

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re:

WL HOMES LLC, et al.,¹

Debtors.

Chapter 11

Case No. 09-0571 (BLS)

Jointly Administered

DEBTORS' MOTION FOR AN ORDER (I) APPROVING STANDARD BIDDING PROCEDURES FOR THE SALE OF UNDEVELOPED AND PARTIALLY DEVELOPED LAND FREE AND CLEAR OF LIENS, CLAIMS, AND INTERESTS PURSUANT TO SECTION 363(1) OF THE BANKRUPTCY CODE, (II) AUTHORIZING THE DEBTORS TO ENTER INTO STALKING HORSE AGREEMENTS CONTAINING A REASONABLE BREAK-UP FEE, AND (III) APPROVING THE FORM OF NOTICE FOR EACH OF THE AUCTIONS AND SALE HEARINGS

The above-captioned debtors and debtors-in-possession (the "Debtors"), hereby move (the "Motion") this Court for entry of an order, pursuant to sections 105 and 363 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 2002-1 (b) and 6004-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules") for approval of standard bidding procedures for the sale of certain undeveloped and partially developed real property (the "Procedures Motion"). In support of the Procedures Motion the Debtors respectfully represent as follows:

¹ The Debtors in these cases, along with the last four digits of each of the Debtor's federal tax identification number, are: WL Homes LLC (6595); JLH Realty & Construction, Inc. (1899); JLH Arizona Construction, LLC (2154); WL Texas LP (0079); WL Homes Texas LLC (0103); and Laing Texas LLC (0052). The current mailing address for each of the Debtors is 19520 Jamboree Road, Suite 500, Irvine, CA 92612.

Preliminary Statement

1. The Debtors, historically one of the largest private, high volume home builders in the nation, own a substantial number of tracts of undeveloped or partially developed land. Many of these undeveloped and partially developed real properties are subject to contracts and regulations related to their development. The Debtors have determined, in the exercise of their business judgment, that selling certain of these properties (the "Properties") is the best way to maximize their value for the benefit of the Debtors' estates and their creditors. Postpetition, in order to maximize their likely return, the Debtors intend to market a number of these Properties concurrently through their brokers and propose to sell the Properties in accordance with the procedures described herein.

2. The Debtors believe that the establishment of a sale process for the Properties is the most efficient and effective method of selling the Properties, and that such a process is necessary, appropriate, and in the best interests of all stakeholders. Therefore, the Debtors are proposing procedures to govern the sale of these properties, including the selection of stalking horse bidders, the conduct of auctions, and the approval of sales by the Court. The proposed process will ensure that maximum value is obtained for these Properties by selling them through a competitive bidding process. The proposed procedures will also streamline the auction and sale process, enabling the Debtors to focus their efforts on marketing and selling the Properties.

Jurisdiction and Venue

3. This Court has jurisdiction to consider the matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. § 1409.

4. The statutory bases for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code.

Background

5. On the date hereof (the "Petition Date"), the Debtors each filed a voluntary petition for relief under chapter 11 of title 11, United States Code (the "Bankruptcy Code"). The Debtors are continuing in possession of their property and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

6. The factual background relating to the Debtors' commencement of these Chapter 11 Cases is set forth in detail in the *Declaration of Bradley D. Sharp, Chief Restructuring Officer of the Debtors, in Support of First Day Motions* (the "Sharp Declaration") filed contemporaneously with this Motion and incorporated herein by reference.

The Debtors' Proposed Land Sales

7. WL Homes LLC, doing business as John Laing Homes, is one of the largest private, high volume home builders in the nation. John Laing Homes has won numerous awards for the quality and design of their homes and is also top rated for its customer service. John Laing Homes has a strong brand name and reputation in the industry.

8. In 2007, the Debtors sold 1,371 homes (including homes sold through non-consolidated joint ventures of 252 homes). Until recently, the Debtors had 105 real estate developments in various stages of development across the nation. The Debtors' homebuilding projects range from entry-level condominiums and townhomes to multi-million dollar luxury estates. The Debtors' projects are typically master-planned residential communities, which draw on the Debtors' experience in the design and development of award-winning large scale communities that provide homesites for sale to individual homebuyers as well as lot sales to other real estate developers.

