IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Case No.: 09-00389-jw

ORDER AUTHORIZING THE SALE OF THE BLOODY POINT GOLF COURSE PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS PURSUANT TO 11 U.S.C. §§ 363(b) AND (f)

The relief set forth on the following pages, for a total of 22 pages including this page and the Exhibit "A" attached hereto, is hereby **ORDERED.**

FILED BY THE COURT
06/17/2011

Entered: 06/17/2011

John E. Waites

Chief US Bankruptcy Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re: Daufuskie Island Properties, LLC aka Daufuskie Island Resort and Breathe Spa, Debtor.	Case No. 09-00389-jw Chapter 11

ORDER AUTHORIZING THE SALE OF THE BLOODY POINT GOLF COURSE PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS PURSUANT TO 11 U.S.C. §§ 363(b) AND (f)

This matter came before the Court upon the Motion and Memorandum for an Order Authorizing the Sale of Real and Personal Property (The Bloody Point Golf Course) Free and Clear of Liens, Claims, Encumbrances and Other Interests (the "Motion") filed on April 28, 2011 by Robert C. Onorato, Trustee (the "Trustee") for the Chapter 11 bankruptcy estate (the "Estate") of Daufuskie Island Properties, LLC (the "Debtor"), seeking authorization pursuant to 11 U.S.C. §§ 363(b) and (f), Rule 6004 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule 6004") and SC LBR 6004-1, to sell the real and personal property comprising the "Bloody Point Golf Course" (the "Property") to George E. Mullen and Carmen T. Mullen (the "Mullens") for the sale price of $1,260,000.00, free and clear of all liens, claims, encumbrances and other interests, except for (a) any and all easements, covenants, conditions, restrictions and other matters of record relating to the real property in the sale, and all matters which would be shown by a current accurate survey of the property, (b) that certain Right of First Refusal covering a small parcel of the real property adjacent to Lot 75 in the Bloody Point development, in favor of James Michael Griffin and Debra Lee Graham, which is recorded in the Register of Deeds Office

for Beaufort County, South Carolina in Book 02722 at page 1055, and (c) to the extent applicable, the provisions of the South Carolina Coastal Zone Act of 1977, S.C. Code Ann. §§ 48-39-10 et seq. (1976), as amended by the South Carolina Beach Management Act, S.C. Code Ann. §§ 48-39-270 et seq. (1976) (hereinafter, the preceding exceptions of (a), (b) and (c) are collectively referred to as the "Permitted Title Exceptions"). The Property is located on Daufuskie Island in Beaufort County, South Carolina, and the legal description of the real property included in this sale is attached as **Exhibit A** to this Order and incorporated herein by reference.

In the Motion, the Trustee also requests that the Court order that the stay provisions of Rule 6004(h) are not applicable to this Order authorizing the sale of the Property.

In conjunction with the Sale Motion, on April 28, 2011, the Trustee also filed the Notice of (1) Sale of Real and Personal Property (The Bloody Point Golf Course) Free and Clear of Liens, Claims, Encumbrances and Other Interests, and (2) Hearing on the Sale (the "Notice of Sale"). The Notice of Sale complies with the form of notice and application of SC LBR 6004-1 and Exhibit A to SC LBR 6004-1. The Notice of Sale includes a request that the Court order that the stay under Bankruptcy Rule 6004(h) shall not be applicable to this Order.

The Court conducted a hearing on the Motion on May 31, 2011 (the "Sale Hearing"). Pursuant to Rule 52 of the Federal Rules of Civil Procedure, which is made applicable to this matter by Rules 7052 and 9014, the Court makes the following Findings of Fact and Conclusions of Law.[1]

[1] The Court notes that, to the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

I. FINDINGS OF FACT

A. The Bankruptcy Case

1. On January 20, 2009, the Debtor filed its petition for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. §§ 101, et seq., the "Bankruptcy Code"). The Debtor operated as a Chapter 11 debtor-in-possession until the Trustee's appointment in this case.

2. On March 17, 2009, the Court entered its Order Granting Joint Motion for Appointment of Chapter 11 Trustee Pursuant to 11 U.S.C. § 1104, granting the joint motion of the Official Committee of Unsecured Creditors (the "Creditors Committee"), Beach First National Bank and AFG, LLC for the appointment of a trustee in this case. Thereafter, on March 23, 2009, the Court entered its Order Approving Appointment of Trustee, approving the United States Trustee's appointment of Robert C. Onorato as Trustee for the Estate.

