

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

In re §
§
XTREME POWER INC., § CASE NO. 14-10096
XTREME POWER SYSTEMS, LLC, and § CASE NO. 14-10095
XTREME POWER GROVE, LLC § CASE NO. 14-10097
Jointly Administered Debtors § CHAPTER 11
§ (Jointly Administered Under
§ CASE NO. 14-10096)

**HORIZON BATTERIES, L.L.C., IDLING SOLUTIONS, LLC
AND HORIZON BATTERIES REAL ESTATE, L.L.C.’S LIMITED OBJECTION
TO DEBTORS’ EXPEDITED MOTION FOR ORDERS (A)(I) APPROVING
BIDDING PROCEDURES IN CONNECTION WITH THE SALE BY PUBLIC
AUCTION OF EQUIPMENT OF XTREME POWER GROVE, LLC, LOCATED IN
GROVE, OKLAHOMA; (II) SCHEDULING A HEARING TO CONSIDER THE SALE
OF XP OWNED EQUIPMENT; AND (III) APPROVING THE FORM AND MANNER
OF NOTICE THEREOF; (B) AUTHORIZING AND APPROVING THE SALE OF
THE XP OWNED EQUIPMENT FREE AND CLEAR OF
LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS**

TO THE HON. H. CHRISTOPHER MOTT, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Horizon Batteries, L.L.C. (“HB”), Idling Solutions, L.L.C. and Horizon Batteries Real Estate L.L.C. (“HBRE”) (sometimes, collectively, the “Horizon Parties”) and for their limited objection to Debtors’ motion for Orders (A)(I) Approving Bidding Procedures in Connection with the Sale By Public Auction of equipment of Xtreme Power Grove, LLC, located in Grove, Oklahoma; (II) Scheduling a Hearing to Consider the Sale of XP Owned Equipment; and (III) Approving the Form and Manner of Notice Thereof; (B) Authorizing and Approving the Sale of XP Owned Equipment Free and Clear of Liens, Claims, Encumbrances and Interests (the “Auction Motion”) state as follows:

1. This Court has previously entered an order regarding the disposition of the XP Owned Equipment located at the facility in Grove, Oklahoma, (which facility is owned by

HBRE.) (Docket No. 419) Paragraph 14 of the Agreed Order entered on March 19, 2014, provides a process by which the Horizon Parties could make one or more offers for the XP Owned Equipment and for any XP Owned Equipment as to which any offer by the Horizon Parties is rejected then the equipment shall be auctioned by the Debtors as provided in the Agreed Order. The Agreed Order further provides that the Horizon Parties may bid at any such auction. Accordingly, the Debtors cannot by this motion establish procedures that infringe on that right.

2. The parties are still in the process of negotiating the acquisition of the XP Owned Equipment and indeed this Court has ordered mediation to aid in that process, which mediation has not been concluded. Although as stated, the Horizon Parties do not oppose the concept of an auction, particularly as a fall-back or parallel track action with a possible sale via the mediation, several of Debtors' statements in its Auction Motion are, at a minimum, misstatements that have to be corrected. For example, in paragraph 8 of its Auction Motion, the Debtors incorrectly stated:

“ 8. One of the provisions of the Horizon Settlement Order calls for an inventory of the XP Owned Equipment and subsequent Disposition of the XP Owned Equipment. After investigation, Horizon and XP agreed that the list of the XP Owned Equipment that was attached to the XPG Bankruptcy Schedules as Exhibit B-29 is substantially accurate. Under these provisions, Horizon Battery made an offer of \$1.5 million to purchase the XP Owned Equipment; XP countered by adding a condition for an earnest money deposit; and Horizon accepted the counteroffer on April 23, 2014. However, after several months, the parties had not been able to agree on the form of the transaction documents to memorialize their contract, and so the sale was not presented to this Court for approval and has not closed.”

3. In its footnote 2 to paragraph 8, the Debtors further alleged:

“ [fn2] An additional provision of the Horizon Settlement Order called for XP to deliver to Horizon Battery the Resolution License. The parties were unable to agree on the form of the Resolution License, and so it has not yet been delivered.”

4. Further, in paragraph 9 of its Auction Motion, Debtors' allege:

“ 9. The Horizon Settlement Order allowed the Bankruptcy Court to order mandatory, non-binding mediation with respect thereto on motion of any party, which Debtors subsequently requested, and the Court ordered on July 14, 2014 (Order, Dk No. 731). The mediation commenced on July 24, 2014, and was continued by agreement of the parties; however, an impasse was reached when Horizon Battery unequivocally and materially breached the parties contract, and on September 4, 2014, the mediation was concluded.”

5. As to each of paragraphs 8 and 9 of the Auction Motion, these allegations are at least erroneous if not overtly false or self-delusional on the part of the Debtors because:

(a) The offer made by the Horizon Parties, prior to the commencement of mediation, was in fact qualified on the Debtors accepting and performing ten specific conditions (see Exhibit A hereto). In retrospect, it is now apparent that the Debtors, even at the time, were unable to perform many of these ten conditions or have since become unwilling to perform others of these ten conditions as specified.

(b) The supposed “counter-offer” by the Debtors, also advanced prior to the commencement of mediation, was in fact and at law a rejection of the offer previously made by the Horizon Parties.

(c) The supposed “counter-offer” by the Debtors, also advanced prior to the commencement of mediation, was never “accepted” by the Horizon Parties. Debtors' allegations in this regard are ephemeral at best and mere posturing.

(d) Indeed, any such “counter-offer” could not even have been “accepted” in any contractual binding sense in light of the requirements of the governing statute of frauds, pertinent provisions of the Uniform Commercial Code, and other governing law. *See for example*, TEX. BUS. & COM. ANN. CODE § 2.201 (LEXIS 1014); MISS. CODE ANN. § 75-2-201 (LEXIS 2014).

(e) In addition to the “escrow” requirement Debtors sought to impose in their supposed “counter-offer,” which Debtors seem happy to disclose, the Debtors also required “a binding PSA”. Clearly, no definitive, binding asset purchase was negotiated prior to mediation (nor since) and no such agreement has been mutually executed and delivered. Thus, on its very face, there has never been any “acceptance” of Debtor's alleged “counter-offer.”

(f) Debtors' attempts to impose any escrow requirement were not, then or at any time prior to mediation, set forth in any definitive manner that was mutually agreed to in any format, much less a binding format.

(g) Moreover, since Debtors' purported "counter-offer" also incorporated (and ostensibly "accepted") by reference the same ten conditions as has been set forth in the original, rejected offer previously made by the Horizon Parties, and since Debtors are now (and were even then) unwilling or unable to perform several of those ten conditions, had any "counter-offer" by the Debtors been accepted, it would now be the Debtors (and not the Horizon Parties) that would now be in "breach" of its own "counter-offer."

(h) As to footnote 2 of Paragraph 8, the Horizon Parties have, to the contrary, been under the impression that the parties are at or near the point of having agreed to a final form of the Resolution License and that delays in executing and delivering same have (like the fully agreed form of the Mutual Release also contemplated in the March 19, 2014 Agreed Order) simply been to accommodate a more efficient, consolidated closing in the event that an agreed upon sale of the Grove equipment owned by the Debtors could also be negotiated and closed. If that assumption is not correct or very close to being correct, it would be a surprise to the Horizon Parties.

(i) Turning more specifically to Paragraph 9 of the Motion, the Court-appointed mediator, Judith Ross, had not declared the mediation to be at an impasse as of September 4, 2014 nor, as of the date of this pleading, has any such declaration been made by the mediator. To the contrary, the Horizon Parties have embraced the mediator role which Ms. Ross has pursued and, as of the date of the filing of the Motion and even to date, the Horizon Parties remain willing to pursue a resolution by mediation.

