UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
NEW ENERGY CORP.,	)	CASE NO. 12-33866 HCD
	)	CHAPTER 11
	)	
DEBTOR.	)	

D E C I S I O N and O R D E R

At South Bend, Indiana, on February 26, 2013.

Before the court is "Natural Chem's Motion Requesting that This Court Amend Its Ruling of February 5, 2013 To Deny Debtor's Request for Order Approving Sale of Debtor's Assets to Liquidators JV" ("Motion to Amend"), filed on February 13, 2013, by Natural Chem Holdings, LLC, pursuant to Federal Rules of Bankruptcy Procedure 9023 and 9014. In its Order of February 13, 2013, the court directed the debtor New Energy Corp. ("NEC" or "debtor") to stay the execution of the sale of substantially all its assets until the hearing, scheduled for February 27, 2013. Written responses to Natural Chem's Motion were due on or before February 25, 2013. The court has received the objections filed by the debtor, the Official Committee of Unsecured Creditors, the successful bidders at the auction, and the United States. *See* R. 253, 254, 255, 258, 259, 261. For the reasons that follow, the court finds that Natural Chem's Motion to Amend is denied.

BACKGROUND

NEC filed its chapter 11 petition on November 9, 2012, and continued its operations as debtor-in-possession, with the intention of selling its assets. On November 14, 2012, the debtor filed motions concerning the bidding and sale procedures for an auction sale of substantially all NEC's assets pursuant to 11 U.S.C. § 363. R. 34, 35. The court approved the proposed bid procedures, the auction schedule, and the hearing dates in its Order of December 19, 2012. R. 116. Natural Chem raised no objection to the NEC

Motion or to the court's Order approving the bid procedures. Pursuant to those procedural strictures, NEC conducted an auction on January 31, 2013. Natural Chem submitted a bid prior to the auction, but it was rejected on the grounds that it was submitted without the required $250,000 deposit and without the required Asset Purchase Agreement proposal. Five parties participated in the auction, and Natural Chem sent non-participating representatives to observe it.

The winning bidder at the auction was a joint venture of two companies, Maynards Industries and BidItUp Worldwide Auctions ("JV"). The second highest bidder at the auction was another joint venture of the two companies Counsel RB Capital, LLC, and Aaron Equipment Company, Inc. ("Runner-Up"). When the winner was announced, no party or observer objected to the sale or claimed that collusion had occurred during the sale proceedings. The first challenge to the sale occurred the day before the court's scheduled hearing on the debtor's Motion for the sale of property under § 363(b). On February 4, 2013, Natural Chem filed its Motion opposing the court's approval of the sale on the ground that there were violations of the bid procedures and illegal bidder collusion. R. 186.

On the day of the hearing, counsel for Natural Chem filed appropriate Motions to Appear pro hac vice, and the court granted the motions. It also allowed counsel for the City of South Bend, Indiana, to appear and to participate in the hearing.[1] Both Natural Chem and the City raised objections to the auction sale of the debtor's assets. The debtor and the United States of America, on behalf of the United States Department of Energy ("DOE"), asserted that neither Natural Chem nor the City had standing to object to the sale. The court determined, however, that collusion was a serious allegation worthy of consideration and that Natural Chem and the City were parties in interest that could be heard. After extensive testimony, the court overruled their objections to the auction sale on their merits and approved the sale. Based upon the

[1] The City of South Bend had filed a "Motion for Leave to Intervene in the Matter of Debtor's Auction Sale," R. 194, and the court ruled on that motion after the hearing. In its Decision and Order of February 7, 2013, the court determined that the City held only a contingent economic interest in the auction sale of the debtor's assets and that its motion to intervene was untimely. Consequently, it denied the Motion and issued a Judgment thereon. R. 204, 205. That ruling was not appealed.

testimony and evidence presented at the hearing, the court made specific findings in open court that Natural Chem had failed to follow the auction bid procedures; that the auction proceeded properly, without any evidence of collusion or impropriety; and that the sale was in the best interest of the estate. It approved the sale of the debtor's assets to the JV (and approved the "Runner-Up" bidder), overruled Natural Chem's Objection, and directed the debtor to submit its proposed Order concerning the sale of the assets. R. 199.

On February 13, 2013, Natural Chem filed its Motion to Amend. R. 218. It urged the court to disapprove the sale and to order a new auction. It asserted that an overheard conversation between the representatives of Maynards and BidItUp constituted new facts worthy of consideration, and insisted that it must obtain the recorded evidence of the auction to verify that conversation. It further claimed that it had standing to move for reconsideration of the court's approval of the sale of NEC's assets.

DISCUSSION

Natural Chem's Motion was brought pursuant to Federal Rule of Bankruptcy Procedure 9023 and 9014, which incorporate Federal Rule of Civil Procedure 59 in bankruptcy contested matters and adversary proceedings. Decisions brought under Rule 59 to alter, amend, or set aside a judgment are in the sound discretion of the court. "Rule 59 requires a showing that the moving party discovered new evidence after trial that could not have been discovered by exercising due diligence before trial." *In re Resource Technology Corp.*, 624 F.3d 376, 388 (7th Cir. 2010). The moving party may also "point to evidence in the record that clearly establishes a manifest error of law or fact." *Miller v. Safeco Ins. Co.*, 683 F.3d 805, 813 (7th Cir. 2012). However, the movant may not raise arguments or evidence which could have and should have been presented to the court before the order was entered. *See Retired Chicago Police Assn v. City of Chicago*, 76 F.3d 856, 867 (7th Cir.), *cert. denied*, 519 U.S. 932 (1996).

