

Acquisition Strategies: Navigating Section 363 Sales and the Impact of Undersecured Liens

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Overview and Advantages

Section 363 of the Bankruptcy Code allows a Chapter 11 debtor to sell assets "free and clear" of existing claims, liens, encumbrances, and other liabilities. This provision facilitates expedited sales that might otherwise be hindered outside of bankruptcy proceedings. With a growing number of cases where courts allow a traditional asset buyer purchasing assets out-of-court to become liable for the seller's liabilities, a court-approved sale of all or part of the seller's assets brings distinct advantages. Among these advantages is the ability to take over favorable contracts and leases, even if they contain anti-assignment clauses. As a result, strategic buyers have the unique opportunity to purchase distressed assets inside of bankruptcy in a way that eliminates or reduces future liability because the bankruptcy court order approving the sale often expressly forecloses "successor liability" claims against a good-faith purchaser.

Recent Notable Sales

The versatility and legal protections offered by Section 363 sales make them an attractive option for strategic buyers and distressed companies, regardless of their industry or size. From pharmaceuticals and biotechnology, clean energy to retail, one can find multiple examples of successfully closed sales.

Merz Pharmaceuticals' Acquisition of Acorda Therapeutics' Assets

Merz Pharmaceuticals, LLC subsidiary of Merz Therapeutics, completed the acquisition of key assets, including two FDA-approved medications for neurological diseases like Parkinson's and MS, from Acorda Therapeutics, Inc. on July 10, 2024, through a court-approved Section 363 sale in the Bankruptcy Court for the Southern District of New York. The transaction was valued at \$185 million in cash.

Teknor Apex Company's Acquisition of Danimer Scientific's Assets

Teknor Apex Company completed the acquisition of substantially all assets of Danimer Scientific, Inc. under Section 363 as part of its Chapter 11 proceedings in the U.S. Bankruptcy Court for the District of Delaware. The winning bidder agreed to a total cash purchase price of \$19 million and assumption of certain liabilities.

Lucid Group's Acquisition of Nikola Corporation's Facilities

Lucid Group, Inc. acquired selected facilities and assets from the bankruptcy estate of Nikola Corporation, a manufacturer of electric and hydrogen-powered trucks, including Nikola's manufacturing facility in Coolidge, Arizona, and its Phoenix

headquarters, totaling over 884,000 square feet of real estate, to expand its electric vehicle (EV) manufacturing and testing operations.

Gonher Music Center's Acquisition of Sam Ash's Assets

Mexican-based retailer Gonher Music Center acquired substantially all of Sam Ash's assets for \$15.2 million in a 363 sale in 2024, following a competitive auction process. Gonher outbid E-Distributors Inc. after initially submitting a bid of \$10.3 million for the e-commerce and wholesale assets, which subsequently increased to \$15.2 million to secure the combined package. The assets included Sam Ash's e-commerce operations, intellectual property, trademarks, customer data, and the wholesale Samson business. The sale excluded assets related to the store closing sales.

Mondee Holdings' Asset Sale to Mondee Purchaser LLC

Mondee Holdings, Inc., a travel technology company specializing in the leisure travel sector, both in the United States and internationally, sold substantially all of its assets to a newly formed entity, Mondee Purchaser LLC, backed by affiliates of its lenders TCW Asset Management Company LLC and Wingspire Capital LLC with the majority stake held by its former CEO.

New York Case Spotlight: In re Urban Commons 2 West LLC

What makes these asset sales possible is Section 363(f) of the Bankruptcy Code. Section 363(f) of the U.S. Bankruptcy Code allows a company in bankruptcy to sell estate property "free and clear" of liens and other interests, provided that one of five specific conditions is met:

(1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien, and the price at which such property is to be sold is greater

than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such an entity could be compelled, in a legal or equitable proceeding, to accept a

money satisfaction of such interest.

11 U.S.C. § 363(f).

Subsection 5 is particularly significant when dealing with "underwater" assets—those whose sale price is less than the total of the liens against them.

A recent decision by Judge Bentley brings a little more peace of mind to asset buyers in New York bankruptcy proceedings. In *re Urban Commons 2 West LLC*, 22-11509 (Bankr. S.D.N.Y. March 4, 2025).

The Urban Commons case involves the sale of the lease interests in Manhattan's Battery Park City Hotel. The hotel was part of a mixed-use condominium building and subject to a ground lease with the Battery Park City Authority (BPCA). The hotel initially operated under the Ritz-Carlton brand, but in March 2018, it changed its brand to The Leading Hotels of the World and its name to The Wagner at Battery Park.

The Debtors purchased the Hotel Lease Interests in September 2018 for approximately \$147 million, of which \$96 million was

financed by a first mortgage issued by BPC Lender, LLC (the “Lender”). The loan matured in 2020, and the Debtors were unable to obtain refinancing. Later that year, following the onset of the Covid-19 pandemic, the hotel ceased operations and remained closed. By the time of the bankruptcy filing, the amount owed under the mortgage loan had grown to approximately \$114 million plus fees and costs. The Debtors negotiated a global resolution with the main creditors, proposing a sale to the holder of the first lien on a \$78 million credit bid and cash payments aggregating \$20 million in cash to cure defaults on leases and contracts.

The only objection to the sale and confirmation of the plan came from the holder of a \$189,000 mechanic’s lien that was deeply underwater. The objector relied on an unpopular district court opinion, *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 710 (S.D.N.Y. 2014). In *Dishi & Sons v. Bay Condos LLC*, the Court held that subsection (5) applies only if the debtor, as the property owner, could compel the lienholder to accept monetary satisfaction.

Judge Bentley rejected the *Dishi* court interpretation of Section 365(f)(5) because he held the construction was so narrow as to virtually nullify Section 363(f)(5). The Court adopted a “realistic possibility” standard, meaning that section 363(f)(5) encompassed not any conceivable hypothetical proceeding that might compel interest holders to accept a money satisfaction, but only proceedings that might realistically be brought in the case before the court if the automatic stay were lifted or did not apply. In most cases, this would include either foreclosure proceedings or UCC sales. The mere hypothetical possibility of an eminent domain taking would not satisfy section 363(f)(5).

In conclusion, Section 363 sales offer a compelling avenue for strategic buyers to acquire distressed assets efficiently and with reduced risk. However, the nuances of Section 363(f), particularly subsection (5), underscore the importance of understanding jurisdictional interpretations. Stakeholders considering participation in a Section 363 sale must conduct thorough due diligence and engage experienced legal counsel to navigate the complexities of bankruptcy proceedings.