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Hearing Date: September 29, 2016
Hearing Time: 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

36-60 ROUTE 303 ASSOCIATES LLC,

Chapter 11
Case No. 16-22645 (RDD)

Debtor.

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**DEBTOR'S MOTION SEEKING ENTRY OF AN ORDER PURSUANT TO
SECTIONS 363(b) AND (f) OF THE BANKRUPTCY CODE AND RULES 2002,
6004 AND 9006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE,
AND LOCAL BANKRUPTCY RULE 9077(a)(1), (I) AUTHORIZING A PRIVATE
SALE OF THE DEBTOR'S REAL PROPERTY LOCATED AT 36-60 ROUTE 303,
VALLEY COTTAGE, NEW YORK TO KONSTANTINOS PAXOS OR AN
ENTITY OF WHICH HE IS A MEMBER FREE AND CLEAR OF ANY AND ALL
LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS; (II)
APPROVING THE AMENDED PURCHASE AND SALE AGREEMENT IN
CONNECTION THEREWITH; (III) AUTHORIZING THE ASSUMPTION AND
ASSIGNMENT OF NONRESIDENTIAL REAL PROPERTY LEASES IN
CONNECTION THEREWITH; AND (IV) GRANTING DEBTOR'S REQUEST
FOR A HEARING TO CONSIDER THE MOTION ON SHORTENED NOTICE**

**TO: THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:**

36-60 Route 303 Associates LLC, the above captioned debtor and debtor-in-possession
("Debtor"), by its attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, hereby files
this motion ("Motion") seeking entry of an order pursuant to §363(b) and (f) of the Bankruptcy
Code and Rules 2002, 6004 and 9006 of the Federal Rules of Bankruptcy Procedure, (I)

authorizing the private sale of certain of the Debtor's real property located at 36-60 Route 303, Valley Cottage, New York to Konstantinos Paxos or an entity of which he is a member ("Purchaser") free and clear of any and all claims, liens, encumbrances and other interests; (II) approving the Amended Purchase and Sale Agreement in connection therewith; (III) authorizing the assumption and assignment of nonresidential real property leases in connection therewith; and (IV) granting Debtor's request to a hearing to consider the Motion on shortened notice. In support of this Motion, the Debtor respectfully represents:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).
2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
3. This proceeding has been initiated pursuant to Bankruptcy Code §§ 105(a), 363(b), (f) and (m), and Bankruptcy Rules 2002(a)(2), 6004 and 9006.

BACKGROUND

4. On May 11, 2016 (the "Petition Date"), the Debtor filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and the management of its business affairs as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. No Official Committee of Unsecured Creditors, trustee or examiner has been appointed.

5. The Debtor owns and operates a shopping mall consisting of 9 commercial units and a parking lot located at 36-60 Route 303, Valley Cottage, New York (the "Property").

6. There is a mortgage on the Property in the approximate outstanding amount of \$2,200,000 held by Amalfi Realty LLC ("Amalfi").

7. In addition, the County of Rockland, Town of Clarkstown, is owed real property taxes in the approximate amount of \$300,000, inclusive of interest, penalties and fees.

8. The Property has been extensively marketed over the past three years in various fashions by several different real estate professionals, including by Royal Properties and on a well-known commercial website, www.loopnet.com.

9. In or about February 2016, Rand Realty identified a potential purchaser for the Property who offered \$2,350,000, by far the highest offer received over the years. Unfortunately, the offer was still “short” of the amount required to pay the disputed mortgage with Amalfi, the outstanding real estate taxes, and closing costs in full.

10. On or about March 21, 2016, a proceeding was commenced by the County of Rockland to foreclose tax liens on the Property, with a deadline to redeem of June 16, 2016.

11. The Debtor attempted in good faith to complete the sale transaction with the Purchaser prior to the tax lien foreclosure by negotiating a discounted pay off with Amalfi, but the parties were unable to come to an agreement. The Debtor missed its April 2016 mortgage payment. On or about May 6, 2016, Amalfi delivered to the tenants at the Property a notice demanding turnover of all rents to Amalfi.

12. On May 11, 2016, the Debtor filed this Chapter 11 case in order to protect the Property from the tax foreclosure, with the intent of either proceeding with a private sale if the Debtor could negotiate a discount of certain claims, or if the creditors would not agree to discounts, then to retain a broker/auctioneer and proceed with an auction of the Property.