After reviewing the Natural Chem Motion, Proposed Findings of Fact, and Brief in Support of the Motion, R. 218-220, in light of the extensive record in this bankruptcy case, the court finds that Natural

Chem brought forth no newly discovered evidence and no evidence establishing a manifest error of law or fact. (The alleged "new evidence" of an overheard conversation was in fact brought out at the February 5, 2013 hearing.) Indeed, Natural Chem stated that the factual and legal arguments upon which it relied were available prior to the court's Order:

> As grounds in support of its Motion to Alter Order to Deny Sale, Natural Chem adopts all of the factual and legal arguments set forth in its original "Motion and Brief in Opposition to Debtor's Request for Order Approving Sale of Debtor's Assets."

R. 218 at 2. Natural Chem presented no legal arguments or facts which were not previously presented to, considered by, and rejected by the court. *See Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) ("It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him."). Natural Chem's Motion to Amend is denied.

Natural Chem also asserts that it has standing to present evidence of collusion and to object to the sale because it has a pecuniary interest in the outcome of any future auction sale. However, its standing argument fails as a matter of law.

First, only the trustee has standing to avoid a sale under § 363. *See In re Butan Valley, N.V.*, 2009 WL 5205343 at *2 (S.D. Tex. Dec. 23, 2009). The statute itself plainly states: "The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale . . . ." § 363(n). Natural Chem is an objector who is not the Trustee. It therefore clearly "lacks standing to file and pursue a claim under § 363(n)." *Id.* (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S. Ct. 1942, 147 L.Ed.2d 1 (2000)); *see also In re Farmland Indus., Inc.*, 376 B.R. 718, 726 n. 14 (Bankr. W.D. Mo. 2007) (stating that § 363(n) confers standing to pursue the avoidance of a sale only on a trustee).

Natural Chem's assertion that its standing is conferred under § 1109(b) is misguided. The Supreme Court, in *Hartford Underwriters*, rejected the use of § 1109(b) to grant standing to a "party in interest" when it stated: "[W]e do not read § 1109(b)'s general provision of a right to be heard as broadly

allowing a creditor to pursue substantive remedies that other Code provisions made available only to other specific parties." *Hartford Underwriters*, 530 U.S. at 8. The court concludes that Natural Chem is without standing to challenge the auction proceedings or the sale under § 363(n) or to seek reconsideration of the court's approval of that sale under Rule 59.

Second, the court finds that Natural Chem is simply a disappointed bidder at the first auction. Unsuccessful bidders lack standing to challenge a bankruptcy court's approval of a sale of a bankruptcy estate's assets. *See In re Farmland Indus., Inc.*, 639 F.3d 402, 405 (8th Cir. 2011); *In re Gucci*, 126 F.3d 380, 388 (2d Cir. 1997). In addition, Natural Chem has not established an injury in fact that is "traceable to the challenged action of the defendant," and has not alleged "facts suggesting that the [successful bidder, debtor, and other parties] were responsible for the deficiencies in its bid." *In re Farmland Indus.*, 639 F.3d at 405. It has alleged no injury sufficient to allow it to claim standing in this proceeding.

Natural Chem did assert that the conduct of the colluding bidders was tantamount to a "fraud on the court." R. 186 at 2. That argument caused the court to allow Natural Chem to participate at the February 5, 2013 hearing so that the court could investigate whether a fraud indeed had occurred. In retrospect, the court should have considered the standing objections at that point. Nevertheless, the court was satisfied, upon hearing the testimony and reviewing the evidence submitted, that court-approved procedures were followed, that the challenged relationship between the bidders was fully disclosed to the debtor and other bidders, and that there was no collusion. *See In re Colony Hill Assocs.*, 111 F.3d 269, 277 (2d Cir. 1997) (noting that § 363(n) prohibits *secret* cooperation between bidders, not disclosed agreements).

"Fraud on the court is an extraordinary means by which to obtain extraordinary relief and requires the plaintiff to prove no adequate remedy at law." *Id.* The court heard Natural Chem's position at the hearing and read its arguments in its many motions and briefs before this court. It found no evidence of fraud, of collusion, or of improper sale procedures. It found no proof that the plaintiff had no adequate remedy at law. It found only that Natural Chem failed to prove a fraud on the court.

In fact, the court's review of the record, in light of this Motion to Amend, leads the court to reiterate its findings that the sale procedures were conducted in good faith and at arm's length; that the purchase price under the sale agreement was fair and reasonable; and that there was insufficient (indeed, no) evidence of collusion between the bidding parties. It reaffirms its ruling at the February 5, 2013 hearing, which authorized the first and second bidders and approved the auction sale. Nothing in the Motion to Amend, its supporting brief, or its findings of fact provide evidence that clearly establishes a manifest error of law or fact.

Accordingly, the court concludes that Natural Chem's Motion to Amend is denied. It further determines that Natural Chem, as an unsuccessful bidder for the debtor's assets, is without standing to challenge the bankruptcy court's Order of February 5, 2013, approving the auction sale conducted on January 31, 2013. Moreover, in light of Natural Chem's lack of standing, its Motion for Reinstatement of Automatic 14 Day Stay of Ruling on Sale Order must be denied as moot.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT