comply with the Requirements of a "Private Sale."**

The authority of a Federal Court to Order the sale of real property by a Receiver is governed by 11 U.S.C. §2001. Therein, the requirements for a "public sale" are much less restrictive than those for a "private sale." For a "private sale," the terms of the sale are required to be published and appraisal of the real property is required. The "private sale" cannot be confirmed if the sale price is less than two-thirds of the appraised value of the property.

Here, the Receiver does not propose to offer the Saint Catharine real estate for sale to the public. Rather, the Receiver proposes to offer the property for sale to only a limited segment of the public. The difference between a "public" and a "private" sale in the context of 11 U.S.C. §2001 is not specifically defined and does not appear to have been the subject of any judicial opinions. However, the difference has been widely considered by various state courts in the context of sales pursuant to the Uniform Commercial Code. Generally, a sale is "public," as opposed to "private," when it is publicly advertised, open to the public, and the sale is made, after competitive bidding, to the highest genuine bidder. *Lawrence's Anderson on the Uniform*

¹ It is certainly worthy of note that the last audited financial statement of Saint Catharine College, Inc., prior to the filing of this Receivership action, estimated the value of Saint Catharine's property and equipment at \$37,576,205. (Doc. # 49-2). The currently proposed sale procedure seems to be geared toward selling the property for only \$4,700,000.

Commercial Code §9-504, p. 367. As further guidance, the official comment 7 to KRS 355.9-610 describes a public disposition as one where, “the price is determined after the public has had a meaningful opportunity for competitive bidding,” requiring “that some form of advertisement or public notice must precede the sale . . . and that the public must have access to the sale.” The Kentucky Court of Appeals provided similar guidance in *Ford Motor Credit Co. v. Hall*, 879 S.W.2d 487 (Ky.App. 1994), where the issue was whether the sale of an automobile at a “dealers only” auction constituted a public sale. The Court strongly suggested that an auction open only to dealers is a private sale, not a public sale.

Because the proposed sales procedures restrict participation in the sale to a limited audience, it cannot be considered a “public” sale and the advertising and appraisal requirements of 11 U.S.C. §2001 are required.

2. The Window Proposed for “Qualifying Bids” Is Unreasonably Narrow.

The Receiver’s proposed sale procedures contemplate that after entry of an Order approving those procedures, it will send notice to a selected audience. To constitute a “qualifying bid” for the property, that bid must be actually in the hands of the Receiver within 21 days of the entry of the Court’s Order. This window requires that in less than three weeks when considering the time which will elapse after entry of the Order before notice to prospective bidders is received and the additional time necessary to deliver the “qualifying bid,” a prospective bidder must perform all of his required due diligence and arrange financing for the purchase of a multi-million dollar tract of real estate. Where the bid, once submitted, is irrevocable and not subject to contingencies, it is entirely unreasonable to assume that prospective bidders will be willing or able to compete for the purchase of the property in such a narrow time frame.

3. **The Receiver Proposes to Sell Property Not Encumbered by the Plaintiff's Security Interest Without Allocation of the Purchase Price Among Those Unencumbered Assets.**

In addition to the Saint Catharine real estate, the Receiver proposes to include other "Transferred Assets" as part of the sale. These "Transferred Assets" include the following:

- (iii) All of Saint Catharine's equipment, machinery, computer systems and software, fixtures, office equipment, furniture, and furnishings;
- (iv) All of Saint Catharine's rights, title and interest in the Assigned Contracts;
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- (vi) All of Saint Catharine's student accounts
- (vii) All of Saint Catharine's intellectual property, including, without limitation all copyrights, patents, patent rights, trademarks, service marks, source code, know-how, trade secrets, confidential information, trade names, fictitious names (include, but not limited to, d/b/a and f/d/b/a names)

However, the Plaintiff's security interest in Saint Catharine's personal property appears to be limited to, "All revenues, receivables, accounts and assignable general intangibles." Thus, it would be inappropriate to sell, for a single purchase price, both real property encumbered by the Plaintiff's mortgage lien, and tangible assets not subject to any lien in favor of the Plaintiff, without an allocation of the purchase price as between those assets.

CONCLUSION

Based on all of the foregoing, FNB respectfully requests that the Receiver's Expedited Motion of the Receiver for an Order (I) Approving Sale Procedures and Bidding Protections to be Employed in Connection with the Proposed Sale of Saint Catharine College, Inc.'s Real Estate and Other Assets, (II) Scheduling an Auction and Hearing to Consider Approval of the Sale of Those Assets, (III) Approving Notice of the Dates, Times, and Places for an Auction and for Hearing on Approval of (A) Sale of Assets, and (B) Other Related Relief be denied.

Respectfully submitted,

/s/ Joseph H. Mattingly III
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CERTIFICATION OF SERVICE

I hereby certify that on this 20th day of November, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Joseph H. Mattingly III
JOSEPH H. MATTINGLY III