13. The Purchaser agreed to be the stalking horse bidder at \$2,350,000. However, in order to exceed the Purchaser’s offer, the next highest offer would have to cover a 10% broker/auctioneer fee of approximately \$235,000 plus marketing costs of approximately \$12,500, plus

add some additional profit to the Estate. The parties were wary that the Property would not justify such as substantial increase in price, thereby resulting in all parties receiving less than in a private sale that provided for discounted pay-offs. Likewise, Rand Realty, the pre-petition broker, had an interest in compromising its claim in order to avoid losing its right to any funds if a new third party was the successful bidder.

14. Therefore, during the Chapter 11 case, the parties continued to negotiate and work toward a resolution that would include discounts on claims because the Purchaser, Amalfi and the Debtor each had an interest in avoiding the uncertainty and substantial costs associated with retaining a broker/auctioneer.

15. In furtherance of these negotiations, early on in the Chapter 11 case the Purchaser offered to increase the purchase price to \$2,450,000 conditioned upon creditors compromising their claims such that a private sale could be conducted. To the Purchaser, the substantial increase in price was worth the certainty of a private sale and avoiding the additional costs of participating in an auction as a stalking horse.

16. In August 2016, Rand Commercial, the pre-petition broker who introduced the Purchaser and the Debtor, agreed to accept \$50,000 in full satisfaction of its brokerage commission in the approximate amount of \$115,000. To Rand, the discount in its claim was worth the certainty that it would receive something, and that the Property would not be sold to an unrelated third party in an auction.

17. On September 20, 2016, the Debtor and Amalfi reached an arrangement whereby Amalfi has agreed to reduce its claim to \$2,000,000, plus a portion of rent for October 2016 as set forth in a stipulation between the parties. This compromise will make it possible for all creditors to be paid in full or be paid an agreed discounted amount on their claims.

18. Creditors Gateway, Harding, King Post Partners, Paret and Teestol, each companies in which the Debtor's principal has an interest or a family member has an interest, have agreed to subordinate their claims, receiving payment only to the extent there are funds remaining after payment of all other creditor claims in full or in an agreed discounted amount.

19. At the closing, the Debtor will pay all real estate tax arrears plus \$2,000,000 to Amalfi. After the closing, the Debtor's professionals will file a fee application and the Debtor will file a motion seeking authorization to distribute the balance of funds from the closing plus all remaining cash assets to the creditors.

20. The Debtor estimates the following assets and payments to creditors:

At Closing:

Purchase Price	\$2,450,000	
County of Rockland	(\$300,000)	estimate
Amalfi Realty LLC	(\$2,000,000)	
<u>Security Deposit Credit</u>	<u>(\$5,220)</u>	
Balance of Sale Proceeds	\$144,780	

Upon Motion to the Court:

Assets:	Balance of Sale Proceeds	\$144,780	
Claims:			
Administrative:	Professional Fees	(\$50,000)	estimate
	US Trustee 3 rd Q	(\$650)	
	US Trustee 4 th Q	(\$9,750)	
Priority:	NYS Tax	(\$264.99)	Proof of Claim #1
General Unsecured:	A&R Alarm	(\$400.98)	
	Bug Runner	(\$173.40)	

NYS Tax (Unsecured)	(\$74.77)	Proof of Claim #1
Orange & Rockland	(\$749.68)	
Orange & Rockland	(\$575.85)	
Orange & Rockland	(\$351.47)	
Orange & Rockland	(\$120.74)	
Orange & Rockland	(\$251.77)	
Rand Commercial	(\$50,000)	
S&J Service Center	(\$4,000)	
Sergio Polanco	(\$2,500)	Proof of Claim #3
SFA Landscaping	(\$704)	
Slacky CPA	(\$10,000)	
Stern Agency	(\$1,432.55)	
Suez Water	(\$458.11)	
Suez Water	(\$126.31)	
Verizon	(\$300.27)	

Total Non-Insider Creditor Claims (\$132,884.89)

