

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.,

Debtor.

Chapter 11

Case No. 3:09-bk-07047-JAF

**DEBTOR'S MOTION FOR AN ORDER, PURSUANT TO SECTIONS 105 AND 363 OF THE BANKRUPTCY CODE AND RULES 2002, 6004 AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE (I) APPROVING BIDDING PROCEDURES AND TERMS OF AUCTION FOR THE SALE OF CERTAIN OF DEBTOR'S "REO" PROPERTY FREE AND CLEAR OF ALL LIENS, CLAIMS AND INTERESTS, (II) SETTING HEARING DATE FOR APPROVAL OF SALE OF PROPERTY, (III) FIXING DEADLINE FOR OBJECTING TO PROPOSED ASSET SALE, (IV) APPROVING FORM AND MANNER OF SALE NOTICE, AND (V) APPROVING BID PROTECTIONS; (VI) AUTHORIZING DEBTOR TO SELL REO PROPERTY FREE OF LIENS, CLAIMS AND INTERESTS, AND (VII) GRANTING RELATED RELIEF**

A hearing to consider and act upon the request for relief enumerated as items I, II, III, IV, and V of this Motion will be held in Courtroom 4D, Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, Florida, on Thursday, November 5, 2009, at 9:30 a.m., before The Honorable Jerry A. Funk, United States Bankruptcy Judge.

Taylor, Bean & Whitaker Mortgage Corp. (the "**Debtor**" or "**Taylor Bean**"), as debtor in possession, and, pursuant to §§ 105 and 363 of Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.* (the "**Bankruptcy Code**") and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure, hereby moves this Court (the "**Motion**") for the entry of an order: (i) approving the proposed bidding procedures and terms of a proposed auction (the "**Auction**") for sale of certain foreclosed real property free and clear of all liens, claims and interests, and approving certain bid protections in connection therewith; (ii) setting a hearing date

for approval of the sale of the property (the “**Sale Hearing**”) (iii) fixing a deadline for objecting to the proposed sale; (iv) approving the form and manner of the notice of this Motion and the Sale Hearing; and (v) approving bid protections; (vi) authorizing the sale of such foreclosed real property free and clear of liens, claims and interests; and (vii) granting certain other related relief as set forth herein. In support of this Motion, the Debtor respectfully represents as follows:

### **Jurisdiction and Venue**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of the Debtor’s chapter 11 case and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On August 24, 2009 (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Clerk of this Court.

3. The Debtor continues to operate its business and manage its properties as debtor in possession pursuant to §§ 1107 and 1108.

4. Until very recently, Taylor Bean was the largest independent (*i.e.*, non-depository owned) mortgage lender in the United States. Headquartered in Ocala, Florida, TBW employed approximately 2,400 people across the country. The largest offices were in Ocala, Florida; Atlanta, Georgia; and Tampa, Florida. Taylor Bean’s principal business comprised the following:

- Origination, underwriting, processing and funding of conforming conventional and Government-insured residential mortgage loans;

- Sale of mortgage loans into the “secondary market” to government-sponsored enterprises such as the Federal Loan Mortgage Corporation (“**Freddie Mac**”) or the Government National Mortgage Association (“**Ginnie Mae**”); and
- Mortgage payment processing and loan servicing.

5. For a detailed description of the Debtor’s business operations and the reasons for the filing of this Bankruptcy Case, please see the description contained in the Debtor’s Case Management Summary [Docket No. 4].

### **The Proposed Sale of the Property**

6. In connection with its mortgage origination and servicing business, Taylor Bean holds title to an extensive portfolio of foreclosed real property assets (the “**REO Assets**”) throughout the United States. In order to facilitate an orderly wind-down and liquidation that will maximize value for its estate, the Debtor has determined that a bulk sale of the REO Assets is necessary and appropriate.

7. To that end, Taylor Bean has been in ongoing negotiations with Selene RMOF REO Acquisition II LLC (the “**Purchaser**”) to effectuate a sale of the REO Assets pursuant to a proposed Real Estate Purchase and Sale Agreement (the “**Agreement**”). The Agreement more specifically sets forth the property to be sold (the “**Property**”). A true and correct copy of the Agreement is attached hereto as Exhibit A.