(j) Although the Horizon Parties deny that they ever accepted, actually, intentionally, or in any binding "unintentional" manner, any alleged "counter-offer" by the Debtor and further deny that they have ever breached any such alleged contract, confidential discussions, exchanges, proposals or counter-proposals inside the context of mediation and its attendant negotiations cannot, as a matter of law, constitute any "breach" of any alleged contract that is in that same process being mediated. Debtors' allegations in this regard in Paragraph 9 of the Auction Motion are an absurdity.

(k) Lastly, this entire set of allegations by the Debtors, in view of their provocative and inflammatory nature, is either wholly irrelevant to the simple request for parallel track bidding procedures or else is intended to cause this Bankruptcy Court to grant it some relief, directly or perhaps in the form of some penalties to the Horizon Parties or damages assessed against them or approval of modified bidding procedures adverse to the Horizon Parties in some way that might otherwise not be imposed in the absence of such allegations. If this set of allegations is not withdrawn by the Debtors as wholly irrelevant and superfluous, then, in light of *Stern v. Marshall*, 564 U.S. ___, 131 S.Ct. 2594 (2011), as very recently interpreted in *Exec. Benefits Ins. Agency v. Arkinson*, __ U.S. ___, 134 S.Ct. 2165, 2172 (2014), *BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.)*, 735 F.3d 279, 289 (5th Cir. 2013), and *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313, 319-20 (5th Cir. 2013), those allegations go to fact-based, non-core matters as to which the Horizon Parties could be entitled to a trial by jury and as to which Bankruptcy Courts may not constitutionally enter final orders or findings of fact. If, instead, Debtors persist in these allegations or

seek any relief whatsoever on their account, this entire contested matter or pertinent, severed aspects of it should immediately be withdrawn to the United States District Court, where Debtors can in the appropriate level, form, procedure and substance, in accordance with the requirements of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), seek whatever relief they feel appropriate in light of what they think they can sustain.

6. In Paragraph 8 of the Auction Motion, the Debtors state that the Horizon Parties and XP “agreed” that the list of the XP Owned Equipment that was attached to the XPG Bankruptcy Schedules as Exhibit B-29 is “substantially accurate.” It is unclear from the Debtors’ Auction Motion exactly what assets will be sold pursuant to the Bidding Procedures, i.e., is the Debtor representing that the XP Owned Equipment still located at the Grove Facility is co-extensive with all items listed on Exhibit B-29.

7. As to the Bidding Procedures attached to the Auction Motion as Annex 1, the Horizon Parties would request that the Court order adequate, commercially reasonable, safeguards to the Landlord, HBRE, for any costs, claims, losses, potential liability and/or damage that may be sustained by the Landlord due to the pre-auction activities, the auction and/or removal of the equipment. At a minimum, the Horizon Parties request the following to be in place prior to any Potential Bidder being allowed access to the HBRE premises:

(a) liability insurance naming HBRE, as landlord, as an additional insured and providing coverage of the following:

(i) damage to the premises, before, during or after the sale or in the process of moving any equipment;

(ii) damage to any of debtors’ equipment, before, during or after the sale or in the process of moving any equipment;

(iii) damage to any of landlord’s equipment, before, during or after the sale or in the process of moving any equipment;

(iv) injury to any non-worker visitor / bidder to the premises, before, during or after the sale or in the process of moving same, including (if not workers, see below) the other purchasers.

(b) a damage deposit of \$200,000 to be deposited with HBRE prior to the auction,

(c) waivers signed by all auction participants including the auctioneers and the Debtors,

(d) an agreement by the Debtors to require all Potential Bidders to provide HBRE indemnity and to pay for any and all damages sustained by HBRE caused by the removal of equipment and for repairing damage to the facility,

(e) A sufficient workers' compensation insurance policy to cover:

(i) workers assisting / working on preparation for the auction, as well as conducting the auction;

(ii) workers prepping equipment, moving equipment, etc., before, during or after the auction

(iii) inspectors who come on the premises to inspect the site or equipment, etc.

(f) an agreement by the Debtors to pay for any damages not covered by insurance for damage to the facility for conducting the auction, and

(g) proof of the auctioneer's license as may be required by state law to conduct the auction.

8. The Confidentiality Agreement that is signed by each Potential Bidder must also extend to any non-public information concerning HBRE's facility and any information learned about the Horizon Parties by virtue of the Potential Bidder obtaining access to the facility pursuant to the Bidding Procedures.

9. In Paragraph 2 of the Bidding Procedures, the Horizon Parties would request that the Court limit the hours that Potential Bidders are allowed on the premises to the hours of 10:00 a.m. to 2:00 p.m., prevailing local time, and that Matthew Jacobs of the Gordian Group give prior notice to HBRE of the Potential Bidders' names and the date and time they wish to view the equipment.

10. The Bidding Procedures do not specify whether there is in place a minimum bid or a reserve requirement. Debtors' proposed procedures must specify whether the auction will be conducted with a minimum bid or reserve requirement, or whether the auction is without a minimum or reserve requirement.

11. It is not clear in the Bidding Procedures whether the Qualified Bids are open to other bidders, and in fact, the Bidding Procedures leave the determination of a Qualified Bid and the highest and best bid in the sole discretion of the Debtors such that it appears that the procedures are not intended to be open. To maximize the potential sales price, the auction should be conducted in some "live" format so that at each step, stage or round each competing bidder can know and be advised of whether an increased bid is required to stay in the bidding.

12. The Bidding Procedures do not speak to the advertising materials submitted to Potential Bidders. Debtors' advertisement materials prior to the auction and supplemental information at the time of auction should thoroughly and accurately disclose the then-current operational or non-operational condition of each item of equipment, including whether such item does or does not have all required software and attendant operational data loaded on such item in functioning condition, whether any license to possess, use and update such software and operational data will or will not be duly obtained by the successful purchaser part and parcel with the bid price, or whether additional software, operational data or licenses must instead be obtained by the successful purchaser after the auction and in addition to the bid price.

13. Furthermore, Debtors' advertisement materials prior to the auction and supplemental information at the time of auction should thoroughly and accurately disclose the availability of operational manuals and maintenance records pertaining to each piece of XP Owned Equipment.

14. Debtors' advertisement materials prior to the auction and supplemental information at the time of the auction should thoroughly disclose the presence of any potentially hazardous materials and the status of any and all environmental permits necessary to operate the equipment, such information to include but not limited to whether each item does or does not contain toxic materials or other materials designated by any state or federal environmental protection agency as a hazardous material.

15. The Bidding Procedures should also ensure to HBRE that the Successful Bidder will indemnify HBRE for any risks of mechanics' liens or any other liens being asserted against HBRE's interest in the premises as a result of the removal of the property sold at the auction.

16. Because of the nature of this equipment, the Horizon Parties request the Court to order that no equipment may be removed from the HBRE premises except upon HBRE's approval of the person/entity proposed by the Successful Bidder to disconnect the XP Owned Equipment and remove same from the HBRE premises and at a time approved by HBRE.

17. Paragraphs 24 and 25 of the Bidding Procedures grant to the Debtors in their sole discretion the ability to adopt, implement, and/or waive additional or existing procedures. Such unlimited, unfettered discretion calls into question the integrity of the auction process and acts to chill potential bidders from participating. Instead, the Horizon Parties request that the Court impose open and commercially reasonable Bidding Procedures that insures a fair and reasonable process for Potential Bidders to bid on the XP Owned Equipment.