Balance of Sale Proceeds: \$11,895.11

Additional
Cash

Assets:	DIP Account Balance	\$30,000 estimate
	Utility Deposit Refund	\$2,560
	<u>Insurance Refund</u>	<u>\$3,000 estimate</u>

Total Funds Available: \$47,455.11

Amalfi Claim: Portion of October 2016 rent unknown (est. less than \$15,000)

Insider Claims ¹ :	Gateway	(\$6,675)
	Harding	(\$33,780)
	King Post Partners	(\$19,520)
	Paret	(\$20,930)
	Teestol	(\$43,350)
	Total	(\$124,255)

¹ In addition to partial payment of the insider claims, the Debtor will propose that its principal Mr. Tenenbaum receive the 2007 Ford F-150 listed in Schedule B valued at approximately \$8,000.

21. In this manner, the Debtor intends to pay all creditors in full or in an agreed discounted amount. The subordinated insider claims are anticipated to receive a partial pro rata distribution, but perhaps at a 75 - 80% discount.

The Purchase and Sale Agreement²

22. On May 12, 2016, after arms-length negotiations, the Debtor and the Purchaser executed a Purchase and Sale Agreement providing for a sale price in the amount of \$2,350,000.

23. As negotiations developed with Amalfi, the Purchaser agreed to increase the sale price to \$2,450,000, with the balance of terms remaining substantially the same. An Amended Purchase and Sale Agreement (the “PSA”) reflecting the increased purchase price is currently being circulated for signatures. The Debtor anticipates filing a supplement to this Motion prior to the hearing containing a signed copy of the PSA.

24. The Debtor seeks approval to sell the Property (as defined in the PSA) to the Purchaser on the following terms and conditions:

Seller	36-60 Route 303 Associates LLC
Purchaser	Konstantinos Paxos, or an entity of which he is a member,
Purchase Price	\$2,450,000
Deposit	\$157,000, payable upon execution of the PSA (currently held in Debtor’s counsel’s escrow account), plus \$78,000 payable within two business days of the Bankruptcy Court entering an order approving the Sale.
Property	All of Seller’s right, title and interest in and to the following, free and clear of all liens, claims, encumbrances and interests of any kind (including, without limitation, those of all federal, State and local taxing authorities):

² The following summary is qualified entirely by the terms of the PSA. To the extent there are any inconsistencies between the description of the PSA contained herein and the terms and conditions of the PSA, the terms of the PSA shall control.

(a) The real property, located at 36-60 Route 303, Valley Cottage, New York, together with (i) all improvements located thereon, (ii) all or singular the rights, benefits, privileges, easements, tenements, hereditaments, and appurtenances thereon or in any way appertaining to such real property, and (iii) without warranty, all right, title, and interest of Seller in and to all strips and gores and any land lying in the bed of any street, road or alley, open or proposed, adjoining such real property.

(b) The tangible personal property, being all fixtures, equipment, machinery, and other tangible personal property owned by Seller, and Seller's interest in any such property leased by Seller, now or hereafter located in and used in connection with the operation, ownership or management of the real property, except as otherwise provided herein. Notwithstanding anything contained herein to the contrary, Seller makes no representation or warranty about the tangible personal property conveyed hereunder.

(c) The intangible personal property, being all intangible personal property related to the real property and the improvements, including, without limitation: any architectural and engineering drawings for the improvements; warranties; contract rights related to the construction, operation, ownership or management of the real property (but only to the extent Seller's obligations thereunder are expressly assumed by Purchaser pursuant to this Agreement); governmental permits, approvals and licenses (to the extent assignable).

Excluded Property

Excluded property shall include the following which is property of the Seller's Bankruptcy estate, (a) all causes of action, including, without limitation, Seller's estate causes of action under Section 542 through 553 of the Bankruptcy Code; (b) all books and records of Seller; (c) accounts receivable, if any; and (d) funds on hand and on deposit in banks; and (e) the Ford F-150 listed in the Debtor's schedules.

Representations and Warranties; Covenants

The representations and warranties and covenants are customary for a transaction of this type, including, without limitation, representations and warranties regarding the authority to enter into the sale transaction and the agreement to abide by all laws with respect to the sale, litigation, material contracts, permits, environmental matter, ownership of Property, taxes and condition of the Property, the best efforts of the parties, notices and consents, access to information and the risk of loss.

