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Hearing Date: March 24, 2017
Hearing Time: 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

ALLWAYS EAST TRANSPORTATION INC.,

Chapter 11
Case No. 16-22589 (RDD)

Debtor.

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**MOTION SEEKING ENTRY OF AN ORDER AUTHORIZING AND APPROVING
PRIVATE SALE OF THE DEBTOR'S *DE MINIMIS* RESIDUAL BUSINESS
ASSETS, FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES
PURSUANT TO 11 U.S.C. 363 (b) and (f) AND REQUEST TO
CONSIDER SUCH RELIEF ON SHORTENED NOTICE**

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

Allways East Transportation Inc., the above captioned debtor and debtor-in-possession ("Debtor"), by its attorneys, DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP, files this motion (the "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 authorizing the private sale of the Debtor's *de minimis* residual business assets (the "Residual Assets") to Phoenix Transportation Services, Inc. (the "Purchaser"), free and clear of any and all claims, liens, encumbrances and other interests and the consideration of such relief on shortened notice, 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 §363(b) and (f).

BACKGROUND

4. On April 28, 2016 (the “Filing Date”), the Debtor filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code (the “Chapter 11 Case”). Thereafter the Debtor’s proceeding was referred to your Honor for administration under the Bankruptcy Code. The Debtor has continued as a debtor-in-possession pursuant to §1107 and 1108 of the Bankruptcy Code. No trustee, examiner or creditors' committee has been heretofore appointed in this proceeding.

5. The Debtor provided school bus and transportation services to primarily special needs adults and children, to and from private and public schools, throughout Westchester and Dutchess counties. In connection with such service, the Debtor operated a fleet of approximately 300 buses and other transport vehicles from two leased locations in Yonkers and a third location in Fishkill, New York.

6. The Debtor filed its Chapter 11 Case due to a lack of cash flow, in order to obtain breathing room from a flurry of default notices, threatened evictions, termination of contracts and a levy by New York State Department of Taxation and Finance which resulted in the restraint of critical payments from customers that were needed for payroll, insurance and other obligations.

7. The Debtor operated in Chapter 11 however it quickly became clear to the Debtor and its professionals that the company was simply not profitable enough to sustain operations let

alone to fund a chapter 11 plan. As such, the Debtor undertook formal efforts to sell the company, either in whole or in part.

8. On December 27, 2016, the Debtor filed a motion seeking authorization to sell substantially all of the assets of the Debtor's estate pursuant to §363 of the Bankruptcy Code. On January 13, 2017, the Court entered an Order approving sales procedures for an auction sale of the Debtor's assets. In turn, on February 15, 2017, the Debtor conducted an auction of substantially all of the Debtor's business-related assets. On February 17, 2017, the Debtor filed a Notice and Report of Auction Sale with the Court, which set forth what assets were sold and not sold at auction respectively.

9. The auction resulted in gross sales of \$2,520,564.00, and a net to the Debtor's estate in the approximate amount of \$380,000 after adjustments and credits and payment of various lease, cure, assumption, and secured claims. The Debtor's receivables and causes of action were not sold and are being retained for the benefit of the estate and the creditors.

10. The Debtor ceased operations on February 28, 2017 and in the days following, the Debtor closed on the sale of the assets sold at auction and has turned over its remaining leased vehicles to its various leasing companies.

11. At the auction, certain *de minimis* residual business-related assets (the "Residual Assets") were offered but not bid on, which notwithstanding, are still capable of being sold. The Residual Assets consist of (a) approximately nine (9) vehicles most of which are either inoperable, in need of significant and costly repairs and/or are "aged out"; (b) the Debtor's phone number; and (c) certain automotive equipment used in the Debtor's shop.

12. In light of the sale of the assets at auction and the cessation of the Debtor's business operations on February 28, 2017, the Residual Assets have little or no value to the

Debtor and quite frankly are a burden to the Debtor's estate as they require the Debtor to store and insure them – and the Debtor is in the process of surrendering all of its business premises back to the respective landlords.

13. In lieu of abandoning the Residual Assets, the Debtor received an offer from Phoenix Transportation Services, Inc. (“Purchaser” or “Phoenix”), an entity that acquired various vehicles and assets at the auction sale. Phoenix is owned, in part, by Marlaina Koller, who is also the Debtor's Vice-President. Phoenix has offered \$10,000.00 to acquire the Residual Assets, free and clear of all claims, liens, and encumbrances, pursuant to Bankruptcy Code §363. A list of the Residual Assets which Phoenix has offered to purchase is annexed hereto as **Exhibit “A”**.

