

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

In re: ) Chapter 11  
)  
TWG CAPITAL, INC., ) Case No. 12-11019-BHL-11  
)  
Debtor. )

**MOTION FOR ENTRY OF AN ORDER (I) APPROVING ASSET PURCHASE AGREEMENT; (II) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL OF THE ASSETS OF THE DEBTOR'S ESTATE FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES; AND (III) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF LEASES AND CONTRACTS**

TWG Capital, Inc. (the "Debtor" or the "Seller"), the debtor and debtor in possession in the above-captioned Chapter 11 case (the "Chapter 11 Case"), files this motion (the "Sale Motion") pursuant to 11 U.S.C. §§ 105(a), 363, 365 and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for entry of an order following a hearing (the "Sale Hearing") (i) subject to higher or otherwise better offers obtained through the Court's approved sale procedures, approving the Asset Purchase Agreement by and among the Debtor and Carmel Funding, LLC, a Delaware limited liability company (the "Purchaser") dated as of September 14, 2012 (the "Purchase Agreement"), substantially in the form of Exhibit A attached hereto (omitting the Exhibits and Schedules, which the Debtor will file on or before two business days prior to the hearing on the Procedures Motion (as defined herein)); (ii) authorizing the sale of substantially all of the assets of the Debtor's estate to the Purchaser pursuant to the terms of the Purchase Agreement, or to the bidder submitting the highest or otherwise best bid, as determined in accordance with the sale procedures established by this Court (the "Successful Bidder") free and clear of all Liens<sup>1</sup> except Permitted Liens with Liens to

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to such term in the Purchase Agreement.

attach to the net proceeds of sale; (iii) authorizing the Debtor's consummation of the transactions contemplated herein and in the Purchase Agreement; and (iv) authorizing the assumption by the Debtor and the subsequent assignment to the Purchaser or other Successful Bidder of certain executory contracts and unexpired leases effective as of the closing of the transaction contemplated by the Purchase Agreement. The proposed form of the order granting the Sale Motion is attached hereto as Exhibit B (the "Sale Order"). In support of the Sale Motion, the Debtor states as follows:

### **JURISDICTION**

1. On September 14, 2012 (the "Petition Date"), the Debtor filed with the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (the "Court"), its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. as amended (the "Bankruptcy Code") commencing the Chapter 11 Case.
2. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.
3. No trustee, examiner, or committee has been appointed in the Chapter 11 Case.
4. This Court has jurisdiction to consider this Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.
5. The statutory bases for the relief sought herein are Sections 105(a), 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006.
6. Pursuant to Rule B-6004-1 of the Local Rules of the United States Bankruptcy Court for the Southern District of Indiana, the Sale Motion is being filed on the same day as the Procedures Motion (as hereinafter defined).

### **BACKGROUND AND EVENTS LEADING TO FILING**

7. As more fully set forth in the Declaration of Mark P. Nondorf in Support of Chapter 11 Petition and First Day Applications and Motions (the "Nondorf Declaration"), the Debtor is a specialty finance company that services the insurance industry. Insurance agents and agencies own predictable renewal commission rights on certain types of insurance policies ("Insurance Commission Receivables," commonly referred to in the industry as "ICRs") that generate significant cash flows over extended periods of time. The Debtor provides a range of products and services based on the value of the ICRs.

8. The Debtor's business consists of three primary segments. The Debtor's most significant line of business is providing liquidity to insurance agents and agencies by serving as an originator to special purpose vehicles ("SPVs") for the purchase of ICRs at a rate less than the expected value of their future cash flows. The Debtor earns origination fees for this service. Second, the Debtor services on behalf of SPVs and other parties ICR asset portfolios, using proprietary technology. The Debtor earns a servicing fee for this service. Finally, the Debtor's wholly owned subsidiary, IR Finance 1, LLC ("IR Finance") makes loans to insurance agencies and collateralizes the loans with future insurance commissions. The Debtor services the loan assets and insurance commission collateral on behalf of IR Finance.