RELIEF REQUESTED

A. The Debtor's Exigent Need For Private Sale to Purchaser

25. By this motion, the Debtor requests expedited approval of the PSA and authorization to sell the assets outlined therein. It took quite some time to negotiate a resolution of Amalfi's claim, during which the Purchaser patiently waited while interest continued to accrue on the unpaid real estate taxes. The Purchaser is ready to close immediately, the Debtor wishes to close as soon as possible to save continued accruing interest on the real estate taxes, and Amalfi's compromised claim is contingent upon a swift closing.

26. For all of the reasons set forth above, the Debtor believes it is in the best interests of its estate to enter into a private sale with the Purchaser. Accordingly, the Debtor is seeking entry of the Sale Approval Order, substantially in the forms annexed as **Exhibit A**.

27. The Debtor is also seeking waiver of the fourteen (14) day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

B. Justification for Private Sale

28. While many Bankruptcy Code Section 363 sales are conducted under competitive bidding procedures, there is no requirement in Section 363 to do so.

29. In fact, Bankruptcy Rule 6004(f) specifically contemplates private sales with the statement that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction". Here, the Debtor and Amalfi support the private sale.

30. Courts have noted that private sales are appropriate under Section 363 in circumstances similar to the instant case. *See In re Bakalis*, 220 B.R. 525, 531 (Bankr. E.D.N.Y. 1998) ("Unlike judicial sales under the Bankruptcy Act, the sale of estate property under the

Bankruptcy Code is conducted by a trustee, who has ample discretion to conduct public or private sales of estate property."); *Penn Mut. Life Ins. Co. v. Woodscape Ltd. P'ship (In re Woodscape Ltd. P'ship)*, 134 B.R. 165, 174 (Bankr. D. Md. 1991) (noting that, with respect sales of estate property pursuant to section 363 of the Bankruptcy Code, "[t]here is no prohibition against a private sale . . . and there is no requirement that the sale be by public auction"). Accordingly, courts in this District have approved private sales of assets when they think the general standards for approval under section 363 of the Bankruptcy Code are satisfied. See, e.g., *In re Wellman, Inc.*, Case No. 08-10595 (SMB) (Bankr. S.D.N.Y. Oct. 6, 2009) (order approving the sales of one of the debtors' facilities' by private sale, not subject to higher and better offers); *In re Delta Air Lines, Inc.*, Case No. 05-17923 (PCB) (Bankr. S.D.N.Y. Nov. 29, 2005) (order authorizing the sale of certain aircraft by private sale and stating that "no auction was necessary with respect to sale of the [a]ircraft"); *In re Angelo & Maxie's, LLC*, Case No. 11-11112 (SCC)(private sale of famous NYC restaurant approved despite not yielding 100% recovery to creditors).

31. Given (a) the previous marketing of the Property; (b) the lack of any other offer to date greater than the PSA; (c) the continuing accrual of interest on the mortgage and real estate taxes, and (d) all non-insider creditors will receive payment in full of their claims, or as otherwise agreed, and (e) the insider claims agreeing to subordinate to all other creditors, the Debtor believes that the private sale is justified and the best way to maximize value. It is extremely unlikely that an overbid process, assuming the Debtor had time to conduct, will generate higher and better offers for the Property because the overbid would have to cover a newly retained broker/auctioneer's fee in the amount of 10% of the purchase price, plus out-of-pocket costs, plus some additional monetary benefit to the Debtor's Estate. Moreover, because of the substantial carrying costs for the business that will be incurred in a competitive bidding process, conducting

even an expedited overbid process would impose significant carrying costs on the Debtor's estate which the Debtor will have no ability to pay.

32. In addition, the Purchaser has indicated that it is not interested in incurring the costs associated with a more extended sale process. The Purchaser may withdraw its offer, leaving the Debtor entering an auction process without a stalking horse bidder. By contrast, selling the Property by a private sale will allow the Debtor to realize sale proceeds in an amount sufficient to pay all creditors the full amount of their claims or an agreed discounted amount while avoiding the possibility of additional substantial administrative costs and potential operating losses being incurred.

33. It is submitted that the Debtor and the Purchaser are proceeding in good faith and at arms length. The Purchaser is not an insider of the Debtor and the transaction was negotiated in good faith and only entered into after negotiations between the parties' respective counsel.