3. The Trustee has been attempting to sell the Property and other assets of the Estate for over two years. The Trustee states that the offer of the Mullens for the Property was the first acceptable offer he received for the Property.

4. The Trustee states that the Property is not the only asset owned by the Estate, nor does it comprise substantially all of the assets owned by the Estate. The Trustee states that the Estate owns other assets, including, most notably, real property known as "Melrose Landing" and two other developmental parcels, boats, a trolley, and miscellaneous personalty.

5. The Trustee reports that *ad valorem* taxes are owed on the Property for 2008, 2009 and 2010, in the approximate aggregate amount of $178,428.00.

6. The Trustee previously filed a proposed plan of reorganization, but it has not been confirmed. The Trustee filed the Chapter 11 Plan (the "Plan") and the Disclosure Statement to Chapter 11 Plan (the "Disclosure Statement") on November 20, 2009. The Plan provides for the

sale of the assets of the Estate; however, the Plan and the Disclosure Statement were primarily based on the sale of substantially all assets to a single purchaser, which is no longer possible due to intervening events in the case since the filing of the Plan and the Disclosure Statement. The Trustee states that he needs to substantially revise the Plan and file an amended Disclosure Statement to address the changes which have occurred during this case, and to provide for the completion of matters in this case.

B. Sale Offers and Matters Prior to the Filing of the Motion

7. The Trustee states that the Mullens made an offer to him in early 2011 to purchase the Property for a price of $1 million. As noted above, the Trustee states that the offer was the first acceptable offer he received for the Property during the (at the time) nearly two years since he was appointed Trustee in this case.

8. The Mullens' offer is a cash offer without contingencies, and the Mullens contract provided for closing within five days after entry of an order authorizing the sale to them.

9. The Trustee states that when it became known that he had received the Mullens' offer, several persons then indicated an interest in making offers for the Property.

10. The Trustee states that Richard Shutte ("Shutte") made an offer to purchase the Property on the same terms as the Mullens' contract, except at an increased price. The Trustee states that there followed a series of offers by the Mullens and by Shutte, at higher prices, culminating in the Mullens offer at a price of $1,260,000.00. Shutte did not respond to the $1,260,000.00 offer from the Mullens, and the Trustee deemed the Mullens offer the highest and best value for the Property.

11. The Trustee then filed the Motion to obtain authorization for the sale to the Mullens. He did not file a companion motion to establish bidding procedures and bid protections for the Mullens, he explains, because (a) the $1,260,000.00 purchase price of the Mullens was

significantly higher than the expected value of the Property; (b) he did not expect to receive additional offers for the Property; (c) the Mullens were ready, willing and desired to close their purchase of the Property as soon as possible; and (d) the Estate has been, and is, in pressing need to realize the sale proceeds for use in payment of administrative expenses and claims.

12. The Trustee states that, had he known that additional competitive bids would be received for the Property, he would have agreed to and would have filed a motion to establish bidding procedures and protections for the Mullens, to protect and compensate them for their expenses in proceeding with their offer and for the increased value realized by the Estate for the Property as a result of their offer.

C. Objection to the Motion, Competing Offers and the Sale Hearing

13. Following the filing of the Motion and the Notice of Sale, Shutte made known his intention to make another offer(s) for the Property, by and through his company, Bloody Point Investors, LLC ("BPI"), at a price higher than the Mullens contract price. On May 19, 2011, BPI filed a response to the Notice of Sale stating its intention to make an offer for the Property.

14. Also on May 19, 2011, the Creditors Committee filed an objection to the Motion, not opposing the sale of the Property but on the grounds that competitive bids for the Property should be allowed at the Sale Hearing to assure realization of the highest and best value for the Property.

15. At the Sale Hearing, the Mullens objected to the consideration of any offers for the Property other than their contract identified in the Motion. They maintained that they had negotiated a contract with the Trustee in good faith (though subject to Court authorization, they acknowledged); they had spent much time and incurred significant expense in proceeding with their offer; they had responded to competitive bidding prior to the filing of the Motion; their offer represented good value for the Property, higher than any other offer the Trustee had

received for the Property in the two years from his appointment; they would have insisted on bid protections had they known that their offer would end up serving as a "stalking horse" bid subject to competing offers; and it was unfair to allow new offers after the filing of the Motion, where competitive bidding had already occurred prior to the filing of the Motion. The Mullens also argued that they had created substantial additional value for the Estate, and that they would be entitled to an administrative claim under 11 U.S.C. § 503(b) for such value, which would negate the difference in higher competitive offers.

16. The Trustee responded that he faced the dilemma that arises for a trustee or debtor-in-possession in situations of this kind. On the one hand, the Trustee does not want to abandon a good faith buyer he has proposed in a sale motion, and, indeed, if the Trustee were to readily disavow proposed sales to buyers identified in sale motions, the Trustee would expect great difficulty in obtaining any acceptable offers, unless the prospective buyer were granted bid protections. On the other hand, the Trustee has a fiduciary duty to attempt to maximize the value of the assets for the Estate, and he cannot easily disregard offers for assets which would produce higher value for the Estate than an existing offer. The Trustee stated that, despite his concern for the fairness of treatment for the Mullens, he could not disregard the possibility of higher value from competing offers. He supported the allowance of competitive bidding, subject to provisions for compensation to the Mullens for their expenses and the value resulting from their offer.

17. The Trustee proposed that the Mullens be granted an award of $50,000.00 to compensate them for their expenses and for the additional value resulting from the offer they made for the Property, in the event that they were outbid for the Property, in the same manner as typically would be provided in a bidding procedures and bid protection order.

18. The Creditors Committee agreed with the Trustee's proposal, under the circumstances of this matter. Numerous other parties were in attendance at the Sale Hearing, comprising what appeared to be, and what the Trustee described as being, the primary parties and active constituencies in this case. None objected to or indicated opposition to the Trustee's proposed $50,000.00 compensation payment for the Mullens.

19. By the $50,000.00 payment that would be due to the Mullens if they were outbid, a competing offer needed to exceed $1,310,000.00 to result in greater value to the Estate that the Mullens contract. The highest and successful bid, at the close of bidding at the Sale Hearing, was $1,640,000.00, some $330,000.00 higher than that amount.

20. All bidders for the Property at the Sale Hearing stipulated that their bids were made upon the same terms as the Mullens contract, including the purchase being subject to the Permitted Title Exceptions.

21. Competitive bidding occurred at the Sale Hearing, at the conclusion of which Brian McCarthy ("McCarthy") was deemed to be the high and successful bidder at a purchase price of $1,640,000.00. BPI agreed to be an approved "back-up" purchaser at a price of $1,620,000.00.

II. CONCLUSIONS OF LAW

The Trustee seeks authorization for the sale of the Property pursuant to 11 U.S.C. § 363(b)(1), as a sale not made in the ordinary course of the Debtor's business, and pursuant to 11 U.S.C. § 363(f), to convey the Property free and clear of all liens, claims, encumbrances and other interests, except for the Permitted Title Exceptions. The Trustee also seeks authorization and approval for the $50,000.00 payment to the Mullens, as an expense reimbursement and compensation for the substantial value enhancement resulting from the Mullens offer. As set forth below, the Court finds and concludes that the sale is proper and should be authorized, and

that the payment to the Mullens is justified, proper and also should be authorized.

A. Jurisdiction

The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157(a) and 1334(a), and Local Civil Rule 83.IX.01, DSC, and this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (N). Venue of this case and the Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

B. Authorization Under 11 U.S.C. §§ 363(b) and (f)

1. Authorization Under 11 U.S.C. § 363(b)

Pursuant to 11 U.S.C. § 363(b), the Trustee may sell property of the Estate other than in the ordinary course of business after notice and hearing.[2] In the Motion, the Trustee seeks authorization under § 363(b)(1) to sell the Property outside of the ordinary course of business, prior to confirmation of a Chapter 11 plan. For authorization of the sale under § 363(b), the Trustee must show that the sale is supported by a sound business reason and is based on a sound exercise of business judgment. See 3 Collier on Bankruptcy ¶ 363.02[4], page 363-18 (16th ed., 7/2010).

This sale is not a sale of substantially all assets of the Estate. However, even if the sale were deemed to be a sale of substantially all assets of the Estate,[3] authorization of the sale still would be proper under § 363(b). For authorization of a proposed sale of substantially all assets of an estate under §363(b)(1) without a confirmed plan of reorganization, the Court employs a "sound business purpose" test. In re Daufuskie Island Properties, LLC, 431 B.R. 626, 637 – 639 (Bankr. D.S.C. 2010); In re Taylor, 198 B.R. 142, 156-157 (Bankr. D.S.C. 1996). See also

[2] Pursuant to 11 U.S.C. § 102, "after notice and hearing" means such notice as is appropriate in the particular circumstances, and an opportunity for hearing.

[3] Many assets of the Estate have been conveyed under prior orders entered in this case, and although the Property is not the only asset remaining in the Estate, the Trustee states that the Property represents a significant portion of the remaining assets.

Stephen Indus., Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986); and In re WBQ Partnership, 189 B.R. 97 (Bankr. E.D. Va. 1995). Under the sound business purpose test, the Trustee has the burden of proving: (1) a sound business reason or emergency justifies the pre-confirmation sale; (2) the sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable. In re Daufuskie Island Properties, LLC, 431 B.R. at 638; In re Taylor, 198 B.R. at 157. The sale proposed in the Motion satisfies the test.

a. Sound Business Reason or Emergency

This case presents compelling reasons for a sale of the Property without delay. First, it must be noted that at the time of the Trustee's appointment, the Debtor's business was closed due to lack of funds to pay any expenses, and the Estate was in danger of loss of substantial value in its assets. The Trustee has attempted for a period of two years to sell assets of the Estate to generate value for unsecured creditors. On March 25, 2011, the Trustee was able to close credit bid sales to two secured creditors, AFG, LLC and Bank of North Carolina (successor in interest to Beach First National Bank), thus freeing property for sale for the benefit of unsecured creditors. During this long process, the unsecured priority claims, i.e., the unpaid administrative expenses of the Estate, mounted, and many persons providing services and goods to the Estate have borne significant hardship by non-payment to date. While the sale proceeds realized from the sale of the Property will not satisfy the outstanding administrative claims against the Estate, the sale proceeds will at least enable payment of some essential expenses, and start a flow of funds for administrative expenses and claims.

Second, the Trustee states that the purchaser in this sale, as did the other competing prospective purchasers, has expressed a desire to take ownership of the Property prior to Summer, 2011. The Trustee is informed and believes that it would be imprudent to risk loss of

this sale by waiting until he can obtain confirmation of a Chapter 11 plan. If the sale were to be delayed until confirmation of a Chapter 11 plan, there is risk that the sale might be lost, or that the sale price would be reduced.

The Trustee urges that the sale of the Property needs to occur as soon as possible, to maximize the value of the Property and to avoid risk of significant loss. Based on the record of this case, the Court is persuaded that proper justification exists to proceed with this sale.

b. Good Faith

The Trustee advises the Court that the purchaser and the back-up purchaser are unrelated to the Trustee, the Trustee's professionals, or, the Trustee is informed and believes, any other party in this case. As shown by the competitive bidding that occurred at the Sale Hearing, the purchaser and the back-up purchaser have made offers for the property which represent arms-length bargaining between the seller (the Trustee) and the purchaser.

The Trustee advises the Court that he is satisfied that the sale to the purchaser, or to the back-up purchaser, is free of collusion or insider advantage. The competitive bidding at the Sale Hearing resulted in an increase in the sale price from the Mullens' offer of $1,260,000.00 to the $1,640,000.00 offer of McCarthy, or the $1,620,000.00 offer of BPI if McCarthy were not to close.

The Court finds and concludes that both McCarthy, as the purchaser, and BPI, as the back-up purchaser, qualify as a good faith purchaser entitled to the protections of 11 U.S.C. § 363(m).

c. Notice

Certificates of service filed with the Court state that the Motion was served upon all parties having appeared in this case through counsel pursuant to ECF notice, and that the Notice of Sale was served by mail upon all creditors and parties in interest as they appear on the mailing

matrix in this case. The Notice of Hearing includes notice of the Sale Hearing. Accordingly, the Court finds that there has been proper notice of the proposed sale of the Property and of the Sale Hearing.

d. Purchase Price

The Trustee states that he believes that the sale/purchase price in the Motion represented fair and reasonable value for the Property. He states that the price was the product of arms-length negotiations and competitive bidding among potential purchasers prior to the filing of the Motion. The competitive bidding prior to the filing of the Motion resulted in an increase in the purchase price from $1 million to $1,260,000.00. As described above, the competitive bidding at the Sale Hearing increased the price to $1,640,000.00 (and $1,620,000.00 for the back-up bid). Under the circumstances relating to this sale, it must be concluded that the sale/purchase price represents fair and reasonable value for the Property.

Accordingly, the Trustee has satisfied the requirements for the sale of the Property under § 363(b), and authorization is proper and should be granted for the sale to McCarthy, and, in the event that McCarthy does not timely close (unless the failure to close is due to a contract default by the Trustee), to BPI as an approved "back-up" purchaser.

