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11 UNITED STATES BANKRUPTCY COURT
12
13 NORTHERN DISTRICT OF CALIFORNIA
14
15 SAN FRANCISCO DIVISION

16 In re:

17 HELLER EHRMAN LLP,

18 Post-Confirmation
19 Liquidating Debtor.

CASE NO.: 08-32514
Chapter 11

Date: November 4, 2022
Time: 10:30 a.m.
Place: Courtroom 17
Judge: Honorable Dennis Montali

*All court hearings will be conducted via AT&T
Conference or by Zoom*

20 **MOTION TO AUTHORIZE PLAN ADMINISTRATOR'S SALE OF 63,351 SHARES OF**
21 **COMMON STOCK OF CONFOMETRX, INC. AND MEMORANDUM OF POINTS AND**
22 **AUTHORITIES IN SUPPORT**

23 Michael F. Burkart, Plan Administrator for the Liquidating Debtor herein ("Heller" or the
24 "Liquidating Debtor"), pursuant to 11 U.S.C. §§ 363, 105(a) and the Joint Plan of Liquidation of
25 Heller Ehrman LLP, hereby requests that this Court enter an order authorizing the Plan
26 Administrator to sell all of Heller's shares in ConfometRx, Inc., a Delaware corporation (the
27 "Company") and seeks Court approval for this sale (the "Motion") and in support of this Motion,
28 respectfully represents as follows:

Summary of Motion

1. The Plan Administrator has reached an agreement to sell 63,351 shares of Common
Stock (the "Shares") of ConfometRx, Inc., a Delaware corporation (the "Company") to the
Company for the amount of \$126,702.00 (the "Proposed Sale").

2. A copy of the Common Stock Repurchase Agreement is attached as Exhibit A to the Notice of Hearing filed concurrently herewith (the “Sale Agreement”).

3. Because the proposed transaction involves a sale of a small minority interest in what appears to be a successful biotech firm, the Plan Administrator requests that the Court entertain overbids at the hearing as outlined below.

Relief Requested

By this Motion, the Plan Administrator requests that the Court:

a. Approve the Proposed Sale pursuant to the terms of the Sale Agreement after entertaining the opportunity for parties in interest to overbid at the Sale Hearing;

b. Approve the Overbid Procedures (described below), including the Deposit Requirement (also described below), prior to entertaining any potential overbids;

c. If appropriate, approve the highest bid in accordance with the Overbid Procedures at the Court’s discretion; and

d. Grant such other relief as is just and appropriate in the circumstances of this case.

Jurisdiction

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 and 11 U.S.C. § 363(b). This is a core proceeding.

Background¹

General Bankruptcy Status

5. On December 28, 2008, Heller filed a voluntary petition for relief under title 11 of the United States Code, Bankruptcy Case number 08-32514 (the “Bankruptcy Case”), in the United States Bankruptcy Court for the Northern District of California (the “Bankruptcy Court”).

6. The Official Committee of Unsecured Creditors and Heller jointly proposed a plan that came on for hearing on August 9, 2010. On August 13, 2010, the Bankruptcy Court entered an order confirming the Joint Plan of Liquidation of Heller Ehrman LLP (August 9, 2010) [Docket

¹ The facts herein are drawn from the Declaration of Michael F. Burkart filed herewith, any exhibit(s) thereto, as well as the pleadings, schedules and other records filed in this case.

1 No. 1431] (the “Plan”). The Plan went effective on September 1, 2010.

2 7. Pursuant to Section 1.103 of the Plan, Michael Burkart is the duly appointed
3 administrator under the Plan (the “Plan Administrator”) and has been managing the Liquidating
4 Debtor since the Plan effective date in accordance with the Plan, including but not limited to section
5 5.4 of the Plan (“Plan Administrator shall be responsible for the implementation of the Plan,
6 including with respect to the management, control and operation of Liquidating Debtor”). Section
7 5.5 specifically authorizes the disposition or abandonment of “Estate Assets” as part of the “wind-
8 down” of the Liquidating Debtor.

9 Overview of Company and Proposed Sale

10 8. Going back to 2002, the Company’s founding shareholders were clients of Debtor.
11 The Liquidating Debtor assisted with the legal formation and incorporation of the Company, when
12 the subject entity was originally incorporated on May 24, 2002, under the Laws of the State of
13 Delaware.

14 9. The Company also registered as a Foreign Entity with the California Secretary of
15 State on April 7, 2003 for conducting business within the State of California and maintaining its
16 company headquarters in Palo Alto, CA.

17 10. Liquidating Debtor purchased 63,351 shares of Common Stock issued by the
18 Company pursuant to a Stock Purchase Agreement executed in November of 2005. The subject
19 63,351 shares of the Company represent approximately 2.0% of the total outstanding shares of
20 common stock shares.

21 11. Currently, all of the common stock shares of the Company are closely held by a
22 small number of inside shareholders and is not publicly traded.

23 12. The Plan Administrator has been in direct communication with the Company’s
24 counsel over recent years, and the Company has shared financial information with the Plan
25 Administrator. After examination of two company evaluations of the Company, the Plan
26 Administrator is persuaded that the proposed sale price of \$126,702.00 for the 63,351 shares of
27 common stock represents a fair and reasonable value.

28 13. The sale and purchase of the Stock shall be without recourse to the Liquidating

1 Debtor, and without any representation or warranty by the Liquidating Debtor, whether express,
2 implied or imposed by law.

3 14. The terms and conditions of the sale are more specifically set forth in the Sale
4 Agreement.

5 Proposed Overbid Procedures (“Overbid Procedures”)

6 15. The Liquidating Debtor requests the adoption of bidding procedures, summarized
7 as follows:

8 (a) Overbidding on the proposed sale of the Stock will take place at the hearing
9 to approve the Motion;

10 (b) The initial overbid must be at least \$150,000. Subsequent bid increments
11 will be determined by the Court at the hearing on the Motion;

12 (c) Any person or entity seeking to overbid must identify the bidder and any
13 principals, owners, members, or shareholders of the bidder and evidence of the prospective buyer’s
14 source of capital, other financial ability to complete the contemplated transactions, and conform to
15 Federal requirements if the funds are obtained offshore and/or from a foreign national who is not a
16 United States citizen. The adequacy of the buyer and any overbidders will be determined in the
17 sole discretion of the Liquidating Debtor and its advisors;

18 (d) All due diligence by any potential overbidder must be completed prior to
19 seven days before the hearing date by the potential overbidder;

20 (e) Any potential overbidder must contact the Plan Administrator seven days
21 before the hearing date and be approved as a potential overbidder by the Plan Administrator;

22 (f) Before being permitted to bid, any overbidder must also deliver to the Plan
23 Administrator a deposit by cashier’s check payable to Heller Ehrman, LLP in an amount of at least
24 \$150,000, and if an overbid is successful, the deposit by the successful overbidder shall be non-
25 refundable, and any funds bid in excess of the cashier’s check provided must be wired to the
26 Liquidating Debtor’s escrow account the next business day; and

27 (g) Any overbidder must agree to sign a purchase agreement for the purchase of
28 the Stock that is substantially similar to the Sale Agreement and must agree to performance of such

1 terms, which agreement shall include indemnification of the Plan Administrator and the Liquidating
2 Debtor from any claims arising out of the shares of the Stock, and that makes clear that the Plan
3 Administrator is executing the overbid sale agreement in his representative capacity as Plan
4 Administrator for Heller only, and shall have no personal liability arising from the overbid sale
5 agreement.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 The Court has Authority to Approve a Sale Under Section 363(b)

8 16. Article IX of the Plan of Liquidation (Docket No. 1431) specifically retains
9 jurisdiction for the Court to “approve any sales of assets . . . pursuant to section 363 of the
10 Bankruptcy Code, which the Plan Administrator in his sole discretion believes should be noticed
11 to creditors.” *Id.* (Docket No. 1431 at pg. 58 of word document, pg. 65 of Court pdf).