34. The exigencies of this case dictate that a private sale be approved. Simply put, if the Debtor were forced to engage in an auction process, it believes the costs associated with the broker would cause Amalfi to receive less than the \$2,000,000 it now stands to receive, and the unsecured creditors would likely receive nothing. .

35. For all of these reasons, the private sale of the Debtor's assets as requested herein should therefore be approved.

C. Debtor's Sale Pursuant to Bankruptcy Code §363(b) and (f) is Appropriate

36. Section 363(b) of the Bankruptcy Code provides, in pertinent part, that the Debtor "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate". 11 U.S.C. §363(b)(1). Inasmuch as the Assets constitute the Debtors' on-going business and are substantially all of the Debtor's business assets, the proposed sale is out of

the ordinary course of the Debtor's business.

37. Section 363 does not set forth an express standard for determining whether a sale of property under §363(b) should be approved; however, courts that have interpreted this section consistently apply an “articulated business judgment” standard. *See, Stephen Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Walter*, 83 B.R. 14, 17 (Bankr. 9th Cir. 1988); *In re Channel One Communications, Inc.*, 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990); *In re Ionosphere Clubs, Inc.*, 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989); *In re Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984).

38. The Court of Appeals for the Second Circuit first enunciated this standard by stating: “The rule we adopt requires that a judge determining a §363(b) application expressly find from the evidence presented before him at the hearing *a good business reason* to grant such application.” *Lionel*, 722 F.2d at 1070-71 (emphasis added).

39. Section 363(b) does not require that the Court substitute its business judgment for that of the Debtor, *See, e.g., Ionosphere Clubs*, 100 B.R. at 676 (court will not substitute a hostile witness's business judgment for a debtor's, unless testimony “established that the [debtor] had failed to articulate a sound business justification for its chosen course”). Rather, the Court should ascertain whether a debtor has articulated a valid business justification for the proposed transaction. This is consistent with “the broad authority to operate the business of the Debtor . . . [which] indicates congressional intent to limit Court involvement in business decisions by a Trustee . . . [so that] a Court may not interfere with a reasonable business decision made in good faith by a Trustee”. *In re Airlift Int'l, Inc.*, 18 B.R. 787, 789 (Bankr. S.D. Fla. 1982).

40. Other courts have approved the sale of a debtor's assets under §363(b)(1) of the

Bankruptcy Code when (i) the sale is supported by the sound business judgment of the debtor's management; (ii) interested parties are provided with adequate and reasonable notice; (iii) the sale price is fair and reasonable; and (iv) the purchaser has acted in good faith. *See, e.g., In re Betty Owens Schools, Inc.*, WL 188127 at *4 (S.D.N.Y. 1997) (setting forth the foregoing four elements in connection with the 363(b)(1) inquiry and citing *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169 (D. Del. 1991); *In re General Bearing Corp.*, 136 B.R. 361, 365-66 (Bankr. S.D.N.Y. 1992) (suggesting that the salient factors under *Lionel* are the foregoing elements).

41. Moreover, “[w]here 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.” *In re Ames Dept. Stores, Inc.*, 136 BR 357, 359 (Bankr. S.D.N.Y. 1992); *In re Integrated Resources, Inc.*, 147 B.R. at 656-57 (S.D.N.Y. 1992) (a debtor’s business judgment is entitled to substantial deference with respect to the procedures to be used in selling assets from the estate). The Debtor has determined that the maximization of the return to creditors can best be accomplished through the proposed real property sale upon the terms contained in the PSA and that the transaction is in the best interests of its estate and creditors and should be approved by the Court.

42. In determining whether a “sound business purpose” exists with respect to a sale of assets prior to confirmation of a plan, Courts have looked at such factors as: the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions, and most importantly perhaps, whether the asset is increasing or

decreasing in value. *Lionel*, 722 F.2d at 1071.

43. In the Debtor's business judgment, the relief sought will maximize the recovery to all creditors, will cut off the continuing interest accruing on the real estate taxes, will minimize the risk and costs associated with a broker and an auction process, and will expeditiously deliver funds to the creditors much earlier than if the Debtor proceeded through a Plan process or an auction process.