2. Authorization Under 11 U.S.C. §363(f)

The sale of the Property to the purchaser[4] is to be free and clear of all liens, claims, encumbrances and interests pursuant to 11 U.S.C. § 363(f), except for the Permitted Title Exceptions. Section 363(f) provides:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if -
>
> (1) applicable non-bankruptcy law permits such sale of such

[4] The purchaser is to be McCarthy, unless he fails to timely close his purchase, in which case BPI would be the purchaser.

> property free and clear of such interests;
> (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 entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

It appears that the only lien on the Property is the lien of Beaufort County, South Carolina for *ad valorem* taxes on the Property. These taxes are to be paid at the closing of the sale from the sale proceeds. Therefore, the sale "free and clear" is proper under § 363(f)(3).

C. Authorization for the Payment to the Mullens

In this case, the Trustee did not seek bid protections when he filed the Motion. He explains that he did not expect any additional offers. The Mullens argue that additional offers should not have been considered at the Sale Hearing, and that, in light of the allowance of the competitive bidding, they should be compensated for the expenses they incurred and for the value they created, in serving as the *de facto* stalking horse offeror. They maintain that they should be entitled to an administrative claim against the Estate for their damages as a result of not being allowed to proceed with their contract for the Property. The Trustee's proposed $50,000.00 payment to the Mullens to compensate them for their expenses and for the value the Estate realized from their offer is acceptable to the Mullens. This payment is consistent with the bid protections that often are granted for this kind of sale of assets, and with the allowance of claims for benefit to the estate under § 503(b). As noted above, the Creditors Committee agreed with the Trustee's proposal, all other significant creditors and creditor constituencies in the case were present at the Sale Hearing, and no party opposed the proposal.

The Mullens created value for the Estate by and through their offer for the Property, by their increased offer in competitive bidding prior to the filing of the Motion, and by their continued commitment and readiness to proceed with and close their purchase of the Property,

which were important to the competitive bidding that took place at the Sale Hearing. The Trustee states that, in the two years since the time of his appointment, the Mullens offer was the first acceptable offer he received for the Property. It appears that it was only in response to the proposed sale to the Mullens that other potential buyers made offers to purchase the Property.

Courts have recognized the value often created by the Estate's receipt of an initial offer, commonly called a "stalking horse" offer. Trustees and debtors-in-possession sometimes have difficulty in obtaining an initial offer at an acceptable price, and "bid protections" are often given to the stalking horse offeror to induce and protect it for making the initial offer that enables the sale process to go forward, and, hopefully, for the Estate to maximize the value of the assets being sold. The bid protections commonly include the reimbursement of the expenses incurred by the stalking horse offeror, and, sometimes, payment of an amount to reflect the additional value created as a result of the stalking horse offer and the ensuing sale process.[5] Courts have recognized that the award of such payments to stalking horse offerors is sometimes necessary or beneficial for an effective sale of assets to occur. See, e.g., In re Integrated Resources, Inc., 135 B.R. 746, 750 (Bankr. S.D. N.Y. 1992), *aff'd*, 147 B.R. 650, 653 (S.D. N.Y. 1992). See also in re Geo. W. Park Seed Co., Inc., Case No. 10-02431-jw (Bankr. D.S.C. July 10, 2010); In re Daufuskie Island Properties, LLC, Case No. 09-00389-jw (Bankr. D.S.C. October 29, 2009); and In re Georgetown Steel Company, LLC, Case No. 03-13156-jw (Bankr. D.S.C. May 13, 2004)(all approving bidding procedures and bid protections which included reimbursement of expense payments in the event the stalking horse bidder were outbid).

In determining whether to approve such payments, courts usually use one of two approaches. Some courts use a business judgment test. See In re 995 Fifth Avenue Associates,

[5] This payment awarded to the stalking horse offeror in excess of the actual expenses incurred is frequently referred to as a "break-up fee."

L.P., 96 B.R. 24, 28 (Bankr. S.D. N.Y. 1989). Other courts review the proposed payment as an administrative expense claim under 11 U.S.C. § 503(b). See Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527, 535 (3d Cir. 1999).

In the decision in In re O'Brien Environmental Energy, Inc., the Court noted ten factors reviewed by courts in determining whether or not to award the proposed bid protections: (1) whether the relationship of the parties who negotiated the break-up fee is tainted by self-dealing or manipulation; (2) whether the fee harms, rather than encourages, bidding; (3) whether the fee is unreasonable in relation to the purchase price; (4) whether the requested fee correlates with a maximization of value for the estate; (5) whether the underlying agreement is an arms-length transaction negotiated by the estate representative and the proposed stalking horse buyer; (6) "whether the principal secured creditors and the official creditors committee are supportive of the concession;" (7) whether the break-up fee is a fair and reasonable percentage of the proposed purchase price; (8) whether the amount of the break-up fee is so substantial that it has a "chilling effect" on other potential buyers; (9) the "existence of available safeguards beneficial to the debtor's estate;" and (10) whether there is a substantial adverse impact on unsecured creditors, where such creditors oppose the break-up fee. 181 B.R. at 534. These factors provide useful guidance in evaluating the Trustee's proposed payment to the Mullens.