8. Pursuant to the Agreement, Purchaser proposes to purchase the Property for an Aggregate Purchase Price<sup>1</sup> based upon a percentage of the value of the Property as established in certain brokers price opinions (“**BPOs**”). It is anticipated that the Aggregate Purchase Price will be a minimum of \$133,247,356 subject to adjustments as set forth in the Agreement. The

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<sup>1</sup> All capitalized terms not otherwise defined herein shall have the meaning given to them in the Agreement.

Purchaser proposes to make a Deposit payment in the amount equal to 10% of the Aggregate Purchase Price, as more particularly described in the Agreement.

9. To ensure that the offer presented in the Agreement represents the highest or otherwise best value to be derived from the sale of the Property, the Debtor has determined that it is in the best interest of all creditors to solicit competing bids and conduct an auction (the “**Auction**”) regarding the sale of the Property.

10. The Agreement is conditioned upon the entry of an Order by this Court approving, *inter alia*, the Bidding Procedures (as defined below) to be used during the Auction, and upon the Purchaser being the Successful Bidder (as defined below) at the Auction. The Agreement is also conditioned upon the entry of an Order by this Court approving the sale of the Property by the Debtor to the Purchaser.

11. The Debtor carefully negotiated and reviewed the Agreement and believes that it is in the best interest of the Debtor, its estate and creditors to enter into and consummate the Agreement.

#### **Relief Requested**

12. By this Motion, the Debtor initially seeks the entry of an order, substantially in the form submitted herewith, pursuant to sections 105 and 363 of the Bankruptcy Code and Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) (i) approving the terms of the Bidding Procedures for sale of the Property free and clear of all liens, claims and interests, including certain bid protections and other particular terms as discussed below, in connection therewith; (ii) setting a hearing date for the Sale Hearing; (iii) fixing a deadline for objecting to the proposed asset sale; (iv) approving the form and

manner of the notice of this Motion and the Sale Hearing; and (v) granting certain related relief as set forth herein. The Debtor requests, after the Auction has been conducted and the Sale Hearing held, that the Court authorize the Debtor to consummate the sale of the Property.

### **Bidding Procedures**

13. The sale of the Property pursuant to the Agreement is subject to higher or better offers. To ensure maximum value is obtained, the Debtor proposes the following terms and procedures (collectively, the “**Bidding Procedures**”) to govern the submission of competing bids for the Property and for the conduct of the Auction. The Debtor believes that the Bidding Procedures provide an appropriate framework for a sale of the Property in a uniform fashion and will enable the Debtor to review, analyze and compare all bids received to determine which bid is in the best interests of the Debtor’s estate and stakeholders. The Bidding Procedures are as follows:

- (a) **Due Diligence Period.** The Debtor intends to arrange for the sale of the Property, in consultation with those entities that have an interest in the Property (the “**REO Parties**”), and to provide a reasonable period of time, not to exceed 10 days, for other potential bidders to review information with respect to the Property to conduct due diligence with respect to the Property.
- (b) **Access to Due Diligence Package.** Any potential bidders will be permitted, subject to execution of confidentiality agreements as may be provided by Debtor, to request certain due diligence information related to the Property (the “**Due Diligence Package**”) to review the property information, including without limitation the Brokers Price Opinions and the updated Property Schedule containing the final Purchase Price for each of the Properties contemplated by Section 3.4(a)(v) of the Agreement, with respect to the Property.
- (c) **Subject to Higher and Better Offers.** The Agreement shall be subject to higher and better offers from potential buyers at an auction (the “**Auction**”). The Auction will be conducted at the offices of Troutman Sanders LLP, Ste. 5200, 600 Peachtree St., NE, Atlanta, Georgia 30308 commencing at 10:00 a.m. (prevailing Eastern time) on December 11,

2009. Other than representatives of the Debtor and the Official Committee of Unsecured Creditors (the "Committee"), only Qualified Bidders (as defined below) and the Purchaser, and their respective representatives, will be permitted to attend the Auction. If no Qualified Bids (as defined below) are received by the Debtor on or before the Bid Deadline (as defined below), the Debtor will seek approval to sell the Property to the Purchaser in accordance with the Agreement at the Sale Hearing (as defined below).

- (d) Bankruptcy Approval After Notice and Hearing. The Debtor shall seek approval of a sale of the Property at a hearing to be conducted on December 15, 2009 (the "Sale Hearing").
- (e) Delivery Requirements for Qualified Bidders. In the event an interested party desires to propose a bid for the purchase all of the Property, such interested party will be required to deliver to the Debtor's counsel by 12:00 p.m. (prevailing Eastern time) on the date that is the second business day prior to date of the Auction (the "Bid Deadline"), the following items in order to be considered a "Qualified Bidder": (i) an original executed purchase and sale agreement for all or substantially all of the Properties, in the form provided by the Debtor (the "Qualified Bidder's Purchase and Sale Agreement") which form shall be substantially similar to the Agreement and which shall include a Property Schedule that contains the Qualified Bidder's proposed Aggregate Purchase Price allocated on a Property-level basis; (ii) a blackline comparison of such Qualified Bidder's Purchase and Sale Agreement against the Agreement; (iii) a cash deposit in an amount of ten (10 %) percent of the amount of the bid, which shall be deposited into escrow with a nationally recognized escrow firm acceptable to the Debtor on escrow terms acceptable to the Debtor; and (iv) financial documentation demonstrating, to the satisfaction of Debtor in consultation with the Committee, the bidder's ability to close the transaction. Any bid received from a Qualified Bidder shall be, subject to the requirements of subparagraph (f) below, a "Qualified Bid." The Debtor retains the right in its reasonable business discretion, in consultation with the Committee, to determine whether a bid is a Qualified Bid. Purchaser's Agreement shall be deemed a Qualified Bid and Purchaser shall be deemed a Qualified Bidder for all purposes under the Bidding Procedures.
- (f) All Cash Purchase Price and No Closing Contingencies Requirements. Without limiting the terms of the Qualified Bidder's Purchase and Sale Agreement, all Qualified Bids must provide that (i) the purchase price will exceed the Purchaser's proposed purchase price by at least the sum of: (a) the amount of the Break Up Fee, to the extent payable (as defined below); (b) \$750,000 (the maximum amount of the Cost Reimbursement, to the extent payable (as defined below)); and (c) \$750,000; (ii) the final Aggregate Purchase Price will be allocated among all remaining

Properties at closing on a pro rata basis consistent with the schedule of purchase prices attached to the Qualified Bidder's Purchase and Sale Agreement submitted prior to the Auction; (iii) the purchase price be "all cash" payable at the closing; and (iv) the bidder's obligation to close shall not be conditioned upon obtaining acquisition financing, the completion of any unperformed or additional due diligence with respect to the Property or any other contingency, other than the approval by the Bankruptcy Court. Any bid which does not include provisions for (i), (ii), (iii) and (iv) shall not be deemed a Qualified Bid and shall be rejected.

- (g) Purchaser Bid Protections. If, and only if, (i) the Aggregate Purchase Price under the Agreement minus an amount equal to the sum of the Purchase Prices for any Uninhabitable or Non-Compliant Properties was in excess of \$133,247,356 minus an amount equal to the product of (x) 40.25% and (y) the sum of the Adjusted Appraisal Values of any Purchaser Excluded Properties, Seller Excluded Properties and Properties which are Uninhabitable or Non-Compliant Properties (the "**Break-Up Fee Threshold Test**"), and (ii) Seller consummates an Alternative Transaction, then Seller agrees to pay to Purchaser upon the closing of any applicable Alternative Transaction an amount equal to the sum of: (i) \$1,000,000 (the "**Break-Up Fee**"), plus (ii) an amount (the "**Cost Reimbursement**") equal to the lesser of (x) \$750,000 or (y) the actual out of pocket expenses of Purchaser paid or payable to third parties, and which have not otherwise been reimbursed to Purchaser, any affiliate of Purchaser or any assignee or designee thereof, with respect to (a) Purchaser's due diligence in connection with the Transaction, (b) Purchaser's reasonable legal fees and expenses incurred in connection with the Transaction, and (c) Purchaser's preparations for the Closing Date.
- (h) Required Amounts of Overbids. At the Auction, the first bid must exceed the highest aggregate purchase price established by any Qualified Bid by at least \$500,000. The Debtor shall announce such highest aggregate purchase price at the commencement of the Auction. Each successive bid at the auction must exceed the previous bid by at least \$500,000.
- (i) Selection of Successful Bid. As soon as practicable after the conclusion of the Auction, the Debtor will, in consultation with the Committee, review each Qualified Bid and identify the highest or otherwise best offer for the Property (the "**Successful Bid**") and the bidder making such bid (the "**Successful Bidder**"). The Debtor will sell the Property for the highest or otherwise best Qualified Bid to the Successful Bidder upon the approval of such Qualified Bid by the Bankruptcy Court at the Sale Hearing. The Committee reserves the right to object at the Sale Hearing to the Debtor's determination and selection of the Successful Bidder.