D. The Debtor Has Exercised Sound Business Judgment

44. The Debtor believes that the sale to the Purchaser represents a prudent and proper exercise of its business judgment and is supported by articulated business reasons because, absent such a sale, the Debtor would likely be forced to liquidate the Property at auction and without a stalking horse bidder, resulting in a diminished realization of its value and substantially increased costs of administration of the transaction. With the sale to Purchaser, the Debtor is maximizing the value of the Property and generating substantial proceeds for the estate. *See, NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (the "fundamental purpose of reorganization is to prevent the debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources"); *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y. 1997) ("public policy, as evidenced by Chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values"). Without the sale, the Debtor has no exit scenario for the Property other than liquidation via auction, likely leaving creditors with far less than the amounts they are likely will receive from the proposed sale of the Property under the PSA.

E. The Sale Price is Fair and Reasonable

45. The sale to Purchaser represents the highest and best price for the Property.

Consequently, in the Debtor's view, the Purchase Price represents substantial value to the Debtor's estate and provides favorable terms for disposition of the Property in exchange for fair and reasonable consideration. *See, Mellon Bank N.A. v. Metro Communications, Inc.*, 945 F.2d 635 (3d Cir. 1992); *See, also, Mellon Bank N.A. v. Official Comm. Of Unsecured Creditors*, 92 F.3d 139 (3d Cir. 1996). Moreover, the Debtor's arm's length negotiations with the Purchaser ensured that the ultimate Purchase Price secured for the Property is fair and reasonable under the circumstances.

F. The Sale Terms Were Negotiated In Good Faith

46. As set forth above, the Purchase Agreement is the product of good faith, arm's length negotiations between unrelated parties. Consequently, the Debtor requests that this Court find that these negotiations were in good faith and that the Purchaser is a "good faith purchaser" under §363(m) of the Bankruptcy Code.

G. Asset Sale Free and Clear of Encumbrances

47. In addition to seeking approval of a private sale outside of the ordinary course of business, the Debtor seeks approval to sell the Property free and clear of any and all liens, claims or encumbrances in accordance with §363(f) of the Bankruptcy Code.

48. A debtor-in-possession may sell property to §§363(b) and 363(f) "free and clear of any interest in such property of an entity other than the estate" if one of the following conditions are satisfied:

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. §363(f).

49. The Debtor has two secured creditors – Amalfi and the County of Rockland – both of which will be paid in full, subject to agreed upon discounts, upon the closing of the sale of the Property. The balance of administrative, priority and unsecured creditors will be paid from the proceeds of the sale and the Debtor's remaining cash assets, except for the insider entities which have agreed to subordinate their claims and to receive payment only after all other creditors are paid.

50. Thus, the Property can be sold free and clear of any secured claims and/or liens.

H. Assumption and Assignment of the Nonresidential Real Property Leases to the Purchaser is Proper

51. In connection with the sale of the Property, the Debtor seeks authority, but not the obligation, to assume and assign the Debtor's interest in certain non-residential real property leases (the "Leases") to the Purchaser pursuant to §365 of the Bankruptcy Code. The Leases and the income they generate are an important factor in the Purchaser's determination to purchase the Property. The Leases, including any riders or amendments thereto, include:

Lease between the Debtor as Landlord and **303 Restaurant LLC d/b/a Whiskey Kitchen** as Tenant for the premises located at 56-58-60 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated February 1, 2014

Lease between the Debtor as Landlord and **Elite Fitness Training Center, Inc.** as tenant for the premises located at 50 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated December 12, 2012

Lease between the Debtor as Landlord and **Hesper Realty Associates Inc.** as Tenant for the premises located at 38 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated June 1, 2015.

Lease between the Debtor as Landlord and **Precision Gunsmiths LLC** as Tenant for the premises located at 52 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated April 16, 2012.

Lease between the Debtor as Landlord and **Subway Real Estate LLC** as Tenant for the premises located at 46 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated December 10, 2010.

Lease between the Debtor as Landlord and **V & A Rest. Corp. d/b/a Cinco de Mayo** as Tenant for the premises located at 40-42-44 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated March 19, 2014

Lease between the Debtor as Landlord and **Winky Dink Ink Corp.** as Tenant for the premises located at 54 Route 303, Valley Cottage, New York pursuant to a lease agreement and rider dated May 2007.