Reviewing the ten factors in this case, the Court finds and concludes that (1) there is no evidence of self-dealing or manipulation by or between the Trustee and the Mullens; (2) the Trustee's proposed payment, which was announced prior to the competitive bidding at the Sale Hearing, did not hamper bidding, as shown by the substantial increase in the price resulting from the competitive bidding; (3) the amount of the payment is not unreasonable in relation to the

purchase price; (4) the payment is correlated to the maximization of value for the Estate, as it resolved the issues raised and potential claim under § 503(b) by the Mullens; (5) the evidence indicates that the contract between the Trustee and the Mullens, and the $50,000.00 payment, were the product of arms-length negotiations; (6) the Creditors Committee supported the payment, and the principal creditors in the case either supported the payment or did not state any opposition to it; (7) the percentage of the payment, approximately 3% of the purchase price, is fair and reasonable for a sale of this kind;[6] (8) the amount of the payment obviously had no chilling effect on other potential buyers at the Sale Hearing, as the price increased by $380,000.00, or approximately 32% of the price stated in the Motion and in the Notice of Sale; (9) other safeguards existed for the benefit of the Estate, including the discussion of the proposed payment at the Sale Hearing, and the open competitive bidding that occurred afterwards at the Sale Hearing; and (10) no creditors stated opposition to the proposed payment, and, by the increased purchase price from the competitive bidding and the resolution of the issues and potential claim by the Mullens, it appears that there is no material adverse impact upon unsecured creditors by the allowance of the payment to the Mullens under § 503(b).

Although requests for approval of reimbursement and break-up fees are frequently made at the beginning of the sale process, as part of a bidding procedures and bid protections motion, there is no prohibition against the request being made later in the sale process. See, e.g., O'Brien Environmental, 181 F.3d at 537 - 538 (consideration of Calpine request for break-up fee not approved prior to sale, denied on the basis that Calpine's requested fee was not necessary to preserve value for the estate); and In re S.N.A. Nut Company, 186 B.R. 98, 106 (Bankr. N.D. Ill. 1995)(consideration of requested break-up fee after the sale, but denial because the requested fee

[6] It must be noted that a three percent (3%) fee or reimbursement may or may not be reasonable in other cases. The reasonableness must be determined by the particular facts of the case.

was not in the best interest of the estate). Even though the Trustee's proposed reimbursement/compensation payment to the Mullens arose and was requested at the Sale Hearing, it is still allowable under the particular circumstances of this case.

Therefore, the Trustee's proposed $50,000.00 payment to the Mullens to compensate them for their expenses and the value they enabled the Estate to realize as a result of their offer, is authorized as an administrative expense under § 503(b). The payment shall be made from the sale proceeds at the closing of the sale of the Property.

D. Good Faith Purchaser Status Under 11 U.S.C. § 363(m)

The Trustee states that the sale negotiations with the Mullens were in good faith. He also states that he is informed and believes that each of the prospective buyers appearing and participating in the bidding at the Sale Hearing were acting in good faith. As shown by the active competitive bidding, and by the stipulation to the sale terms in the Mullens contract, the prospective buyers were acting independently and without collusion. Based upon the record of the Sale Hearing, including the terms of sale, which are cash payment of the purchase price without contingencies and closing within ten days after entry of the order authorizing the sale, the Court finds and concludes that the purchaser is properly deemed a good faith purchaser and is entitled to the protections afforded under 11 U.S.C. § 363(m).

E. Additional Conclusions Stated for the Auction

In addition to the conclusions stated above, the following conclusions apply for the sale of the Property.

a. It appears from certificates of service filed with the Court that the Trustee served the Motion on the Debtor, the Creditors Committee, secured creditors, and all parties having made an appearance in this case (except for any who withdrew their notices of appearance), and that the Trustee served the Notice of Sale on all creditors and parties in interest in the case.