9. On or around July 12, 2007, the Debtor entered into an origination and servicing contract with its wholly owned subsidiary, Insurance Receivables 7, LLC ("IR7"), whereby the Debtor would receive (i) an origination fee for purchases placed in IR7's debt facility and (ii) a servicing fee for monitoring and processing commission payments that were received under the purchases (the "IR7 Servicing Agreement"). On or around May 13, 2008, the Debtor, Inservico, Inc. ("Inservico") and other parties, including lenders to IR7 (the "IR7 Lenders") entered into that certain Back-Up Servicing Agreement (the "Back-Up Servicing

Agreement"). On August 13, 2010, the Debtor was terminated as the IR7 servicer and pursuant to the Back-Up Servicing Agreement, the IR7 Lenders purportedly appointed Inservico as successor to the Debtor as the servicer with respect to the IR7 Servicing Agreement. Inservico disputes any allegation that it has any obligations under the Back-Up Servicing Agreement or the IR7 Servicing Agreement. With reservation of Inservico's position, by that certain Subservicing Agreement between Inservico and the Debtor dated as of September 13, 2012, Inservico has subcontracted the servicing of IR7 to the Debtor. The origination and servicing fees from IR7 are currently the Debtor's primary source of revenue. Inservico is a 62.47% owner of the Debtor.

10. The prolonged impact of the financial crisis that hit in 2008 has impaired the performance of the Debtor's purchased asset portfolio, and the Debtor has sustained significant losses as a result. The financial crisis has also impacted the insurance industry as a whole, which caused the Debtor to experience lower than projected cash flows. The Debtor has also been required to sustain unexpected costs of litigation, including arbitration resulting from the Debtor's discovery of misrepresentations by the seller in the purchase of Medicare Supplemental policies (the "AIMC Arbitration"). During the AIMC Arbitration, the senior lenders on the IR7 debt facility declared an event of default that resulted in the immediate termination of new originations within the IR7 debt facility, thereby further impairing the Debtor's cash flow.

11. The Debtor has taken many measures to prevent the filing of the Chapter 11 Case. The Debtor has worked with investment bankers for over three years to develop and execute recapitalization strategies. However, traditional financing sources have been constrained, and the Debtor has been unable to raise sufficient capital to implement its business plan.

12. A more in depth discussion of the Debtor's business and the circumstances precipitating the filing of the Chapter 11 Case is set forth in the Nondorf Declaration, which is incorporated by reference herein.

13. On September 14, 2012, the Debtor filed its *First Day Motion for Interim Order (i) Authorizing Debtor to Obtain Postpetition Financing Pursuant to 11 U.S.C. § 364(c) and 364(d); (ii) Granting Liens and Superpriority Claims; and (iii) Scheduling a Final Hearing* (the "DIP Motion"), pursuant to which the Debtor seeks entry of an order (the "DIP Order") approving the proposed post-petition financing from the Purchaser in the maximum aggregate amount of \$340,000 (plus the fees and expenses incurred by the Purchaser that constitute "DIP Obligations" as defined in the DIP Motion and the DIP Agreement) (the "DIP Financing"), all as provided for in that Debtor In Possession Loan Agreement entered into between the Debtor and Purchaser (the "DIP Agreement"). As contemplated in the DIP Motion and per the DIP Agreement (the capitalized terms used in the remainder of this paragraph are defined in the DIP Agreement), the "DIP Obligations" shall be secured by automatically perfected security interests and "Liens" granted pursuant to Section 364(c) of the Bankruptcy Code, with first priority on all "Collateral," subject and subordinate only to (i) the "Carveout" and (ii) "Permitted Liens"; provided, however, that the "Interim DIP Advance" shall not be secured by a "Lien" on claims and causes of action arising under chapter 5 of the Bankruptcy Code unless and until the "Final DIP Order" is entered. In addition, the Purchaser, as lender, will be entitled to super-priority administrative status for the obligations of the Debtor to it under the DIP Agreement.

**RELIEF REQUESTED**

14. The Debtor requests that the Court (i) approve the Purchase Agreement, subject to higher or otherwise better offers, (ii) authorize the sale of substantially all of the assets

of the Debtor's estate to the Purchaser pursuant to the terms of the Purchase Agreement, or to the Successful Bidder free and clear of Liens except the Permitted Liens, with such Liens to attach to the net proceeds of sale; (iii) authorize the Debtor's consummation of the transactions contemplated herein and in the Purchase Agreement; and (iv) authorize the assumption by the Debtor and the subsequent assignment to the Purchaser of certain executory contracts and unexpired leases effective as of the closing of the transaction contemplated by the Purchase Agreement.