9. Since its formation, the Debtors have operated as a homebuilder with the capability to acquire entitled land, develop furnished lots, and use such lots for its own building program. In addition to selling single improved parcels of land to individual homebuyers, the Debtors have also marketed and sold multiple parcels and entire developments to other home builders and developers (the "Bulk Lot Sales"). During the period between 1999 and 2007, the Company generated revenue from Bulk Lot Sales of approximately \$400 million.

10. In order to maximize the value of their business and assets for the benefit of creditors, the Debtors have determined in their business judgment that it is appropriate to market and sell a number of parcels of undeveloped and partially developed land to the highest or otherwise best bidder(s) during the bankruptcy cases. The Debtors propose to conduct such auctions through a network of local, on-site brokers for each of the individual developments (the "Brokers"). The Debtors and their Brokers have marketed, and continue to market, the

Properties in an effort to maximize the recovery for the estates.² The Debtors estimate that the Bulk Lot Sales contemplated by these procedures will provide a net recovery to the estates of nearly \$50 million.

Relief Requested

11. The Debtors believe that a standard competitive bidding process for the Properties will enable the Debtors to sell the Properties in an efficient manner and receive the highest and best price for each Property. The Debtors expect to negotiate a purchase agreement (the "Stalking Horse Agreement") for each Property with a "stalking horse" bidder (the "Stalking Horse"), subject to higher and better offers received through a bidding process and auction. The Debtors expect that each Stalking Horse may require that, in the event a transaction with a higher or better bidder is consummated, the Stalking Horse will be entitled to a fee as compensation for the time invested by the Stalking Horse in making its bid for the Property, for generating market interest in the sale, and for reimbursement of reasonable out-of-pocket expenses (the "Break-Up Fee"). While the Debtors expect to select a Stalking Horse before scheduling an auction, the Debtors reserve the right to proceed with any auction without a Stalking Horse, or without the payment of a Break-Up Fee to such Stalking Horse. Pursuant to the procedures proposed hereunder, the Debtors will seek final approval from the Court of the sale of each Property to the bidder with the highest and best offer (as more specifically defined in the Bidding Procedures, the "Successful Bidder").

² The Brokers' compensation for the services provided in support of the sale shall be identified in the auction and sale notices. The Debtors anticipate that all Broker compensation shall be paid out of the proceeds of the sale.

12. Accordingly, by this Procedures Motion, the Debtors seek entry of a bidding procedures order (the "Bidding Procedures Order") (i) approving standardized bidding procedures for each Property (the "Bidding Procedures"); (ii) authorizing the Debtors, in their sole discretion, to set and pay a reasonable Break-Up Fee in connection with any purchase agreement entered into by a Stalking Horse; (iii) approving the manner for providing notice of (a) the selection of a Stalking Horse, (b) entry into a Stalking Horse Agreement and any proposed Break-Up Fee payable thereunder, (c) the deadline to submit competing bids (the "Bid Deadline"), and (d) the time, date and place for an auction for any of the Properties (the "Auction") (the "Auction Notice"); (iv) approving the selection of each Stalking Horse and any Break-Up Fee payable under a Stalking Horse Agreement upon the expiration of an objection period of five (5) business days after the Auction Notice is filed or, only if a timely objection is filed, after a hearing before the Court; and (v) approving the manner for providing notice of the hearing (the "Sale Hearing") to consider the sale of any of the Properties (the "Sale Hearing Notice").

13. Approval of a standardized set of Bidding Procedures and a process for providing notice of the Auction and Sale Hearing for each Property will provide a more efficient process for the sale of the Properties. The Bidding Procedures will reduce the number of hearings required for the sale of each Property, will shorten the time between when the Debtors enter into a Stalking Horse Agreement and when the Sale Hearing will be held, and will provide interested parties with the opportunity to review the proposed sale, submit bids for the Property, and be heard regarding any proposed transaction.

14. Procedures substantially similar to those described below and the other relief sought herein has been adopted and approved by this Court in a recent, similarly-sized home-builder case. *See In re LandSource Communities Development LLC*, Case No. 08-11111 (KJC) pending in the District of Delaware [Docket No. 971, entered December 9, 2008].

Summary of the Proposed Bidding Procedures and Auction

15. The Debtors have conducted extensive marketing of the Properties prior to the Petition Date. In many cases, the Debtors have previously engaged Brokers who they have utilized many times in the past to market the Properties. The Brokers are high volume land brokerage firms with years of experience marketing and selling land in the area where the Properties are located. The Brokers that marketing the Properties are all considered knowledgeable, reputable, and active in their respective market areas, and are marketing the Properties to interested buyers in the local, regional and national markets. The ultimate goal of such continuing marketing is the execution of a Stalking Horse Agreement with a willing buyer that will serve as an initial bid for a Property, and which may include a number of protections for the Stalking Horse Bidder.

16. While the Debtors anticipate scheduling an Auction only after entering into a Stalking Horse Agreement, the Debtors may, in their sole business judgment, schedule an open Auction without naming a Stalking Horse. In the event the Debtors schedule an Auction without naming a Stalking Horse, the Debtors and the Brokers will market the Properties to all potential bidders up until the time of the Auction, and shall serve notice of the Auction to all such potential bidders.

17. In the event the Debtors succeed by entering into a Stalking Horse Agreement, to maximize the value the Debtors receive for the Properties, the Debtors intend to continue marketing the Property to other bidders and, under the circumstances outlined in the Bidding Procedures, hold an Auction for each Property to provide a competitive market for the sale of the Property. The Bidding Procedures contain the terms and procedures that will govern the submission of bids for the Property being sold. The following summary includes only the key terms of the Bidding Procedures.

18. After determining to schedule an Auction with respect to the Property, the Debtors will serve copies of the Auction Notice at least twenty (20) days prior to the Auction on (i) counsel to any Official Committee of Unsecured Creditors appointed in these cases, (ii) the Stalking Horse, or counsel, (iii) any party who, in the past six months, expressed in writing to the Debtors an interest in acquiring the Property or any party who the Debtors, upon consultation with the applicable Broker, believe may otherwise have an interest in acquiring the Property, (iv) any party with a lien of record on, or other written asserted interest in, the Property, (v) the U.S. Trustee and (vi) all other parties who have filed a notice of appearance and request for service of documents filed in these cases (collectively referred to herein as the "Auction Notice Parties").

19. The Auction Notice will include (i) a description of the Property to be sold, (ii) the date, time and location of the Auction, (iii) a deadline for submitting bids on the Property, and (iv) a deadline to object to the selection of any proposed Stalking Horse and proposed Break-Up Fee that is at least five business (5) days later than the date of filing of the Auction Notice. Additionally, if applicable, the Debtors will attach a copy of the Stalking Horse

Agreement to the Auction Notice and also will include in the Auction Notice (i) the identity of the Stalking Horse, (ii) the price agreed to by the Stalking Horse, (iii) the amount of any Break-Up Fee and (iv) the amount of the deposit provided by the Stalking Horse. Finally, the Debtors will attach a copy of the Bidding Procedures to the Auction Notice. If no party objects to the Stalking Horse or Break-Up Fee within five (5) business days after the filing of the Auction Notice, the Stalking Horse will be deemed approved under the Bidding Procedures Order, and the Debtors will be authorized to pay the Break-Up Fee on the terms and conditions set forth in the Stalking Horse Agreement as though a separate order had been entered approving Bidding Procedures with respect to the Stalking Horse.

20. Following approval of a Stalking Horse, the Debtors will continue to market the applicable Property in an effort to generate a competing bid for the Property. An Auction will only be held if one or more bids determined to be qualified under the terms of the Bidding Procedures (each a "Qualified Bid") of sufficient value in excess of the Stalking Horse bid are received pursuant to the Bidding Procedures before the Bid Deadline.

21. If an Auction is held, the Debtors will evaluate all Qualified Bids received and will select the Qualified Bid that reflects the highest and best offer, as determined by the Debtors in their sole and absolute discretion, as the "Starting Auction Bid" for the Property. At the Auction, Bidders will be permitted to increase their bids in an increment to be determined at the sole discretion of the Debtors prior to the Auction, or in such amounts as provided by the terms of the Stalking Horse Agreement, and all bids subsequent to the Starting Auction Bid,

whether oral or written, shall be deemed to constitute valid modifications or amendments to the bids previously submitted by such bidder.

22. The Debtors will determine the highest and best bid or bids for the Property with the goal of maximizing the total value to the Debtors' estates. In evaluating each bid, the Debtors intend to consider its financial and contractual terms and the factors relevant to the sale process and the best interests of the Debtors' estates and creditors. At the end of the Auction, the Debtors will select the bidder that submits the highest and best bid for the Properties and designate such bidder as the successful bidder (the "Successful Bidder").