- (j) Approval of Bankruptcy Court. The entry of an order (the “**Sale Order**”) by the Bankruptcy Court approving the sale of the Property to the Purchaser or the Successful Bidder shall be required before any offer shall be deemed to have been accepted by the Debtor. The Sale Hearing shall occur on the date scheduled by the Bankruptcy Court pursuant to this Order. At the Sale Hearing, the Debtor will establish that all requirements of section 363 of the Bankruptcy Code have been satisfied.
- (k) Closing of the Sale. The closing of the sale of the Property shall occur as soon as practical after entry of the Sale Order and in accordance with the terms of the Successful Bid.
- (l) Failed Sale. If a Successful Bidder cannot timely close the approved sale transaction because of such Successful Bidder’s material breach of the purchase agreement agreed to pursuant to the terms of this Order, such bidder shall forfeit its deposit. The next highest bidder shall have five (5) days from the date it is notified by the Debtor of the failed closing to close its own sale pursuant to its approved bid. In the event that the next highest bidder also fails to timely close the sale transactions, that bidder’s deposit shall also be forfeited. Notwithstanding anything to the contrary in these Bid Procedures, in the event the Purchaser is not the Successful Bidder: (i) the Purchaser shall have the right, but not the obligation, to keep its Agreement open as a back-up to the Successful Bid; and (ii) whether or not the Purchaser agrees to keep its Agreement open as a back-up, the Purchaser shall remain entitled to collect its Break-Up Fee and Expense Reimbursement in accordance with this Order and the Agreement.
- (m) Payment of Break-Up Fees and Cost Reimbursement. In the event the Purchaser is not the Successful Bidder, the Debtor shall pay the Break-up Fee to the Purchaser, if due under the terms of the Agreement, no later than three (3) business days after the Closing of the Transaction. The Debtor shall pay the Cost Reimbursement to the Purchaser, if due under the terms of the Agreement, no later than three (3) business days after delivery by Purchaser of an invoice to the Debtor of a cost incurred by the Purchaser of the kind described in subparagraph (g) above.
- (n) Deposits. The Successful Bidder’s deposit shall be applied to the purchase price pursuant to the Qualified Bidder’s Purchase and Sale Agreement. Upon closing of the sale of the Property, deposits that are not (i) forfeited as set forth in the Agreement or Successful Bidder’s proposed agreement, or (ii) applied to the purchase price paid by the Purchaser or Successful Bidder, shall be returned to the bidder. In the event the Purchaser is not the Successful Bidder and the Purchaser elects not to keep its Agreement open as a back-up, the Debtor shall refund the Purchaser’s deposit within two (2) business days of written demand by the Purchaser.



- (o) Reservation of Rights. The Debtor, in consultation with the Committee (i) may determine which bid, if any, is the highest or otherwise best offer and (ii) may reject at any time any bid (other than the Agreement) that is: (a) inadequate or insufficient; (b) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, or the terms and conditions of the sale; or (c) contrary to the best interests of the Debtor, its estate, and creditors as determined by the Debtor in its sole discretion. The Committee reserves the right to object at the Sale Hearing to any of the foregoing determinations by Debtor.

#### **Basis for Relief**

14. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that “the trustee, after notice and a hearing, may use, sell, lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). A debtor-in-possession is given these rights by § 1107(a) of the Bankruptcy Code. In accordance with Bankruptcy Rule 6004(f)(1), sales of property outside of the ordinary course of business may occur by private sale or by public auction.

#### **The Sale of the Property and the Auction on the Terms Set Forth in the Bidding Procedures Is Warranted**

15. Section 363 of the Bankruptcy Code does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor’s assets prior to confirmation of a plan. Courts have required that the decision to sell assets outside the ordinary course of business be based upon the sound business judgment of the debtor. See, e.g., Licensing By Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 387 (2d Cir. 1997) (“A sale of a substantial part of a Chapter 11 estate may be conducted if a good business reason exists to support it.”); Stephens Indus. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (“bankruptcy court can authorize a sale of all a Chapter 11 debtor’s assets under [section] 363(b)(1) when a sound business purpose dictates such action”); Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (“Where the

debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct.”).

16. Courts typically consider the following four factors in determining whether a proposed sale satisfies this standard: (a) whether a sound business justification exists for the sale, (b) whether adequate and reasonable notice of the sale was given to interested parties, (c) whether the sale will produce a fair and reasonable price for the property and (d) whether the parties have acted in good faith. See, e.g., In re Weatherly Frozen Food Group, Inc., 149 B.R. 480, 483 (Bankr. N.D. Ohio 1992); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D. Del. 1991).

17. Here, each of these four factors has been satisfied. The Debtor currently has liquidity to continue operating in accordance with its traditional practice. First, the rapid, but orderly, sale of the Property will minimize the liquidity the Debtor needs to continue operations while providing a means for the Debtor to maximize the value of the Property for the benefit of its creditors and stakeholders. Second, as discussed below, the Debtor will be providing adequate and reasonable notice to interested parties of the opportunity to bid on the Property and participate in the Auction and of the opportunity to object to the sale of the Property. See, e.g., Folger Adam Security Inc. v. DeMatteis/MacGregor, 209 F.3d 252, 265 (3d Cir. 2000) (stating that notice is sufficient if it includes “the time and place of any public sale, the terms and conditions of any private sale, states the time for filing objections and, if real estate is being sold, provides a general description of the property”); In re WBQ Partnership, 189 B.R. 97, 103 (Bankr. E.D. Va. 1995) (“notice is sufficient if it includes the terms and conditions of the sale, if it states the time for filing objections, and if the estate is selling real estate, it generally describes

the property” (quoting In re Karpe, 84 B.R. 926, 929 (Bankr. M.D. Pa. 1988)). Third, the Bidding Procedures and the terms of the Auction set forth in the Bidding Procedures will provide for an open and competitive bidding process for the Property. Fourth, the Debtor is proceeding in good faith and will make a showing at the Sale Hearing that the purchaser or purchasers of the Property have acted in good faith. Courts generally conclude that parties have acted in good faith with respect to a proposed sale if the purchase price is adequate and reasonable and the terms of the sale are disclosed fully. See, e.g., In re Abbotts Dairies of Pa., Inc., 788 F.2d 143, 149-50 (3d Cir. 1986). The sale of the Property and Auction pursuant to the Bidding Procedures should therefore be approved.

18. As described in detail above, the Debtor has determined that the sale of the Property pursuant to the Bidding Procedures will enable the Debtor to obtain the highest and best offer for the Property and maximize the value of the Property for its estates and stakeholders. Accordingly, it is in the best interests of the Debtor’s estate and stakeholders to implement a sale of the Property and the Auction, if necessary, through the terms set forth in the Bidding Procedures.

**Request for Approval of a Sale Free and Clear of All Claims and Interests**

19. Pursuant to section 363(f) of the Bankruptcy Code, a debtor in possession may sell property “free and clear of any interest in such property of an entity other than the estate” if any one of the following conditions is satisfied:

- (a) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
- (b) such entity consents;

- (c) 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;
- (d) such interest is in bona fide dispute; or
- (e) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). In addition, a court may authorize the sale of a debtor's assets free and clear of any liens, claims, or encumbrances under section 105 of the Bankruptcy Code. See Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of liens] is within the court's equitable powers when necessary to carry out the provisions of Title 11.").

20. To facilitate the sale of the Property, the Debtor proposes, as set forth in the Bidding Procedures, that all of the Debtor's right, title, and interest in and to the Property, be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "Claims and Interests"), such Claims and Interests to attach to the net proceeds of the sale of such Property. All liens will be satisfied from the proceeds of the sale of the Property or will attach to the proceeds of the sale of the Property with the same force, effect and priority as such liens had on the Property on the day prior to the closing, subject to the rights and defenses, if any, of the Debtor and any party in interest thereto. Accordingly, the Debtor respectfully submits that the sale of Property free and clear of the Claims and Interests satisfies the statutory prerequisites of section 363(f) of the Bankruptcy Code.

### **Request for Approval of Certain Bid Protections**

21. As set forth in the Bidding Procedures, the Debtor proposes to provide the Purchaser with a Break-Up Fee and Cost Reimbursement.