## **PROPOSED SALE**

### **A. Marketing Efforts Leading to the Purchase Agreement**

15. Prior to the Petition Date, the Debtor, in consultation with its financial and legal advisors, have analyzed its operations and assets to determine how best to maximize values and potential recoveries for its creditors. Unable to raise sufficient capital to offset the Debtor's mounting losses, the Debtor determined, in the exercise of its sound business judgment, that a sale of substantially all of its assets pursuant to 11 U.S.C. § 363(b) was in the best interests of its estate and creditors.

16. Prior to the Petition Date, the Purchaser was identified as a potential purchaser and as the Debtor's post-petition lender. The Purchaser agreed to provide the DIP Financing in order to permit the maintenance and proper preservation of the Debtor's assets; to satisfy other working capital, operational, financial, and general corporate needs; and to facilitate the sale transaction contemplated herein and the confirmation of a liquidating Chapter 11 plan. The Purchaser further agreed that the Purchase Agreement will serve as a "stalking horse" bid, against which other potential buyers may submit competing bids for the Debtor's assets in support of generating the best and best offer for the benefit of the debtor's estate and creditors.

17. Contemporaneously herewith, the Debtor has filed its *Motion for Entry of an Order (I) Approving Certain Bidding Procedures With Respect to the Sale of Substantially All of the Assets of the Debtor's Estate; (II) Scheduling an Auction and Subsequent Hearing to Consider the Sale of the Debtor's Assets; and (III) Approving the Form and Manner of Notice Thereof* (the "Procedures Motion"). Pursuant to the Procedures Motion, the Debtor seeks entry of an order approving certain bidding procedures (the "Bidding Procedures") regarding the sale transaction contemplated herein (the "Procedures Order").

18. Pursuant to the Procedures Order, and as provided for in the DIP Order, the Purchaser is entitled to credit bid all or some portion of the amounts owed to it as the Debtor's post-petition lender to the extent consistent with the terms of the DIP Order. The DIP Liens (as defined in the DIP Motion) will be paid in full and released via the Purchaser's credit bid for the Assets or application of proceeds paid by a Successful Bidder other than the Purchaser.

#### **B. Purchase Agreement**

19. In consultation with its advisors and legal counsel, the Debtor evaluated the terms of the Purchase Agreement as well as the benefits of other alternatives. In its business judgment, the Debtor concluded that the Purchase Agreement represents the highest and best offer for the Assets (as defined herein) received to date, and provides the best opportunity to initiate a sale process that will maximize creditor recoveries, both in terms of purchase price and eliminating further operational losses. The Debtor will conduct an Auction of the Assets in an effort to solicit further interest from potential purchasers pursuant to the Bidding Procedures described in the Procedures Motion.

20. The Purchase Agreement is subject to higher and better offers and is conditioned in part on the Purchaser receiving the bid protections described in the Procedures Motion.

21. The Purchase Agreement contemplates the sale of substantially all of the Debtor's assets, as set forth in § 1.1 of the Purchase Agreement (the "Assets") free and clear of all liens, claims, and encumbrances, except Permitted Liens. The Assets include, without limitation, the following: Debtor's investments, Accounts Receivable, prepaid insurance, prepaid expenses related to the Assets, deposits and refunds, Ownership Interests, Equipment, Properties, rights and interests under the Assumed Lease and the Assumed Contracts, Permits, Books and Records, Intellectual Property, general intangibles, and the Debtor's goodwill (collectively and as defined in the Purchase Agreement, the "Assets"). The proposed sale will not include any asset not specifically enumerated in Section 1.1 of the Purchase Agreement, including, without limitation, the "Excluded Assets" described in § 1.2 of the Purchase Agreement (the "Excluded Assets"). The following highlights and summarizes the material terms of the proposed sale, all of which are more fully explained in the Purchase Agreement.<sup>2</sup>

- a. Purchase Price. The aggregate purchase price to be paid by the Purchaser for the sale and purchase of the Assets shall be \$200,000 (the "Purchase Price"). The Purchase Price shall be payable in whole or in part, as determined by the Purchaser in its sole discretion, in the form of a credit bid of the DIP Financing pursuant to 11 U.S.C. § 363(k). Any portion of the Purchase Price that is payable in cash shall be paid by wire to a fund designated by the Debtor at least two (2) business days prior to close.
- b. Representations and Warranties. The Purchase Agreement contains such representations and warranties of the Debtor and the Purchaser as are customary for transactions of this type and size. Except as

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<sup>2</sup> The summary of the terms of the Purchase Agreement contained in this Sale Motion is intended only as a brief description of the Purchase Agreement and is qualified entirely by the terms and conditions contained in the Purchase Agreement, which is incorporated herein by reference. To the extent of any contradiction between the terms of the Sale Motion and the Purchase Agreement, the Purchase Agreement shall be deemed to control.



expressly set forth in the Purchase Agreement, the Assets are being sold "AS IS, WHERE IS."