RELIEF REQUESTED AND BASIS FOR RELIEF

14. By this Motion, the Debtor is seeking entry of an order authorizing the private sale of the Residual Assets pursuant to §§363(b) and (f) of the Bankruptcy Code and Bankruptcy Rule 6004, free and clear of any and all claims, liens, encumbrances and other interests.

15. As a result of its financial condition, the Debtor simply does not have the available funds to further market the Residual Assets, especially in light of the *de minimis* value of the Residual Assets. The Debtor believes a robust marketing effort has already occurred, and bidders were already afforded an opportunity to bid on the Residual Assets at the auction conducted on February 15, 2017. A private sale is therefore necessary to maximize the value for the benefit of creditors. The Debtor, therefore, believes it is in the best interests of its estate to enter into a private sale with the Purchaser.

16. While many Section 363 sales are conducted under competitive bidding

procedures there is no requirement in Section 363 of the Bankruptcy Code to do so. 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 believes that the private sale will be the most cost effective manner in which to sell its Assets and to maximize the benefit to the Debtor's creditors and to the Debtor's estate.

17. 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").

18. 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).

19. Given (a) the continued efforts to market the Debtor's Residual Assets and the auction sale at which the Residual Assets went unsold, (b) the lack of any better offer to date, (c) the Debtor's cessation of business operations, (d) the burden on the estate to maintain ownership of the tangible assets, and (e) the possibility of losing the Purchaser if the proposed sale cannot be closed in a timely manner, the Debtor believes that a private sale is justified and the best way to maximize value.

20. Selling the Debtor's Residual Assets through private sale will allow the Debtor to create funds that will provide for a maximum liquidation value while avoiding the incurrence of additional administrative debt and/ or depleting what minimal assets the Debtor has on hand during this final wind down period.

21. It is submitted that the Debtor and the Purchaser are proceeding in good faith and Purchaser has been represented by separate counsel. Furthermore, this Motion is being served on all creditors as well as all parties who previously expressed any interest in purchasing assets of the Debtor, to give an opportunity to any such party to come forward and offer to purchase the assets for an amount greater than Phoenix's offer.

22. For all of these reasons, the private sale of the Debtor's Residual Assets as requested herein should be approved.

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

23. 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." Inasmuch as the Residual Assets constitute all of the Debtor's remaining assets, other than its accounts receivable, the proposed sale is not in the ordinary course of the Debtor's business.

24. 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). 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).

25. 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).

26. 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). 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 sale of its Residual Assets will best maximize the return to creditors.

27. 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.

28. In the Debtor’s business judgment, the relief sought will maximize the Debtor’s recovery on its Residual Assets and is therefore in the best interests of its estate and creditors

29. 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 the sale the Debtor will possibly incur losses for the storage or removal of the Residual Assets. With the sale to Purchaser, the Debtor is maximizing the value of the Residual Assets 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”).

30. The sale to Purchaser represents the highest and best price for the Residual Assets. The sale price is the only viable offer that the Debtor received for the Residual Assets, even after an auction that included said assets. The Debtor does not believe that the Residual Assets will receive any higher, better or more cost-effective offers. In the Debtor’s view, the Purchaser’s offer represents substantial value to the Debtor’s estate and provides favorable terms for disposition of the Assets 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).

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

32. 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).

33. Accordingly, the Debtor request that this Court authorize the sale free and clear of any and all liens, claims or encumbrances in accordance with §363(f) of the Bankruptcy Code.

**REQUEST PURSUANT TO LOCAL BANKRUPTCY
RULE 9077 FOR HEARING TO CONSIDER THE
RELIEF SOUGHT ON SHORTENED NOTICE**

34. As set forth above, the Debtor is in the process of vacating its business premises and as such, absent a sale of the Residual Assets, storage or abandonment would be required. Under either scenario, the estate would suffer as it would either incur additional debt or potentially lose the opportunity to realize any value on the assets.

35. Therefore, the Debtor hereby requests that the Court enter order shortening time pursuant to Rule 9006(c) of the Federal Rules of Bankruptcy Procedure so that the hearing to consider entry of an Order granting the sale of the Residual Assets may be heard on March 24, 2017 (which is the next hearing date in this Chapter 11 Case).