23. If no Qualified Bid other than the Stalking Horse bid is received by the Bid Deadline, then the Auction will not be held, and, pursuant to the Stalking Horse Agreement, the Stalking Horse Bidder shall be considered the Successful Bidder. If the no Stalking Horse was named prior to serving notice of the Auction, and no Qualified Bids are received, the Auction will not be held, and the Debtors and their Brokers will continue to market the Property, while reserving the right to schedule additional Auctions.

24. Promptly after the Auction, or after the expiration of the two (2) business day period after the Bid Deadline, if no Bidders submit higher and better offers than the Stalking Horse, the Debtors propose to file with the Court a notice of the sale hearing (the "Sale Hearing Notice") and serve the same on the Auction Notice Parties. The Sale Hearing Notice will include (i) the date, time and location of the Sale Hearing, (ii) a description of the Property, and (iii) a deadline to object to the proposed sale. The Debtors will attach to the Sale Hearing Notice and a copy of the purchase agreement entered into with the Successful Bidder. Service of the

Sale Hearing Notice will be performed in accordance with the procedures described above for service of the Auction Notice.

25. If a timely objection is received to the Sale Hearing Notice, the Debtors will present the results of the Auction to the Bankruptcy Court at a hearing scheduled to approve the sale of the Property (the "Sale Hearing"). In the Sale Order, the Debtors will seek certain findings from the Bankruptcy Court regarding the Auction, including, among other things, that (i) the Auction was conducted in a fair and reasonable manner, (ii) the Successful Bidder was selected in accordance with the Bidding Procedures, and (iii) consummation of the Sale contemplated by the Successful Bid will provide the highest and best value for the Property and is in the best interests of the Debtors and their estates. The Debtors shall be deemed to have accepted a Qualified Bid only when the Bankruptcy Court has approved the Successful Bid and entered the Sale Order.

26. If, for any reason, the Successful Bidder fails to purchase the Property after the Sale Hearing, then, without notice to any other party or further Bankruptcy Court order, the Debtors may elect to close the Sale with the Bidder that submitted the Next Highest Bid (as defined in the Bidding Procedures).

Break Up Fee

27. The Debtors expect that a Stalking Horse will likely require that in the event a transaction with a different Bidder is consummated, the Stalking Horse will be entitled to a Break-Up Fee. To help ensure that a potential buyer is willing to be the Stalking Horse for each of the Properties, thereby establishing a floor for the subsequent Auction, the Debtors seek

authority to include a reasonable Break-Up Fee in each Stalking Horse Agreement, in the Debtors' sole discretion and in accordance with the amounts of typical Break-Up Fees approved for the sale of similar assets before this Court. The amount of the Break-Up Fee will be set forth in the Auction Notice for the Property. Under the Bidding Procedures Order, if a party in interest objects to the proposed Break-Up Fee, then it is required to file an objection with the Court and serve such objection on the Auction Notice Parties within five (5) business days after the filing of the Auction Notice.

Provisions to Highlight in the Bidding Procedures³

28. In accordance with Local Rule 6004-1 (c)(i), the Debtors highlight the following provisions in the Bidding Procedures and request approval of them as proposed:

- **Bid Deadline and Requirements:** To make a bid, a bidder shall deliver, prior to the Bid Deadline set by the Debtors, written copies of its bid to the Debtors and the designated Broker together with the items set forth below.

The Debtors and their Broker shall afford each bidder reasonable due diligence information, including, without limitation, the due diligence information provided to the Stalking Horse Bidder. The Debtors reserve the right to require that potential bidders sign a form of nondisclosure agreement approved by the Debtors as a condition to receiving due diligence information. The due diligence period will end on the Bid Deadline (as defined below). No conditions relating to the completion of due diligence shall be permitted to exist after the Bid Deadline.

- **Form of Qualified Bid:** To be a Qualified Bid, any bid for the Property must:
 - (a) be a written irrevocable offer from a bidder (i) stating that the bidder offers to consummate a Sale; (ii) confirming that the offer shall remain open and irrevocable until the closing of a Sale to the Successful Bidder or the Next Highest Bidder (as defined below); (iii) enclosing a copy of the proposed bid; and (iv) enclosing a certified or bank check, wire transfer, or letter of credit reasonably acceptable to the Debtors equal to a percentage of the amount of

³ The description of the procedures contained herein is qualified in its entirety from the Bidding Procedures attached to the Bidding Procedures Order as Exhibit 1.

the Qualified Bid to be set by the Debtors, as a minimum deposit (the "Minimum Deposit");

(b) provide for the purchase of all of the Property and may not have conditions to close not present in the Stalking Horse Agreement, unless waived by the Debtors;

(c) not be conditioned on due diligence or financing;

(d) not request or entitle the subsequent bidder to any break-up fee or expense reimbursement;

(e) disclose the identity of each entity bidding for the Property or participating in connection with a bid, and the terms of any such participation;

(f) contain written evidence that the bidder has the requisite corporate or similar authority to consummate the proposed Sale;

(g) offer a cash amount set by the Debtors, or other consideration acceptable to the Debtors in their sole discretion;

(h) be accompanied by an acknowledgement that the Bidder has had an opportunity to conduct due diligence, does not require further due diligence and has relied solely upon its own independent review in making its bid;

(i) be accompanied by a signed contract substantially in the form of the Stalking Horse Agreement and marked to show any changes made thereto.

- **Deposit:** As noted above, each Qualified Bid must be accompanied by a Minimum Deposit in an amount to be established by the Debtors for each Auction. Such Minimum Deposit, other than that submitted by the Successful Bidder or the Next Highest Bidder, shall be returned within three (3) business days after the Auction. As a condition to the selection of the Successful Bid, the Successful Bidder may be required by the Debtors to increase its Minimum Deposit. The Minimum Deposit of the Successful Bidder and the Next Highest Bidder shall be held until the closing of the Sale, and the deposit of the Successful Bidder, or the Next Highest Bidder if the Property are sold to it, will be applied to the amount of the Successful Bid. If the Successful Bidder (or the Next Highest Bidder, if applicable) fails to close the Sale, it will forfeit its Minimum Deposit.
- **Break-Up Fee:** Each Stalking Horse Agreement may provide for a Break-Up Fee to be set by the Debtor and to be paid to the Stalking Horse Bidder in the event that the Stalking Horse Bidder is not the purchaser of the Property by virtue of another party closing the sale of such Property as the Successful Bidder at the Auction. The amount of the Break-Up Fee may be considered by the Debtors in determining the highest or otherwise best bid and the net value that the Debtors and their estates will realize at any Auction.
- **Credit Bidding:** The secured lender(s) for each Property shall be entitled to credit bid at the Auction pursuant to section 363(k) of the Bankruptcy Code; *provided, however*, that

to the extent applicable, any such credit bid must be accompanied by a cash payment equal to (a) the amount necessary to pay liens senior to the liens of the secured lender that is credit bidding and (b) the amount necessary to pay the excess cash portion of the Stalking Horse Bid and the Break-Up Fee. In the event a secured lender is the Successful Bidder at Auction, the Debtors reserve all rights under Section 506(c) of the Bankruptcy Code to recover its costs of securing or disposing of the Property.

- Modifications of Bidding Procedures or Conducting an Auction: The Debtors may extend an Auction deadline and/or adjourn, continue or suspend such Auction and/or the applicable Sale Hearing for any reason by filing a notice with the Bankruptcy Court and serving such notice on the Auction Notice Parties. At or prior to the Auction, the Debtor, in its sole and absolute discretion, may adopt other rules for the Auction that, in its reasonable judgment, will better promote the goals of the Auction. Additionally, the Debtors may remove from the Bidding Procedures for a given Auction any provisions that are not applicable to that Auction.
- Closing with Alternative Back-Up Bidders: If, for any reason, the Successful Bidder fails to close the Sale contemplated by its Successful Bid, then, without notice to any other party or further Bankruptcy Court order, the Debtors shall be authorized to close the Sale with the Bidder that submitted the Next Highest Bid (the "Next Highest Bidder") in accordance with the foregoing procedures.

The Bidding Procedures Order Should Be Entered

The Bidding Procedures Should Be Approved

29. Approval of standardized bidding procedures for the Properties eliminates the need for a separate motion and hearing to approve bidding procedures in connection with each sale. This will allow the Debtors to act quickly on market interest in the Properties while also providing interested parties sufficient notice of the proposed sales to submit competing bids, object to the sale, or otherwise be heard as appropriate, as required by Bankruptcy Rules 6004 and 2002 and discussed in more detail below.

30. The proposed form of Bidding Procedures, which are standard for the sale of assets in large chapter 11 cases, will ensure that the Debtors' estates receive the greatest benefit available from the sale of the Properties. The Bidding Procedures are designed to attract the maximum number of bidders while allowing the Debtors the flexibility to select the bid that

optimizes the value to the Debtors' estates from the sale. Further, the Bidding Procedures are fair and open and do not unfairly favor the Stalking Horse or any other potential purchaser of any of the Properties. Finally, the Bidding Procedures, when combined with the extensive marketing conducted by the Brokers prior to and after the execution of a Stalking Horse Agreement, set out a time frame that will allow potential purchasers sufficient time to conduct due diligence, arrange financing, and construct and submit informed competing bids, while still providing for the expeditious sale of the Properties. Based upon the foregoing, the Debtors submit that the Bidding Procedures will help ensure that the highest and best bids are received for the Properties, thereby optimizing the value of the Debtors' estates from the sales, and accordingly warrant Court approval.

The Debtors Should Be Granted the Authority
to Set and Pay a Reasonable Break-Up Fee

31. The Debtors submit that entering into one or more Stalking Horse Agreements furthers the purpose of the Auctions by ensuring a sale to a contractually committed buyer at a price the Debtors believe is fair while also providing the Debtors a chance to enhance the price through an auction process. Accordingly, the Debtors request authority, in the exercise of their business judgment, to offer each Stalking Horse a Break-Up Fee in an amount to be determined by the Debtors in their sole discretion and in accordance with the amounts of typical Break-Up Fees approved for the sale of similar assets before this Court.

32. The Debtors will exercise prudent business judgment before offering or entering into a Stalking Horse Agreement and will only do so if such agreement, in the Debtors' reasonable business judgment, will likely result in the realization of greater value for the

Debtors, their estates, and their creditors. The Debtors' ability to offer potential purchasers this protection will likely benefit their estates and creditors as, absent such an incentive, potential purchasers may not be sufficiently induced to submit or increase purchase offers prior to the Auction. Absent a floor, the Auction could produce offers that substantially undervalue the Debtors' assets. Not only may entry into a Stalking Horse Agreement prevent such undervaluation, a Stalking Horse Agreement will establish a higher floor for further offers. Thus, even if a Stalking Horse entitled to a Break-Up Fee is not the Successful Bidder, the Debtors will have benefited from the higher floor established by the Stalking Horse.

33. Bidding incentives encourage a potential purchaser to invest the requisite time, money and effort to negotiate with the Debtors and perform the necessary due diligence attendant to the acquisition of the Debtors' assets, despite the inherent risks and uncertainties of the chapter 11 process. Historically, bankruptcy courts have approved bidding incentives similar to the Expense Reimbursement, under the "business judgment rule," which proscribes judicial second-guessing of the actions of a corporation's board of directors taken in good faith and in the exercise of honest judgment. *See, e.g., In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding incentives may "be legitimately necessary to convince a white knight to enter the bidding by providing some form of compensation for the risks it is undertaking") (internal quotation marks and citation omitted).

34. The Third Circuit has established standards for determining the appropriateness of bidding incentives in the bankruptcy context. *In Calpine Corp. v. O'Brien Envtl. Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999), the court held that even though bidding

incentives are measured against a business judgment standard in nonbankruptcy transactions, the administrative expense provisions of Bankruptcy Code § 503(b) govern in the bankruptcy context. Accordingly, to be approved, bidding incentives must provide some benefit to the Debtors' estates. *See id.* at 533.

35. The *O'Brien* court identified at least two instances in which bidding incentives such as expense reimbursements and break-up fees may provide benefit to the estate. First, benefit may be found if "assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *Id.* at 537. Second, where the availability of bidding incentives induces a bidder to research the value of the Debtors and submit a bid that serves as a minimum or floor bid on which other bidders can rely, "the bidder may have provided a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth." *Id.*

36. Whether evaluated under the "business judgment rule" or the Third Circuit's "administrative expense" standard, the payment of the Break-Up Fee passes muster. The Debtors' agreement to pay the Break-Up Fee pursuant will encourage competitive bidding and ultimately result in a benefit to the estates. The proposed Break-Up Fee is fair and reasonable in amount, and is reasonably intended to compensate for the risk to the purchaser of being used as a stalking horse bidder. Moreover, the Break-Up Fee will only be paid for the sale of a Property that solicits a higher and better bid than the Stalking Horse Bid, and ultimately leads to a closing of a sale that results in a greater recovery to the estates.

37. Bankruptcy courts in this District have approved protections similar to the proposed protections requested herein as reasonable and consistent with the type and range of bidding protection typically approved. *See, e.g., In re EZ Lube, LLC*, Ch.11 Case No. 08-13256 (CSS) (Bankr. D. Del. December 9, 2008); *In re Linens Holding Co.*, Ch. 11 Case No. 08- 10832 (CSS) (Bankr. D. Del. Nov. 12, 2008) (authorizing the debtor to pay “stalking horse” a break-up fee, subject to court approval); *In re LandSource Communities Development LLC*, Case No. 08-11111 (KJC) (Bankr. D. Del. June 8, 2008)(same); *In re Sharper Image Corporation*, Ch. 11 Case No. 08- 10322 (KGG) (Bankr. D. Del. May 14,2008) (authorizing break-up fee and reimbursement of expenses for initial bidder); *In re Wickes Holdings, LLC, et al.*, Case No. 08-10212 (KJC) (Bankr. D. Del. Feb. 19,2008) (authorizing debtor to enter into stalking horse agreement); *In re Tweeter Home Entm't Group, Inc.*, Ch. 11 Case No. 07-10787 (PJW) (Bankr. D. Del. July 13, 2007) (authorizing the payment of a termination fee to the “stalking horse” bidder); *In re Riverstone Networks, Inc.*, Ch. 11 Case No. 06-10110 (CSS) (Bankr. D. Del Feb. 24, 2006) (authorizing termination fee and reimbursement of expenses for initial buyer).

The Proposed Manner of Providing Notice for
the Auction and the Sale Hearing Is Reasonable and Should Be Approved

38. Bankruptcy Rule 6004 prescribes the notice that must be given of a proposed sale of property pursuant to section 363(b) of the Bankruptcy Code. Pursuant to Bankruptcy Rule 6004(a), notice of a proposed use, sale or lease of property not in the ordinary course of business must satisfy the requirements of Bankruptcy Rule 2002(a)(2), (c)(I), (i) and (k) (as well as section 363(b)(2) of the Bankruptcy Code, which is not applicable here).

Bankruptcy Rule 2002(a) requires that “the clerk, or some other person as the court may direct,” give “the debtor, the trustee, all creditors and indenture trustees at least 20 days’ notice by mail of: ... (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business” Subsections (i) and (k) of Bankruptcy Rule 2002 require that the same twenty (20) day notice be given to the Creditors’ Committee and the U.S. Trustee. Local Rule 2002-1 modifies these requirements by providing that motions (with certain exceptions) must be served upon counsel for the debtor, the U.S. Trustee, the Creditors’ Committee, all parties who file a request for service of notices, and all parties whose rights are affected by the motion.

39. As described above, the Auction Notice Parties include all of the parties required to be served by Local Rule 2002-1, including the U.S. Trustee, any Committee appointed in these cases, all parties who have filed a notice of appearance and request for service, and certain parties whose rights may be affected by the sale (such as parties with liens on or other interests in the Property to be sold) will receive twenty (20) days’ notice of the Auction of any Property, as well as the terms of any Stalking Horse Bid. After the Auction or the expiration of the Bid Deadline, they will also receive a Sale Hearing Notice indicating the results of the Auction and a copy of the Debtors’ proposed Sale Order. Bankruptcy Rule 2002(c) requires that this notice include “the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections” and provides that notice of a proposed sale of property is “sufficient if it generally describes the property.” Fed. R. Bankr. P. 2002(c)(1). Each of these facts will be included in the Auction Notice.