- c. Assumed Liabilities. Effective on the Closing Date, the Purchaser shall assume the liabilities and obligations under the Assumed Leases, the Assumed Contracts, or the Permits first arising or accruing after the Closing Date; provided that the Debtor shall have assumed the Assumed Lease and Assumed Contracts with requisite Court approval and the Purchaser shall pay all cure and compensation amounts required under Section 365 of the Bankruptcy Code with respect to the Assumed Leases and Assumed Contracts prior to and as a condition of the assignment of the Assumed Leases and Assumed Contracts to the Purchaser and the Purchaser's assumption thereof. No assumption of the Assumed Leases and Assumed Contracts, or any one of them, shall be effective until the closing of the transaction.
- d. Conditions to Closing. Closing is conditioned on the satisfaction or waiver of, in part, the following:
  - i. DIP Financing. The Court shall have entered a final, nonappealable order approving the DIP Financing.
  - ii. Employment Agreements. Buyer shall have entered into an Employment Agreement with each of Melanie Otto and Mark Nondorf, each in form and substance satisfactory to Buyer and Otto and Nondorf, respectively;
  - iii. Representations and Warranties. Each of the representations and warranties of the Purchaser and the Debtor contained in the Purchase Agreement shall be true and correct in all material respects on and as of the Closing Date, as though made on and as of the Closing Date.
  - iv. Agreements and Covenants. The Purchaser and the Debtor shall have performed or complied with all agreements and covenants required by the Purchase Agreement to be performed or complied with on or prior to the Closing Date.
  - v. Certificate. At the Closing, the Purchaser and the Buyer shall have received a certificate or certificates signed by duly authorized senior executive officers, to the effect set forth in Sections 6.1(a) and (b) and 6.2(a) and (b) of the Purchase Agreement.
  - vi. Procedures Order. The Court shall have entered the Procedures Order, and the Procedures Order shall not have been amended, modified, appealed, supplemented, vacated or stayed. The Procedures Order, among other things, explicitly shall permit Purchaser to elect to pay the Purchase Price in the form of a credit bid of the DIP Obligations.

- vii. Sale Order. The Court shall have entered the Sale Order, and the Sale Order shall not have been amended, modified, appealed, supplemented, vacated or stayed as of the Closing Date and shall have become final and non-appealable on or before the Closing Date. In addition, if not contained in the Sale Order, the Court shall have entered an order under Section 365 of the Bankruptcy Code, which shall be final and non-appealable by the Closing Date, approving the Seller's assumption of the Assumed Lease and the Assumed Contracts, the Seller's cure of any defaults under the Assumed Lease and the Assumed Contracts, and Seller's assignment of the Assumed Lease and the Assumed Contracts to the Purchaser at and effective as of the Closing.
  - viii. Transfer Free of Liens. The Assets shall be transferred to the the Purchaser free and clear of all Liens except for Permitted Liens.
  - ix. Other Governmental Approvals. All filings required to be made prior to the Closing by the Debtor with, and all consents, approvals and authorizations required to be obtained by the Purchaser from, any Governmental Entities in connection with the transactions contemplated hereby shall have been made or obtained.
  - x. No Order. On the Closing Date, no litigation or other proceeding by or before any Governmental Entity shall have been instituted, and no Governmental Entity, including any federal or state court of competent jurisdiction, shall have enacted, issued, promulgated, enforced or entered any statute, rule, regulation, executive order, judgment, decree, injunction or other order (whether temporary, preliminary or permanent), which, in either case, is in effect and which has the effect of making the transactions contemplated by the Purchase Agreement illegal, or otherwise restrains consummation of the transactions contemplated in the Purchase Agreement.
  - xi. Affidavits of Service. The Debtor shall provide affidavits of service or other evidence reasonably satisfactory to the Purchaser demonstrating that the Debtor provided valid notice to all creditors, claimants, Lien holders and other appropriate parties-in-interest, of the sale of the Assets and assignment of the Assumed Lease and the Assumed Contracts, in each case free and clear of claims (as defined in the Bankruptcy Code) and other Liens.
- e. Termination Events. The Purchase Agreement contains termination events which are customary for transactions of this type and size.

- f. Overbid Protection and Break-up Fee. Pursuant to the Bidding Procedures and in consideration of the Purchaser submitting the Purchase Agreement and serving as the stalking horse for purposes of further competitive bidding for the Assets, the Debtor requests that the Court approve a payment by the Debtor to the Purchaser of a break-up fee in an amount comprised of (i) reimbursement of Purchaser's out of pocket expenses incurred in connection with the Sale Process not to exceed the sum of \$10,000 (the "Expense Reimbursement"), plus a flat fee payment (not dependent on amounts actually expended or incurred by the Purchaser) in an amount equal to \$10,000 (together with the Expense Reimbursement, the "Break-up Fee"). If the Debtor breaches the Purchase Agreement and Purchaser terminates the Purchase Agreement as the result of such breach, the Break-Up Fee shall be treated as a super-priority administrative expense in the Chapter 11 Case. If the Assets are sold to a Successful Bidder other than the Purchaser pursuant to the Bidding Procedures, (i) the Successful Bidder and/or the Seller shall immediately cause the Break-up Fee to be paid to the Purchaser directly from the proceeds associated with the sale to such Successful Bidder; provided, however, that in the event that a third party sale is not consummated within 15 days following the Sale Hearing, the Seller and the Purchaser shall close the transactions contemplated by the Purchase Agreement upon the terms and conditions set forth in the Purchase Agreement as modified by any Overbid by the Purchaser, and (ii) pursuant to §§ 364(c)(1) and 506(c) of the Bankruptcy Code, the Purchaser shall have superpriority administrative expense and surcharge claims payable out of the Seller's cash or Deposit of the Successful Bidder. Should overbidding take place, the Purchaser shall have the right, but not the obligation, to participate in overbidding and may credit bid the Break-up Fee.

22. In the Debtor's business judgment, the Purchase Agreement is structured in such a way that competing bids, if any, can be accurately and efficiently analyzed and compared. As such, the Debtor believes that it is appropriate to afford the Purchaser "stalking horse" status.

### **C. Debt Structure of the Debtor**

23. Pursuant to Rule B-6004-1(a)(3), "[I]f schedules have not been filed by the Debtor, [a Motion to Sell must include] a summary of the Debtor's debt structure, including

the amount of the Debtor's secured debt, priority claims, and general unsecured claims."

Paragraphs 24, 25 and 26 provide a summary of the Debtor's debt structure.

24. Secured Debt. As of the Petition Date, the only party claiming a lien on assets of the Debtor is the U.S. Small Business Administration, as Receiver for Cardinal Growth, L.P. ("Receiver"). The Receiver claims a first, valid and perfected security interest in all assets of the Debtor (the "Receiver's Lien") to secure an obligation of approximately \$52,475.84 (the "Receiver's Claim"). The Debtor disputes the validity of the Receiver's Lien and the Receiver's Claim. Debtor has no other secured obligations, and the only liens on its assets, other than the disputed Receiver's Lien, are liens permitted under the DIP Agreement. The value of the Debtor's assets substantially exceeds the amount of the disputed Receiver's Claim.

25. Priority Claims. As of the Petition Date, the obligations of Debtor that constitute priority claims within the meaning of 11 U.S.C. §507(a) are (i) current, pre-petition wages and salaries and certain benefits and employee withholding obligations, estimated not to exceed the aggregate approximate sum of \$27,000.00; (ii) contributions owed to Debtor's employee benefit plans in an aggregate approximate sum no greater than \$2,000.00; and (iii) personal property taxes in the approximate sum of \$1,650.00.

26. General Unsecured Claims. As of the Petition Date, the obligations of Debtor that constitute general unsecured claims against Debtor's estate aggregate the sum of approximately \$1,800,000, owed to approximately 600 creditors. In addition, the Debtor is named as a defendant in two pending, disputed litigation matters: (i) an action brought by a former landlord, alleging to be owed approximately \$49,300.00, plus attorneys fees, and (ii) an action filed by two "downline" agents on behalf of putative class of all "downline" agents,

claiming an undetermined amount related to alleged underpayment of certain insurance commission.