18. Finally, and most importantly, this Court has previously ordered that the Horizon Parties may bid at the auction. Therefore, the Horizon Parties request that the Court enforce its order by providing such protections as may be appropriate to prohibit the Debtors from

excluding the Horizon Parties from the auction process, ensuring that the Horizon Parties are Qualified Bidders, and ensuring that the auction process is an open, fair and reasonable auction.

WHEREFORE, the Horizon Parties, although not objecting to the auction process, object to the Debtors' Motion for Orders (A)(I) Approving Bidding Procedures in Connection with the Sale By Public Auction of equipment of Xtreme Power Grove, LLC, located in Grove, Oklahoma; (II) Scheduling a Hearing to Consider the Sale of XP Owned Equipment; and (III) Approving the Form and Manner of Notice Thereof; (B) Authorizing and Approving the Sale of XP Owned Equipment Free and Clear of Liens, Claims, Encumbrances and Interests and requests the Court to: (a) impose commercially reasonable protections for the Landlord, (b) cause the Debtors to identify the specific equipment to be sold pursuant to the Bidding Procedures, (c) impose commercially reasonable Bidding Procedures to insure an open, fair and reasonable auction process, including the Horizon Parties' participation in the auction process, and (d) to grant any such other and further relief at, at law or in equity to which the Horizon Parties may justly be entitled.

Dated: September 23, 2014.

Respectfully submitted,

/s/ J. Michael Sutherland

J. Michael Sutherland, Texas Counsel

TX Bar No. 19524200

Lisa M. Lucas

TX Bar No. 24067734

**CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.**

901 Main Street, Suite 5500

Dallas, TX 75202

(214) 855-3000

(214) 855-1333 (Fax)

msutherland@ccsb.com

llucas@ccsb.com

C. Joyce Hall

MS Bar. No. 2123

WATKINS & EAGER PLLC

400 East Capitol Street

Jackson, MS 39201

(601) 965-1900

(601) 965-1901 (Fax)

jhall@watkinseager.com

Admitted Pro Hac Vice

*ATTORNEYS FOR HORIZON BATTERIES, L.L.C., IDLING
SOLUTIONS L.L.C. AND HORIZON BATTERIES REAL
ESTATE, LLC*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been forwarded to all counsel and parties of record, and served electronically upon those parties registered to receive electronic notice via the Court's CM/ECF system on this 23rd day of September 2014.

/s/ J. Michael Sutherland

J. Michael Sutherland

Grove Plant Information Request

The following is a list of important items needed to setup, operate and maintain Grove operations and comply with regulatory agencies with purview over Grove operations.

1. All files, hard copy and digital, relating to the Grove building complex, installed manufacturing and support equipment and facility infrastructure. Please include warranties and maintenance records for all such equipment. Please include a copy of the Preventive Maintenance Plan in place at the time the plant closed.
2. All files, hard copy and digital, relating to the various battery product configurations (variations 1-6.5) manufactured at the Grove facility. This should include records which document how many of each configuration manufactured and to whom they were sold. This information should include all manufactured quality data files pertaining to the manufactured product configurations delivered. Include all manufacturing processes developed by XP.
3. Please provide Records of gas, water, electricity usage for the last 12 months of production.
4. Names and contact information of employees during periods of peak production. Please include information relating to performance and disciplinary actions required for any XP Grove employee.
5. Please provide copies of last 12 months reports required by any local, state or Federal Agency documenting the safety and environmental compliance history of Grove operations.
6. Please provide any and all passwords and/or access codes required to access or use any and all password protected equipment used in production at the Grove plant.
7. If there is other information required to operate and/or maintain any equipment at the Grove plant, please identify and provide it.
8. Please provide a copy of the documentation of the Horizon Technology that was provided First Wind.
9. Please provide the insurance company and agent that was used to insure the plant, equipment and product liability.
10. We want as part of the purchase of assets the Trade Mark for Powercell. In addition, any design developed for a box to place the Powercell used in various applications.