12 The Sale Meets the Requirements of Section 363(b)

13 17. The Bankruptcy Code empowers sales “other than in the ordinary course of
14 business, property of the estate.” 11 U.S.C. § 363(b). In considering a proposed sale, courts look
15 at whether the sale is in the best interests of the estate based on the facts and history of the case. *In*
16 *re American West Airlines*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994) (citing *In re Lionel Corp.*,
17 722 F.2d 1063, 1071 (2d Cir. 1983)). This requires an examination of the “business justification”
18 for the proposed sale. *In re 240 North Brand Partners, Ltd.*, 200 B.R. 653 (B.A.P. 9th Cir. 1996);
19 *In re Wilde Horses Enterprises, Inc.*, 136 B.R. 380 (Bankr. C.D. Cal. 1991). The trustee has “broad
20 power” under section 363 to sell property of an estate, and “the manner of sale is within the
21 discretion of the Trustee.” *In re The Canyon Partnership*, 55 B.R. 520, 524 (Bankr. S.D. Cal.
22 1985).

23 18. The Plan Administrator believes that a sale of the Stock, subject to overbid, is in the
24 best interests of the Estate because the Stock is not publicly traded, it is a small minority interest in
25 a closely held corporation, and that even though it may have some intellectual property assets based
26 on public information, selling a minority interest to any party other than the “company” is extremely
27 difficult. *See Declaration of Michael F. Burkart, filed concurrently herewith.* ¶14.

28 19. Based on the factors set forth above, the Liquidating Debtor believes it is in the best

1 interests of the Estate and its creditors if the Stock is sold to Purchaser on the terms set forth in the
2 Agreement after allowing an opportunity for overbids on the terms proposed in the Overbid
3 Procedures herein.

4 Relief under Federal Rule of Bankruptcy Procedure 6004(h) is Appropriate

5 20. Federal Rule of Bankruptcy Procedure (“Rule”) 6004(h) provides that an “order
6 authorizing the use, sale or lease of property . . . is stayed until the expiration of 14 days after the
7 entry of the order, unless the court orders otherwise.” The Liquidating Debtor requests that any
8 order approving the sale be effective immediately by providing that the 14-day stay under Rule
9 6004(h) shall not apply to any order granting this motion.

10 21. The purpose of Rule 6004(h) is to provide sufficient time for an objecting party to
11 appeal before an order can be implanted. *See* Advisory Committee Notes to Fed. R. Bankr. P.
12 6004(h). Although Rule 6004(h) and the Advisory Committee Notes are silent as to when a court
13 should “order otherwise” and eliminate or reduce the 14-day stay period, Collier suggests that the
14 14-day stay period should be eliminated to allow a sale or other transaction to close immediately
15 “where there has been no objection to the procedure.” A. Resnick & H. Sommer, eds., 10 *Collier*
16 *on Bankruptcy* ¶ 6004.11 (16th ed.). Further, Collier states that if an objection is filed and
17 overruled, and the objecting party informs the court of its intent to appeal, the stay may be reduced
18 to the amount of time actually necessary to file such appeal. *Id.*

19 22. The Liquidating Debtor hereby requests that the court order authorizing the sale also
20 waive the 14-day stay period under Rule 6004(h) if no objection to the sale is filed or made at the
21 sale hearing.

22 **CONCLUSION**

23 Wherefore, the Liquidating Debtor seeks an order approving the relief requested herein.

24 Dated: October 6, 2022

25 FELDERSTEIN FITZGERALD
26 WILLOUGHBY PASCUZZI & RIOS LLP

27 By: /s/ Thomas A. Willoughby
28 THOMAS A. WILLOUGHBY
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Liquidating Debtor Heller Ehrman LLP