**D. Relationship of the Purchaser**

27. The Purchaser is an affiliate of the Debtor within the meaning of Section 101(2) of the Bankruptcy Code. Purchaser is owned solely by 221 Partners Fund, LP ("221 Partners"). 221 Partners is also the 57.72% owner of Inservico. As noted above in paragraph 9, Inservico owns 62.47% of the Debtor. Also as noted above in paragraph 13, pursuant to the DIP Motion, the Debtor seeks entry of the DIP Order approving the DIP Financing to be provided by the Purchaser.

28. The Purchaser is an affiliate of Inservico, the counter-party to the Subservicing Agreement to be assumed by the Debtor and assigned to the Purchaser, and the fees payable thereunder shall be paid by IR7, a subsidiary of the Debtor. A condition precedent to the Closing requires that the Purchaser shall have entered into an Employment Agreement with each of Melanie Otto and Mark Nondorf.

**APPLICABLE AUTHORITY**

**A. Sale Pursuant to 11 U.S.C. § 363(b)**

29. Bankruptcy Code § 363(b)(1) provides that a debtor-in-possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Section 105 of the Bankruptcy Code is the source of general authority for this Court to issue orders to further the purposes of the Bankruptcy Code or to preserve its jurisdiction over assets of the Debtor's estate.

30. To approve the use, sale, or lease of property outside the ordinary course of business, there must be "some articulated business justification." *Fulton State Bank v.*

*Schipper*, 933 F.2d 513, 515 (7th Cir. 1991); *see also Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *Stephens Inc., v. McClung*, 789 F.2d 386, 389-90 (6th Cir. 1986); *In re Abbott Dairies of Pa., Inc.*, 788 F.2d 143, 145-47 (3d Cir. 1986); *In re Telesphere Communications, Inc.*, 179 B.R. 544, 552 (Bankr. N.D. Ill. 1999); *In re Delaware & Hudson Rv. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991).

31. Once a valid business justification made in the ordinary course of business is established, "[t]he business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company. *In re S.N.A. Nut Co.*, 186 B.R. 98 (Bankr. N.D. Ill. 1995); *see also In re Johns-Manville Corp.*, 60 B.R. 612, 615-616 (Bankr. S.D.N.Y. 1986) ("A presumption of reasonableness attaches to a debtor's management decisions"). Similarly, a court will defer to the debtor's judgment to make a sale outside the ordinary course of business pursuant to Section 363, when the debtor has "sound business reasons for making the sale." *Schipper*, 933 F.2d at 515.

32. The Debtor possesses sound business justifications for selling substantially all of its assets at this time. The facts set forth above amply support the Debtor's business judgment that the proposed sale is in the best interest of its estate and creditors.

33. As set forth in detail above and in the Nondorf Declaration, the Debtor has been unable to raise sufficient capital to sustain its continued business operations. The Debtor has reasonably determined that the proposed sale of substantially all of its assets is the best alternative for maximizing the value of its assets for the benefits of its estate and creditors.

34. The Bidding Procedures proposed in the Procedures Motion and the submission of a stalking horse bid afford assurance that the highest and best price will be

realized for the Assets. Notice of the proposed sale and the Bidding Procedures will be provided to all persons the Debtor believes may have an interest in the Assets. The Debtor believes notice to such parties will provide appropriate encouragement for overbids for the Assets.

35. Based upon these factors and those discussed above, the Debtor has demonstrated a valid business justification and good business reason for the proposed sale of the Assets pursuant to the Bidding Procedures.

**B. The Purchase Agreement Was Negotiated In Good Faith Pursuant To 11 U.S.C. § 363(m).**

36. Section 363(m) reflects that the Bankruptcy Code strongly favors finality of sale orders, and the protection of good-faith purchasers maximizes the value of the assets for sale, which benefits both debtors and creditors. *See Hower v. Molding Systems Engineering Corp.*, 445 F.3d 935, 938 (7th Cir. 2006).