52. A debtor's decision to assume or reject an executory contract or unexpired lease must only satisfy the "business judgment rule" and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 318 U.S. 523 (1943) (applying Bankr. Act section 77 subsection (b), the predecessor to Bankruptcy Code section 365) (rejecting the test of whether the executory contract was burdensome in favor of whether rejection is within the debtor's business judgment); *Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046-47 (4th Cir. 1985).

53. Section 365(b)(1) of the Bankruptcy Code authorizes a debtor-in-possession to assume, assume and assign, or reject executory contracts and unexpired leases subject to the approval of the Bankruptcy Court, on the condition, *inter alia*, that the Debtor cures any default under the executory contract or unexpired lease and provides adequate assurance of future performance under such contract or lease. The Debtor is not in default of any of the Leases.

54. Several tenants defaulted in the obligation to pay rent starting in May 2016 due to

their confusion as to whether they should pay the Debtor or Amalfi. The Debtor commenced non-payment proceedings in the Town of Clarkstown civil court. Each tenant entered into a Stipulation of Settlement providing an agreed payment schedule for the arrears, to which the Purchaser will become the Debtor's successor in interest.

55. Any assumption and assignment of the Leases will be subject to all of the provisions of such lease, to the extent required by applicable law, and will be subject to all of the applicable provisions of the Bankruptcy Code.

WAIVER OF STAY PERIODS

56. It is important that the Debtor be allowed to close the transaction contemplated by the PSA as soon as possible. The entire rationale for the sale is premised upon the need for the Debtor to close swiftly so that the claims have not increased beyond the ability for the sale proceeds to pay creditors in full, or the full amount of their discounted claim. Moreover, Amalfi's agreement to discount its claim is premised upon a swift closing before the end of October 2016.

57. The parties contemplate closing the sale as soon as possible after the Sale Order is entered. Accordingly, the Debtor requests that the Court waive the fourteen (14) day stay periods under Bankruptcy Rules 6004(h) and 6006(d).

NOTICE

58. A motion to sell an asset outside of the ordinary course of business is required to be served on twenty one days' notice unless the court for cause shown shortens the time or directs another method for giving service.

59. The Debtor respectfully submits that sufficient cause exists for scheduling a hearing on shortened notice to consider the Motion and refers the Court to the Declaration of Dawn Kirby Arnold pursuant to Local Bankruptcy 9077-1 ("9077-1 Affidavit") annexed hereto as

Exhibit B.

60. Notice of this Motion will be provided by first class mail to (a) counsel for the Purchaser, (b) all parties which have filed notices of appearance, (c) all parties that have agreed to discount or compromise their claims, (d) all taxing authorities, (e) the Office of the United States Trustee, (f) all of the Debtor's creditors, and (g) all parties to nonresidential real property leases with the Debtor.

61. The Debtor respectfully submits that such notice is good and sufficient under the circumstances, and satisfies the requirements of Bankruptcy Rules 2002 and 6004.

CONCLUSION

62. The Debtor submits that a private sale of the Property on an expedited basis pursuant to the PSA is a sound and prudent exercise of its business judgment. The sale to Purchaser will maximize the value of the Property and minimize the continued accrual of the real property tax claims.

63. Accordingly, the Debtor respectfully requests that (i) the PSA be approved and (ii) the sale of the Acquired Assets to Purchaser free and clear of all claims, liens, interests and encumbrances be authorized and approved consistent with the proposed Sale Order annexed as

Exhibit A.

64. The Debtor shall supplement this motion by filing a fully executed copy of the PSA prior to the hearing.

WHEREFORE, the Debtor seeks the entry of an order (i) pursuant to §§363(b) and (f) of the Bankruptcy Code and Bankruptcy Rule 6004, authorizing the Debtor to sell the Property free and clear of any and all claims, liens, encumbrances and other interests thereon; (ii) approving the Amended Purchase and Sale Agreement in connection therewith; (iii) authorizing the assumption and assignment of nonresidential real property leases in connection therewith and the rejection, as applicable, of certain executory contracts; and (iv) granting Debtor's request to a hearing to consider the Motion on shortened notice, and granting the Debtor such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
September 19, 2016

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