Accordingly, proper, timely, adequate and sufficient notice of the Motion and the Sale Hearing was provided in accordance with 11 U.S.C. §§ 105(a), 363 and 365 and Rules 2002, 6004 and 9014; such notice was good and sufficient, and appropriate under the particular circumstances; and no other or further notice of the Motion, or the Sale Hearing, shall be required.

b. The only objection filed to the Sale Motion and/or the Notice of Sale is the objection of the Creditors Committee, filed on May 19, 2011. The Creditors Committee's objection does not oppose authorization of the sale of the Property; rather, it states that the Creditors Committee was aware of another potential buyer for the Property, and that the Creditors Committee requested that the Court allow and consider competing offers for the Property. The Creditors Committee withdrew its objection to the sale, and stated its support for authorization of the sale of the Property to McCarthy as the successful purchaser at the Sale Hearing, and to BPI as a back-up purchaser in the event McCarthy were not to close his purchase.

BASED UPON THE FOREGOING, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED hereby that:

1. The Trustee is authorized to sell the real and personal property comprising the Property, which real property is described in **Exhibit A** attached to this Order, to Brian McCarthy or his assigns (collectively, "McCarthy") for the sale price of $1,640,000.00, cash without financing or any other contingency, to close within ten (10) business days after entry of this Order, pursuant to 11 U.S.C. § 363(b).

2. Pursuant to 11 U.S.C. § 363(f), the sale and transfer of the property to McCarthy shall be free and clear of all liens, claims, encumbrances and other interests, except for (a) any and all easements, covenants, conditions, restrictions and other matters of record relating to the

real property included in the sale, and all matters which would be shown by a current accurate survey of the property, (b) that certain Right of First Refusal covering a small parcel of the real property adjacent to Lot 75 in the Bloody Point development, in favor of James Michael Griffin and Debra Lee Graham, recorded in the Register of Deeds Office for Beaufort County, South Carolina in Book 02722 at page 1055, and (c) to the extent applicable, the provisions of the South Carolina Coastal Zone Act of 1977, S.C. Code Ann. §§ 48-39-10 et seq., as amended by the South Carolina Beach Management Act, S.C. Code Ann. §§ 48-39-270 et seq. (1976).

3. The *ad valorem* taxes due on the property sold shall be paid from the sale proceeds at closing, to satisfy the existing secured claim of Beaufort County, South Carolina.

4. McCarthy is a good faith purchaser entitled to the protections of 11 U.S.C. § 363(m), and, accordingly, the protections of 11 U.S.C. § 363(m) shall apply to McCarthy's purchase of assets under this Order.

5. BPI is approved as a "back-up" purchaser for the assets, and in the event McCarthy fails to close his purchase under this Order in a timely manner, the Trustee is authorized to sell the Property to BPI for the sale price of $1,620,000.00 pursuant to 11 U.S.C. § 363(b), such sale shall be free and clear under 11 U.S.C. § 363(f) upon the same terms as stated in paragraph 2 hereinabove, and BPI shall be entitled to the good faith purchaser protections of 11 U.S.C. § 363(m) for its purchase under this Order.

6. The fourteen day stay provision of Bankruptcy Rule 6004(h) shall not apply to this Order.

AND IT IS SO ORDERED.

EXHIBIT A

Legal Description of Bloody Point Real Property
Owner by Daufuskie Island Properties, LLC

Parcel 1 – R800-027-000-0022-0000 (1.98 ACRES, TRACT A, BLOODY POINT):

ALL that certain piece, parcel or tract of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, containing 1.98 acres, more or less, known and described as Tract "A", Bloody Point on a plat of the Lands of the Estate of Morton Deutsch and Surfside Development Company prepared by Matthew M. Crawford, SCRLS #9756, dated March 25, 1988, last revised July 21, 1988, and recorded July 28, 1988 in the Beaufort County Records in Plat Book 35 at Page 223. For a more detailed description as to courses, metes, bounds, etc., reference may be made to said plat of record.

Parcel 2 – R800-027-00A-0076-0000 (176.30 ACRES, BLOODY POINT GOLF COURSE):

ALL that certain piece, parcel or tract of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, containing 176.30 acres, more or less, and being more particularly shown and described as the "Golf Area" on a plat of Bloody Point Golf Course & Facilities prepared by Boyce L. Young, SCRLS #11079, dated May 16, 1990 and revised March 27, 1997, recorded in the Beaufort County Records in Plat Book 61 at Page 5A. For a more detailed description as to courses, metes, bounds, etc., reference may be made to said plat of record.