37. "The requirement that a purchaser act in good faith, of course, speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *In re Frain Srvcs., Inc.*, 798 F.2d 1113, 1125 (7th Cir. 1986) (citing *In re Rock Industries Machinery Corp.*, 572 F.2d 1995, 1198 (7th Cir. 1978)). Although the Bankruptcy Code does not define "good faith," courts have found that the good faith requirement focuses principally on the disclosure of all material sale terms and absence of fraud or collusion between bidders. *See In re Apex Oil Co.*, 92 BR. 847, 869-71 (Bankr. E.D. Mo. 1988). It is typically only "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders" that leads to a determination that there was a lack of good faith in a sale proceeding. *T.C. Investors v. Joseph (In re M Capital Corp.)*, 290 B.R. 743,

748 (B.A.P. 9th Cir. 2003) (quoting *Cnty. Thrift & Loan v. Suchy (In re Suchy)*, 786 F.2d 900, 902 (9th Cir. 1985)).

38. In the present case, the Purchase Agreement represents several months of continuous and extensive, arms-length and good faith negotiations and discussions between the Debtor, the Purchaser, and their respective counsel and advisers. Further, the Purchase Agreement specifically provides for overbids at the Auction. The terms of the sale will be fully disclosed to creditors and other potential bidders pursuant to the notice procedures described herein and in the Procedures Motion.

39. Based on the foregoing, the Debtor submits that the Purchaser or the Successful Bidder is entitled to the protection of Section 363(m) of the Bankruptcy Code. Accordingly, the Debtor requests that the Court make a finding that the Purchaser or the Successful Bidder is entitled to the protections of Section 363(m).

**C. The Proposed Sale Was Free of Collusion and May Not Be Avoided Pursuant to 11 U.S.C. § 363(n).**

40. The proposed sale price was not controlled by an agreement among potential bidders. As set forth in detail herein and in the Procedures Motion, the Bidding Procedures and the submission of a stalking horse bid evidences that the highest and best price for the Assets will be obtained. Accordingly, the Debtor requests that the Court make a finding that the sale may not be avoided pursuant to Section 363(n) and that there is no basis for any claim under Section 363(n).

**D. Sale Should Be Free and Clear of Liens**

41. Pursuant to Section 363(f) of the Bankruptcy Code, the Debtor seeks authority to sell the Assets free and clear of Liens, with the exception of the Permitted Liens, with Liens to attach to sales proceeds. Section 363(f) of the Bankruptcy Code provides that a



debtor may sell property free and clear of liens, claims, encumbrances, and other interests if one of the following conditions is satisfied:

- a. Applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
- b. The 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. The entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). Because Section 363(f) is stated in the disjunctive, satisfaction of any one of its five requirements will suffice to warrant approval of the proposed sale of the Assets. *Scherer v. Fed. Nat'l Mortgage Assoc. (In re Terrace Chalet Apts., Ltd.)*, 159 B.R. 821, 827 (Bankr. N.D. Ill. 1993) ("Section 363(f) authorizes a sale free and clear of a lien if one of the five exceptions applies.").

42. In this case, Section 363(f)(c) is satisfied. The purchase price of the Assets is projected to be greater than the value of the Liens. Consequently, the Debtor should be authorized to sell the Assets free and clear of Liens, with Liens to attach to proceeds of the sale.

#### **E. Assumption and Assignment of the Assumed Lease and the Assumed Contracts**

43. The Purchase Agreement provides that, as part of the sale of the Assets, the Debtor shall assume and assign to the Purchaser the Assumed Leases and the Assumed Contracts. Assumption and assignment of the Assumed Leases and the Assumed Contracts should be approved.

44. Section 365(a) of the Bankruptcy Code provides, in part, that the Debtor "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." The prevailing test used by the courts in determining whether the Debtor may assume an executory contract is the "business judgment" test. If the debtor's business judgment

has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract.

45. As part of the sale of the Assets under the Purchase Agreement, the Debtor is required to assume and assign the Assumed Leases and the Assumed Contracts to the Purchaser contemporaneously with the transfer of the Assets. Given that the assignment of the Assumed Leases and the Assumed Contracts is an integral part of the sale of the Assets, assumption of the Assumed Leases and the Assumed Contracts with a view to assign them to the Purchaser or other Successful Bidder falls squarely within the Debtor's sound business judgment.

46. Section 365(b) of the Bankruptcy Code provides that an executory contract or unexpired lease may only be assumed if the debtor cures any default existing thereunder. Pursuant to the Purchase Agreement, the Purchaser is responsible for the payment of any cure amounts with respect to the Assumed Leases and the Assumed Contracts.