22. A “stalking-horse bidder” is a bidder that submits an early bid and absorbs the initial costs and consequences of bidding. If a stalking-horse agreement is negotiated and disclosed to all interested parties, it is anticipated that any such initial, firm bid will assist in generating higher and better offers. If a debtor accepts a higher bid from a party other than the “stalking-horse” bidder, a break-up fee and cost reimbursement customarily is paid to the “stalking-horse” bidder to compensate the “stalking-horse” bidder for costs incurred as a result of its role as a “stalking-horse” bidder. See, e.g., In re Loral Space & Commc’ns Ltd., No. 03-41710 (RDD) (Bankr. S.D.N.Y. 2003) (approving break-up fee and expense reimbursement) (the “Loral Order”); In re Integrated Resources, 147 B.R. 650, 660 (S.D.N.Y. 1992) (noting that break-up fees may be approved where they enhance the bidding process); see also In re LTV Steel Co., Inc., Case No. 00-43866 (Bankr. N.D. Ohio April 24, 2001) (approving bid protections that included a termination fee and a minimum overbid); In re EWI, Inc., 208 B.R. 885, 888 (Bankr. N.D. Ohio 1997) (noting the customary nature of break-up fees); In re CSC Indus., Inc. and Copperweld Steel Co., Nos. 93-41898 and 93-41899 (Bankr. N.D. Ohio Nov. 2, 1994) (approving break-up fees); In re Hupp Indus., Inc., 140 B.R. 191, 195 (Bankr. N.D. Ohio 1992) (noting that an unsuccessful bidder should be entitled to a reasonable break-up fee).

23. The Debtor submits that the Break-Up Fee and Cost Reimbursement may be payable in accordance with the terms, conditions, and limitations set forth in the Agreement and, (i) to the extent payable, shall be deemed an actual and necessary cost and expense of preserving the Debtor’s estate, within the meaning of sections 503 and 507(b) of the Bankruptcy Code,

(ii) is of substantial benefit to the Debtor, its estate and all creditors, (iii) is reasonable and appropriate, including in light of the size and nature of the proposed sale and the efforts that have been and will be expended by the Purchaser notwithstanding that the Agreement is subject to higher or better offers for all or substantially all of the Property, (iv) were negotiated by the parties at arms' length and in good faith, and (v) are necessary to ensure that the Purchaser will continue to pursue its proposed acquisition of the Property. The Break-Up Fee and Cost Reimbursement are material inducements for, and condition of, the Purchaser's entry into the Agreement. The Purchaser is unwilling to commit to hold open its offer to purchase the Property under the terms of the Agreement unless it is assured of payment of the Break-Up Fee and Cost Reimbursement. Thus, assurance to the Purchaser of payment of the Break-Up Fee and Cost Reimbursement will promote competitive bidding by inducing the Purchaser's offer that otherwise would not have been held open, and without which other bidding would be less competitive.

24. Further, because the Break-Up Fee and Cost Reimbursement induced the Purchaser to submit a bid that will serve as a minimum or floor bid on which other bidders can rely, the Purchaser has provided a benefit to the Debtor's estate by increasing the likelihood that the price at which the purchased Property is to be sold reflects its true worth.

25. Finally, absent authorization of the Break-Up Fee and Cost Reimbursement, the Debtor will lose the opportunity to obtain the highest or otherwise best available offer for the Property.

26. For the foregoing reasons, the Debtor submits that it is reasonable and in the best interest of the estate for the Bankruptcy Court to approve the Break-Up Fee and Cost Reimbursement.

**Good Faith Pursuant to 11 U.S.C. § 363(m)**

27. Section 363(m) of the Bankruptcy Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

28. Although the Bankruptcy Code does not define “good faith,” courts have held that:

the good faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser’s good faith is lost by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.”

*In re Rock Industries Machinery Corp.*, 572 F.2d 1195, 1198 (7<sup>th</sup> Cir 1978); *see also In re Andy Frain Services, Inc.*, 798 F.2d 1113, 1125 (7<sup>th</sup> Cir. 1986).

29. As previously discussed, the Agreement is the product of intensive negotiations in which the Debtor, the Committee and the Purchaser each acted in good faith and at arms’ length. The Debtor therefore requests that the Court make a finding that the Purchaser, to the extent the offer set forth in the Agreement is the highest and best offer following the Auction, has

purchased the Property in good faith within the meaning of section 363(m) of the Bankruptcy Code.