TOGETHER WITH the following easements:

A. Non-exclusive easement for access and utilities recorded in Book 506 at Page 1957;
B. Non-exclusive Easement granted in the BPAC Easement Agreement recorded in Book 951 at Page 1038;
C. Non-exclusive Easement granted in Entrance Road Non-exclusive Access and Lagoon Easement recorded in Book 951 at Page 1049;
D. Non-exclusive Easement granted in Reciprocal Parking Easement recorded in Book 951 at Page 1069;
E. Non-exclusive Easement granted in Golf Traffic and Utility Easement recorded in Book 951 at Page 1106;
F. Non-exclusive Easement granted in Maintenance Facility Easement recorded in Book 952 at Page 2554;
G. Limited, Non-exclusive Easement granted in that certain Easement Agreement recorded in Book 1458 at Page 1339;
H. Non-exclusive Easement granted in Tee Box Easement recorded in Book 1140 at Page 976;
I. Non-exclusive Easement granted in Access Easement Agreement (Melrose Landing) recorded in Book 951 at Page 1076 and re-recorded in Book 1352 at Page 544;

subject to Absolute Assignment to Daufuskie Island Oceanfront, LLC recorded in Book 1361 at Page 1533; and

J. Non-exclusive Easement granted in Access Easement Agreement (Salty Fare) recorded in Book 951 at Page 1091 and re-recorded in Book 1352 at Page 560; subject to Absolute Assignment to Daufuskie Island Oceanfront, LLC recorded in Book 1361 at Page 1533.

Parcel 3 – R800-027-00A-0078-0000 (RIVERFRONT LOT & CEMETERY ACCESS):

ALL that certain piece, parcel or tract of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, shown and described as "Riverfront Lot III, Cemetery Access and Parking Easement" and Lot III on a plat of Bloody Point Golf Course & Facilities prepared by Boyce L. Young, SCRLS #11079, dated May 16, 1990, revised March 27, 1997, and recorded in the Beaufort County Records in Plat Book 61 at Page 5A. For a more detailed description as to courses, metes, bounds, etc., reference may be made to said plat of record.

Parcel 4 – R800-027-00A-0085-0000 (0.75 ACRES, PARCEL H, BLOODY POINT):

ALL that certain piece, parcel or tract of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, being shown and designated as Parcel "H" containing 0.75 acres and a portion of the right-of-way for Bloody Point Road located to the southwest of Parcel "H" on a plat entitled "A Plat of Bloody Point Golf Course and Facilities" prepared by Thomas & Hutton Engineering Co., certified by Boyce L. Young, SCRLS #11079, and recorded in the Beaufort County Records in Plat Book 39 at Page 40. For a more detailed description as to courses, metes, bounds, etc., reference may be made to said plat of record.

Parcel 5 – R800-027-00A-0087-0000 (FUTURE DEVELOPMENT TRACTS, RIVER ROAD R/W):

ALL those certain pieces, parcels or tracts of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, being shown as Future Development Tracts (2) along River Road 50' R/W on a plat entitled "A Plat of Phase II Lots, a Portion of Daufuskie Island Club" prepared by Thomas & Hutton Engineering Co., Certified by Boyce L. Young, SCRLS #11079, dated April 17, 1991, last revised September 5, 1997 and recorded in the Beaufort County Records in Plat Book 62 at Page 14. For a more detailed description as to courses, metes, bounds, etc., reference may be made to said plat of record.

SAVE AND EXCEPT:

ALL those certain pieces, parcels or lots of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina known and described as Lots 100, 101 and 102, Phase III, Daufuskie Island Club on a plat entitled "A Plat of Daufuskie Island Club Phase III Lots (formerly Parcel B) a Portion of Daufuskie Island Club" prepared by Thomas & Hutton Engineering Co., certified by Boyce L. Young, SCRLS #11079, last revised September 5, 1997, and recorded in the Beaufort County Records in Plat Book 62 at Page 100. For a more detailed

description as to the metes and bounds, courses and distances, reference is made to said plat of record.

Parcel 6 – R800-027-00A-0092-0000 (LOT A-2, FOUNDERS COTTAGE TRACT):

ALL that certain piece, parcel or tract of land situate, lying and being on Daufuskie Island, Beaufort County, South Carolina, containing 0.949 acres, more or less, and being more particularly shown and described as Lot A-2 Founders Cottage Tract, a portion of Daufuskie Island Club property on a plat prepared by Boyce L. Young, SCRLS #11079, dated January 31, 1997 and recorded in the Beaufort County Records in Plat Book 61 at Page 6. For a more detailed description as to courses, metes, bounds, etc., reference may be made to said plat of record.