36. The Federal Rules of Bankruptcy Procedure provide for a shortening of time under certain circumstances.

37. Federal Rule of Bankruptcy Procedure 9006(c) provides as follows:

(c) *Reduction.*

(1) *In General.* Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

(2) *Reduction Not Permitted.* The court may not reduce the time for taking action under Rules 2002 (a)(4) and (a)(8), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

38. Thus, the Federal Rules of Bankruptcy Procedure specifically authorize the Court to hear an application such as this motion herein on shortened notice, for cause shown.

39. 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 Affidavit of Erica R. Aisner pursuant to Local Bankruptcy Rules 1007-2 and 9077-1 in support of a hearing on shortened notice on the Motion ("9077-1 Affidavit") filed contemporaneously herewith.

NOTICE

40. Notice shall be provided by first class mail to (a) the Purchaser; (b) all creditors (c) all parties which have filed notices of appearance, (d) all taxing authorities, (e) all parties who have expressed an interest in purchasing assets of the Debtor and (f) the Office of the United States Trustee.

41. The Debtor submits that such notice is good and sufficient under the circumstances, and satisfies the requirements of Bankruptcy Rules 2002, 6004, and 6006.

WHEREFORE, the Debtor seeks the entry of an Order authorizing the private sale of the Residual Assets to Purchaser free and clear of any and all claims, liens, encumbrances and other interests, and granting the Debtor such other and further relief as the Court deems just and proper.

Dated: White Plains, New York
March 6, 2017

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By: /s/ Jonathan S. Pasternak
Jonathan S. Pasternak

Exhibit "A"

Residual Assets

1. VEHICLES:

<i>Bus No.</i>	<i>Year</i>	<i>Make/ Model</i>	<i>VIN No.</i>
38	2006	FORD VAN	1FDSE35L26HB01433
999	2000	IC BUS	1HVBBAAN3YH276649
M2222	2007	IC BUS	4DRBUAAN37B358183
4444	1999	INTER BUS	1HVBBAAN0XH209599
60	2004	TOY MINI	5TDZA23C64S217822
100	2008	HONDA MINI	5FNRL38778B000785
721	2007	HONDA MINI	5FNRL38767B448269

2. TOOLS/ EQUIPMENT

- 2 Compressors
- 3 Lifts
- 2 Tire Machines
- 1 above-ground fuel (diesel) tank
- 2 above-ground oil (waste and lube) tanks

3. ALLWAYS EAST TELEPHONE NUMBER

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

In re:

Chapter 11

ALLWAYS EAST TRANSPORTATION INC.

Case No. 16-22589 (RDD)

Debtor.

-----X

AFFIDAVIT PURSUANT TO LOCAL RULE 9077-1(a)

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

ERICA R. AISNER, ESQ., being duly sworn, deposes and says:

1. Deponent is an attorney duly admitted to practice before this Court and the Courts of the State of New York.

2. Deponent submits this affidavit pursuant to Local Rule 9077-1(a) in support of the Debtor's Motion Seeking Entry of an Order Authorizing and Approving Private Sale of the Debtor's De Minimus Residual Business Assets and to consider such relief on shortened notice (the "Motion").

3. It is necessary for the Debtor to proceed by shortened notice because the Debtor is in the process of vacating its business premises and it does not have the ability to continue to

insure and store the Residual Assets (as that term is defined in the Motion) and abandonment would result in a zero recovery to the estate.

4. The Debtor currently has secured a hearing date on March 24, 2017 on this Court's very busy calendar for other matters in this case. It would be to the benefit of the estate and its creditors for the Motion to be heard on that date.

5. Absent a hearing of the Motion on shortened notice, the Debtor may be forced to abandon the Residual Assets or incur additional administrative debt to continue to store and insure same.

6. Thus, I respectfully submit that the Motion should be heard and determined on an expedited basis in order to enable the Debtor realize the maximum value of the Residual Assets.

WHEREFORE, your Deponent respectfully requests the consideration of the Motion and approving such Motion on shortened notice, together with such other and further relief as is proper.

/s/ Erica R. Aisner
Erica R. Aisner

Sworn to me this
6th day of March, 2017

/s/ Bryn A. Leonardo
Notary Public ~ State of New York