**Request to Schedule the Sale Hearing**

30. Through this Motion, the Debtor intends to seek, among other things, approval of the Bidding Procedures, the Break-Up Fee and Cost Reimbursement, and the form and manner of service of the Sale Notice. To expedite the sale process and in accordance with the terms of the Bidding Procedures, the Debtor requests that the Court schedule a Sale Hearing on December 15, 2009, at 10:00 a.m. (prevailing Eastern time) before the United States Bankruptcy Court for the Middle District of Florida, Courtroom 4-D, Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, Florida, at which time the Court shall consider the Debtor's request to approve the sale and the Successful Bidder and to confirm the results of the Auction.

**Request for the Court to Establish the Deadline to Object to the Proposed Asset Sale**

31. The Debtor requests that all responses or objections, if any, to the proposed sale be filed and served no later than 4:00 p.m. (prevailing Eastern time) on December 11, 2009. The Debtor further requests that the Bankruptcy Court require any responses or objections to be in writing, state the name of the objecting party, state with particularity the reasons and basis for the objection, conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and be filed with the Bankruptcy Court and served upon (1) counsel to the Debtor, (2) special counsel to the Debtor, (3) the United States Trustee, (4) counsel to the Committee, (5) counsel to Purchaser, and (6) any other parties requiring notice in this case pursuant to Bankruptcy Rule 2002.



**Approval of the Form of Notice of Sale Motion and Sale Hearing**

32. Pursuant to Bankruptcy Rule 2002(a), the Debtor is required to provide their creditors with 20 days' notice of the Sale Hearing. Pursuant to Bankruptcy Rule 2002(c), such notice must include the date, time, and place of the Auction and the Sale Hearing, and the deadline for filing any objections to the relief requested herein.

33. The Debtor submits that notice of the Sale Motion and the Sale Hearing is sufficient, and no other or further notice shall be required, if given as follows:

- (a) **Notice of Sale Hearing.** Within five days after entry of the order requested herein (the "Mailing Date"), the Debtor (or its agent) shall serve this Motion, the Agreement, a proposed sale order, the Bidding Procedures, a copy of the notice attached hereto as Exhibit B and a copy of the bidding procedures order by first-class mail, postage prepaid, upon (i) the Office of the United States Trustee, Orlando, Florida, (ii) counsel for the Purchaser, (iii) counsel for the Official Committee of Unsecured Creditors appointed in this chapter 11 case, (iv) all entities known to have expressed an interest in a transaction with respect to the Property during the past two months, (v) all entities known to have asserted any lien, claim, interest or encumbrance in or upon the Property, and (vi) all creditors and equity security holders.
- (b) **Publication Notice.** On or before the Mailing Date, or as soon thereafter as is practicable, the Debtor shall cause notice substantially in the form of the notice attached hereto as Exhibit B to be published in the national editions of the Wall Street Journal (International Edition) and the New York Times.

34. The Debtor shall also file a certificate of service with the Bankruptcy Court showing that service in accordance with this Order has been effectuated.

35. The Debtor submits that the notice of the Sale Motion, the Auction, and the Sale Hearing as provided for herein complies fully with Bankruptcy Rule 2002 and the Local Rules of

this Court and constitutes good and adequate notice of the sale of the Property and the proceedings with respect thereto. Therefore, the Debtor respectfully requests that this Court approve the notice procedures proposed above.

**Relief Under Bankruptcy Rules 6004(g) and 6006(d)**

36. Bankruptcy Rule 6004(g) provides that an “order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” The Debtor requests that any order approving the sale of the Property be effective immediately by providing that the 10-day stay under Bankruptcy Rule 6004(g) is waived.

**Notice**

37. No trustee or examiner has been appointed in this chapter 11 case. Notice of this Motion has been provided to (a) the United States Trustee, (b) the REO Parties, (c) counsel for the Committee, (d) counsel for Purchaser, (e) the parties that have filed requests for service of documents in this case, and (f) the Local Rule 1007(d) Parties in Interest List. In light of the nature of the relief requested, the Debtors submit that notice in the foregoing manner is adequate and sufficient and that no further notice need be given.

**No Prior Request**

38. No prior request for the relief sought in this Motion has been made by the Debtor to this or any other court in connection with these chapter 11 cases.

**WHEREFORE**, the Debtor respectfully requests that the Court enter an order substantially in the form attached hereto as Exhibit C (a) granting the relief sought herein, and (b) granting to the Debtor such other and further relief as the Court may deem proper.

/s/ Jeffrey W. Kelley

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