40. Bankruptcy Rule 6004(c) requires that a motion pursuant to section 363(f) of the Bankruptcy Code for authority to sell property free and clear of liens or other interests “shall be served on the parties who have liens or other interest in the property to be sold.” Fed. R. Bankr. P. 6004(c). As noted above, the Auction Notice Parties include holders of liens or other interests in the Property to be sold. As such, any interest holder in the Properties will be served with copies of the Auction Notice applicable to the Property in which they hold an interest, the Bidding Procedures, and a Stalking Horse Agreement at least twenty (20) days prior to the Bid Deadline and will be given five (5) business days to object to the selection of the Stalking Horse or the proposed Break-Up Fee amount. In addition, after the Auction they will receive a Sale Hearing Notice and the form of purchase agreement entered into by the Successful Bidder. This will provide parties holding liens or other interests in the Property with the requisite notice for them to be heard and protect their interests at any Sale Hearing. Given the ample notice provided by these proposed procedures, any party failing to object to the proposed sale should be deemed to consent to the treatment of its interest under section 363(f)(2) of the Bankruptcy Code and this Procedures Motion. *See, e.g., FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281,285 (7th Cir. 2002) (“It is true that the Bankruptcy Code limits the conditions under which an interest can be extinguished by a bankruptcy sale, but one of those conditions is the consent of the interest holder, and lack of objection (provided of course there is notice) counts as consent.”); *Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855,858 (Bankr. D.N.J. 1994) (same); *In re Elliot*, 94 B.R. 343 (E.D. Pa. 1988) (same).

41. The Auction Notice and Sale Hearing Notice for each Property will set forth all the information a potential bidder and any other party in interest should require about the bidding process for the Property, including the following: a copy of the Bidding Procedures; the Bid Deadline; the time, date and location of the Auction; the time, date, and location of the Sale Hearing; the Sale Order; and copies of the Stalking Horse Agreement or other purchase agreement governing the sale of the Property. The Debtors submit that these notice procedures satisfy the requirements of Bankruptcy Rule 6004 and should be approved.

**The Court Should Waive or Reduce the Stay Periods Required
By Rules 6004(h) and 6006(d) of the Federal Rules of Bankruptcy Procedure**

42. Pursuant to Rule 6004(h) of the Bankruptcy Rules, unless the court orders otherwise, all orders authorizing the sale of property pursuant to section 363 of the Bankruptcy Code are automatically stayed for ten (10) days after entry of the order. Fed. R. Bankr. P. 6004(h). The purpose of Bankruptcy Rule 6004(h) is to provide sufficient time for an objecting party to appeal before the order is implemented. *See* Advisory Committee Notes to Fed. R. Bankr. P. 6004(h). Similarly, Bankruptcy Rule 6006(d) stays all orders authorizing a debtor to assign an executory contract or unexpired lease pursuant to section 365(f) of the Bankruptcy Code for ten (10) days, unless the court orders otherwise. Fed. R. Bankr. P. 6006(d).

43. Any Sale Order approving the Bidding Procedures should be effective immediately by providing that the ten (10) day stay under Bankruptcy Rules 6004(h) and 6006(d) is waived. Bankruptcy courts in this District have waived the stay provisions of the Bankruptcy Rules in similar sale situations. *See, e.g., In re Tweeter Home Entm't Group, Inc.*, Ch. 11 Case

No. 07-10787 (PJW) (Bankr. D. Del. July 13,2007) (final order authorizing debtor to continue store closing sales pursuant to store closing agreement).

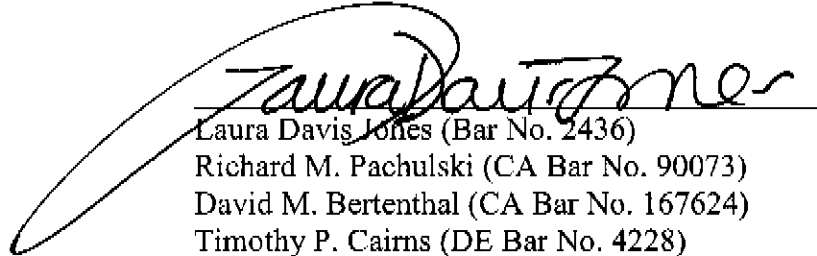
Notice

44. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (i) the Office of the United States Trustee and (ii) the Debtors' pre-petition and post-petition lenders. Following the first day hearing in these cases, this Motion will be served on (a) creditors holding the thirty-five (35) largest unsecured claims against the Debtors on a consolidated basis as identified in Debtors' petitions, or their legal counsel (if known); (b) all known holders of Liens against the Debtors' property; and (c) those persons who have requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors respectfully request entry of an order authorizing the relief requested herein and such other and further relief as is just.

Dated: February 19, 2009

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