47. The Debtor will provide notice of the amounts necessary, in the Debtor's good faith estimation, to cure any defaults under the Assumed Leases and the Assumed Contracts. The Procedures Order shall provide that any non-debtor party to the Assumed Leases and the Assumed Contracts shall have the right to object in writing to the assumption of the contract or lease and to the proposed cure amount, provided that any objection is received on or before the objection deadline set forth in the Procedures Order. If no objection is timely filed, or if a timely objection is received but is not in compliance with the foregoing requirements, the cure amount set forth in the applicable notice of cure amount shall be controlling, notwithstanding anything to the contrary in any Assumed Leases, Assumed Contract, claim, or any other document or instrument. Any objection to the assumption and assignment of any Assumed Lease or Assumed Contract shall be heard at the Sale Hearing.

48. Section 365(f) of the Bankruptcy Code provides that once the Debtor has assumed the Assumed Leases and the Assumed Contracts, the Debtor can assign them to the Purchaser, provided the Purchaser can provide adequate assurance of its future performance to the counter-parties to the Assumed Leases and the Assumed Contracts. The Purchaser has agreed to reasonably demonstrate such adequate assurance; provided however the assignment of the Assumed Leases and the Assumed Contracts shall not be effective until the Closing.

49. If specifically requested by the Court or other appropriate party, the Purchaser agrees to make commercially reasonable efforts to demonstrate adequate assurance of future performance under the Assumed Leases and the Assumed Contracts, which will include, but not be limited to, submitting the Purchaser's proforma financial statements and proof of the Purchaser's ability to close on the transactions contemplated herein and in the Purchase Agreement and which will not in any event include any guaranties by any other person of the Purchaser's obligations under any Assumed Leases or Assumed Contract or security deposit or other security beyond that currently provided in the Assumed Leases and the Assumed Contracts. The Purchaser will pay any and all costs and expenses necessary in connection with the Purchaser's demonstration of adequate assurance as to the Assumed Leases and the Assumed Contracts.

50. In the event that the Purchaser does not demonstrate adequate assurance of future performance of any Assumed Leases or Assumed Contract so that the Sale Order does not authorize the Debtor to assign that Assumed Leases or Assumed Contract to the Purchaser, then at the election of the Purchaser, (i) those Assumed Leases and the Assumed Contracts will be deemed to be rejected, and (ii) the Purchaser and the Debtor will nonetheless close the transactions contemplated herein and by the Purchase Agreement with a reduction of the

Purchase Price in an amount equal to the allocated value of the Asset which is the subject of the Section 365 Contract.

51. If any requests for additional assurance are filed, the Court, at the Sale Hearing, will determine whether the Purchaser has provided adequate assurance in compliance with Section 365(f) of the Bankruptcy Code.

52. The provisions set forth in paragraphs 48 through 51 above apply with equal force to a Successful Bidder other than the Purchaser.

**F. Waiver of Bankruptcy Rule 6004(h) and 6006(d)**

53. Rule 6004(h) of the Bankruptcy Rules provides that an "order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Pursuant to Rule 6006(d), an order authorizing the assignment of executory contracts and leases is also stayed for 14 days after the entry of the order, unless a court orders otherwise. The Debtor requests that the Court waive the 14-day stay provided for in Bankruptcy Rules 6004(h) and 6006(d).

**NOTICE**

54. The Debtor has provided or will provide sufficient and adequate notice of this Sale Motion by service on (i) the office of the United States Trustee for the Southern District of Indiana; (ii) any counsel or party that has filed an appearance and served such appearance on the Debtor; (iii) the Internal Revenue Service; (iv) each governmental agency, regulatory body or taxing authority and other party that might claim an interest in the Assets to be sold; (v) the counter-parties to the Assumed Leases and the Assumed Contracts; (vi) all parties to the Purchase Agreement and all related agreements; (vii) all entities known to have expressed an interest in a transaction with respect to the Debtor or the Assets; (viii) all entities known to have asserted any Lien related to the Assets; (ix) the Service List as defined in Rule B-1000-1(b)(4) of

the Local Rules of this Court to the extent duplicative of the foregoing; and (x) to any party requesting a copy of the Sale Motion or to whom the Court directs that notice be given.

55. Service of the notice of the Sale Hearing shall be served on all creditors of the Debtor's estate and on the parties set forth in the foregoing paragraph.

WHEREFORE, for all of the foregoing reasons, the Debtor respectfully requests entry of an order granting the relief requested herein and such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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